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

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2023–0563]

Special Local Regulations; Marine Events Within the Fifth Coast Guard District—Atlantic City, NJ

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a special local regulation for the Atlantic City Triathlon on August 12, 2023, to provide for the safety of life on navigable waterways during this event. Our regulation for marine events within the Fifth Coast Guard District identifies the regulated area for this event in Atlantic City, NJ. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

DATES: The regulations in 33 CFR 100.501 for Atlantic City, NJ, will be enforced for the regulated areas listed in table 1 to paragraph (i)(1) of § 100.501 for the Triathlons in Atlantic City from 6:30 a.m. to 10 a.m. on August 12, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Petty Officer Christopher Payne, U.S. Coast Guard, Sector Delaware Bay, Waterways Management Division, telephone: 215–271–4889, Email: SecDelBayWWM@uscg.mil.

SUPPLEMENTARY INFORMATION: *The Coast Guard will enforce special local regulations in 33 CFR 100.501 for the Triathlons in Atlantic City regulated Area from 6:30 a.m. to 10 a.m. on August 12, 2023. This action is being taken to provide for the safety of life on*

navigable waterways during this event. Our regulation for marine events within the Fifth Coast Guard District, § 100.501, specifies the location of the regulated area for the Triathlons in Atlantic City which encompasses portions of the New Jersey Intracoastal Waterway. As reflected in § 100.501(d)(2), during the enforcement periods if you are the operator of a vessel in the regulated area you must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

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

Dated: July 24, 2023.

Kate F. Higgins-Bloom,

Captain, U.S. Coast Guard, Captain of the Port, Delaware Bay.

[FR Doc. 2023–17223 Filed 8–10–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2022–0222]

Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of temporary deviation from regulations; request for comments.

SUMMARY: The Coast Guard is issuing a temporary deviation from the operating schedule that governs the Florida East Coast (FEC) Railroad Bridge, across the Okeechobee Waterway (OWW), mile 7.41, at Stuart, Florida. In anticipation of a significant increase in railway activity across the FEC Railroad Bridge, the Coast Guard is considering changing the operating regulation for the FEC Railroad Bridge to allow the drawbridge to operate on a more predictable schedule. This temporary deviation will test a drawbridge operating schedule to determine whether a permanent change to the schedule is needed. The Coast

Guard is seeking comments from the public regarding this deviation.

DATES: This deviation is effective from 12:01 a.m. on August 15, 2023, through 11:59 p.m. on December 17, 2023.

Comments and related material must reach the Coast Guard on or before October 15, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2022–0222 using Federal Decision Making Portal at <https://www.regulations.gov>.

See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Ms. Jennifer Zercher, Bridge Management Specialist, Seventh Coast Guard District; telephone 305–415–6740, email Jennifer.N.Zercher@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Background, Purpose and Legal Basis

The Florida East Coast (FEC) Railroad Bridge across the Okeechobee Waterway (OWW), mile 7.4, at Stuart, Florida, is a single-leaf bascule bridge with a six-foot vertical clearance at mean high water in the closed position. The normal operating schedule for the bridge is found in 33 CFR 117.317(c).

In anticipation of a significant increase in railway activity across the FEC Railroad Bridge, the Coast Guard is considering changing the operating regulation for the FEC Railroad Bridge to allow the drawbridge to operate on a more predictable schedule, to be open for navigation at least 50 percent of the time during daytime operations (6 a.m. to 10 p.m.) and to allow for reasonable usage of competing modes of transportation.

On May 3, 2022, the Coast Guard published a Notification of Inquiry entitled “Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL” in the **Federal Register** (87 FR 26145). On June 10, 2022, a Supplemental Notification of Inquiry entitled “Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL” was published in the **Federal Register** (87 FR 35472). We received a total 2,358 comments on those publications. Those comments

were taken into consideration when developing this test deviation.

On June 8, 2023, the Coast Guard published a Temporary Deviation entitled “Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL” in the **Federal Register** (88 FR 37470). The comment period ended on August 4, 2023, with 342 comments received. While those comments were taken into consideration while making this modification, comments from all Notices of Inquiry and Temporary Deviations will be addressed further if a notice of proposed rulemaking (NPRM) is published. The NW Dixie Hwy Bridge has been removed from this docket to allow the Coast Guard to commence a separate rulemaking for the highway bridge to operate on demand.

Under this temporary deviation, the FEC Railroad Bridge will be maintained in the fully open-to-navigation position, except during periods when it is closed for the passage of train traffic, to conduct inspections, and to perform maintenance and repairs authorized by the Coast Guard. However, the bridge will not be closed for more than 50 consecutive minutes in any given hour during daytime operations (6 a.m. to 10 p.m.) and for more than 8 total hours during daytime operations (6 a.m. to 10 p.m.).

Notwithstanding the above paragraph, the drawbridge will open and remain open to navigation for a fixed 10-minute period at the top of each hour from 6 a.m. to 10 p.m. In addition, the drawbridge will open and remain open to navigation for a fixed 15-minute period as outlined in the table below:

TABLE 1

Monday through Friday
8:55 a.m. through 9:10 a.m.
Saturday and Sunday
8:55 a.m. through 9:10 a.m.
9:55 a.m. through 10:10 a.m.
10:55 a.m. through 11:10 a.m.
12:55 p.m. through 1:10 p.m.
4:55 p.m. through 5:10 p.m.

From 10:01 p.m. until 5:59 a.m. daily, the drawbridge will remain in the fully open-to-navigation position, except during periods when it is closed for the passage of train traffic, to conduct inspections, and to perform maintenance and repairs authorized by the Coast Guard. The drawbridge will not be closed more than 60 consecutive minutes.

If a train is in the track circuit at the start of a fixed opening period, the opening may be delayed up to, but not more than, five minutes. Once the train has cleared the circuit, the bridge must

open immediately for navigation to begin the fixed opening period.

In the event of a drawbridge operational failure, or other emergency circumstances impacting normal drawbridge operations, the drawbridge owner will immediately notify the Coast Guard Captain of the Port Miami and provide an estimated time of repair and return to normal operations.

The drawbridge will be tended from 6 a.m. to 10 p.m., daily. The bridge tender will monitor VHF-FM channels 9 and 16 and will provide estimated times of drawbridge openings and closures, or any operational information requested. Operational information will be provided 24 hours a day by telephone at (772) 403-1005.

The drawbridge owner will maintain a mobile application. The drawbridge owner will publish drawbridge opening times, and the drawbridge owner will provide timely updates to schedules, including but not limited to, impacts due to emergency circumstances, inspections, maintenance, and repairs authorized by the Coast Guard.

Signs will be posted and visible to marine traffic, displaying VHF radio contact information, application information, and the telephone number for the bridge tender.

A drawbridge logbook will be maintained including the date and time of each closing and opening of the draw. The drawbridge logbook will also include all maintenance opening, closings, malfunctions, or other comments. During the temporary deviation, a copy of the drawbridge logbook for the previous week will be provided to the Seventh Coast Guard District Bridge Manager by 4 p.m. each Monday.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedules immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulation is authorized pursuant to 33 CFR 117.35(a).

II. Public Participation and Request for Comments

We view public participation as essential to determining the needs of the public and will consider all comments and material received during the comment period. Your comment can help shape the outcome of future actions. If you submit a comment, please include the docket number for this test deviation, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at <https://www.regulations.gov>. To do so, go to <https://www.regulations.gov>, type USCG-2022-0222, in the search box and click “Search.” Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If your material cannot be submitted using <https://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

View material in the docket. To view documents mentioned in this deviation as being available in the docket, find the docket as described in the previous paragraph, and then select “Supporting & Related Material” in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the <https://www.regulations.gov> Frequently Asked Questions web page. Also, if you go to the online docket and sign up for email alerts, you will be notified when comments, future actions or updates are posted to the docket.

We review all comments received, but we will only post comments that address the topic of this deviation. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

We accept anonymous comments. Comments we post to <https://www.regulations.gov> will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Dated: August 7, 2023.

Douglas M. Schofield,

Rear Admiral, U.S. Coast Guard, Commander, Coast Guard Seventh District.

[FR Doc. 2023-17222 Filed 8-10-23; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG-2022-0222]

Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of temporary deviation from regulations; cancellation.

SUMMARY: The Coast Guard is canceling the temporary deviation concerning the Florida East Coast (FEC) Railroad Bridge, mile 7.41, and the NW Dixie Highway Bridge, mile 7.5, across the Okeechobee Waterway (OWW), at Stuart, Florida. The cancellation will allow the Coast Guard to review and adjudicate the comments posted to determine whether this temporary deviation would meet the safe and reasonable needs of navigation while taking into consideration competing modes of transportation.

DATES: The temporary deviation published on June 8, 2023, 88 FR 37470, is cancelled as of August 11, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>. Type the docket number (USCG–2022–0222) in the “SEARCH” box and click “SEARCH”. In the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this cancellation, call or email Ms. Jennifer Zercher, Bridge Management Specialist, Seventh Coast Guard District; telephone 305–415–6740, email Jennifer.N.Zercher@uscg.mil.

SUPPLEMENTARY INFORMATION: On June 8, 2023, we published a temporary deviation entitled “Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL” in the **Federal Register** (88 FR 37470). The temporary deviation concerned the anticipated significant increase in railway activity across the FEC Railroad Bridge and the anticipated negative impact on safe and reasonable navigation under the current operating regulation. Given this concern, the Coast Guard issued a temporary deviation to the FEC Railroad Bridge and the adjacent NW Dixie Highway Bridge to allow the drawbridges to operate in concert and on a more predictable schedule. This action was taken to assist the Coast Guard in determining an operating schedule that would meet the safe and reasonable needs of navigation, taking into consideration other modes of transportation. This deviation from the operating regulations was authorized pursuant to 33 CFR 117.35(a).

This temporary deviation is being cancelled to allow the Coast Guard to review and adjudicate the comments posted to determine whether this temporary deviation would meet the safe and reasonable needs of navigation while taking into consideration competing modes of transportation. If we determine this temporary deviation was not effective, a second temporary

deviation will be published in the **Federal Register** to test an alternate operating schedule. The NW Dixie Hwy Bridge has been removed from this docket to allow the Coast Guard to commence separate rulemaking for the highway bridge to operate on demand. In accordance with 33 CFR 117.35(e), the FEC Railroad Bridge must return to its regular operating schedule immediately upon the cancellation date of this deviation.

Dated: August 4, 2023.

Randall D. Overton,

Director, Bridge Administration, Seventh Coast Guard District.

[FR Doc. 2023–17413 Filed 8–10–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0623]

RIN 1625–AA00

Safety Zone; Coast Guard Island, Alameda, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all waters of the Alameda Estuary, from surface to bottom, within 250 feet of the pier along the southwest side of Coast Guard Island in support of a munitions transfer on August 13, 2023. The safety zone is necessary to protect personnel, vessels, and the marine environment from the dangers associated with live munitions. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port San Francisco.

DATES: This rule is effective from 8 a.m. through 1 p.m. on August 13, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–0623 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 LT Helen Oh, Sector San Francisco Waterways Safety Management, U.S. Coast Guard; telephone 415–399–7405, email SFWaterways@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
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 munitions must be transferred for operational readiness. It is impracticable to publish an NPRM because we must establish this safety zone by August 13, 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 with the munitions transfer near Alameda, CA beginning August 13, 2023.

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 (COTP) San Francisco has determined that potential hazards associated with the munitions transfer starting August 13, 2023, will be a safety concern for anyone within a 250-foot radius of the pier along the southwest side of Coast Guard Island. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the munitions transfer.

IV. Discussion of the Rule

This rule establishes a safety zone from 8 a.m. until 1 p.m. on August 13, 2023. The safety zone will cover all waters of the Alameda Estuary, from surface to bottom, within 250 feet of the pier along the southwest side of Coast Guard Island. The safety zone is necessary to ensure the safety of people, vessels, and the marine environment for

the duration of the munitions transfer. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

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 the size, location, duration, and time-of-day of the safety zone. Vessel traffic will be able to safely transit around this safety zone which would impact a small, designated area of the Alameda Estuary for only five hours. The Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this 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 lasting only five hours that will prohibit entry within 250 feet of the pier along the southwest side of Coast Guard Island. 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.T11–136 to read as follows:

§ 165.T11–136 Safety Zone; Coast Guard Island, Alameda, CA.

(a) *Location.* The following area is a safety zone: All waters of the Alameda Estuary, from surface to bottom, within 250 feet of the pier along the southwest side of Coast Guard Island.

(b) *Definitions.* As used in this section, “designated representative” means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel, or a Federal, State, or local officer designated by or assisting the Captain of the Port (COTP) San Francisco 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) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or the COTP’s designated representative to obtain permission to do so. Vessel operators given permission to enter in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP’s designated representative. Persons and vessels may request permission to enter the safety zone on VHF–23A or through the 24-hour Command Center at telephone (415) 399–3547.

(c) *Enforcement period.* This section will be enforced from 8 a.m. to 1 p.m. on August 13, 2023.

Dated: August 3, 2023.

Taylor Q. Lam,

Captain, U.S. Coast Guard, Captain of the Port San Francisco.

[FR Doc. 2023–17269 Filed 8–10–23; 8:45 am]

BILLING CODE 9110–04–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201 and 205

[Docket No. 2023–1]

Ex Parte Communications

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule

SUMMARY: The U.S. Copyright Office is issuing a final rule establishing procedures governing *ex parte* communications with the Office. This final rule adopts regulatory language set forth in the Office’s February 2023 notice of proposed rulemaking with

some modifications in response to public comments. The rule defines *ex parte* communications, provides instructions on how to request an *ex parte* meeting, sets forth the parties’ responsibilities after an *ex parte* meeting, and explains how non-compliant communications will be treated.

DATES: Effective September 11, 2023.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at mft@copyright.gov, or Melinda Kern, Attorney-Advisor, by email at mkern@copyright.gov, or telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

On February 17, 2023, the Office published a notice of proposed rulemaking (“NPRM”) proposing new regulations governing *ex parte* communications with the Office in informal rulemakings.¹ Specifically, the Office proposed codifying its existing policies for *ex parte* communications used in prior rulemakings. To aid in drafting the NPRM, the Office reviewed other agencies’ comparable regulations and the Administrative Conference of the United States’ recommendations.²

The proposed regulations defined which communications with the Office should be considered “*ex parte* communications,” as well as which communications fall outside that definition’s scope. The NPRM also described the process to request an *ex parte* meeting with the Office. It provided that, after an *ex parte* meeting, parties must submit written summaries of the meeting and proposed a deadline for doing so. It stated that all meeting summaries will be made publicly available on the Office’s website. Finally, the NPRM described what communications related to informal rulemaking are impermissible, how the Office will treat such communications, and the steps that Office employees must follow if they receive such communications.

The Office sought public input concerning the proposed rule and received six comments. Commenters generally supported the rule and noted the value of *ex parte* communications in the rulemaking process,³ though some

suggested various amendments.⁴ Having reviewed and carefully considered these comments, the Office now issues a final rule that largely adopts the proposed rule, with some modifications made in response to the submitted comments.

II. Final Rule

A. Definition of Ex Parte Meetings

The NPRM proposed that “*ex parte* communications” include only communications to the Office on substantive issues concerning an “ongoing rulemaking.”⁵ The Office received two comments requesting clarification on when a communication would fall within the scope of the *ex parte* communication rule.⁶ The Digital Licensee Coordinator (“DLC”) suggested that the Office revise the proposed rule to broaden its application to communications occurring after the publication of a notification (or notice) of inquiry (“NOI”).⁷ The DLC noted that “in their experience, Copyright Office rulemaking often commences not with an NPRM but with a Notification of Inquiry.”⁸ Spotify echoed the DLC’s suggestion.⁹

The Office agrees with the suggested change and finds that it is consistent with the goal that the *ex parte* communications process “foster[] a complete and transparent rulemaking record.”¹⁰ Accordingly, the final rule clarifies that *ex parte* communications include those communications that occur after the commencement of a rulemaking, whether the rulemaking process begins with the publication of

(“NCTA”) Comment at 1; National Music Publishers’ Association (“NMPA”) Comment at 1; Spotify Comment at 1. The Office also received a comment from Harvey Jearld Johnson Jr. See Harvey Jearld Johnson Jr. Comment at 1.

⁴ Authors Alliance Comment at 2; DLC Comment at 1; NCTA Comment at 1; NMPA Comment at 1; Spotify Comment at 1.

⁵ 88 FR 10248, 10252 (Feb. 17, 2023).

⁶ DLC Comment at 3; Spotify Comment at 1.

⁷ DLC Comment at 3. An NOI is an official document that provides or requests information, but is not a proposed or final rule, *i.e.*, it cannot amend the Code of Federal Regulations. See 1 CFR 5.9(d) (also stating that an NOI cannot be an Executive order or Presidential proclamation). The Office has used NOIs to announce studies or public consultations, or to request public input in advance of issuing an NPRM. See, e.g., 86 FR 72638 (Dec. 22, 2021) (announcing public consultation on technical measures); 85 FR 34252 (June 3, 2020) (announcing sovereign immunity study); 84 FR 49966 (Sept. 24, 2019) (requesting public comments on implementing title I of the Music Modernization Act).

⁸ DLC Comment at 3 (citing 88 FR 11398 (Feb. 23, 2023) (notification of inquiry on Fees for Late Royalty Payments Under the Music Modernization Act)).

⁹ Spotify Comment at 1.

¹⁰ 88 FR 10248, 10249 (Feb. 17, 2023).

¹ 88 FR 10248 (Feb. 17, 2023).

² 79 FR 35988, 35993 (June 25, 2014) (reflecting Administrative Conference of the United States Recommendation 2014–4, “Ex Parte” Communications in Informal Rulemaking).

³ Authors Alliance Comment at 1; Digital Licensee Coordinator (“DLC”) Comment at 1; NCTA—The Internet & Television Association

an NPRM or another **Federal Register** notice, such as an NOI.

B. Time Frame for Submitting Meeting Summaries

In the NPRM, the Office proposed that a party that engages in an *ex parte* meeting with the Office normally must submit a summary of the meeting's discussion within two business days, a timeframe that the Office has used in previous rulemakings.¹¹ Commenters requested that the Office consider extending the submission timeframe.¹² The DLC expressed concern that the proposed timeframe "imposes more than a 'minimal burden' on participating parties" and explained that *ex parte* meetings "almost always generate[] follow-up questions from the Office, which require time to investigate, including on occasion additional time to survey DLC members, and then time to draft a response."¹³ Similarly, the National Music Publishers' Association ("NMPA") indicated that the proposed timeframe "poses a hurdle, particularly to individual creators" and small businesses, "[g]iven the level of detail required" and those parties' potential unfamiliarity with the regulatory process.¹⁴ Moreover, the NMPA explained that in its experience, any questions not answered during *ex parte* meetings "should be [answered]" in the meeting summary, but noted that the proposed timeframe is "often insufficient for compiling the necessary information and drafting a response."¹⁵ Spotify also recommended that the Office increase the timeframe.¹⁶

The Office concludes that the requested modification to the proposed rule is reasonable and supports the overall goal. Accordingly, the final rule includes a requirement that summaries be submitted within five business days of the *ex parte* meeting. This portion of the rule is designed to provide parties with sufficient time to submit compliant meeting summaries and ease any potential hardships. The final rule, however, retains language that provides the Office with flexibility to set a different deadline for submitting meeting summaries with respect to a specific rulemaking. The Office believes that this flexibility is appropriate in

certain limited situations, such as where it needs to enlarge the timeframe to account for extenuating circumstances, or decrease the timeframe to meet a statutory deadline or respond quickly to significant developments, such as new legal precedent or facts, that may impact the Office's reasoning or the rulemaking's record.¹⁷

C. Timeframe for Posting Meeting Summaries

While the proposed rule provided that the Office will publish a party's meeting summary on its website, it did not include a deadline for the publication.¹⁸ The NMPA suggested that the Office amend the proposed rule to impose a timeframe for publishing meeting summaries that is "commensurate with the number of days [that] parties have to file their meeting summary letters."¹⁹

The Office understands the importance of prompt and effective disclosure of *ex parte* meeting summaries, but declines to include such language in its regulations. In past rulemakings, the Office has uploaded meeting summaries in a timely manner—in most cases within 24 hours of receiving a compliant summary. The Office will continue to post meeting summaries as soon as possible, after determining that they are compliant with its regulations. The Office believes that this practice sufficiently acknowledges and facilitates prompt and effective disclosure.

D. Confidential Information

Commenters made additional suggestions with respect to the ability to provide confidential information in meeting summaries.²⁰ Specifically, the DLC requested that the Office "make clear that the *ex parte* meeting summary may exclude disclosure of any confidential or sensitive information provided to the Office," such as financial and competitive information.²¹ The DLC's comments cited a previous rulemaking in which the Office allowed public-facing meeting summaries to exclude confidential information²² and

a regulation from the Federal Communications Commission that allows parties to request that confidential information be withheld from public inspection.²³ Spotify also recommended that the Office refine the proposed rule related to confidential information.²⁴

After considering these comments, the Office proposes no additional regulatory changes to address submitting confidential information. The Office understands that allowing parties to exclude confidential information from publicly posted meeting summaries would allow parties to be more open to participating in meetings with the Office and more candid in those meetings. At the same time, there is a strong public interest in transparent rulemaking proceedings, which the meeting summaries are intended to promote.

In limited instances in which this balance between these interests weighs in favor of non-disclosure, the Office may exercise its discretion to allow parties to exclude confidential information from publicly posted meeting summaries. The Office may also consider formalizing its practices pertaining to confidential information in a future regulation.

E. Sanctions and Penalties

The NPRM addressed the situation where parties engaged, or attempted to engage, in impermissible substantive communications with the Office regarding an ongoing rulemaking. Specifically, communications not in compliance with the *ex parte* regulations would not be considered part of the rulemaking record, "unless [such information] has been introduced into the rulemaking record through a permitted method."²⁵ In response, the Authors Alliance asserted that the proposed penalty does not provide any "additional negative effect" on parties engaging in a prohibited *ex parte* communication and urged the Office to strengthen its enforcement mechanisms for noncompliance.²⁶ Where an impermissible *ex parte* communication occurs, the Authors Alliance

(last visited May 11, 2023) (notating meeting summaries where a party "simultaneously submitted a version containing confidential information to advise the Copyright Office of certain confidential information pertaining to its business").

²³ DLC Comment at 2 (referencing 47 CFR 1.1206(b)(2)(ii) governing permit-but-disclose proceedings).

²⁴ Spotify Comment at 1.

²⁵ 88 FR 10248, 10253 (Feb. 17, 2023).

²⁶ Authors Alliance Comment at 2 (suggesting that any noncompliance should result in a public posting of the noncompliance on the Office's website).

¹¹ See 88 FR 10248, 10249 n.9 (Feb. 17, 2023) (listing several rulemakings where the Office imposed the two-business day timeframe).

¹² DLC Comment at 2–3; NMPA Comment at 1–3; Spotify Comment at 1.

¹³ DLC Comment at 2 (footnote omitted) (quoting 88 FR 10248, 10251 (Feb. 17, 2023)).

¹⁴ NMPA Comment at 2.

¹⁵ NMPA Comment at 2.

¹⁶ Spotify Comment at 1.

¹⁷ See, e.g., 17 U.S.C. 1201(a)(1)(C) (noting that the Office must conduct a rulemaking regarding exemptions to the prohibition on the circumvention of technological measures every three years).

¹⁸ 88 FR 10248, 10251 (Feb. 17, 2023).

¹⁹ NMPA Comment at 3–4 (citing timeframes from the Surface Transportation Board, 47 CFR 1102.2(g)(4)(vi) ("within five days of submission") and the Federal Communications Commission, 47 CFR 1.1206(b)(4) ("at least twice per week")).

²⁰ DLC Comment at 2; Spotify Comment at 1.

²¹ DLC Comment at 2.

²² DLC Comment at 2 (citing U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/mta-implementation/ex-parte-communications.html>

recommended “sanctions and/or public notification to other parties about any impermissible *ex parte* communication” to “deter such behavior.”²⁷

At this time, the Office is not adding additional sanctions or penalty provisions to its final regulations. In light of its current experience with *ex parte* meetings, the Office believes that the proposed penalty (of not including noncompliant *ex parte* communications as part of the rulemaking record and not considering the substance of such communications) provides enough of a deterrent to prevent noncompliance with the rule. In addition, nothing prevents the Office from notating the meeting on its website or authoring its own meeting summary, if it believes that doing so would serve the public interest. Further, the Office believes it is valuable to evaluate the effectiveness of the penalty, and stakeholders’ adjustments to it, before considering additional sanctions or penalties. In the future, the Office may reevaluate the need for additional sanctions or penalties, such as those suggested by the Authors Alliance or used by other federal government agencies.²⁸

F. Attempting To Initiate Noncompliant Ex Parte Meetings With Other Employees

The Authors Alliance recognized that some parties may contact Office staff other than the staff member listed as the contact for further information in the **Federal Register** or the Assistant to the Office’s General Counsel—to initiate an *ex parte* meeting, and suggested that the Office amend its rule to either “explicitly disallow[]” initiating *ex parte* communications with persons not listed in the regulations or “provid[e] a mechanism to manage and disclose such communications.”²⁹

The Office understands that additional clarity is called for on this subject. The final rule clarifies the process for managing requests for an *ex parte* meeting, but declines to incorporate the Authors Alliance’s other suggestions. The rule addresses instances where a party requests an *ex parte* meeting through an Office employee not listed as a contact in the

Federal Register. In these circumstances, the Office employee will either direct the party to contact the appropriate contact person(s) or forward the request to the contact person(s). Generally, centralizing *ex parte* meeting requests and meeting summaries helps guard against attempts to engage in unauthorized *ex parte* communications.³⁰ It also has the practical benefit of allowing the appropriate Office employee(s) to evaluate the request and coordinate meeting logistics.

G. Other Comments

Commenters made additional suggestions that would expand the scope of the proposed rule. These expansions would permit parties to submit “*ex parte* letters,” *e.g.*, written comments, without first engaging in an *ex parte* meeting with the Office,³¹ allow parties to submit documentary materials during *ex parte* meetings without the Office’s prior written approval,³² or expand the rule to apply to additional communications with the Office with respect to its other responsibilities, including policy studies and amicus briefs.³³ At this time, the Office is not adopting these suggestions.

The Office declines to permit parties to file “*ex parte* letters” without first meeting with the Office. Allowing parties to submit written comments without requiring a meeting would risk allowing the *ex parte* process to supplant, not supplement, the ordinary comment submission process.

The Office also declines to allow parties to submit documentary materials during *ex parte* meetings without the Office’s prior written approval.³⁴ As stated in the NPRM, *ex parte* communications are intended to provide an opportunity for participants to clarify evidence or arguments made in prior written submissions and to respond to the Office’s questions on those matters, to enhance transparency, and to create a comprehensive rulemaking record.³⁵ The introduction of documentary evidence through *ex parte* meetings could introduce unnecessary inefficiencies or delays and deprive rulemaking parties of an opportunity to respond to new documentary evidence.

Further, the Office declines to extend the proposed rule to communications

related to the Office’s other work, including policy studies and amicus briefs.³⁶ This rulemaking only addresses *ex parte* meetings in informal rulemakings, *i.e.*, where the Office is acting as a regulatory decision-maker. This is consistent with how other agencies have addressed *ex parte* communications to ensure a complete and transparent rulemaking record.

Finally, at NCTA—the internet & Television Association’s (“NCTA”) request, the Office is making a minor edit to clarify that any member of the public can request an *ex parte* meeting. This opportunity is not limited to individuals or entities who file comments in the proceeding, *e.g.*, “rulemaking parties.”³⁷ The Office notes that this language is solely a clarification, and not a change to its existing practice.

List of Subjects

37 CFR Part 201

Administrative practice and procedure, Cable television, Copyright, Recordings, Satellites.

37 CFR Part 205

Copyright, Courts.

Final Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR parts 201 and 205 as follows:

PART 201—GENERAL PROVISIONS

- 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

- 2. Amend § 201.1 by adding paragraph (d) to read as follows:

§ 201.1 Communication with the Copyright Office.

* * * * *

(d) *Requests for an ex parte meeting.* The rules governing *ex parte* communications in informal rulemakings, including methods to request *ex parte* meetings, are found in 37 CFR 205.24.

PART 205—LEGAL PROCESSES

- 3. The authority citation for part 205 continues to read as follows:

Authority: 17 U.S.C. 702.

- 4. Add subpart D, consisting of § 205.24, to read as follows:

Subpart D—Ex Parte Communications

Sec.

²⁷ Authors Alliance Comment at 2. The Authors Alliance also suggested that to help “disincentivize[]” noncompliance with the proposed rule, the Office should utilize these penalties, which may involve excluding the impermissible communication from the rulemaking record, when parties fail to submit any meeting summary. Authors Alliance Comment at 3.

²⁸ 88 FR 10248, 10251 n.24 (Feb. 17, 2023) (listing sanctions or penalties imposed by other federal government agencies on parties that engage in impermissible *ex parte* communications).

²⁹ Authors Alliance Comment at 3.

³⁰ 88 FR 10248, 10250 (Feb. 17, 2023).

³¹ NCTA Comment at 1, 3.

³² NCTA Comment at 2.

³³ Authors Alliance Comment at 3–4.

³⁴ NCTA Comment at 2.

³⁵ 88 FR 10248, 10249–50, 10252 (Feb. 17, 2023).

³⁶ Authors Alliance Comment at 3–4.

³⁷ NCTA Comment at 3.

205.24 *Ex Parte* communications in informal rulemakings.

§ 205.24 Ex Parte communications in informal rulemakings.

(a) *General.* The rules in this section governing *ex parte* communications in informal rulemakings are intended to provide an opportunity for parties to clarify evidence or arguments made in prior written submissions, to respond to assertions or requests made by other parties, or to respond to questions from the Copyright Office on any of those matters.

(b) *Applicability.* (1) An *ex parte* communication is a written or oral communication regarding the substance of an ongoing rulemaking between a Copyright Office employee and a member of the public that must be included in the rulemaking record, as described in this section.

(2) An *ex parte* communication does not include the following:

(i) Communications made prior to the publication of a **Federal Register** document commencing a rulemaking proceeding;

(ii) Non-substantive inquiries, such as those regarding the status of a rulemaking or the Copyright Office's procedures;

(iii) Communications made by members of Congress, Federal departments and agencies, the Judiciary, foreign governments, or state and local governments; or

(iv) Communications required by law.

(3) To the extent that communications made on Copyright Office web pages, including social media pages, would be considered *ex parte* communications under paragraph (b)(1) of this section, such communications are not subject to the rules described in this section and will not be considered as part of the rulemaking record.

(c) *Process*—(1) *Submitting an ex parte meeting request.* (i) A party may request an in-person, telephonic, virtual, or hybrid *ex parte* meeting to discuss aspects of an ongoing rulemaking by submitting a written request to either—

(A) The Copyright Office employee listed as the contact for further information in the **Federal Register** for the ongoing rulemaking that the party wishes to discuss; or

(B) The Copyright Office's Assistant to the General Counsel. The current contact information for this employee can be obtained by contacting the Copyright Office.

(ii) If a party makes an *ex parte* meeting request to a Copyright Office employee not identified in paragraph (c)(1)(i)(A) or (B) of this section, that

employee will either direct the party making the request to contact the appropriate employee(s) or forward the party's request to the appropriate employee(s).

(iii) The Copyright Office permits *ex parte* meetings in informal rulemakings at its discretion. When *ex parte* meetings are permitted, the Office will determine the most appropriate format (e.g., in-person, telephonic, virtual, or hybrid) for each meeting, but will consider the requesting party's preferences in making that determination.

(iv) The request should be submitted by email. If email submission of an *ex parte* meeting request is not feasible, a party may contact the Copyright Office for special instructions.

(2) *Ex parte meeting request content.* An *ex parte* meeting request must identify the following information:

(i) The names of all proposed attendees;

(ii) The party or parties on whose behalf each attendee is appearing; and

(iii) The rulemaking that will be discussed.

(3) *Ex parte meeting summary.* (i)(A) Unless otherwise directed by the Copyright Office, within five business days after an *ex parte* meeting, attendees must email the Copyright Office employee identified in paragraph (c)(1)(i)(A) or (B) of this section a letter detailing the information identified in paragraph (c)(2) of this section and summarizing the meeting's discussion. The letter must summarize the substance of the views expressed and arguments made at the meeting in such a way that a non-participating party would understand the scope of issues discussed. Merely listing the subjects discussed or providing a short description will not be sufficient. If email submission of the letter is not feasible, an attendee may contact the Copyright Office for special instructions.

(B) Meeting attendees representing different groups may submit a joint summary letter, but if the groups represent conflicting viewpoints, the groups must submit separate summary letters.

(C) If a party's *ex parte* meeting summary letter does not comply with paragraph (c)(3)(i) of this section or contains inaccuracies, the Copyright Office shall notify the *ex parte* meeting attendee and request a corrected letter. Unless otherwise directed by the Copyright Office, the attendee must submit the corrected letter within two business days of receiving such notification from the Office.

(D) If the *ex parte* meeting attendee does not provide a corrected letter under paragraph (c)(3)(i)(C) of this section, the Copyright Office may add a notation on its website noting or describing the deficiency. The Copyright Office may also, in its discretion, decline to consider the noncompliant letter as part of the rulemaking record.

(d) *Publication of ex parte communications.* *Ex parte* meeting letters and comments will be made publicly available on the Copyright Office's website.

(e) *Impermissible communications*—(1) *General; attempts to circumvent the ex parte communication process.* If a party attempts to make an *ex parte* communication outside of the process described in paragraph (c) of this section to a Copyright Office employee, the employee shall attempt to prevent the communication. If unsuccessful in preventing the communication, the employee shall advise the person making the communication that it will not be considered by the Copyright Office as a part of the rulemaking record and shall deliver either a copy of the communication or, if the communication was made orally, a summary of the communication to the Copyright Office's General Counsel and Associate Register of Copyrights.

(2) *Other impermissible communications*—(i) *Post-deadline communications.* The Copyright Office may impose a deadline to make *ex parte* meeting requests or to submit written comments for a rulemaking. Parties normally may not make requests after that deadline has passed, unless the deadline is removed by the Copyright Office or until after a final rule is published in the **Federal Register** for that rulemaking.

(ii) *New documentary material.* (A) The Copyright Office generally will not consider or accept new documentary materials once the rulemaking record has closed.

(B) The restriction in this paragraph (e)(2)(ii) does not apply to any Copyright Office requests, e.g., requests for supporting legal authority or additional documentary evidence.

(C) The restriction in this paragraph (e)(2)(ii) does not apply to non-substantive visual aids used in an *ex parte* meeting that are not otherwise submitted by a party as part of the rulemaking record. The Copyright Office, in its discretion, may include a copy of the visual aid in the rulemaking record.

(f) *Effect of impermissible ex parte communications.* No prohibited *ex parte* communication shall be considered as

part of the rulemaking record, unless it has been introduced into the rulemaking record through a permitted method. In the interests of justice or fairness, the Copyright Office may waive this restriction.

Dated: July 24, 2023.

Shira Perlmutter,

Register of Copyrights and Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2023–17162 Filed 8–10–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 230804–0183]

RIN 0648–BM06

Fisheries of the Northeastern United States; Monkfish; Framework Adjustment 13

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

ACTION: Final rule.

SUMMARY: NMFS is implementing specifications submitted by the New England and Mid-Atlantic Fishery Management Councils (collectively, the Councils) in Framework Adjustment 13 to the Monkfish Fishery Management Plan (FMP). This action sets monkfish specifications for fishing years 2023 through 2025, adjusts annual Days-At-Sea (DAS) allocations, and, beginning in fishing year 2026, increases the minimum gillnet mesh size for vessels fishing on monkfish DAS. This action is needed to establish allowable monkfish harvest levels and management measures that will prevent overfishing and reduce bycatch.

DATES: Effective August 11, 2023.

ADDRESSES: Copies of the Framework 13 document, including the Regulatory

Flexibility Act Analysis and other supporting documents for the specifications, are available from Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The specifications document is also accessible via the internet at: <https://www.nefmc.org/management-plans/monkfish>.

FOR FURTHER INFORMATION CONTACT:

Spencer Talmage, Fishery Policy Analyst, (978) 281–9232.

SUPPLEMENTARY INFORMATION:

Background

The monkfish fishery is jointly managed under the Monkfish Fishery Management Plan (FMP) by the New England and the Mid-Atlantic Fishery Management Councils (collectively, the Councils). The fishery extends from Maine to North Carolina from the coast out to the end of the continental shelf. The Councils manage the fishery as two management units, with the Northern Fishery Management Area (NFMA) covering the Gulf of Maine and northern part of Georges Bank, and the Southern Fishery Management Area (SFMA) extending from the southern flank of Georges Bank through Southern New England and into the Mid-Atlantic Bight to North Carolina.

The monkfish fishery is primarily managed by landing limits and a yearly allocation of monkfish days-at-sea (DAS) calculated to enable vessels participating in the fishery to catch, but not exceed, the target total allowable landings (TAL) and the annual catch target (ACT), which is the sum of the TAL and the estimate of expected discards, for each management area.

Under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act, or MSA), we approve, disapprove, or partially approve measures that the Council proposes, based on consistency with the Act and other applicable law. We review proposed regulations for consistency with the fishery management plan, plan amendments, the Magnuson-Stevens Act and other applicable law, and publish the

proposed regulations, solicit public comment, and promulgate the final regulations. We have approved all the measures in Framework 13 recommended by the Councils, as described below. The measures implemented in this final rule:

- Set specifications, for the NFMA and SFMA for fishing years 2023 through 2025;
- Adjust the annual DAS allocation to limited access monkfish vessels; and
- Increase the minimum gillnet mesh size for vessels on a monkfish DAS or fishing in the Gulf of Maine/Georges Bank Dogfish and Monkfish Gillnet Fishery Exemption starting in fishing year 2026.

This action also makes regulatory corrections that are not part of Framework 13, but that are implemented under our section 305(d) authority in the Magnuson-Stevens Act to make changes necessary to carry out the FMP. We are making these corrections in conjunction with the Framework 13 measures in the interest of efficiency.

1. Specifications

This action sets the NFMA and SFMA quotas for fishing years 2023 through 2025 (Table 1), based on the Councils' recommendations, which are consistent with the recommendations from the New England Council's Scientific and Statistical Committee (SSC) from January 2023. Further information on the development of these specifications by the SSC and Councils is available in the proposed rule (88 FR 25351).

The approved specifications include a 25-percent decrease in the acceptable biological catch (ABC) and annual catch limit (ACL) in the NFMA and a 52-percent decrease in the ABC and ACL in the SFMA, when compared to the 2020–2022 specifications. Discards, which are calculated using the median of the most recent 10 years of data, decreased in both areas, but more significantly in the SFMA. After accounting for discards, the specifications result in a 20-percent decrease in the TAL for the NFMA and a 41-percent decrease in the TAL for the SFMA.

TABLE 1—FRAMEWORK 13 SPECIFICATIONS

Catch limits	Northern area		Southern area	
	2023–2025 Specs (mt)	Percent change from 2022 *	2023–2025 Specs (mt)	Percent change from 2022 *
Acceptable Biological Catch	6,224	– 25	5,861	– 52
Annual Catch Limit	6,224	– 25	5,861	– 52
Management Uncertainty (3%)	187		176	

TABLE 1—FRAMEWORK 13 SPECIFICATIONS—Continued

Catch limits	Northern area		Southern area	
	2023–2025 Specs (mt)	Percent change from 2022 *	2023–2025 Specs (mt)	Percent change from 2022 *
Annual Catch Target (Total Allowable Landings + discards)	6,038	– 25	5,685	– 52
Expected Discards	729	– 51	2,205	– 64
Total Allowable Landings	5,309	– 20	3,481	– 41

* Percent change from the previously approved 2020–2022 specifications.

At the end of each fishing year, we evaluate catch information and determine whether the quota has been exceeded. The regulations at 50 CFR 648.96(d) require the Councils to revise the monkfish ACT in the following year if it determines that the annual catch limit was exceeded in any given year. If the Councils fail to act, NMFS will revise the monkfish ACT. Publication of a notification in the **Federal Register** will accompany any revisions to these specifications if an overage occurs. We expect, based on preliminary 2022 year-end accounting, that no adjustment is necessary for fishing year 2023. We will provide notice of the 2024 and 2025 quotas prior to the start of each respective fishing year.

2. Annual DAS Allocations

To ensure that the fishery can meet, but not exceed, the new TALs for 2023–2025, this action changes the yearly DAS allocation to limited access monkfish vessels. First, the initial allocation of DAS that could previously be used in any area is now split into separate DAS allocations for each of the NFMA and SFMA. Under this change, each limited access vessel is allocated 35 DAS for the NFMA and 37 DAS for the SFMA. Second, the 37 DAS usage restriction for the SFMA is removed and replaced with a new general DAS usage restriction that prohibits any vessel from using more than 46 allocated DAS during each fishing year. Third, the annual deduction of Research Set-Aside DAS from each limited access vessel's DAS allocation is applied proportionally to the separate DAS allocations for the NFMA and SFMA. The DAS carryover provisions are not changed by this action; vessels would be eligible for up to 4 carryover DAS in each fishing year that would not count against the allocation limits in either area or the general allocated DAS usage restriction.

3. Minimum Gillnet Mesh Size Increase

To reduce bycatch of small monkfish, this action increases the minimum gillnet mesh size for vessels on a monkfish DAS or fishing in the Gulf of

Maine/Georges Bank Dogfish and Monkfish Gillnet Fishery Exemption from 10 inches (25.4 cm) to 12 inches (30.5 cm) diamond mesh. This change will go into effect at the beginning of May 1, 2026. The additional time is intended to allow any affected vessels not already using the larger mesh size time to make the transition as part of the normal operation and replacement of worn nets. We expect that the delayed implementation will reduce the overall cost of this measure to industry.

4. Regulatory Corrections

Using our authority under section 305(d) of the Magnuson-Stevens Act, this action clarifies the regulation at § 648.92(b)(2)(iii)(B) that describes the interaction between the Northeast (NE) multispecies DAS leasing program at § 648.82(k) and monkfish DAS balances for category C, D, F, G, or H vessels that choose to lease Northeast multispecies DAS.

When a category C, D, F, G, or H vessel leases Northeast multispecies DAS to another vessel(s), a certain number of monkfish DAS owned by the lessor vessel become unavailable for use.

The changes to § 648.92(b)(2)(iii)(B) more clearly describe the interaction between the NE multispecies DAS leasing program and monkfish DAS balances for category C, D, F, G, or H vessels that choose to lease Northeast multispecies DAS. The changes do not substantively change the way in which monkfish DAS balances are affected by leases of Northeast multispecies DAS.

Comments and Responses on Measures Proposed in the Framework 13 Proposed Rule

We received two comments on the Framework 13 proposed rule, both from members of the public.

General Comments on Framework 13

Comment 1: An individual commented in support of Framework 13, noting that the Council-recommended and NMFS-proposed specifications would decrease allowable monkfish catch and promote a healthy

marine ecosystem without resulting in a significant economic impact on a substantial number of small entities.

Response 1: We agree that the specifications recommended by the Councils and implemented through this action will prevent overfishing and result in sustainable management of the monkfish resource.

Comment 2: An individual commented that input from fishermen and commercial fishing organizations should be more transparently incorporated into the regulatory process. The commenter also noted that some content available on the NOAA Fisheries website is out of date and should include more social science information.

Response 2: Fishery management in the United States is a transparent and public process of science, management, and collaboration with the fishing industry, as laid out by the Magnuson-Stevens Act. Framework Adjustment 13 was jointly developed by the Councils. The Councils held several public meetings throughout 2022 and in January 2023. During these meetings, the development of Framework 13 and the underlying science, including social sciences, was discussed, with opportunity for public comment. Input from fishermen and other industry stakeholders was a key component to the development of this action. Engagement by the public in meetings of the Monkfish Committee and Advisory Panel directly contributed to actions taken by the Councils to request that the SSC reconsider their October ABC recommendations. Concerns raised by the public were considered by the SSC and addressed in a new recommendation that is being adopted by this final rule for Framework 13.

NMFS will continue to review website content and address instances of outdated website content identified in the comment.

Classification

NMFS is issuing this rule pursuant to sections 304(b)(3) and 305(d) of the MSA, which provide specific authority for implementing this action.

Additionally, this rule contains a regulatory correction being issued pursuant to MSA section 305(d) that is necessary to carry out the Monkfish FMP. The correction is necessary to carry out the Monkfish FMP because it clarifies regulations describing how monkfish DAS are managed in relation to the Northeast multispecies DAS leasing program. A clear description of this process is necessary for the public and industry to understand it and make decisions regarding management of DAS. Though this correction is included in this final rule to implement Framework 13, it is not part of Framework 13 as approved by the Councils. The lack of clarity in the current regulatory text was discovered after the approval of Framework 13 by the Councils and could not be included. Making this correction pursuant to section 305(d) authority allows for the correction to be implemented more quickly than otherwise possible. Though the correction is consistent with the FMP and review was not necessary, the Councils did receive the opportunity to review the change to the regulatory text as necessary and appropriate.

The NMFS Assistant Administrator has determined that this final rule is consistent with the Monkfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delayed effectiveness of this action. This action, which includes measures for fishing year 2023, was jointly developed by the Councils as part of the annual Framework Adjustment process, with final action by the Councils expected in December 2022 in order to allow for implementation of measures in time for the May 1, 2023 start of fishing year 2023. However, the Council process was delayed to provide time for SSC to re-evaluate its ABC recommendations for 2023 through 2025. As a result of this delay, specifications were not in place for the start of the 2023 fishing year, and the monkfish fishery has been operating under an interim status without specifications and a DAS allocation scheme that is planned to be replaced by this action. Additionally, between the publication of the proposed rule for Framework 13 and the development of this final rule, it was estimated that gillnet take of Atlantic Sturgeon exceeded limits in the 2021 Batched Biological Opinion. This rule could not be published sooner, as time was necessary to understand the implications of this new information and whether this action would be likely to result in changes to, or the addition

of, adverse impacts to Endangered Species Act-listed species.

A further delay in effectiveness of this action would be contrary to the public interest, as it would extend the amount of time in which no specifications are in place for fishing year 2023, rather than replacing them with the quotas, based in the best available science, in this rule. It additionally extends the amount of time during which the fishery continues to operate under previous DAS allocations. It is necessary for vessels to monitor their usage of allocated DAS in order to ensure that they do not exceed DAS allocations, a violation of the regulations. Though the agency provides vessels with current DAS balances, these are provided relative to the previous DAS allocations. Upon effectiveness of this action, DAS balances are re-calculated to reflect the new DAS scheme being implemented, which differs from the previous DAS allocation scheme by separating DAS allocations by area. During the period prior to the effective date of FW13, vessels must manually track their DAS usage to ensure that they do not exceed the new allocation scheme. As the fishing year advances and vessels continue to fish and use DAS, the chances are greater that a vessel may exceed the new DAS allocation scheme. Waiving the 30-day delayed effectiveness of this action would provide vessels with their final allocations as soon as possible and eliminate the chances of accidental violations of the regulations by vessels confused about how many DAS they are allocated and where these DAS may be used.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing.

Dated: August 7, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. Amend § 648.10 by revising paragraph (g)(3)(ii) to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(g) * * *

(3) * * *

(ii) An operator of a vessel issued both a NE multispecies permit and a monkfish permit is authorized to change their DAS declaration from a NE multispecies Category A DAS to a monkfish DAS, while remaining subject to the NE multispecies DAS usage requirements under § 648.92(b)(1)(iv), during a trip, as provided at § 648.92(b)(1)(vi)(A).

* * * * *

■ 3. Amend § 648.14 by revising paragraphs (m)(2)(i) and (m)(3)(ii) to read as follows:

§ 648.14 Prohibitions.

* * * * *

(m) * * *

(2) * * *

(i) Fish with or use nets with mesh size smaller than the minimum mesh size specified in § 648.91(c) while fishing under a monkfish DAS, except as authorized by § 648.91(c)(1)(v).

* * * * *

(3) * * *

(ii) Fail to comply with the Northern Fishery Management Area (NFMA) or Southern Fishery Management Area (SFMA) requirements specified at § 648.92(b)(1)(v).

* * * * *

■ 4. Amend § 648.80 by revising paragraph (a)(13)(i)(B) to read as follows:

§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(a) * * *

(13) * * *

(i) * * *

(B) The minimum mesh size for gillnets are as follows:

(1) Through April 30, 2026, all gillnets must have a minimum mesh size of 10-inch (25.4-cm) diamond mesh throughout the net.

(2) Starting May 1, 2026, all gillnets must have a minimum mesh size of 12-inch (30.5-cm) diamond mesh throughout the net.

* * * * *

■ 5. Amend § 648.91 by revising paragraphs (c)(1)(iii) and (iv) and adding paragraphs (c)(1)(v) and (vi) to read as follows:

§ 648.91 Monkfish regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(c) * * *

(1) * * *

(iii) *Gillnets while on a monkfish DAS for fishing years 2023, 2024, and 2025.* Until April 30, 2026, the minimum mesh size for any gillnets used by a vessel fishing under a monkfish DAS is 10-inch (25.4-cm) diamond mesh, unless the vessel meets one of the exceptions in paragraph (c)(1)(v) of this section.

(iv) *Gillnets while on a monkfish DAS from fishing year 2026 and beyond.* Starting May 1, 2026, the minimum mesh size for any gillnets used by a vessel fishing under a monkfish DAS is 12-inch (30.5-cm) diamond mesh, unless the vessel meets one of the exceptions in paragraph (c)(1)(v) of this section.

(v) *Exceptions from the minimum mesh size for gillnets on a monkfish DAS.* A vessel fishing with gillnet gear under a monkfish DAS is subject to the minimum mesh size as defined in paragraph (c)(1)(iii) or (iv) of this section, unless:

(A) The owner or operator of a limited access NE multispecies vessel fishing under a NE multispecies category A DAS with gillnet gear in the NFMA changes the vessel's DAS declaration to a monkfish DAS through the vessel's VMS unit during the trip in accordance with the provisions specified under § 648.92(b)(1)(vi);

(B) A vessel issued a Category C or D limited access monkfish permit is fishing under both a monkfish and NE multispecies Category A DAS in the SFMA using roundfish gillnets, as defined at § 648.2, with 6.5-inch (16.5-cm) diamond mesh;

(C) A vessel issued a limited access monkfish permit is fishing on a monkfish-only DAS in the Mid-Atlantic Exemption Area using roundfish gillnets with a minimum mesh size of 5 inches (12.7 cm) in accordance with the provisions specified under § 648.80(c)(5); or

(D) A vessel issued a limited access monkfish permit is fishing on a monkfish-only DAS in the Southern New England Dogfish Exemption Area using roundfish gillnets with a minimum mesh size of 6 inches (15.2 cm) in accordance with the provisions specified under § 648.80(b)(7).

(vi) *Authorized gear while on a monkfish and scallop DAS.* Vessels issued a Category C, D, G, or H limited access monkfish permit and fishing under a monkfish and scallop DAS may only fish with and use a trawl net with a mesh size no smaller than that specified in paragraph (c)(1)(i) of this section.

* * * * *

■ 6. Amend § 648.92 by revising paragraphs (b)(1)(i) through (v), adding paragraph (b)(1)(vi), and revising paragraphs (b)(2)(ii), (b)(2)(iii)(B), and (c)(1)(ii)(A) to read as follows:

§ 648.92 Effort-control program for monkfish limited access vessels.

* * * * *

(b) * * *

(1) * * *

(i) *DAS allocations.* Each vessel issued a limited access monkfish permit will be allocated 35 monkfish DAS each fishing year that may be used only in the Northern Fishery Management Area as defined in § 648.91(a). Each vessel issued a limited access monkfish permit will also be allocated 37 monkfish DAS each fishing year that may be used only in the Southern Fishery Management Area as defined in § 648.91(b). The annual allocation of monkfish DAS to each vessel issued a limited access monkfish permit in the NFMA and SFMA shall be reduced by the amount calculated in paragraph (b)(1)(iii) of this section for the research DAS set-aside. All DAS must be used in accordance with the provisions of this paragraph (b) unless the permit is enrolled in the Offshore Fishery Program in the SFMA, as specified in paragraph (b)(1)(ii) of this section.

(ii) *Offshore fishery program DAS allocation.* A vessel issued a Category F permit, as described in § 648.95, shall be allocated a prorated number of monkfish DAS as specified in § 648.95(g)(2).

(iii) *Research DAS set-aside.* A total of 500 DAS will be set aside and made available for cooperative research programs as described in paragraph (c) of this section. These DAS shall be deducted proportionally from the DAS allocated to each vessel issued a limited access monkfish permit by the process prescribed in this paragraph (b)(1)(iii).

(A) *Calculating the total per vessel DAS deduction.* The total per vessel

DAS deduction will be calculated as the quotient of 500 divided by the total number of limited access permits issued in the previous fishing year.

(B) *Calculating the per vessel DAS deduction for the NFMA and SFMA.* The total vessel DAS deduction will be distributed proportionally to the DAS for the NFMA and SFMA allocated to each vessel issued a monkfish limited access permit, as specified in paragraph (b)(1)(i) of this section. To determine the per-vessel deduction from the NFMA DAS allocation, the total per vessel deduction will be multiplied by the quotient of the NFMA DAS allocation divided by the total number of DAS allocated to each monkfish limited access vessel. To determine the per-vessel deduction from the SFMA DAS allocation, the NFMA deduction will be subtracted from the total per vessel deduction.

(C) *Example.* If, in the current year, each vessel is allocated 30 NFMA DAS and 20 SFMA DAS, then the total vessel DAS allocation is 50 DAS. In this example, 625 limited access monkfish permits were issued in the previous year. Dividing 500 by the 625 permits equals a total per-vessel DAS deduction of 0.8 DAS. Dividing the NFMA allocation of 30 DAS by the total DAS allocation of 50 DAS equals 0.6. Multiplying 0.6 by 0.8 equals an NFMA DAS deduction of 0.48, which is rounded to 0.5. Subtracting the 0.5 NFMA DAS deduction from the total per vessel deduction of 0.8 results in an SFMA DAS deduction of 0.3 DAS. The result of is that each limited access monkfish vessel would be allocated 29.5 NFMA DAS and 19.7 SFMA DAS.

(iv) *General DAS usage restrictions.* A vessel issued a limited access monkfish permit may not use more than 46 allocated monkfish DAS in a fishing year. Unless otherwise specified in paragraph (b)(2) of this section or under this subpart, a vessel issued a limited access NE multispecies or limited access Atlantic sea scallop permit that is also issued a limited access monkfish permit must use a NE multispecies or sea scallop DAS concurrently with each monkfish DAS utilized.

(v) *DAS declaration requirements.* Each vessel issued a limited access monkfish permit that intends to fish under a monkfish DAS must declare that it will fish in either the NFMA or SFMA through the vessel call-in system or VMS prior to the start of each trip. A vessel fishing or intending to fish for, possessing, or landing monkfish under a NE multispecies, scallop, or monkfish DAS under the management measures of the NFMA, must fish exclusively in the NFMA for the entire trip. In addition, a

vessel that is not required to and does not possess a VMS unit must declare its intent to fish in the NFMA by obtaining a letter of authorization from the Regional Administrator, which is effective for a period of not less than 7 days, and fish exclusively in the NFMA during the effective period of that letter of authorization. A vessel that has not declared into the NFMA under this paragraph (b)(1)(v) shall be presumed to have fished in the SFMA and shall be subject to the requirements of that area. A vessel that has declared into the NFMA may transit the SFMA, providing that it complies with the transiting and gear storage provision described in § 648.94(e).

(vi) *Monkfish Option provision and declaration requirements.* Any limited access NE multispecies vessel fishing on a sector trip or under a NE multispecies Category A DAS in the NFMA, and issued an LOA as specified in paragraph (b)(1)(v) of this section, may change its DAS declaration to a monkfish DAS through the vessel's VMS unit during the course of the trip after leaving port, but prior to crossing the VMS demarcation line upon its return to port or leaving the NFMA, if the vessel exceeds the incidental catch limit specified under § 648.94(c).

(A) Vessels that change their DAS declaration from a NE multispecies Category A DAS to a monkfish DAS during a trip remain subject to the NE multispecies DAS usage requirements (*i.e.*, use a NE multispecies Category A DAS in conjunction with the monkfish DAS) described in paragraph (b)(2)(iv) of this section.

(B) Gillnet vessels that change their DAS declaration in accordance with this paragraph (b)(1)(vi) are not subject to the gillnet minimum mesh size restrictions found at § 648.91(c)(1)(iii) and (iv) but are subject to the smaller NE multispecies minimum mesh requirements for gillnet vessels found under § 648.80 based upon the NE Multispecies Regulated Mesh Area in which the vessel is fishing.

(2) * * *

(ii) *Monkfish-only DAS.* When a vessel issued a limited access monkfish Category C, D, F, G, or H permit and a limited access NE multispecies DAS permit has an allocation of NE multispecies Category A DAS, specified under § 648.82(d)(1), that is less than the number of monkfish DAS allocated for the fishing year May 1 through April 30, that vessel shall be allocated “monkfish-only” DAS equal to the difference between the number of its allocated monkfish DAS and the number of its allocated NE multispecies Category A DAS at the start of a fishing

year. For example, if a vessel issued a limited access monkfish Category D permit is allocated 30 monkfish DAS for use in the Northern Fishery Management Area, 20 monkfish DAS for use in the Southern Fishery Management Area, and 26 NE multispecies Category A DAS, it would have 24 monkfish-only DAS at the start of each fishing year. The available balance of monkfish-only DAS may vary throughout the fishing year based upon monkfish-only DAS usage and the acquisition or relinquishment of NE multispecies DAS under the NE Multispecies DAS Leasing Program, as specified in paragraph (b)(2)(iii) of this section. A vessel issued a limited access monkfish Category C, D, F, G, or H permit may use monkfish-only DAS without the concurrent use of a NE multispecies DAS at any time throughout the fishing year, regardless of the number of NE multispecies Category A DAS available. When fishing under a monkfish-only DAS, the vessel must fish under the regulations in this part pertaining to a limited access monkfish Category A or B permit, as applicable, and may not retain any regulated NE multispecies. For example, a vessel issued a limited access monkfish Category C permit must comply with the monkfish landing limits applicable to a Category A monkfish permit when fishing under a monkfish-only DAS.

(iii) * * *

(B) A vessel issued a limited access monkfish Category C, D, F, G, or H permit may forfeit some of its monkfish DAS, if it leases NE multispecies DAS to another vessel(s), pursuant to § 648.82(k). The number of monkfish DAS forfeited by a vessel depends on its balance of Monkfish and NE multispecies DAS at the time of the lease. Any forfeited monkfish DAS will be deducted proportionally between the DAS allocated to the vessel for use in the Northern Fishery Management Area and Southern Fishery Management Area in paragraph (b)(1)(i) of this section.

(1) If the vessel's unused monkfish DAS balance is greater than or equal to its unused NE multispecies DAS balance, at the time of the lease, then the vessel will forfeit an amount of monkfish DAS equal to the number of NE multispecies DAS being leased to another vessel. For example, if a vessel has 40 monkfish DAS and 30 NE multispecies DAS and it leases 10 NE multispecies DAS in accordance with § 648.82(k), then, as part of the lease, the vessel would forfeit 10 monkfish DAS and be left with 30 monkfish DAS and 20 multispecies DAS.

(2) If the vessel's unused monkfish DAS balance is less than its unused NE multispecies DAS balance, at the time of lease, then the vessel will forfeit an amount of monkfish DAS equal to the number of NE multispecies DAS being leased minus the difference between the vessel's unused NE multispecies DAS balance and the vessel's unused monkfish DAS balance. If the number of NE multispecies DAS being leased is less than the difference between the vessel's unused NE multispecies DAS balance and the vessel's unused monkfish DAS balance, then no monkfish DAS are forfeited. For example, if a vessel has 25 monkfish DAS and 30 NE multispecies DAS at the time of the lease, and it leases 10 NE multispecies DAS, the vessel would forfeit 5 monkfish DAS (10 leased – [30 NE multispecies DAS – 25 monkfish DAS] = 5 forfeited monkfish DAS). If, however, the vessel has 25 monkfish DAS and 40 NE multispecies and the vessel leases 10 NE multispecies DAS, it would not forfeit any monkfish DAS (10 leased NE multispecies DAS – [40 NE multispecies DAS – 25 monkfish DAS] = – 5. The number of DAS forfeited cannot be negative, so 0 DAS are forfeited).

* * * * *

(c) * * *

(1) * * *

(ii) * * *

(A) Each panel member shall recommend which research proposals should be authorized to utilize the research DAS set aside in accordance with paragraph (b)(1)(iii) of this section, based on the selection criteria described in the RFP.

* * * * *

§ 648.94 [Amended]

■ 7. Amend § 648.94 by removing and reserving paragraph (f).

■ 8. Amend § 648.95 by revising paragraph (e)(3) to read as follows:

§ 648.95 Offshore Fishery Program in the SFMA.

* * * * *

(e) * * *

(3) A vessel issued a limited access monkfish Category F permit fishing on a monkfish DAS is subject to the minimum mesh size requirements specified in § 648.91(c)(1)(i), (iii) and (iv), as well as the other gear requirements specified in § 648.91(c)(2) and (3).

* * * * *

[FR Doc. 2023–17198 Filed 8–10–23; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 88, No. 154

Friday, August 11, 2023

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2023-1705; Project Identifier MCAI-2023-00480-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) 2020-02-13, which applies to certain Dassault Aviation Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes. AD 2020-02-13 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2020-02-13, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require certain actions in AD 2020-02-13 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 25, 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-2023-1705; 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 EASA 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](https://easa.europa.eu). It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1705.

- For Dassault service information identified in this NPRM, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201-440-6700; website dassaultfalcon.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.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 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-2023-1705; Project Identifier MCAI-2023-00480-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](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 Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 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 2020-02-13, Amendment 39-19827 (85 FR 6744, February 6, 2020) (AD 2020-02-13), for certain Dassault Aviation Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes. AD 2020-02-13 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2019-0142, dated June 17, 2019 (EASA AD 2019-0142) (which

corresponds to FAA AD 2020–02–13), to correct an unsafe condition.

AD 2020–02–13 requires revising the existing maintenance or inspection program, as applicable, to incorporate new maintenance requirements and airworthiness limitations. The FAA issued AD 2020–02–13 to address, among other things, fatigue cracking and damage in principal structural elements; such fatigue cracking and damage could result in reduced structural integrity of the airplane.

Actions Since AD 2020–02–13 Was Issued

Since the FAA issued AD 2020–02–13, EASA superseded AD 2019–0142 and issued EASA AD 2023–0059, dated March 16, 2023 (EASA AD 2023–0059) (referred to after this as the MCAI), for certain Dassault Aviation Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes. The MCAI states that new or more restrictive airworthiness limitations have been developed.

The FAA is proposing this AD to address the unsafe condition on these products. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1705.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0059. This service information specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This proposed AD would also require Chapter 5–40–01, Airworthiness Limitations, Revision 10, effective January 1, 2019, of the Dassault Aviation Falcon 20 Maintenance Manual, which the Director of the Federal Register approved for incorporation by reference as of March 12, 2020 (85 FR 6744, February 6, 2020).

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 certain requirements of AD 2020–02–13. 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 would terminate the retained requirements. These actions are specified in EASA AD 2023–0059 already described, as proposed for incorporation by reference. Any differences with EASA AD 2023–0059 are identified as exceptions in the regulatory text of this proposed 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 (l)(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 incorporate EASA AD 2023–0059 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0059 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 2023–0059 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 2023–0059. Service information required by EASA AD 2023–0059 for compliance will be available at *regulations.gov* by searching for and locating Docket No. FAA–2023–

1705 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 61 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 2020–02–13 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) 2020–02–13, Amendment 39–19827 (85 FR 6744, February 6, 2020); and
 - b. Adding the following new AD:

Dassault Aviation: Docket No. FAA–2023–1705; Project Identifier MCAI–2023–00480–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by September 25, 2023.

(b) Affected ADs

This AD replaces AD 2020–02–13, Amendment 39–19827 (85 FR 6744, February 6, 2020) (AD 2020–02–13).

(c) Applicability

This AD applies to Dassault Aviation Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2023–0059, dated March 16, 2023 (EASA AD 2023–0059).

(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, among other things, fatigue cracking and damage in principal structural elements. The unsafe condition, if not addressed, could result in 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 (i) of AD 2020–02–13, with no changes. Within 90 days after March 12, 2020 (the effective date of AD 2020–02–13), revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Chapter 5–40–01, Airworthiness Limitations, Revision 10, dated January 1, 2019, of the Dassault Aviation Falcon 20 Maintenance Manual. The initial compliance time for doing the tasks is at the time specified in Chapter 5–40–01, Airworthiness Limitations, Revision 10, dated January 1, 2019, of the Dassault Aviation Falcon 20 Maintenance Manual, or within 90 days after March 12, 2020 (the effective date of AD 2020–02–13), whichever occurs later. Where the threshold column in the table in paragraph B, Mandatory Maintenance Operations, of Chapter 5–40–01, Airworthiness Limitations, Revision 10,

dated January 1, 2019, of the Dassault Aviation Falcon 20 Maintenance Manual specifies a compliance time in years, those compliance times start from the date of issuance of the original airworthiness certificate or date of issuance of the original export certificate of airworthiness.

(h) Retained Restrictions on Alternative Actions and Intervals With No Change

This paragraph restates the requirements of paragraph (j) of AD 2020–02–13, with no changes. Except as required by paragraph (i) of this AD, after the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (e.g., inspections) or intervals may be used unless the actions or intervals are approved as an AMOC in accordance with the procedures specified in paragraph (l)(1) of this AD.

(i) New Revision of the Existing Maintenance or Inspection Program

Except as specified in paragraph (j) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2023–0059. Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraph (g) of this AD.

(j) Exceptions to EASA AD 2023–0059

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0059.

(2) Paragraph (3) of EASA AD 2023–0059 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 2023–0059 is at the applicable “limitations” and “associated thresholds” as incorporated by the requirements of paragraph (3) of EASA AD 2023–0059, 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 2023–0059.

(5) This AD does not adopt the “Remarks” section of EASA AD 2023–0059.

(k) New Provisions for Alternative Actions and Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (i) 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 2023–0059.

(l) 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 (m) of this AD. Information may be emailed to: 9-AVS-AIR-730-AMOC@faa.gov.

(i) 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.

(m) Additional Information

For more information about this AD, contact Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 206-231-3226; email: tom.rodriguez@faa.gov.

(n) 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.

(i) European Union Aviation Safety Agency (EASA) AD 2023-0059, dated March 16, 2023.

(ii) [Reserved]

(3) The following service information was approved for IBR on March 12, 2020 (85 FR 6744, February 6, 2020).

(i) Chapter 5-40-01, Airworthiness Limitations, Revision 10, effective January 1, 2019, of the Dassault Aviation Falcon 20 Maintenance Manual.

(ii) [Reserved]

(4) For EASA AD 2023-0059, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find this EASA AD on the EASA website at ad.easa.europa.eu.

(5) For Dassault service information identified in this AD, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201-440-6700; website dassaultfalcon.com.

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

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

Issued on August 1, 2023.

Victor Wicklund,

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

[FR Doc. 2023-16871 Filed 8-10-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2023-1021; Airspace Docket No. 22-AWA-6]

Establishment of Class C Airspace and Removal of Class D Airspace; Harrisburg International Airport, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class C airspace, and remove Class D airspace, at the Harrisburg International Airport (MDT), PA. The FAA is proposing this action to enhance the efficient management of air traffic operations and reduce the potential for midair collision in the MDT terminal area. The Class C airspace would replace the existing Class D airspace at MDT. In addition, the non-regulatory Terminal Radar Service Area (TRSA) would be removed.

DATES: Comments must be received on or before October 10, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA-2023-1021 and Airspace Docket No. 22-AWA-6 using any of the following methods:

* *Federal eRulemaking Portal:* Go to www.regulations.gov and follow the online instructions for sending your comments electronically.

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

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

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

Docket: Background documents or comments received may be read at www.regulations.gov at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12-140 of the

West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

FOR FURTHER INFORMATION CONTACT:

Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the airspace structure as necessary to enhance the safe and efficient flow of air traffic within the Harrisburg, PA, terminal area.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public

contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at www.regulations.gov. Recently published rulemaking documents can also be accessed through the FAA's web page at www.faa.gov/air_traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Avenue, College Park, GA 30337.

Incorporation by Reference

Class C airspace areas and Class D airspace areas are published in paragraphs 4000 and 5000, respectively, of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

Harrisburg International Airport (MDT) is located 8 miles southeast of the city of Harrisburg, PA. Capital City

Airport (CXY) is located approximately 3.5 miles northwest of MDT. The MDT Airport Traffic Control Tower (ATCT) consists of a combined tower and Terminal Radar Approach Control (TRACON) facility operating 24 hours a day. CXY has a part-time ATCT that operates 0700 to 2100 local time, daily. Class D airspace, extending from the surface to and including 2,800 feet above mean sea level (MSL), surrounds both airports. During times when the CXY ATCT is closed, the CXY Class D airspace reverts to a Class E surface area.

A Terminal Radar Service Area (TRSA) overlies the two contiguous Class D airspace areas and extends approximately 15 nautical miles (NM) east and west of MDT, within the TRACON's delegated airspace.

The airspace surrounding MDT and CXY is complex and congested due to the location and uniqueness of the two airport configurations. There are five airports with operational ATCTs in and around the MDT terminal area. There are 11 non-towered satellite airports, and 5 hospital heliports with instrument approach procedures under the jurisdiction of MDT ATCT. Restricted Area R-5802 is located approximately 11 NM northeast of MDT. R-5802 is in use nearly every day, and MDT ATCT frequently controls military aircraft into and out of that airspace.

Pilots operating under visual flight rules (VFR) frequently navigate above the MDT and CXY Class D airspace areas by following very popular routes created by the Susquehanna River and the various interstate highways interspersed throughout the area. Due to their proximity, aircraft operations at MDT and CXY may penetrate the current Class D airspace boundaries of the other. Consequently, air traffic control (ATC) must often sequence and separate the aircraft landing and departing MDT and CXY as if they were a single airport.

The runway configurations at MDT and CXY, plus the proximity to other airports, local geography, restricted airspace, flight training, skydiving, and the mix of jet and propeller aircraft combine to make the airspace in the MDT terminal area a web of intersecting flight paths. Additionally, significant numbers of VFR aircraft, which are not in contact with ATC, operate throughout the MDT and CXY terminal area. Without such communications, air traffic controllers are unaware of nonparticipating pilots' intentions. Heading and/or altitude changes made by nonparticipating VFR aircraft are unpredictable, and this often requires controllers to take action to avoid possible conflicts with other aircraft

under their control. With the current airspace configuration, there is no requirement for VFR pilots to contact ATC when operating beyond the boundaries of the MDT and CXY Class D airspace areas.

Class C Airspace and Terminal Radar Service Areas (TRSA)

Class C airspace areas are designated under Title 14, Code of Federal Regulations (CFR) part 71 rulemaking to improve aviation safety by reducing the risk of midair collisions in the terminal area and enhancing the management of air traffic operations therein. Class C airspace is designed to keep ATC informed of all aircraft operating within the Class C airspace. Pilots are required to establish two-way radio communications with ATC prior to entering Class C airspace, and they must maintain communications while operating in Class C airspace. In addition, pursuant to 14 CFR part 91, no person may operate an aircraft in Class C airspace unless the aircraft is equipped with an operational transponder and Automatic Dependent Surveillance—Broadcast (ADS-B) Out.

TRSAs are not officially designated by airspace rulemaking action. They are not incorporated in 14 CFR part 71, nor are there any TRSA-specific operating rules in 14 CFR part 91. TRSAs are established around designated airports where ATC provides radar vectoring, sequencing, and separation services on a full-time basis for all instrument flight rules (IFR) and participating VFR aircraft. Pilots operating under VFR are encouraged to contact ATC to avail themselves of TRSA services. However, VFR pilot participation in TRSA services is voluntary. The limitations of the TRSA (e.g., voluntary participation by VFR pilots) often contributes to nonparticipating VFR aircraft coming in direct conflict with higher-performance jets landing or departing MDT or CXY.

Need for Class C Airspace at MDT

To qualify for Class C airspace, an airport must be served by an operational ATCT and a radar approach control; and meet one of the following criteria:

An annual instrument operations count of 75,000 at the primary airport; or

An annual instrument operations count of 100,000 at the primary and secondary airports; or

An annual count of 250,000 enplaned passengers at the primary airport.

MDT qualifies as a candidate for Class C airspace based on its annual enplaned passenger count. MDT's enplaned passenger count for calendar year (CY) 2021 (the latest year for which validated

figures are available) was 512,251. This figure represents a 64.05% increase over CY 2020 numbers. Other factors considered are traffic volume, airspace complexity, and the potential for midair collision in the terminal area.

The existing TRSA does not adequately support the volume and diversity of aircraft operating in the congested MDT terminal area. Currently, there is no requirement for VFR pilots to establish radio contact with ATC outside of the existing MDT and CXY Class D airspace areas. Since participation in TRSA services is voluntary on the part of VFR pilots, the TRSA does not provide ATC with an adequate level of flight information or control required to segregate IFR and VFR aircraft operating in this complex airspace environment. VFR aircraft that are not in contact with ATC routinely operate in the area, and in so doing they cross MDT and CXY arrival and departure corridors and/or make unexpected heading and/or altitude changes. These aircraft frequently operate at altitudes that may conflict with aircraft arriving or departing MDT. As a result, IFR aircraft must alter their flight path or altitude thereby disrupting the orderly flow of MDT arrivals or departures. Additionally, air traffic controller workload is increased due to the need for additional vectoring or altitude changes of MDT arrivals and departures to ensure separation from the unknown VFR aircraft that are not communicating with ATC. Under this proposal, those VFR aircraft operating in the vicinity of the MDT arrival and departure corridors would be required to establish contact with ATC to ensure controllers are aware of pilots' intentions and promote increased safety and efficiency.

Benefits of Class C Airspace

All pilots would benefit from the enhanced safety provided by Class C services, which include separation, traffic advisories, and safety alerts. In addition, Class C airspace would:

- Enhance safety by lessening the likelihood of MDT arrivals and departures encountering unknown aircraft that are not in contact with ATC, thereby reducing the potential for midair collision;
- Reduce air traffic controller workload by lessening the need for additional vectoring of arrivals and departures to avoid conflicts with unknown VFR aircraft; and
- Minimize disruptions to the orderly flow of arrivals and departures to ensure pilots can fly stabilized approaches during a critical phase of flight.

Pre-NPRM Public Input

In 2019, the FAA initiated action to form an Ad Hoc Committee (Committee) to seek input and recommendations from representatives of affected aviation users for the FAA to consider in designing a proposed Class C airspace area at MDT. The Committee consisted of a diverse sampling of local aviation users, including representatives from the Pennsylvania Bureau of Aviation, Susquehanna Area Regional Airport Authority (SARAA), local airports and flight schools, Piedmont Airlines, the Experimental Aircraft Association (EAA), Life Lion Emergency Medical Services, and Corporate Flight Departments.

Ad Hoc Committee Recommendations

The Committee met throughout 2020 and submitted its report to the FAA in February 2021. The committee made a counterproposal to the traditional circular Class C shape being considered by the FAA. The Committee's design consists of a surface area generally within a 5 NM radius of MDT; and a rectangular shape aligned primarily along MDT's runway 13/31 approach/departure corridors extending 15 NM northwest and southeast of MDT. The FAA studied the Committee's design and determined that it would meet the needs of enhanced safety and efficiency in the MDT terminal area and would actually lessen the impact on satellite airports as opposed to the preliminary circular design. The FAA proposes to adopt the Committee's design as described in this proposal.

The Committee recommended that the CXY ATCT operating hours be extended from the current 0700 to 2100, local time, to 0600 to 2200, local time, at least from April through September, to mitigate the potential for conflicts between CXY traffic and MDT arrivals and departures. When the CXY ATCT is closed, the CXY Class D airspace reverts to Class E airspace. MDT Approach Control provides services and has radio communications coverage with aircraft on the ground at CXY. Pilots at CXY could contact MDT Approach prior to departure to request entry into the Class C airspace.

The decision to change the ATCT operating hours is governed by a separate, stand-alone process, and is outside the scope of this rulemaking action. However, the FAA believes that the proposed Class C airspace would provide adequate space for CXY operations while enhancing safety for operations into and out of MDT.

The Committee expressed concern that the current TRSA allows

nonparticipating aircraft to loiter or transition through the MDT arrival and departure corridors creating conflicts between IFR and nonparticipating VFR aircraft.

The proposed Class C airspace would require all aircraft to establish radio communications with ATC before entering the airspace, and to maintain communications while operating in the airspace. This would ensure that controllers are aware of, and would provide Class C services to, all aircraft operating in the Class C airspace thereby reducing the potential for conflicts with unknown aircraft.

The Committee emphasized that the Class C design should minimize the impact on CXY and other satellite airport operations.

The proposed design includes a cutout within a 1.5 NM radius northeast of CXY, and a shelf on the southwest side of the Class C surface area to accommodate CXY operations beyond the lateral boundary or beneath Class C airspace. The proposed 2,600-foot Class C floor, over and southwest of CXY, would allow CXY traffic to arrive and depart beneath the Class C airspace shelf away from MDT traffic flows. This design would provide adequate space to permit operations by pilots who do not wish to receive Class C services, or aircraft not properly equipped to enter that airspace while providing enhanced safety for operations into and out of MDT. There were also concerns that the CXY ATCT may extend aircraft in the runway 30 traffic pattern into the MDT Class C airspace for spacing. CXY ATCT will adjust the upwind/downwind traffic pattern legs as needed to keep those aircraft clear of the Class C. To accommodate non-participating aircraft (including aircraft not equipped with ADS-B Out) operating to/from CXY runway 08, the proposed class C design excludes a 1.5 NM radius around CXY from the Class C surface area northeast of CXY airport. This exclusion would allow operations to/from runway 08 without entering Class C airspace. The proposed Class C design would enable operations at CXY to continue largely unchanged. When the CXY ATCT is closed, pilots departing CXY to the east who wish to enter Class C airspace may contact MDT Approach prior to takeoff or establish communications with Approach before entering the Class C area.

Regarding the various satellite airports in the vicinity of MDT, only Donegal Springs airport (N71) lies beneath a Class C shelf (2,100 feet MSL). The shelf also allows non-ADS-B equipped aircraft to operate into and out of LNS without entering Class C

airspace. MDT will continue supporting the aerobatic box and skydiving operations at N71. Where necessary, a letter of agreement (LOA) with the stakeholders will be developed to define the procedures for these operations in Class C airspace.

The Committee expressed concern that aircraft operating into and out of CXY during times when the CXY ATCT closes could conflict with MDT traffic and VFR nonparticipating traffic.

The proposed airspace design provides sufficient protection for existing flight patterns, including the extended downwind and final flight paths of heavy aircraft that routinely operate to and from MDT. The flight paths into and out of VFR airports located outside of the proposed Class C remain accessible to nonparticipating aircraft.

The Committee suggested that visual landmarks be associated with the Class C boundaries to assist pilots identifying the boundaries or maintaining clearance from the Class C airspace.

The proposed boundaries are situated near a number of visual landmarks to assist pilots with boundary identification. For example, the “S turn” in the Susquehanna River and the ridgeline identifies the northwestern airspace boundary. Founders Hall is a notable landmark used when operating at Reigle Field (58N). It lies just north of the northern lateral boundary of the Class C airspace. Other boundaries are configured so that major highways, such as the Pennsylvania Turnpike, I-81, and Carlisle Pike can be used to reference the airspace boundaries visually. In addition, bridges over the Susquehanna River, and other landmarks such as Roundtop Ski Mountain, and Pinchot Lake are also available to mark the southern boundary of Class C airspace. These landmarks, in combination with the various Class C shelves, would assist pilots seeking to avoid the Class C airspace.

Discussion of Informal Airspace Meeting Comments

As announced in the **Federal Register** on June 4, 2021, the FAA held an informal airspace meeting on August 18, 2021 (86 FR 29969). The meeting was held virtually via the Zoom platform and was simultaneously broadcast on the FAA’s Facebook and YouTube channels. A total of 103 people logged into the Zoom meeting. The meeting was also advertised through the FAA’s Flight Standards FAA Safety Team (FAAST) distribution list. The purpose of the meeting was to provide interested airspace users with an opportunity to present their views and offer

recommendations regarding the proposed establishment of Class C airspace at MDT. The meeting began with a presentation of the proposed Class C airspace by the MDT Air Traffic Manager. Eight attendees offered comments at the meeting. Four of the eight speakers expressed support for the Class C proposal. One of the eight opposed the MDT Class C establishment based on the aircraft equipage requirements. Three of the eight asked questions rather than making a presentation. The following topics were discussed.

Attendees expressed concern that the requirement to equip aircraft with ADS-B Out for flight within Class C airspace would exclude many operators from access to the airspace. Commenters stated that pilots operating non-ADS-B equipped aircraft should be given reasonable opportunity to access Class C airspace, such as via LOAs.

In order to ensure access for all operators, the proposed Class C configuration accommodates aircraft not equipped with ADS-B by including various shelves designed to allow pilots to navigate through the area and access airports, while remaining outside Class C airspace. The FAA designed the shelves and area boundaries to lessen the impact on satellite airports. Generally, aircraft not equipped with ADS-B Out would be required to fly around or below the proposed Class C airspace.

ADS-B Out is a key component in the FAA’s multibillion-dollar Next Generation Air Transportation System (NextGen) program. NextGen is designed to modernize the U.S. National Airspace System (NAS) in order to meet future demand, reduce delays, and improve safety. ADS-B provides more accurate information to air traffic controllers and pilots. The FAA mandated the requirement for ADS-B Out equipage in Class C airspace by rulemaking in 14 CFR part 91.¹

Attendees were also concerned that establishing Class C airspace may cause a reduction in flight training and loss of business in the MDT area. Additionally, attendees expressed that the Class C might discourage pilots from other airports who come to this airspace to gain experience operating with both ATCTs and approach control facilities.

The FAA does not agree. For aircraft capable of operating in Class C airspace, there would be few operational differences, thus no impact. For aircraft

not equipped to fly in Class C airspace, Class C developers gave special consideration to the dimensions and altitudes of the proposed airspace to ensure operators can fly the ILS runway 08 approach at CXY, and the ILS runway 08 at LNS without entering Class C airspace. Area Navigation (RNAV) approaches at Donegal Springs Airport (N71) and Carlisle Airport (N94) are also outside of Class C. However, the RNAV runway 26 at CXY and the RNAV-A approach at Reigle Field (58N) are in Class C airspace because they conflict with MDT arrivals and departures. Alternatively, many other nearby airports such as York (THV), Lancaster (LNS), and Reading (RDG), have instrument approaches that can be used for flight training or alternates to MDT. Considering the 2,600-foot Class C shelf over and southwest of CXY, student pilots should be able to continue receiving similar training at CXY as they do today without having to enter Class C airspace. The establishment of Class C airspace at MDT could increase local training possibilities by providing students with the opportunity to learn and operate in Class C as well as Class D airspace. This experience could also be beneficial to pilots planning flights to Class C airports beyond the MDT terminal area.

A student pilot was concerned about the impact to flight training of the 2,100 and 2,600-foot Class C shelves above the Carlisle practice area, an area heavily used for ground reference maneuvers and flight training. The pilot was concerned the shelves could cause aircraft attempting to avoid the Class C airspace to further congest the training area and potentially force aircraft to fly low over populated areas.

The Carlisle practice area has no published or defined boundaries. It is a locally used, unofficial designation that helps pilots communicate their intentions to ATC. MDT Approach Control is familiar with the area and provides services, such as traffic advisories, in the Carlisle practice area today. ATC typically considers the Carlisle practice area to be west of Carlisle airport (N94), which is already west of the proposed Class C airspace. The area west of a straight line between N94 and the Harrisburg Very High Frequency (VHF) Omnidirectional Range/Tactical Air Navigation (VORTAC) is beyond the lateral boundaries of the proposed Class C and is safe for flight training. Aircraft performing maneuvers in the practice area should remain west of the proposed Class C airspace to remain safely separated from aircraft arriving and departing CXY and MDT. Pilots who

¹ Automatic Dependent Surveillance-Broadcast (ADS-B) Out Performance Requirements to Support Air Traffic Control (ATC) Service, Final Rule, 75 FR 30193 (May 28, 2010).

wish to operate in the western portion of the proposed Class C would be permitted to do so when in communication with ATC.

Several commenters were concerned about the proposed Class C airspace effects on CXY's traffic pattern operations. They noted that frequently, CXY ATCT extends the downwind leg for runway 30 beyond the boundary of CXY's Class D airspace and into MDT's Class D airspace. Currently, this is coordinated between controllers at CXY and MDT. However, with the proposed Class C airspace at MDT, pilots might worry about entering the Class C airspace without the required equipment, and possibly receive a violation, or pilots could put themselves in an unsafe position trying to avoid the airspace. Another concern was being directed to make a right 360-degree turn over elevated terrain and antennas south of CXY near the 1,500-foot MSL traffic pattern altitude.

MDT ATCT conducted a study of the CXY runway 30 operation. They reviewed 100 hours of recordings from a sampling of 7 different days that were selected due to their high traffic count and likelihood of congestion. During the study period, more than 250 operations were conducted to/from runway 30. Of the 250, only 7 aircraft were extended beyond the CXY Class D boundary. Three of the 7 aircraft performed a 360-degree turn on the downwind leg prior to extending beyond the CXY Class D airspace. Pilots continue to perform this maneuver in the airspace today. The FAA does not anticipate that the airspace change from Class D to Class C will impact the safety of a pilot's ability to perform that maneuver. MDT and CXY ATCTs have no safety concerns with the traffic pattern operations for CXY runway 12/30. The traffic pattern operation will not change nor be affected by the proposed Class C airspace. Regarding ATC extending an aircraft into the Class C airspace, as stipulated in 14 CFR part 91, no person may operate an aircraft contrary to an ATC instruction, except in an emergency. Also, any pilot who is uncomfortable with flying in proximity to the tall antennas south of CXY can be provided alternate instructions (*e.g.*, extend upwind or downwind).

Another commenter noted that the published missed approach procedure for the CXY ILS runway 08 approach would enter the proposed Class C airspace.

Currently, during normal operations, ATC does not assign the published missed approach procedure for the ILS runway 08 approach. Instead, ATC routinely issues alternate missed

approach instructions in order to de-conflict the CXY runway 08 missed approach segment from aircraft executing the ILS runway 13 approach at MDT, and MDT runway 13 departures that are turning outbound to the northwest. Pilots can expect a west or south turn out at the HORVI intersection identical to the standard procedures used today. ATC will issue these instructions regardless of whether the CXY ATCT is open or closed. Additionally, VFR aircraft conducting a practice instrument approach to CXY runway 08 are not authorized to fly the published missed approach unless approved by ATC. Other segments of the CXY ILS runway 08 approach remain beyond Class C airspace; thus, the approach is still available to non-ADS-B equipped aircraft with the assigned the alternate climb-out instructions.

Several commenters believed that the low floors of the proposed Class C airspace shelves could potentially force aircraft to fly low over heavily populated areas. They stated that requiring aircraft to maneuver at low altitudes under the shelves is concerning. Having additional altitude would provide pilots with more time to make decisions, especially in emergency situations.

While the FAA recognizes that flying at higher altitudes increases the time to respond to an unexpected emergency situation, the FAA developed the Class C shelf floors in the proposed design as high as possible to enable the most access to nonparticipating aircraft while retaining the margin of safety required between participating aircraft and those transitioning under the Class C airspace. The shelves in the proposed design permit safe flight in compliance with 14 CFR part 91. The proposed Class C configuration does not obligate any pilot to fly at a lower altitude or in an unsafe manner. Ultimately, it is the pilot's responsibility to evaluate all factors that could affect a planned flight and determine the safest course of action, whether that be circumnavigating the Class C, flying beneath the area, or establishing communication with ATC to enter the Class C and receive ATC services. The proposed Class C airspace would increase safety by reducing the risk of midair collision in the terminal area. The change would also ensure that aircraft choosing not to participate in Class C services remain safe and segregated from other aircraft operating in the congested airspace around MDT.

Two pilots were concerned about the proposed airspace change at MDT from Class D to Class C. One pilot suggested that the FAA consider expanding the MDT Class D airspace as an alternative

to establishing Class C airspace. That would provide the required communication with ATC without imposing the equipment mandates associated with Class C airspace.

Class D airspace is designated to provide controlled airspace for terminal VFR and IFR operations at airports having an operational ATCT. While Class D airspace does require communication with ATC, Class D services do not include radar traffic advisories and separation services that are provided in Class C airspace. A large, expanded Class D airspace around MDT, as suggested, would be contrary to the criteria for establishing Class D airspace, and would not facilitate the ATC services provided in Class C airspace that are essential to reducing the potential for midair collision in the busy MDT terminal area. Therefore, the FAA is unable to adopt the suggestion for an expanded Class D airspace area at MDT.

Two aviation organizations commended the collaborative approach the FAA used in this proposal process but stated that many of their members remain unaware of the proposed establishment of Class C airspace at MDT. They recommended wider communications to the local community.

The FAA's outreach efforts regarding the proposed MDT Class C airspace are described in the Ad Hoc Committee and Informal Airspace Meeting sections of this notice. A recording of the Informal Airspace Meeting is available for the public to watch on the FAA's YouTube channel at www.faa.gov/air_traffic/community_engagement/mdt/. Additionally, this NPRM establishes a 60-day comment period during which the public can submit their views about the proposal. The FAA will continue to publicize the proposal and remains receptive to feedback.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to establish Class C airspace at MDT and remove the existing Class D airspace area at MDT. The latitude/longitude coordinates for the MDT and CXY airport reference points (ARP) would be updated to reflect the current Airport Master Records data. Also, the existing MDT TRSA would be removed and replaced by the Class C airspace area. The FAA is proposing this action to enhance the safe and efficient use of airspace and reduce the risk of midair collision in the MDT terminal area (see the attached chart).

The proposed Class C airspace area would consist of six sub-areas identified

by the letters A through F, described as follows:

Area A: Area A would extend from the surface up to 4,400 feet MSL within a 5 NM radius of MDT, except for that portion described as Area E, below, and excluding that area within a 1.5 NM radius of CXY, northeast of the airport. Area A would replace the existing Class D airspace at MDT.

Area B: Area B would extend from 1,600 feet MSL up to 4,400 feet MSL. It would consist of that airspace within 3.5 miles either side of the 117° bearing from MDT, between the 5 mile and 10-mile radii from MDT.

Area C: Area C would extend from 1,600 feet MSL up to 4,400 feet MSL. It would be located northwest of MDT between the 5- and 10-mile radii of MDT and bounded on the south side by Area E. Area C would overlie a portion of the CXY Class D airspace area.

Area D: Area D would extend from 2,100 feet MSL up to 4,400 feet MSL. Area D would be bounded as follows: on the northwest end by the 15-mile radius of MDT northwest of MDT; on the northeast side by a line extending from the intersection of the 15-mile radius of MDT and the MDT's 325° bearing, direct to the intersection of MDT's 089° bearing and the 15-mile radius of MDT southeast of MDT; and on the southwest side, by a line extending from lat. 40°01'45" N, long. 76°40'43" W, to lat. 40°05'32" N, long. 76°50'21" W, excluding the airspace contained in Areas A, B, C, E, and F. Area D's 2,100-foot floor would create a shelf in the vicinity of Donegal Springs Airpark (N71) allowing for operations beneath the Class C airspace.

Area E: Area E would extend from 2,600 feet MSL up to 4,400 feet MSL south and west of CXY. Area E would overlie part of the CXY Class D airspace area to the south and west of CXY. Area E would allow aircraft to operate to and from CXY without the need for pilots to enter Class C airspace.

Area F: Area F would extend from 2,600 feet MSL up to 4,400 feet MSL. The proposed Area F floor creates a shelf below which pilots could fly instrument approaches to Lancaster Airport (LNS) runway 08, without having to enter Class C airspace.

Full descriptions of the MDT Class C subareas are listed in the amendments to part 71 set forth below.

The FAA believes that all users would benefit from participation in the proposed Class C services around MDT, which include sequencing of all aircraft to the primary airport; standard IFR services to IFR aircraft; separation, traffic advisories, and safety alerts between IFR and VFR aircraft; and

mandatory traffic advisories and safety alerts between VFR aircraft.

The FAA strongly recommends that pilots participate in the Class C airspace and receive ATC services. Communication with ATC is critical in order to provide controllers with awareness of a pilot's intended flight path. With that predictability, ATC can issue safe, logical instructions to ensure the safety of all participating aircraft.

As previously stated, the MDT Class D airspace area and the MDT TRSA would be removed under this proposal. Any required amendments to the CXY Class D airspace and the CXY Class E surface area would be addressed in a separate rulemaking action.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new information collection requirement associated with this proposed rule.

Regulatory Notices and Analyses

Regulatory Notices and Analyses Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995). The current threshold after adjustment for inflation is \$177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product.

In conducting these analyses, the FAA has determined that this proposed rule:

(1) is expected to have a minimal cost impact, (2) is not a “significant regulatory action” as defined in section 3(f) of Executive Order 12866, (3) is not significant under DOT's administrative procedure rule on rulemaking at 49 CFR 5.13; (4) not have a significant economic impact on a substantial number of small entities; (5) does not create unnecessary obstacles to the foreign commerce of the United States; and (6) does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

This action proposes to establish Class C airspace at MDT in place of the existing Class D airspace at MDT. The latitude/longitude coordinates for the MDT and CXY ARP would be updated to reflect the current Airport Master Records data. Also, the existing MDT TRSA would be removed and replaced by the Class C airspace area.

The airspace surrounding MDT and CXY is heavily trafficked due to the five airports with operational ATCTs in and around the MDT terminal area. In addition, 11 non-towered satellite airports, 5 hospital heliports, and military aircraft nearby contribute to the increasing traffic. The FAA determined that changes in this proposed rule would enhance the efficient management of air traffic operations and reduce the potential for midair collision in the MDT terminal area. The proposal would reduce air traffic controller workloads by lessening the need for additional vectoring of arrivals and departures to avoid conflicts with unknown VFR aircraft and minimize disruptions to the orderly flow of arrivals and departures to ensure pilots can fly stabilized approaches during a critical phase of flight. Pilots would also benefit from the enhanced safety provided by Class C services that include separation, traffic advisories, and safety alerts.

The FAA considered and accepted recommendations from an Ad Hoc Committee and informal airspace meetings from stakeholders. The committee made a counterproposal to the traditional circular Class C shape being considered by the FAA. The Committee's design consists of a surface area generally within a 5 NM radius of MDT; and a rectangular shape aligned primarily along MDT's runway 13–31 approach/departure corridors and extending 15 NM northwest and southeast of MDT. The FAA studied Committee's design and determined that it would meet the needs of enhanced safety and efficiency in the MDT terminal area and would lessen the

impact on satellite airports as opposed to the preliminary circular design.

Class C airspace areas are designated under 14 CFR part 71 rulemaking to improve aviation safety by reducing the risk of midair collisions in the terminal area and enhancing the management of air traffic operations therein. Class C airspace is designed to keep ATC informed of all aircraft operating within the Class C airspace. Pilots are required to establish two-way radio communications with ATC prior to entering Class C airspace, and they must maintain communications while operating in Class C airspace. In addition, pursuant to 14 CFR part 91, no person may operate an aircraft in Class C airspace unless the aircraft is equipped with an operational transponder and ADS-B Out. VFR operators would only need to make minor adjustments to accommodate the proposed Class C airspace by flying under or around it. Therefore, the FAA expects the proposal would result in minimal cost to VFR operators. The FAA requests comments on the benefits and costs of this proposal to inform the final rule.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.” To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration. The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines it will, it must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify, and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The proposed rule would replace Class D airspace with Class C airspace at MDT. The FAA is proposing this action to enhance the efficient management of air traffic operations and reduce the potential for midair collision in the MDT terminal area. The change would affect general aviation operators using the proposed Class C airspace. Operators flying VFR would need to make small adjustments to their flight paths to avoid the modified Class C airspace, so pilots could operate without contacting ATC. Additionally, some VFR operators are currently doing so to avoid heavy traffic. Therefore, as provided in section 605(b), the head of the FAA certifies that this rulemaking would not result in a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

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

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action”. The FAA currently uses an inflation-adjusted value of \$177 million in \$100 million. This proposed rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures” prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 4000 Subpart C—Class C Airspace.

* * * * *

AEA PA C Harrisburg, PA [New]

Harrisburg International Airport, PA
(Lat. 40°11'35" N, long. 76°45'45" W)
Capital City Airport
(Lat. 40°13'02" N, long. 76°51'05" W)

Boundaries

Area A. That airspace extending upward from the surface to and including 4,400 feet MSL bounded by a line beginning at lat. 40°12'23" N, long. 76°48'37" W, thence direct to the intersection of the Capital City Airport's 106° bearing and 1.5-mile radius, thence counterclockwise along the Capital City Airport's 1.5-mile radius to the Harrisburg International Airport's 5-mile radius, thence clockwise along the Harrisburg International Airport's 5-mile radius to the intersection of the 5-mile radius and a line bearing 191° from a point at lat. 40°12'23" N, long. 76°48'37" W, thence direct to the point of beginning.

Area B. That airspace extending upward from 1,600 feet MSL to and including 4,400 feet MSL extending from the Harrisburg International Airport's 5-mile radius, and within 3.5 miles each side of the Harrisburg International Airport's 117° bearing to the Harrisburg International Airport's 10-mile radius southeast of the Harrisburg International Airport.

Area C. That airspace extending upward from 1,600 feet MSL to and including 4,400 feet MSL bounded by a line beginning at the intersection of the Capital City Airport's 106° bearing and 1.5-mile radius direct to lat. 40°14'13" N, long. 76°53'23" W direct to lat. 40°14'12" N, long. 76°56'05" W thence direct to lat. 40°14'12" N, long. 76°58'22" W, thence clockwise along the Harrisburg International Airport's 10-mile radius to lat. 40°18'58" N, long. 76°54'35" W, thence direct to the Harrisburg International Airport's 341° bearing and the Harrisburg International Airport's 5-mile radius, thence counterclockwise along the Harrisburg International Airport's 5-mile radius to the intersection of the Capital City Airport's 1.5-mile radius, thence clockwise along the Capital City Airport's 1.5-mile radius to the point of beginning.

Area D. That airspace extending upward from 2,100 feet MSL to and including 4,400 feet MSL, within an area bounded by a line beginning at lat. 40°14'12" N, long. 76°58'22" W, thence direct to lat. 40°14'11" N, long. 77°05'03" W, thence clockwise along the Harrisburg International Airport's 15-mile

radius to the intersection of the Harrisburg International Airport's 325° bearing, thence direct to the intersection of Harrisburg International Airport's 089° bearing and the Harrisburg International Airport's 15-mile radius, thence clockwise along the airport's 15-mile radius to the intersection of the Harrisburg International Airport's 113° bearing, thence direct to lat. 40°01'45" N, long. 76°40'43" W, thence direct to lat. 40°05'32" N, long. 76°50'21" W, thence direct to lat. 40°12'23" N, long. 76°48'37" W, thence direct to the point of beginning; excluding that airspace contained in Areas A, B, and C.

Area E. That airspace extending upward from 2,600 feet MSL to and including 4,400 feet MSL bounded by a line beginning at lat. 40°12'23" N, long. 76°48'37" W, thence direct to lat. 40°05'32" N, long. 76°50'21" W, thence direct to the Harrisburg International Airport's 269° bearing and Harrisburg International Airport's 15-mile radius, thence clockwise along the Harrisburg International Airport's 15-mile radius to lat. 40°14'11" N, long. 77°05'03" W, thence direct to lat. 40°14'12" N, long. 76°58'22" W thence direct to lat. 40°14'12" N, long. 77°56'05" W, thence

direct to lat. 40°14'13" N, long. 76°53'23" W, thence direct to lat. 40°12'37" N, long. 76°49'12" W, thence direct to the point of beginning.

Area F. That airspace extending upward from 2,600 feet MSL to and including 4,400 feet MSL bounded by a line beginning at the intersection of the Harrisburg International Airport's 113° bearing and the airport's 15-mile radius, thence clockwise along the Harrisburg International Airport's 15-mile radius to the intersection of the airports 145° bearing and the airport's 15-mile radius, thence direct to lat. 40°01'45" N, long. 76°40'43" W, thence direct to the point of beginning.

* * * * *

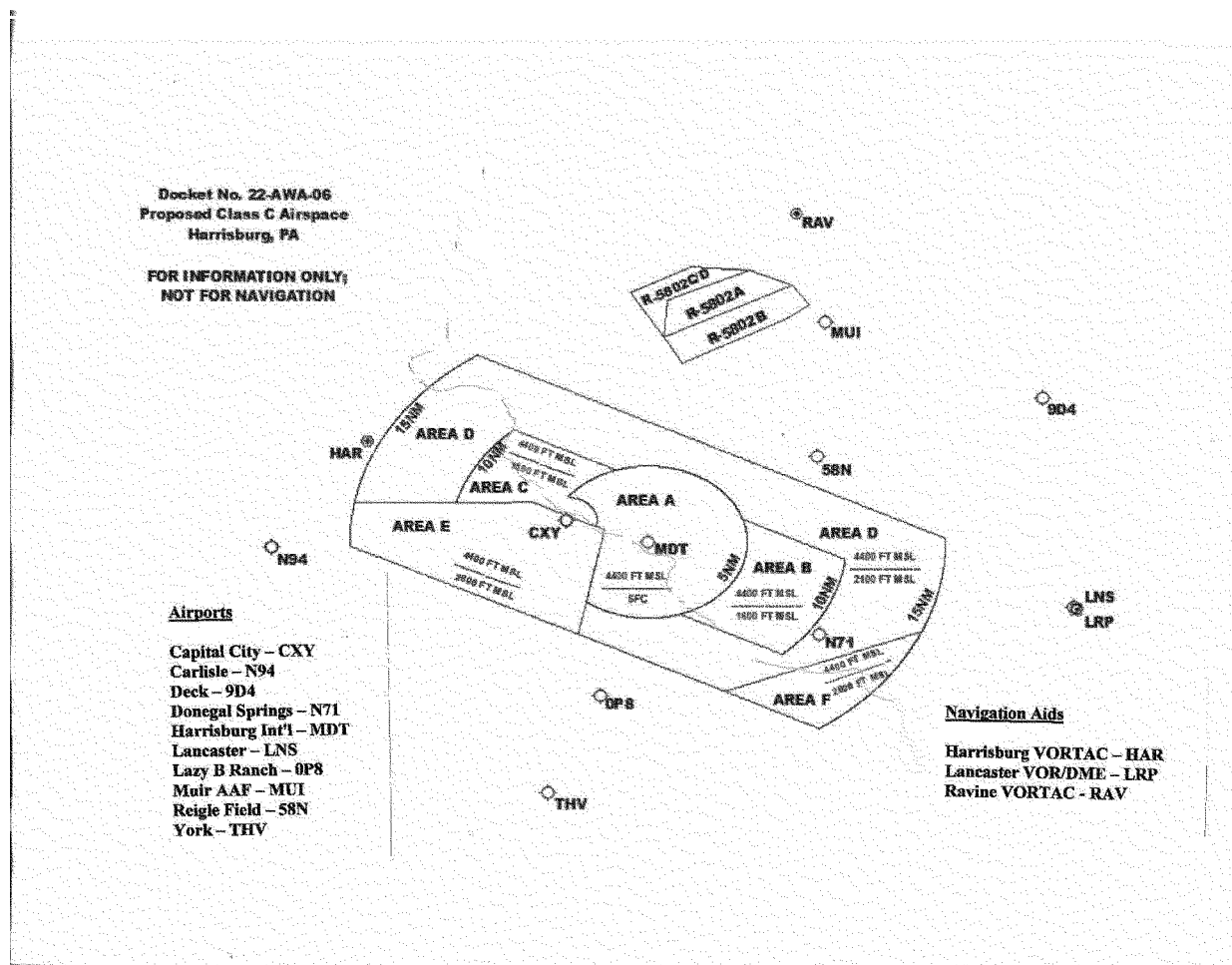
Paragraph 5000—Subpart D—Class D Airspace

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AEA PA D Harrisburg International Airport, PA [Removed]

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BILLING CODE 4910-13-P



Issued in Washington, DC, on August 4, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–17074 Filed 8–10–23; 8:45 am]

BILLING CODE 4910–13–C

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2510, 2520, 2550

RIN 1210–AC23

Request for Information—SECURE 2.0 Reporting and Disclosure

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Request for information.

SUMMARY: The Employee Benefits Security Administration of the U.S. Department of Labor (the Department) is publishing this Request for Information to solicit public feedback and to begin developing a public record for a number of provisions of Division T of the Consolidated Appropriations Act, 2023, (Dec. 29, 2022) (referred to as the SECURE 2.0 Act of 2022 or SECURE 2.0) that impact the reporting and disclosure framework of the Employee Retirement Income Security Act of 1974 (ERISA). Several sections of SECURE 2.0 establish new, or revise existing, ERISA reporting and disclosure requirements, in some cases also requiring that the Department undertake a review of existing or new requirements and submit reports to Congress on the Department's findings. The Department believes that it will be helpful to initiate several of these actions, given their commonality in affecting reporting of information to the Department and the disclosure of information to retirement plan participants and beneficiaries, in this Request for Information. Any later action by the Department on these SECURE 2.0 provisions, whether rulemaking or otherwise, will be better informed by responses to this Request for Information.

DATES: To be assured consideration, comments must be received at one of the following addresses no later than October 10, 2023.

ADDRESSES: You may submit written comments to the Office of Regulations and Interpretations, identified by RIN 1210–AC23, to one of the following addresses:

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

• *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, Attention: Request for Information—SECURE 2.0 Reporting and Disclosure.

Instructions: Persons submitting comments electronically are encouraged not to submit paper copies. Comments will be available to the public, without charge online at www.regulations.gov, at www.dol.gov/agencies/ebsa, and at the Public Disclosure Room, EBSA, U.S. Department of Labor, Suite N–1513, 200 Constitution Avenue NW, Washington, DC 20210.

Warning: Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT:

Kristen Zarenko, Office of Regulations and Interpretations, EBSA, Department of Labor, (202) 693–8500.

SUPPLEMENTARY INFORMATION:

Background

On December 29, 2022, the Consolidated Appropriations Act, 2023, H.R. 2617 was enacted. Part of this Act, SECURE 2.0, includes provisions amending ERISA and the Internal Revenue Code (the Code). Some of the provisions in SECURE 2.0 require regulations or other guidance for implementation. Other provisions direct the Department to undertake a review of certain statutory and regulatory requirements and submit reports to Congress on the Department's findings.

This Request for Information (RFI) focuses on certain SECURE 2.0 sections that principally impact, directly or indirectly, ERISA's reporting and disclosure requirements. Not all of the SECURE 2.0 provisions that affect the reporting and disclosure framework of ERISA are covered in this RFI, generally because the Department has already started or intends to initiate separate notice and comment rulemaking, actions, issue guidance, request additional information, or release reports, as appropriate, to implement these other provisions. For example, the changes to ERISA's audit requirements by section 345 of SECURE 2.0 were implemented through a recent rulemaking relating to annual reporting requirements under ERISA.¹ In

addition, the Department published a solicitation for comment on the effects of section 305 of SECURE 2.0 on the Department's Voluntary Fiduciary Correction Program on February 14, 2023.²

Another example of a SECURE 2.0 provision that affects reporting and disclosure but which is not addressed in this RFI is section 319 of SECURE 2.0. This provision directs the Department, in consultation with the Department of the Treasury (Treasury Department) and the Pension Benefit Guaranty Corporation (PBGC), to review each agency's existing reporting and disclosure requirements for retirement plans. After this review, and in consultation with a balanced group of participant and employer representatives, the agencies must report to Congress on the effectiveness of these reporting and disclosure requirements, including recommendations to consolidate, simplify, standardize, and improve such requirements. Rather than dealing with the specific substance of individual reporting and disclosure requirements under ERISA and the Code, the section 319 review is expansive in scope and calls for more generalized questions about how to best communicate information—information that can be quite complex—to the government and to workers of widely variable capabilities, enabling workers to obtain, understand, and use information about their plans and retirement. Further, these themes are to be explored in the context of a significant number of reporting and disclosure requirements under the jurisdiction of three different agencies. The Department currently intends to move forward by formally soliciting public input on the section 319 project, in coordination with the Treasury Department and PBGC, but as part of a rulemaking initiative separate from this RFI.

Apart from these exceptions, the Department believes that it will be helpful to initiate progress on the specific SECURE 2.0 items set forth below in this RFI by expeditiously obtaining feedback from a diverse set of stakeholders from the earliest stages of the process and building an initial public record. This feedback will inform more specific, detailed rulemaking or other guidance on such provisions in the future, including completion of multiple reports to Congress, as required by SECURE 2.0. Moving forward, as relevant, the Department will continue to consult with other agencies,

¹ 88 FR 11793 (Feb. 24, 2023).

² 88 FR 9408 (Feb. 14, 2023).

including the Treasury Department and PBGC.

II. Request for Information—SECURE 2.0 Reporting and Disclosure Provisions

The purpose of this RFI, as explained above, is to inform future action by the Department on the following SECURE 2.0 mandates related to ERISA's reporting and disclosure provisions. The Department invites comments, including relevant data, if available, from all interested stakeholders. The RFI includes questions about a number of distinct SECURE 2.0 provisions. Commenters need not answer every question, but are encouraged to identify, by number, each question addressed.

A. Pooled Employer Plans. Section 105 of SECURE 2.0 amended ERISA section 3(43)(B)(ii), defining a "pooled employer plan" (PEP), to provide that the terms of the plan must "designate a named fiduciary (other than an employer in the plan) to be responsible for collecting contributions to the plan and require such fiduciary to implement written contribution collection procedures that are reasonable, diligent, and systematic[.]" This clarification as to which persons may be designated as a named fiduciary for this purpose is effective for plan years beginning after December 31, 2022. The Department intends to update the Form PR and Instructions (Registration for Pooled Plan Provider), as necessary, to reflect this amendment for purposes of reporting the designated named fiduciary.

Section 344 of SECURE 2.0 also directs Department action on the topic of PEPs. Specifically, section 344 directs the Department, not later than five years after enactment, and every five years thereafter, to submit a report to Congress, and make publicly available on a website, the Department's findings from a study of the PEP industry, including recommendations on how PEPs can be improved, through legislation, to serve and protect retirement plan participants.³ The Department is in the preliminary stages of planning such a study and anticipates using data collected from the Form PR and the Form 5500 Annual Report to

assist in preparing this report. As part of this RFI, the Department is requesting commenters' ideas about how to construct such a study effectively in response to this directive and whether, and what, additional information the Department should focus on to help achieve the stated objectives of the study to improve PEPs and subsequent reports to Congress. In addition to general feedback on the methodology and scope of the required study, the Department seeks input on the specific issues set forth below.

■ **Question 1:** What guidance, if any, for purposes of reporting on Form PR or otherwise, do pooled plan providers, fiduciaries, trustees, or other parties need to implement the revised definition in ERISA section 3(43)(B)(ii) effectively?

■ **Question 2:** In addition to the Form PR and the Form 5500 Annual Report, what are other data sources the Department could use to collect data on the topics enumerated in SECURE 2.0 section 344(1), *e.g.*, the fees assessed in such plans, or the range of investment options provided in such plans?

■ **Question 3:** The Department interprets the language in section 344(1)(C) of SECURE 2.0 requiring identification of "the range of investment options provided in such plans" to mean the specific investment options the responsible plan fiduciary has selected as "designated investment alternatives" under the plan.⁴ The Department does not, for example, consider this language to require examination of the potentially large range of investments available through a brokerage window or similar arrangement, to the extent offered in a PEP. What would be efficient and comprehensive methods for the Department to determine the range of designated investment alternatives for all PEPs?

■ **Question 4:** Section 344(1)(E) of SECURE 2.0 requires the study to focus on the "manner in which employers select and monitor such plans." How and by whom are PEPs most commonly marketed to employers? Do marketing techniques differ based on the size of employers? How often do employers rely on the advice of others when selecting and monitoring a PEP? If so, who gives this advice to employers, generally, *e.g.*, consultants, financial advisors, brokers, record keepers, others? In addition to this RFI, are there other efficient and comprehensive methods for the Department to solicit information on the steps employers take to select and monitor PEPs and to

decide to stay in the PEPs? For instance, should the Department consider a public hearing, focus groups, questionnaires, online polling, or other similar information gathering techniques? From whom should the Department solicit this information (*i.e.*, directly from employers, pooled plan providers, or both), using these other techniques?

■ **Question 5:** Section 344(1)(F) of SECURE 2.0 requires the study to focus on the disclosures provided to participants in such plans. What would be efficient and comprehensive methods for the Department to collect examples of such disclosures or otherwise solicit information from employers, PEPs, plan administrators, or other parties on the disclosures provided to plan participants? Is there additional or different information that should be disclosed to participants in the context of PEPs, versus what is required to be disclosed under ERISA to participants in other defined contribution plans? If so, why, and what other additional disclosures should be required in the context of PEPs?

■ **Question 6:** Section 344(1)(H) of SECURE 2.0 requires the study to focus on the extent to which PEPs have "increased retirement savings coverage in the United States." How should the Department measure "increased retirement savings coverage" and what information would the Department need to make this assessment? For example, the formation of new PEPs may suggest increased coverage, but if the participating employers previously maintained a retirement plan, that could indicate a transfer of coverage types, rather than an increase in coverage. What are efficient and comprehensive methods for the Department, depending on how "increase retirement savings coverage" is measured, to collect such information?

B. Emergency Savings Accounts Linked to Individual Account Plans. Section 127 of SECURE 2.0 amended ERISA section 3 to add a new definition, at section 3(45), for a "pension-linked emergency savings account" (PLESA). A PLESA is a short-term savings account established and maintained as part of an individual account plan. Section 127 of SECURE 2.0 also added a new part 8 to subtitle B of title I of ERISA that includes a comprehensive set of requirements for PLESAs. This includes a requirement that plan administrators for individual account plans that include PLESAs furnish to participants an initial and annual notice as to: the purpose of PLESAs; limits on and tax treatment of, contributions to a PLESA; any fees, expenses, restrictions, or

³ The required study will focus on: the legal name and number of pooled employer plans; the number of participants in such plans; the range of investment options provided in such plans; the fees assessed in such plans; the manner in which employers select and monitor such plans; the disclosures provided to participants in such plans; the number and nature of any enforcement actions by the Department on such plans; the extent to which such plans have increased retirement savings coverage in the United States; and any additional information as the Department determines is necessary. SECURE 2.0 section 344.

⁴ 29 CFR 2550.404a-5(h)(4).

charges associated with PLESA; procedures for electing to make or opting out of PLESA contributions, changing contribution rates, and making participant withdrawals; the amount of the PLESA account and the amount or percentage of compensation a participant has contributed to the PLESA; the designated investment option for PLESA contributions; options for the PLESA account balance after termination of employment or of the PLESA by the plan sponsor; and other information. Section 127 of SECURE 2.0 also amended section 110 of ERISA to grant the Department authority to prescribe an alternative method for satisfying any reporting and disclosure requirement under ERISA with respect to PLESAs. Section 127 of SECURE 2.0 also amended section 404(c) of ERISA with respect to specified default investment arrangements for PLESAs. The amendments made to ERISA are applicable to plan years beginning after December 31, 2023.

■ **Question 7:** What guidance, if any, do plan administrators need to effectively implement the requirements of section 127 of SECURE 2.0 and new part 8 of ERISA? Because section 127 of SECURE 2.0 impacts many provisions under ERISA and the Code, commenters are encouraged to be as specific as possible with their responses, with clear citation to the specific statutory provision or provisions in question. If guidance is needed on multiple provisions, commenters are asked to prioritize the issues according to importance and offer a supporting rationale for the priority.

■ **Question 8:** Would administrators of plans that include PLESAs benefit from a model notice or model language for inclusion in the required notice under section 801 of ERISA? If so, commenters are encouraged to submit suggested model language.

C. Performance Benchmarks for Asset Allocation Funds. Section 318 of SECURE 2.0 requires that the Department, not later than two years after enactment, issue regulations under ERISA section 404 (Fiduciary duties) providing that:

[I]n the case of a designated investment alternative that contains a mix of asset classes, the administrator of a plan may, but is not required to, use a benchmark that is a blend of different broad-based securities market indices if—(1) the blend is reasonably representative of the asset class holdings of the designated investment alternative; (2) for purposes of determining the blend's returns for 1-, 5-, and 10-calendar-year periods (or for the life of the alternative, if shorter), the blend is modified at least once per year if needed to reflect changes in the asset class holdings of the designated investment

alternative; (3) the blend is furnished to participants and beneficiaries in a manner that is reasonably calculated to be understood by the average plan participant; and (4) each securities market index that is used for an associated asset class would separately satisfy the requirements of such regulation for such asset class.

■ **Question 9:** Are there additional factors beyond the criteria in section 318 of SECURE 2.0 that plan administrators should use to ensure they can effectively select and monitor, and participants and beneficiaries can effectively understand and utilize, blended performance benchmarks for mixed asset class funds? If so, why, and what are the other factors the Department should consider when developing regulations? Commenters are encouraged to review the Department's prior guidance on the use of blended performance benchmarks, albeit as secondary benchmarks, for purposes of the participant-level disclosure regulation; the standards for use of a "reasonable" blended performance benchmark therein are similar, but not identical, to the four criteria in section 318 of SECURE 2.0.⁵

■ **Question 10:** Section 318 of SECURE 2.0 also requires that the Department, not later than three years after the applicability date of such regulations, deliver a report to Congress regarding the utilization, and participants' understanding of these benchmark requirements. Comments are solicited on methods the Department might use to assess whether, and the extent to which, participants understand the type of benchmark described in section 318 of SECURE 2.0.

D. Defined Contribution Plan Fee Disclosure Improvements. Section 340 of SECURE 2.0 requires the Department to undertake a review of 29 CFR 2550.404a–5, relating to fiduciary requirements for disclosure in participant-directed individual account plans. The review must explore how the contents and design of the disclosures under this regulation may be improved to enhance participants' understanding of defined contribution plan fees and expenses, including the cumulative effect of such fees on retirement savings over time. The Department must submit a report of its findings to Congress within three years, including recommendations for legislative changes. Although the Department may take steps in addition to this RFI to conduct its review of the regulation in question, the Department anticipates

that responses to the following questions will be a helpful start.

The regulation that is the subject of this required review was published in 2010. The intent of the regulation was to increase fee transparency and to provide America's workers with the information they need to effectively manage and invest the money they contribute to their 401(k)-type retirement plans. The regulation requires that plan administrators use standard methodologies when calculating and disclosing investment expense and historical return information to achieve uniformity across the spectrum of investment options that exist in 401(k)-type plans, facilitating "apples-to-apples" comparisons among investment options. The regulation also requires that investment-related information is furnished in a format that enables workers to meaningfully compare the cost and historical performance of investment options available in their plan.

■ **Question 11:** What information, including information required by the subject regulation, is currently being provided to participants in participant-directed individual account plans to provide them with information about their plans' fees and expenses and the cumulative effect of fees and expenses on their retirement savings over time? How is the information adequate or inadequate in helping plan participants make informed investment decisions? If inadequate, is there evidence that this inadequacy is tied directly to the subject regulation as opposed to other exogenous factors impacting financial literacy?

■ **Question 12:** Is there evidence that the subject regulation could or should be improved to help participants better understand the fees and expenses related to their participant-directed individual account plans? For instance, is there additional or different content, not required under the current regulation, that could enhance participants' understanding of the costs associated with participating in their plan, including the costs of their available investment options? In addition, are there additional or different design, formatting, delivery, or other similar characteristics, not required under the current regulation, that could improve the effectiveness of these disclosures? If so, how should these improvements be incorporated into the subject regulation?

■ **Question 13:** The subject regulation requires that investment fee and performance information for each designated investment alternative under

⁵ See, e.g., Field Assistance Bulletin 2012–02R (July 30, 2012), Question 16; 75 FR 64910, 917 (Oct. 20, 2010).

the plan must be furnished in a chart or similar format that is designed to facilitate a comparison of such information.⁶ Is the Department's model comparative chart, attached to this RFI as Appendix A, helpful to participants in facilitating a meaningful comparative analysis and selecting among investment options and for plan administrators in satisfying their disclosure obligations under the regulation? If not, how could the model be modified to enhance its effectiveness? Are there examples of disclosures provided to satisfy the subject regulation that use formats or designs that differ from the Department's model comparative chart that have proven to be more effective?

E. Eliminating Unnecessary Plan Requirements Related to Unenrolled Participants. Section 320 of SECURE 2.0 amended ERISA by inserting a new section 111, applicable for plan years beginning after December 31, 2022. Section 111 provides that, with respect to individual account plans, no required disclosure, notice, or other plan document, must be furnished to unenrolled participants, subject to two exceptions. Under the first exception, the unenrolled participant must be furnished an annual reminder notice of the participant's eligibility to participate in the plan and any applicable election deadlines. Under the second exception, the unenrolled participant must be furnished any document to which they are otherwise entitled if the participant requests the document. Section 111 defines an "unenrolled participant" for this purpose as an employee who is eligible to participate in an individual account plan; has been furnished a summary plan description and any other ERISA or Code notices related to the participant's initial eligibility to participate in the plan; is not participating in such plan; and satisfies such other criteria as the Department, in consultation with the Treasury Department, may determine appropriate. Section 111 also defines an "annual reminder notice" for this purpose as a notice provided in accordance with 29 CFR 2520.104b-1 that is furnished in connection with the annual open season election period for the plan or, if there is no such period, is furnished within a reasonable period prior to the beginning of each plan year; and that notifies the unenrolled participant of their eligibility to participate in the plan, the key benefits and rights under the plan, with a focus on employer contributions and vesting provisions; and provides such

information in a prominent manner calculated to be understood by the average participant. Section 320 of SECURE 2.0 also makes amendments to the Code that are parallel to the amendments to ERISA.

■ **Question 14:** Is there any guidance, regulatory or otherwise, that plan administrators need or would find helpful to implement ERISA section 111?

■ **Question 15:** Are there additional criteria that the Department, in consultation with the Treasury Department, should consider for determining who is an unenrolled participant?

■ **Question 16:** Is there additional information that the Department, in consultation with the Treasury Department, should consider for inclusion on the required "annual reminder notice" to unenrolled participants?

■ **Question 17:** Would plan administrators benefit from a model notice or model language for inclusion in the required "annual reminder notice" to unenrolled participants? If so, commenters are encouraged to submit suggested model language, specifically focusing on the "key benefits and rights under the plan, with a focus on employer contributions and vesting provisions" language. Considering that different plans contain different "benefits and rights," and a range of plan-specific employer contribution rates and vesting provisions, is it feasible for the Department to create model language?

■ **Question 18:** Is there a reliable source of data to estimate the number of people that may be impacted by section 111 of ERISA?

F. Requirement to Provide Paper Statements in Certain Cases. Section 338 of SECURE 2.0 amended ERISA section 105(a)(2) by adding a new requirement, "Provision of Paper Statements," effective for plan years beginning after December 31, 2025, that at least one pension benefit statement furnished for a calendar year for an individual account plan, and at least one pension benefit statement furnished every three years for a defined benefit plan, must be furnished on paper in written form, with two general exceptions. First, if a plan furnishes such statement in accordance with 29 CFR 2520.104b-1(c) (the Department's 2002 electronic delivery safe harbor, or the 2002 safe harbor), no paper statement must be furnished. Second, if a plan permits participants and beneficiaries to request that pension benefit statements be furnished by electronic delivery, no paper statement

must be furnished to individuals who request electronic delivery if the statements are so delivered.⁷

Section 338 of SECURE 2.0 directs the Department to update the 2002 safe harbor to provide that, in addition to the other requirements of the safe harbor, participants who first become eligible to participate (and beneficiaries who first become eligible for benefits) after December 31, 2025 must be furnished a one-time initial notice on paper in written form, prior to the electronic delivery of any pension benefit statement, their right to request that all documents be furnished on paper in written form. Section 338 of SECURE 2.0 also directs the Department, no later than December 31, 2024, to update "applicable guidance governing electronic disclosure," except for the 2002 safe harbor, as necessary to ensure that (1) participants and beneficiaries are permitted the opportunity to request that any disclosure required to be delivered on paper under such guidance shall be furnished electronically; (2) each paper statement furnished pursuant to such updated guidance includes an explanation of how to request that all such statements, and any other documents required to be disclosed under ERISA, be furnished electronically and contact information for the plan sponsor, including a telephone number; (3) the plan may not charge any fee to a participant or beneficiary for delivery of any paper statements; (4) each required document that is furnished electronically by such plan shall include an explanation of how to request that all such documents be furnished on paper in written form; and (5) a plan is permitted to furnish a duplicate electronic statement in any case when the plan furnishes a paper pension benefit statement. The "applicable guidance governing electronic disclosure" referenced in section 338(b) of SECURE 2.0 refers to the Department's second electronic delivery safe harbor regulation at 29 CFR 2520.104b-31, titled "Alternative method for disclosure through electronic media—Notice-and-access" (the 2020 electronic delivery safe harbor, or the 2020 safe harbor).⁸ The Department intends, therefore, to update

⁷ Section 338 of SECURE 2.0 did not amend the alternative notice provision in section 105(a)(3) of ERISA. ERISA section 105(a)(3)(A), in relevant part, provides that plan administrators of defined benefit plans shall be treated as meeting the requirements of ERISA section 105(a)(1)(B)(i) "if at least once each year the administrator provides to the participant notice of the availability of the pension benefit statement and the ways in which the participant may obtain such statement."

⁸ 29 CFR 2520.104b-31; 85 FR 31884 (May 27, 2020).

⁶ See 29 CFR 2550.404a-5(d)(2).

the 2020 safe harbor as necessary to reflect these updates.

■ **Question 19:** What modifications or updates to the 2002 safe harbor are needed to implement section 338 of SECURE 2.0? Commenters are encouraged to consider whether any additional information (other than a statement of the right to request that all documents required to be disclosed under ERISA be furnished on paper in written form) should be included, and whether there are other standards that should apply to the required one-time initial paper notice that must be furnished for compliance with 29 CFR 2520.104b–1(c), the 2002 safe harbor? For example, should the 2002 safe harbor be modified or updated to include an initial paper notice that resembles the initial paper notice required by paragraph (g) of the 2020 safe harbor regulation?

■ **Question 20:** What modifications or updates to the 2020 safe harbor are needed to implement section 338 of SECURE 2.0? Commenters are encouraged to consider and compare the contents of the initial paper notification required under paragraph (g) of the 2020 safe harbor with the content requirements of section 338(b)(2)(B) of SECURE 2.0. To what extent should a statement under ERISA section 105(a)(2) contain the content of the initial paper notification described in paragraph (g) of the 2020 safe harbor, and why?

■ **Question 21:** Should both safe harbors be modified such that their continued use by plans is conditioned on access in fact? Can plan administrators (through their electronic delivery systems) reliably and accurately ascertain whether an individual actually accessed or downloaded an electronically furnished disclosure, or determine the length of time the individual accessed the document? If so, should the safe harbors contain a condition that plan administrators monitor whether individuals actually visited the specified website or logged on to the website, as a condition of treating website access as effective disclosure? And, in the event that such monitoring reveals individuals have not visited or logged on to the specified website (meaning that effective disclosure was not achieved through website access), should the safe harbors require that plan administrators revert to paper disclosures or take some other action in the case of individuals whom plan administrators know forsake such access?

G. Consolidation of Defined Contribution Plan Notices. Section 341 of SECURE 2.0 requires the Department

and the Treasury Department, not later than two years after enactment, to issue regulations providing that plan administrators may, but are not required to, consolidate two or more of the following notices into a single notice: (1) the qualified default investment alternative notice, ERISA section 404(c)(5)(B); (2) the notice for preemption of automatic contribution arrangements, ERISA section 514(e)(3); (3) the notice for alternative methods of meeting nondiscrimination requirements, Code section 401(k)(12)(D); (4) the notice for alternative methods of meeting nondiscrimination requirements for automatic contribution arrangements, Code section 401(k)(13)(E); and (5) the notice for special rules for certain withdrawals from eligible automatic contribution arrangements, Code section 414(w)(4). The consolidated notice must include all required content, clearly identify the matters addressed therein, satisfy the timing and frequency requirements for each such notice, and be presented in a manner that is reasonably calculated to be understood by the average plan participant without obscuring, or failing to highlight, the primary information for each notice.

■ **Question 22:** To what extent are regulations needed for plan administrators to consolidate the notices described in section 341 of SECURE 2.0? What are the perceived legal impediments to consolidation under current law and regulations? What are the perceived administrative or other practical impediments to consolidation? What are the benefits and drawbacks to plans of consolidating the notices described in section 341 of SECURE 2.0? Similarly, what are the benefits and drawbacks to plan participants and beneficiaries of consolidating these notices? Other than plans and plan participants, are there other stakeholders that have an interest in this topic? If so, who and what are their interests?

H. Information Needed for Financial Options Risk Mitigation. Section 342 of SECURE 2.0 amended part 1 of ERISA by adding a new section 113 that requires administrators of plans amended to provide a period of time during which a participant or beneficiary may elect to receive a lump sum to, among other things, provide participants and beneficiaries with advance notice of the opportunity to elect a lump sum payment in lieu of annuity payments for life from the pension plan. The disclosure under section 113 would provide participants and beneficiaries, as they consider what is best for their financial futures, with

important information to compare the other distribution options available under the plan, such as monthly payments for life and the life of their spouses, and the lump sum. In addition to explaining the potential ramifications of accepting the lump sum, the disclosure also would explain how the lump sum was calculated, including whether the lump sum is based on the early retirement benefit and, for a terminated vested participant, the relative values of the lump sum, the single life annuity, and the qualified joint and survivor annuity. The disclosure would also have to provide details about the election period, and how to obtain additional information. Section 342 of SECURE 2.0 requires the Department to issue regulations implementing the requirements under section 113 of ERISA not earlier than one year after enactment. Further, these regulations must contain a model disclosure reflecting the content requirements under section 113 that plan administrators may use to discharge their statutory obligation.

■ **Question 23:** Is there a need for guidance with respect to any of the specific content requirements in ERISA section 113(b)(1)(A) through (H)? If so, please specify the particular content requirement and explain the need for guidance.

■ **Question 24:** ERISA section 113(b)(1)(E) requires the notice to specify, in a manner calculated to be understood by the average plan participant, the “potential ramifications of accepting the lump sum.” Beyond the specific items set forth in ERISA section 113(b)(1)(E), what other potential ramifications should the Department consider incorporating into regulations under ERISA section 113, and why?

■ **Question 25:** Are transactional complexity, aging and cognitive decline, and financial literacy relevant factors the Department should consider when deciding to add to the list of potential ramifications in making regulations under section 113 of ERISA? Risk transfer transactions are by nature inherently complex involving uncertainty. Some behavioral finance professionals suggest that more and better information by itself is unlikely to ensure that people, even with average financial literacy, make good choices in the cognitively challenging task of choosing between an annuity and a lump-sum payout. Despite such challenges, are there ways to structure and present the notice that would increase the likelihood of better decisions and retirement outcomes?

■ **Question 26:** Are there mandatory notices or disclosures under the Code

that the Department should factor into the development of regulations under section 113 of ERISA? If so, which notices and disclosures, and how should they be factored into regulations under section 113 of ERISA?

■ *Question 27:* The Department must issue a model notice for plan administrators to use in discharging their new statutory disclosure obligations under section 113 of ERISA. Commenters are encouraged to submit for the Department's consideration exemplary samples of notices that plan administrators have used in prior lump sum offers that comprehensively explain the consequences of electing a lump sum in lieu of annuity payments for life. Commenters should include a concise explanation of why the commenter believes that the sample was effective in conveying meaningful information to participants and beneficiaries. The Department, in turn, offers for consideration by commenters a model notice developed in 2015 by the ERISA Advisory Council.⁹ The Council's model is the product of careful deliberation following the receipt of extensive public input from a broad array of stakeholders.¹⁰ The model is attached as Appendix B to this RFI.¹¹ Should the Department consider using this model as the starting point for the model required under section 113 of ERISA, and if not, why? If so, to what extent could and should this model be improved, for example, to conform to specific requirements under section 113 that were not considered by the ERISA Advisory Council?

⁹ ERISA section 512 provides for the establishment of an advisory council on employee pension and welfare plans, known as the ERISA Advisory Council. The Council is comprised of fifteen members representing different stakeholders, meets at least four times annually, and advises the Department and submits recommendations on the Department's functions under ERISA.

¹⁰ A list of witnesses providing input to the Council on this topic, including their written statements, is available at www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2015-written-statements-by-invited-witnesses-and-issue-statements#2.

¹¹ The full Report explaining the model is available at www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2015-model-notices-and-disclosures-for-pension-risk-transfers.pdf.

■ *Question 28:* ERISA section 113 contains a pre- and post-election window reporting framework under which plans must report information relating to the lump sum offerings and elections to the Department and the PBGC. In addition to the number of participants and beneficiaries who accepted the lump sum offer, the Department has authority to require plans to furnish "such other information as the Department may require" in the post-election report. Separately, the Department itself must report information about offerings and elections to Congress on a biennial basis. The Department also must post on its website for public consumption the information it receives under this reporting framework. The Department is considering what information should be reported to the Department to ensure that the Department can effectively discharge its monitoring, enforcement, public disclosure, and biennial reporting obligations under ERISA. To these ends, what data or information other than the number of participants and beneficiaries who were eligible for and accepted lump sum offers should be reported to the Department, and why? For instance, should the Department collect demographic information on those individuals who elected lump sum offers and, if so, what information? This information could, for instance, enable the Department to provide Congress with more detailed information on the cohorts of participants and beneficiaries who accept lump sum offers as compared to those who do not.

I. *Defined Benefit Annual Funding Notices.* Section 343 of SECURE 2.0 amended section 101(f) of ERISA by modifying the content requirements for defined benefit plan annual funding notices. For single-employer defined benefit plans, the "funding target attainment percentage" was replaced by the "percentage of plan liabilities funded" as a measure to reflect the plan's current funding status in section 101(f) notices. The replacement measure uses year-end market value for assets rather than actuarial value, disregards prefunding and funding carryover balances, and determines year-end

liabilities using unadjusted spot segment rates. Funding notices for single-employer plans also must contain a statement of the circumstances when participants and beneficiaries may receive benefits in excess of the amount guaranteed by PBGC. The existing requirement regarding participant demographic data also was expanded to include the preceding two years and mandates presentation of the data in tabular format. The new amendments apply for plan years beginning after December 31, 2023.

■ *Question 29:* Is there a need for guidance with respect to any of the amended content requirements in section 101(f)(2)(B) of ERISA? If so, please specify the provision and explain the need for such guidance.

■ *Question 30:* Is there a need for guidance on the interrelationship of the new definition of "percentage of plan liabilities funded" in section 101(f)(2)(B) and the segment rate stabilization disclosure provisions in section 101(f)(2)(D)? When applicable, the segment rate stabilization disclosure provisions continue to use the funding target attainment percentage. In responding to this question, commenters are encouraged to address the extent to which participants and beneficiaries would find value in, or alternatively be confused by, two different funding percentages for the same plan.

■ *Question 31:* Existing regulations under section 101(f) of ERISA contain a model notice for single-employer defined benefit plans.¹² The Department is interested in suggestions and comments on how to modify the model to reflect the amendments to section 101(f) of ERISA by SECURE 2.0, and for improvements more generally. For ease of reference, the model is attached to this RFI as Appendix C.¹³

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¹² 29 CFR 2520.101-5.

¹³ Although SECURE 2.0 made only modest changes under section 101(f) with respect to multiemployer defined benefit plans, commenters are not precluded from submitting suggestions or ideas on how to improve the existing model notice for such plans.

F Fund/ GICs www. website address	.72%	3.36%	3.11%	5.56%	1.8%	3.1%	3.3%	5.75%
					3-month US T-Bill Index			
G Fund/ Stable Value www. website address	4.36%	4.64%	5.07%	3.75%	1.8%	3.1%	3.3%	4.99%
					3-month US T-Bill Index			
Generations 2020/ Lifecycle Fund www. website address	27.94%	N/A	N/A	2.45%	26.46%	N/A	N/A	3.09%
					S&P 500			
					23.95%	N/A	N/A	3.74%
					Generations 2020 Composite Index*			

*Generations 2020 composite index is a combination of a total market index and a US aggregate bond index proportional to the equity/bond allocation in the Generations 2020 Fund.

Table 2 focuses on the performance of investment options that have a fixed or stated rate of return. Table 2 shows the annual rate of return of each such option, the term or length of time that you will earn this rate of return, and other information relevant to performance.

Table 2—Fixed Return Investments			
Name/ Type of Option	Return	Term	Other
H 200X/ GIC www. website address	4%	2 Yr.	The rate of return does not change during the stated term.
I LIBOR Plus/ Fixed- Type Investment Account www. website address	LIBOR +2%	Quarterly	The rate of return on 12/31/xx was 2.45%. This rate is fixed quarterly, but will never fall below a guaranteed minimum rate of 2%. Current rate of return information is available on the option's Web site or at 1-800-vyy-zzzz.
J Financial Services Co./ Fixed Account Investment www. website address	3.75%	6 Mos.	The rate of return on 12/31/xx was 3.75%. This rate of return is fixed for six months. Current rate of return information is available on the option's Web site or at 1-800-vyy-zzzz.

Part II. Fee and Expense Information

Table 3 shows fee and expense information for the investment options listed in Table 1 and Table 2. Table 3 shows the Total Annual Operating Expenses of the options in Table 1. Total Annual Operating Expenses are expenses that reduce the rate of return of the investment option. Table 3 also shows Shareholder-type Fees. These fees are in addition to Total Annual Operating Expenses.

Table 3—Fees and Expenses		
Name / Type of Option	Total Annual Operating Expenses As a Per % \$1000	Shareholder-Type Fees
Equity Funds		
A Index Fund/ S&P 500	0.18% \$1.80	\$20 annual service charge subtracted from investments held in this option if valued at less than \$10,000.

B Fund/ Large Cap	2.45% \$24.50	2.25% deferred sales charge subtracted from amounts withdrawn within 12 months of purchase.
C Fund/ International Stock	0.79% \$7.90	5.75% sales charge subtracted from amounts invested.
D Fund/ Mid Cap ETF	0.20% \$2.00	4.25% sales charge subtracted from amounts withdrawn.
Bond Funds		
E Fund/ Bond Index	0.50% \$5.00	N/A
Other		
F Fund/ GICs	0.46% \$4.60	10% charge subtracted from amounts withdrawn within 18 months of initial investment.
G Fund/ Stable Value	0.65% \$6.50	Amounts withdrawn may not be transferred to a competing option for 90 days after withdrawal.
Generations 2020/ Lifecycle Fund	1.50% \$15.00	Excessive trading restricts additional purchases (other than contributions and loan repayments) for 85 days.
Fixed Return Investments		
H 200X / GIC	N/A	12% charge subtracted from amounts withdrawn before maturity.
I LIBOR Plus/ Fixed- Type Invest Account	N/A	5% contingent deferred sales charge subtracted from amounts withdrawn; charge reduced by 1% on 12-month anniversary of each investment.
J Financial Serv Co. / Fixed Account Investment	N/A	90 days of interest subtracted from amounts withdrawn before maturity.

The cumulative effect of fees and expenses can substantially reduce the growth of your retirement savings. Visit the Department of Labor's Web site for an example showing the long-term effect of fees and expenses at http://www.dol.gov/ebsa/publications/401k_employee.html. Fees and expenses are only one of many factors to consider when you decide to invest in an option. You may also want to think about whether an investment in a particular option, along with your other investments, will help you achieve your financial goals.

Part III. Annuity Information

Table 4 focuses on the annuity options under the plan. Annuities are insurance contracts that allow you to receive a guaranteed stream of payments at regular intervals, usually beginning when you retire and lasting for your entire life. Annuities are issued by insurance companies. Guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability.

Table 4—Annuity Options			
Name	Objectives / Goals	Pricing Factors	Restrictions / Fees
Lifetime Income Option www. website address	To provide a guaranteed stream of income for your life, based on shares you acquire while you work. At age 65, you will receive monthly payments of \$10 for each share you own, for your life. For example, if you own 30 shares at age 65, you will receive \$300 per month over your life.	The cost of each share depends on your age and interest rates when you buy it. Ordinarily the closer you are to retirement, the more it will cost you to buy a share. The cost includes a guaranteed death benefit payable to a spouse or beneficiary if you die	Payment amounts are based on your life expectancy only and would be reduced if you choose a spousal joint and survivor benefit. You will pay a 25% surrender charge for any amount you withdraw before annuity payments begin.

		before payments begin. The death benefit is the total amount of your contributions, less any withdrawals.	If your income payments are less than \$50 per month, the option's issuer may combine payments and pay you less frequently, or return to you the larger of your net contributions or the cash-out value of your income shares.
Generations 2020 Variable Annuity Option www. website address	To provide a guaranteed stream of income for your life, or some other period of time, based on your account balance in the Generations 2020 Lifecycle Fund. This option is available through a variable annuity contract that your plan has with ABC Insurance Company.	You have the right to elect fixed annuity payments in the form of a life annuity, a joint and survivor annuity, or a life annuity with a term certain, but the payment amounts will vary based on the benefit you choose. The cost of this right is included in the Total Annual Operating Expenses of the Generations 2020 Lifecycle Fund, listed in Table 3 above. The cost also includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the greater of your account balance or contributions, less any withdrawals.	Maximum surrender charge of 8% of account balance. Maximum transfer fee of \$30 for each transfer over 12 in a year. Annual service charge of \$50 for account balances below \$100,000.

Please visit www.ABCPlanGlossary.com for a glossary of investment terms relevant to the investment options under this plan. This glossary is intended to help you better understand your options.

Appendix B**Financial Options Risk Mitigation – ERISA Advisory Council Model Notice**

**LUMP SUM NOTICE -
ERISA Advisory Council – November 2015****YOUR RETIREMENT OPTIONS****Overview**

Your employer, [Company Name], is offering you the choice between keeping your current pension or receiving a one-time lump sum payment. The choice is up to you, and this notice is based on a model developed by the Department of Labor (DOL) to provide factual, unbiased information about that choice.

Here is the choice you are asked to make:

1. If you want to keep your pension, you do not need to take action at this time. In retirement, you will receive monthly income for the rest of your life (and your spouse's life if you are married); or
2. If you want to give up your pension, you can take your money out now in a lump sum. [One sentence description of what the employee needs to do under this option, such as: To do so, you'll need to fill out a form that your employer provides.] Note -- in many cases, a lump sum will not give you as much income for the rest of your life (and your spouse's life). [Note to plan sponsors: it may be useful to include a Lifetime Income Estimator here. An example of such a calculator is shown in this hyperlink: <https://www1.cannex.com/scripts/c22484.asp>]

The deadline for your decision is [date]. The rest of this notice provides additional information about these two options.

Common questions

The following table answers common questions that people ask about receiving a one-time lump sum payment versus receiving a lifetime of payments from a pension.

	Lifetime Pension Payments	Lump Sum
Will I receive guaranteed income for the rest of my life?	Yes*	No, unless I buy an annuity**
What if I live longer than expected?	I will continue to receive my monthly income	I may run out of money

What happens if my company is not able to meet its pension promise?	Your pension payments are protected*	The lump sum you've already received is not affected
How is the money distributed?	In a series of lifetime monthly payments	All at once
Am I personally responsible for investing the money?	No	Yes
What if the market falls?	My monthly benefit is the same.*	I could end up with less money
Do I pay investment management fees?	No	Yes
What is taxed?	I am taxed as I receive my monthly income	I am taxed on the full lump sum unless I roll it over into an IRA or other qualified plan (IRA withdrawals are taxed when they occur)***
What if I have an urgent need for money?	You cannot take out your money	The lump sum may provide access to some money depending on how it was invested
If I die earlier than expected, can I leave anything for my spouse and children or charity?	Yes, if I chose a survivor benefit (but not to charity)	Only if there is unspent money when I die
* Payments from your pension plan are backed by the assets in the plan, your employer, and the Pension Benefit Guaranty Corporation, subject to certain limits. ** An annuity purchased in the insurance market will generally provide less income than your plan's pension. *** See also IRS rules on required minimum distributions from an IRA when you are retired and past the age of 70 1/2.		

Which might be better for me?

One of the most common questions people ask, of course, is "which might be better for me?" While there are no blanket answers to that question, the following rules of thumb are useful places to start:

- If you do not have enough guaranteed income from other sources, such as Social Security and other pension plans or assets, to pay for your (and your spouse's) costs in retirement (e.g. medical, housing, vacation, etc.) - then keeping your pension may be a good idea.
- If you already have more than enough money for retirement – then the lump sum may provide more flexibility, even though you could receive less money overall.

- If you or your spouse is likely to live longer than average - then a pension is generally better. The money from the lump sum can run out before you and your spouse die.
- If you or your spouse is uncomfortable making investment decisions or calculating complex financial models - then a lump sum may not be a good choice for you.
- If you are currently in a dire medical or other financial emergency - then a lump sum can help cover that emergency. However, once the lump sum is gone it will not help you if a future emergency arises.
- If both you and your spouse do not expect to live a long time - then the lump sum may be more valuable than the pension.
- If you are young and years away from being able to start receiving your pension and worried that inflation will decrease its value - then investing the lump sum might result in more income. However, you must be comfortable with managing your money over a long period of time, even when you are old.
- If your pension plan includes early retirement or spousal benefit subsidies and you were planning to take advantage of these features, but these are not included in the lump sum (see the answer to question 2 below under Additional Questions and Answers) - then your pension annuity may be more valuable to you than the lump sum.

Lump sum payments often *look* much larger than a pension. However, unless you meet the particular criteria described here, you could end up receiving less money in the long run.

Detailed Information about This Choice

1) A pension provides guaranteed lifetime income. With a lump sum, you may not be able to generate income for the rest of your life.

The pension provided under your Plan is a monthly guaranteed paycheck to help you avoid running out of money before you (and your spouse) die. By choosing a lump sum, you are giving up that guaranteed lifetime income. To duplicate the pension payments on your own for the remainder of your life and your spouse's life, you must be able to invest the lump sum to provide you and your spouse with equivalent lifetime income.

2) It is difficult to invest the lump sum to provide equal lifetime income.

Investing on your own is challenging, even if you work with a trusted financial advisor, and you might incur high fees. Have you or your spouse had any experience investing your money on your own? If not, do you want to start now? Your investment will go up and down with the market. Over your lifetime there will be good periods and bad periods. You have to be able to handle these bad times. Even if you are a good investor now, financial skills for many people deteriorate as they get older. If your spouse outlives you, will your spouse be able to handle the investments? And, don't forget that you also have to manage your investments so that you can take money out each month. If you take out too much, you will run out of money.

3) You will want to make sure any advisor working with you has your best interests in mind.

It is sometimes a good idea to work with a trusted financial advisor to help you make

important decisions such as whether to take the lump sum or the pension, or how to invest any money that you have control over. If you use a financial advisor, you will want to understand how much they charge and whether they may have a conflict of interest. You may wish to review the Department of Labor proposed regulations on conflicts of interest of financial providers to participants who roll over lump sums to an Individual Retirement Account at: <http://www.dol.gov/ebsa/newsroom/fsfiduciaryoutreachconsumers.html>.

[Employer to provide details if independent financial advisors will be made available to participants to assist with issues related to making a decision].

4) Buying an annuity with the lump sum will likely be worth less than the plan's pension.

Generally, payments from an annuity that you purchase on your own will be smaller than the annuity payment provided by the Plan. This is a complicated topic, but there are a number of reasons, which are summarized below. If you wish to make your own comparison between the pension and the annuity you might purchase, be careful to make an “apples to apples” comparison between the Plan's pension and the purchased annuity. The following link contains a tool which can be used to estimate the annuity you could purchase on your own: [Employer to insert tool, such as the tool in this link <https://www1.cannex.com/scripts/c22484.asp>]

- (a) The insurance company will charge a fee for an annuity you purchase on your own while there is no fee for the monthly benefit you would receive from the pension plan.
- (b) Insurers assume that people who purchase annuities are generally healthy and expect to live longer and the price of the annuity is increased to take this into account.
- (c) Women generally live longer than men, which will result in a more expensive annuity than the plan would provide.

5) You may have to pay additional taxes if you take a lump sum

You will have to pay taxes immediately (plus a 10% penalty the IRS levies on people younger than 59 1/2 who cash out retirement assets), unless you roll over the funds into an IRA or another qualified pension plan in compliance with IRS rules. In that case, you will be taxed when you later withdraw the funds from the new account. It is worth noting that rollovers can take two forms. In a direct rollover, the individual instructs the plan trustee to transfer funds directly to the IRA or qualified plan and the transaction is complete. With an indirect rollover, the individual receives a check from the plan trustee which has been reduced by a mandatory 20 percent federal withholding tax. In order to complete the rollover within the allowable 60 days, the individual must deposit into the IRA or qualified plan both the amount of the check received and the amount of the tax withholding. Individuals receive a refund of the 20 percent withholding when they subsequently file their tax return. If the individual does not fund the additional 20 percent from personal funds, he or she would owe tax on the 20 percent shortfall for the current tax year. You may wish to consult a financial advisor to discuss your specific tax situation. Guidance on the federal tax consequences of a lump sum distribution is provided in IRS Publication 575 titled “Pension and Annuity Income” (2014) which is available at: <http://www.irs.gov/pub/irs-pdf/p575.pdf>

6) Taking a lump sum can have additional ramifications

You may want to talk to your own professional advisor about the consequences of this decision (which can depend on your state or county). For example, if you roll over your lump sum to an IRA, it may not be protected from bankruptcy or your creditors anymore, while the pension was protected. In addition, state tax laws may tax lump sums, but not pension payments. Similarly, state law could prohibit you from receiving Medicaid, until you spend down a lump sum to a small amount.

Additional Questions and Answers about Your Pension

1) What are my benefit options under the Plan?

If you do not elect the lump sum, your benefit options under the Plan are [to be provided by the employer] [include earliest and Normal Retirement Age single life annuity and Qualified Joint and Survivor Annuity benefits].

2) Is the company offering a subsidy for early retirement and/or spousal benefits?

A pension plan may include special subsidies to pay for spousal benefits or to encourage early retirement. These subsidies may not be included in the lump sum, lessening its value in comparison to a stream of payments from the pension. Your Plan [does/does not] provide a “subsidy” (a benefit of greater value) which [is/is not] included in the lump sum. [Employer to revise as needed].

3) How was my lump sum calculated?

The lump sum amount represents the current value of your pension, based on certain assumptions. The lump sum is calculated by adding up the value of each monthly payment you would receive with the pension, based on the chances that you would live to receive that payment and an interest rate assumption. The assumptions used in calculating your lump sum comply with the minimum lump sum rules and are shown here: [Plan Sponsor to insert the mortality table used, the interest rates used, and the date of the interest rates in effect]. A lump sum may not be a “better deal” even if you believe that you can earn higher rates of return in the future than the interest rates used to calculate your lump sum. Even if you are able to generate high average returns over an extended period, your ability to have higher income over a lifetime relative to a pension payment can still be challenging if markets are very choppy (i.e. lots of ups and downs) and/or you are fortunate to live longer than is typical.

4) Is my pension insured and what levels of benefits are protected?

Your pension is guaranteed by your employer and backed by the assets in its pension fund. When a pension plan fails, the Pension Benefit Guaranty Corporation (PBGC) steps in and pays benefits, subject to limits set by law. Most people receive all, or close to all, of the benefits earned before the plan failed. Detailed information on the PBGC insurance program is available at the PBGC’s website: <http://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee.html>

5) If I am still not sure what to do, where can I get additional help?

You could seek the help of a financial advisor. The employer offering you this choice may be offering access to advisors to help you with your decision, or you may want to seek out additional help on your own. If you use a financial advisor, you will want to understand how

much they charge and whether they may have a conflict of interest. You may wish to review the Department of Labor website at:

<http://www.dol.gov/ebsa/newsroom/fsfiduciaryoutreachconsumers.html>

Appendix C**Annual Funding Notice – Model Language**

ANNUAL FUNDING NOTICE

For

*[insert name of single-employer pension plan]***Introduction**

This notice includes important information about the funding status of your single-employer pension plan (the “Plan”). It also includes general information about the benefit payments guaranteed by the Pension Benefit Guaranty Corporation (“PBGC”), a federal insurance agency. All traditional pension plans (called “defined benefit pension plans”) must provide this notice every year regardless of their funding status. This notice does not mean that the Plan is terminating. It is provided for informational purposes and you are not required to respond in any way. This notice is required by federal law. This notice is for the plan year beginning *[insert beginning date]* and ending *[insert ending date]* (“Plan Year”).

How Well Funded Is Your Plan

The law requires the administrator of the Plan to tell you how well the Plan is funded, using a measure called the “funding target attainment percentage.” The Plan divides its Net Plan Assets by Plan Liabilities to get this percentage. In general, the higher the percentage, the better funded the plan. The Plan’s Funding Target Attainment Percentage for the Plan Year and each of the two preceding plan years is shown in the chart below. The chart also shows you how the percentage was calculated.

Funding Target Attainment Percentage			
	<i>[insert Plan Year, e.g. 2015]</i>	<i>[insert Plan Year preceding Plan Year, e.g., 2014]</i>	<i>[insert Plan Year 2 years preceding Plan year, e.g., 2013]</i>
1. Valuation Date	<i>[insert date]</i>	<i>[insert date]</i>	<i>[insert date]</i>
2. Plan Assets			
a. Total Plan Assets	<i>[insert amount]</i>	<i>[insert amount]</i>	<i>[insert amount]</i>
b. Funding Standard Carryover Balance	<i>[insert amount]</i>	<i>[insert amount]</i>	<i>[insert amount]</i>
c. Prefunding Balance	<i>[insert amount]</i>	<i>[insert amount]</i>	<i>[insert amount]</i>
d. Net Plan Assets (a) – (b) – (c) = (d)	<i>[insert amount]</i>	<i>[insert amount]</i>	<i>[insert amount]</i>
3. Plan Liabilities	<i>[insert amount]</i>	<i>[insert amount]</i>	<i>[insert amount]</i>
4. At-Risk Liabilities	<i>[insert amount]</i>	<i>[insert amount]</i>	<i>[insert amount]</i>
5. Funding Target Attainment Percentage (2d)/(3)	<i>[insert percentage]</i>	<i>[insert percentage]</i>	<i>[insert percentage]</i>

{Instructions: Report Valuation Date entries in accordance with section 303(g)(2) of ERISA. Report Total Plan Assets in accordance with section 303(g)(3) of ERISA. Report credit balances (i.e., funding standard carryover balance and prefunding balance) in accordance with section 303(!) of ERISA. Report Net Plan Assets, Plan Liabilities (i.e., funding target), and Funding Target Attainment Percentage in accordance with section 303(d)(2) of ERISA. The amount reported as “Plan Liabilities” should be the funding target

determined without regard to at-risk assumptions, even if the plan is in at-risk status. At-Risk Liabilities are determined under section 303(i) of ERISA (taking into account section 303(i)(5) of ERISA). Report At-Risk Liabilities for any year covered by this chart in which the plan was in "at-risk" status within the meaning of section 303(i) of ERISA, only if At-Risk Liabilities are greater than Plan Liabilities; otherwise delete the entire row designated as number 4. Round off all amounts in this chart to the nearest dollar.

Plan Assets and Credit Balances

The chart above shows certain “credit balances” called the Funding Standard Carryover Balance and Prefunding Balance. A plan might have a credit balance, for example, if in a prior year an employer contributed money to the plan above the minimum level required by law. Generally, an employer may credit the excess money toward the minimum level of contributions required by law that it must make in future years. Plans must subtract these credit balances from Total Plan Assets to calculate their Funding Target Attainment Percentage.

{Instructions: Include the preceding discussion, entitled Plan Assets and Credit Balances, only where such balances exist.}

Plan Liabilities

Plan Liabilities in line 3 of the chart above is an estimate of the amount of assets the Plan needs on the Valuation Date to pay for promised benefits under the Plan.

At-Risk Liabilities

The law considers a plan to be in “at-risk” status if its funding target attainment percentage for the prior plan year was below a legal threshold. The sponsor of an at-risk plan must make certain assumptions and contribute more money to that plan. For example, plans in “at-risk” status must assume that all workers eligible to retire in the next 10 years will do so as soon as they can, and that they will take their distribution in whatever form would create the highest cost to the plan, without regard to whether those workers actually do so. The additional contributions that result from “at-risk” status may then remove a plan from this status. The Plan was in “at-risk” status in *[enter year or years covered by the chart above]*. The At-Risk Liabilities row in the chart above shows the increased liabilities resulting from “at-risk” status.

{Instructions: Include the preceding discussion, entitled At-Risk Liabilities, only in the case of a plan required to report At-Risk Liabilities. Delete the entire row designated as number 4 in the chart above if the At-Risk Liabilities discussion is not included in the notice.}

Year-End Assets and Liabilities

The asset values in the chart above are measured as of the first day of the Plan Year. They also are “actuarial values.” Actuarial values differ from market values in that they do not fluctuate daily based on changes in the stock or other markets. Actuarial values smooth out those fluctuations and can allow for more predictable levels of future contributions. Despite the fluctuations, market values tend to show a clearer picture of a

plan's funded status at a given point in time. As of *[enter the last day of the Plan Year]*, the fair market value of the Plan's assets was *[enter amount]*. On this same date, the Plan's liabilities, determined using market rates, were *[enter amount]*.

{Instructions: Insert the fair market value of the plan's assets as of the last day of the plan year. You may include contributions made after the end of the plan year to which the notice relates and before the date the notice is timely furnished but only if such contributions are attributable to such plan year for funding purposes. A plan's liabilities as of the last day of the plan year are equal to the present value, as of the last day of the plan year, of benefits accrued as of that same date. With the exception of the interest rate assumption, the present value should be determined using assumptions used to determine the funding target under section 303. The interest rate assumption is the rate provided under section 4006(a)(3)(E)(iv), but using the last month of the year to which the notice relates rather than the month preceding the first month of the year to which the notice relates. If consistent with section 303(g)(2) of ERISA, the plan's valuation date is not the first day of the plan year, make appropriate modifications to the preceding paragraph, e.g., replace "first day of" with "valuation date for."}

{Instructions: If pursuant to section 303(g)(3) of ERISA, the value of the plan's assets in the chart above is fair market value, include the paragraph below rather than the paragraph above, but otherwise follow the instructions above.}

The asset values in the chart above are measured as of the first day of the Plan Year. As of *[enter the last day of the Plan Year]*, the fair market value of the Plan's assets was *[enter amount]*. On this same date, the Plan's liabilities, determined using market rates, were *[enter amount]*.

Participant Information

The total number of participants and beneficiaries covered by the Plan on the Valuation Date was *[insert number]*. Of this number, *[insert number]* were current employees, *[insert number]* were retired and receiving benefits, and *[insert number]* were retired or no longer working for the employer and have a right to future benefits.

Funding & Investment Policies

Every pension plan must have a procedure to establish a funding policy for plan objectives. A funding policy relates to how much money is needed to pay promised benefits. The funding policy of the Plan is *[insert a summary statement of the Plan's funding policy]*.

Pension plans also have investment policies. These generally are written guidelines or general instructions for making investment management decisions. The investment policy of the Plan is *[insert a summary statement of the Plan's investment policy]*.

Under the investment policy, the Plan's assets were allocated among the following categories of investments, as of the end of the Plan Year. These allocations are percentages of total assets:

{Instructions: Insert and complete either Alternative 1 or Alternative 2, below.}

Alternative 1

Asset Allocations	Percentage
1. Cash (interest bearing and non-interest bearing)	_____
2. U.S. Government securities	_____
3. Corporate debt instruments (other than employer securities):	_____
Preferred	_____
All other	_____
4. Corporate stocks (other than employer securities):	_____
Preferred	_____
Common	_____
5. Partnership/joint venture interests	_____
6. Real estate (other than employer real property)	_____
7. Loans (other than to participants)	_____
8. Participant loans	_____
9. Value of interest in common/collective trusts	_____
10. Value of interest in pooled separate accounts	_____
11. Value of interest in master trust investment accounts	_____
12. Value of interest in 103-12 investment entities	_____
13. Value of interest in registered investment companies (e.g., mutual funds)	_____
14. Value of funds held in insurance co. general account (unallocated contracts)	_____
15. Employer-related investments:	_____
Employer Securities	_____
Employer real property	_____
16. Buildings and other property used in plan operation	_____
17. Other	_____

For information about the Plan's investment in any of the following types of investments - common/collective trusts, pooled separate accounts, master trust investment accounts, or 103-12 investment entities - contact *[insert the name, telephone number, email address or mailing address of the plan administrator or designated representative]*.

{Instructions: Percentages must total 100%. If a plan holds an interest in one or more of the direct filing entities (DFEs) noted above, i.e., MTIAs, CCTs, PSAs, or 103-121Es and the administrator does not break out the DFE's investments among the other asset classes, immediately following the asset allocation chart include the paragraph above informing recipients how to obtain more information regarding the plan's DFE investments (e.g., the plan's Schedule D and/or the DFE's Schedule H). If a plan does not hold an interest in a DFE or the plan administrator breaks out the investments of all DFEs among the other asset classes, do not include the above paragraph. If the administrator knows the actual asset allocation of an MTIA, the MTIA entry (line 11) should not be completed and the investments of the MTIA should be reflected in the relevant asset classes.}

Alternative 2

Asset Allocations	Percentage:
Stocks	_____
Investment grade debt instruments	_____
High-yield debt instruments	_____
Real estate	_____
Other	_____

{Instructions: Percentages must total 100%. Follow the instructions for the latest Schedule R to Form 5500 to allocate investments to one of the above asset classes.}

Events Having A Material Effect on Assets or Liabilities

By law this notice must contain a written explanation of new events that have a material effect on plan liabilities or assets. This is because such events can significantly impact the funding condition of a plan. For the plan year beginning on *[insert the first day of the current plan year (i.e., the year after the notice year)]* and ending on *[insert the last day of the current plan year]*, the Plan expects the following events to have such an effect: *[Insert explanation of any plan amendment, scheduled benefit increase or reduction, or other known event taking effect in the current plan year and having a material effect on plan liabilities or assets for the current plan year, as well as a projection to the end of the current plan of the effect of the amendment, scheduled increase or reduction, or event on plan liabilities].*

{Instructions: Include the preceding discussion, entitled Events having a Material Effect on Assets or Liabilities, only if and to the extent applicable.}

Right to Request a Copy of the Annual Report

Pension plans must file annual reports with the US Department of Labor. The report is called the “Form 5500.” These reports contain financial and other information. You may obtain an electronic copy of your Plan's annual report by going to www.efast.dol.gov and using the search tool. Annual reports also are available from the US Department of Labor, Employee Benefits Security Administration's Public Disclosure Room at 200 Constitution Avenue, NW, Room N- 1513, Washington, DC 20210, or by calling 202.693.8673. Or you may obtain a copy of the Plan's annual report by making a written request to the plan administrator. *[If the plan's annual report is available on an Intranet website maintained by the plan sponsor (or plan administrator on behalf of the plan sponsor), modify the preceding sentence to include a statement that the annual report also may be obtained through that website and include the website address.]* Annual reports do not contain personal information, such as the amount of your accrued benefits. You may contact your plan administrator if you want information about your accrued benefits. Your plan administrator is identified below under “Where To Get More Information.”

Summary of Rules Governing Termination of Single-Employer Plans

If a plan terminates, there are specific termination rules that must be followed under federal law. A summary of these rules follows.

There are two ways an employer can terminate its pension plan. First, the employer can end a plan in a “standard termination” but only after showing the PBGC that such plan has enough money to pay all benefits owed to participants. Under a standard termination, a plan must either purchase an annuity from an insurance company (which will provide you with periodic retirement benefits, such as monthly for life or for a set period of time when you retire) or, if the plan allows, issue one lump-sum payment that covers your entire benefit. Your plan administrator must give you advance notice that identifies the insurance company (or companies) selected to provide the annuity. The PBGC's guarantee ends upon the purchase of an annuity or payment of the lump-sum. If the plan purchases an annuity for you from an insurance company and that company becomes unable to pay, the applicable state guaranty association guarantees the annuity to the extent authorized by that state's law.

Second, if the plan is not fully-funded, the employer may apply for a distress termination. To do so, however, the employer must be in financial distress and prove to a bankruptcy court or to the PBGC that the employer cannot remain in business unless the plan is terminated. If the application is granted, the PBGC will take over the plan as trustee and pay plan benefits, up to the legal limits, using plan assets and PBGC guarantee funds.

Under certain circumstances, the PBGC may take action on its own to end a pension plan. Most terminations initiated by the PBGC occur when the PBGC determines that plan termination is needed to protect the interests of plan participants or of the PBGC insurance program. The PBGC can do so if, for example, a plan does not have enough money to pay benefits currently due.

Benefit Payments Guaranteed by the PBGC

When the PBGC takes over a plan, it pays pension benefits through its insurance program. Only benefits that you have earned a right to receive and that cannot be forfeited (called vested benefits) are guaranteed. Most participants and beneficiaries receive all of the pension benefits they would have received under their plan, but some people may lose certain benefits that are not guaranteed.

The amount of benefits that PBGC guarantees is determined as of the plan termination date. However, if a plan terminates during a plan sponsor's bankruptcy, then the amount guaranteed is determined as of the date the sponsor entered bankruptcy.

The PBGC maximum benefit guarantee is set by law and is updated each calendar year. For a plan with a termination date or sponsor bankruptcy date, as applicable in *[insert current calendar year]*, the maximum guarantee is *[insert amount from PBGC web site, www.pbgc.gov, applicable for the current calendar year]* per month, or *[insert amount from PBGC web site, www.pbgc.gov, applicable for the current calendar year]* per year, for a benefit paid to a 65-year-old retiree with no survivor benefit. If a plan terminates during a plan sponsor's bankruptcy, the maximum guarantee is fixed as of the calendar year in which the sponsor entered bankruptcy. The maximum guarantee is lower for an individual who begins receiving benefits from PBGC before age 65 reflecting the fact that younger retirees are expected to receive more monthly pension checks over their lifetimes. *[If the plan does not provide for commencement of benefits before age 65, you may omit this sentence.]* Similarly, the maximum guarantee is higher for an individual who starts receiving benefits from PBGC after age 65. The maximum guarantee by age can be found on PBGC's website, www.pbgc.gov. The guaranteed amount is also reduced if a benefit will be provided to a survivor of the plan participant.

The PBGC guarantees “basic benefits” earned before a plan is terminated, which include *[Include the following guarantees that apply to benefits available under the plan.]*:

- pension benefits at normal retirement age;
- most early retirement benefits;
- annuity benefits for survivors of plan participants; and
- disability benefits for a disability that occurred before the date the plan terminated or the date the sponsor entered bankruptcy, as applicable.

The PBGC does not guarantee certain types of benefits *[Include the following guarantee limits that apply to the benefits available under the plan.]*:

- The PBGC does not guarantee benefits for which you do not have a vested right, usually because you have not worked enough years for the company.
- The PBGC does not guarantee benefits for which you have not met all age, service, or other requirements.
- Benefit increases and new benefits that have been in place for less than one year are not guaranteed. Those that have been in place for less than five years are only partly guaranteed.
- Early retirement payments that are greater than payments at normal retirement age may not be guaranteed. For example, a supplemental benefit that stops when you become eligible for Social Security may not be guaranteed.
- Benefits other than pension benefits, such as health insurance, life insurance, death benefits, vacation pay, or severance pay, are not guaranteed.
- The PBGC generally does not pay lump sums exceeding \$5,000.

In some circumstances, participants and beneficiaries still may receive some benefits that are not guaranteed. This depends on how much money the terminated plan has and how much the PBGC recovers from employers for plan underfunding.

For additional general information about the PBGC and the pension insurance program guarantees, go to the “General FAQs about PBGC” on PBGC's website at www.pbgc.gov/general_faqs. Please contact your employer or plan administrator for specific information about your pension plan or pension benefit. PBGC does not have that information. See “Where to Get More Information About Your Plan,” below.

Corporate and Actuarial Information on File with PBGC

A plan sponsor must provide the PBGC with financial information about itself and actuarial information about the plan under certain circumstances, such as when the funding target attainment percentage of the plan (or any other pension plan sponsored by a member of the sponsor's controlled group) falls below 80 percent (other triggers may also apply). The sponsor of the Plan, *[enter name of plan sponsor]* or a member of its controlled group, was subject to this requirement to provide corporate financial information and plan actuarial information to the PBGC. The PBGC uses this information for monitoring and other purposes.

{Instructions: Insert the preceding paragraph entitled “Corporate and Actuarial Information on File with PBGC” only if a reporting under section 4010 of ERISA was required for the information year ending in the Plan Year. Modify the preceding paragraph, as appropriate, if the plan sponsor is the sole member of its controlled group.}

Where to Get More Information

For more information about this notice, you may contact *[enter name of plan administrator and*

if applicable, principal administrative officer], at [enter phone number and address and insert email address if appropriate]. For identification purposes, the official plan number is [enter plan number] and the plan sponsor's name and employer identification number or "EIN" are [enter name and EIN of plan sponsor].

Signed at Washington, DC, this 8th day of August, 2023.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 2023–17249 Filed 8–10–23; 8:45 am]

BILLING CODE 4510–29–C

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2022–0608; FRL–10387–01–R4]

Air Plan Approval; FL; Noninterference Demonstrations for Removal of CAIR and Obsolete Rules in the Florida SIP

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a portion of a State Implementation Plan (SIP) revision submitted by the Florida Department of Environmental Protection (FDEP) on April 1, 2022, for the purpose of removing several rules from the Florida SIP. EPA is proposing to remove the State's Clean Air Interstate Rule (CAIR) rules from the Florida SIP as well as several Reasonably Available Control Technology (RACT) rules for particulate matter (PM) because these rules have become obsolete. The State has provided a non-interference demonstration to support the removal of these rules from the Florida SIP pursuant to the Clean Air Act (CAA or Act).

DATES: Comments are due on or before September 11, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2022–0608 at www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, 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>.

FOR FURTHER INFORMATION CONTACT:

Evan Adams, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9009. Mr. Adams can also be reached via electronic mail at adams.evan@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background on 62–296.470, F.A.C., Implementation of Federal Clean Air Interstate Rule

Under CAA section 110(a)(2)(D)(i)(I), which EPA has traditionally termed the good neighbor provision, States are required to address the interstate transport of air pollution. Specifically, the good neighbor provision requires that each State's implementation plan contain adequate provisions to prohibit air pollutant emissions from within the State that will contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any national ambient air quality standard (NAAQS).

In 2005, EPA published CAIR to limit the interstate transport of ozone and fine particulate matter (PM_{2.5}) under the CAA's good neighbor provision. *See* 70 FR 25162 (May 12, 2005). CAIR originally required twenty-eight eastern States, including Florida, to submit SIPs prohibiting emissions that exceeded:

(1) Annual budgets specific to each State for nitrogen oxides (NO_x)—an ozone precursor;

(2) ozone season budgets specific to each State for NO_x; and

(3) annual budgets specific to each State for sulfur dioxide (SO₂)—a PM_{2.5} precursor. CAIR also established several¹ trading programs for these pollutants that EPA implemented through Federal implementation plans (FIPs) for electric generating units (EGUs) greater than 25 megawatts in each affected State.² However, these trading programs did not apply to large non-EGUs. States could then submit SIPs to replace the FIPs to achieve the required emission reductions from EGUs and could choose to opt in non-EGU sources.

On October 12, 2007, EPA approved a SIP revision for Florida implementing the requirements of CAIR. *See* 72 FR 58016. That revision to Florida's SIP included Rule 62–296.470, which, as discussed later in this notice, EPA is now proposing to remove from Florida's SIP as obsolete.

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) initially vacated CAIR in 2008, but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR. *See North Carolina v. EPA*, 531 F.3d 896, *modified on rehearing*, 550 F.3d 1176 (D.C. Cir. 2008). The ruling allowed CAIR to remain in effect temporarily until a replacement rule consistent with the court's opinion was developed. While EPA worked on developing a replacement rule, the CAIR program continued to be implemented with the NO_x annual and ozone season trading programs beginning in 2009 and the SO₂ annual trading program beginning in 2010.

In response to the D.C. Circuit's remand of CAIR, EPA promulgated the Cross-State Air Pollution Rule (CSAPR) to address the good neighbor provision for the 1997 ozone NAAQS, the 1997 PM_{2.5} NAAQS, and the 2006 PM_{2.5} NAAQS. *See* 76 FR 48208 (August 8, 2011). CSAPR requires EGUs in many eastern States to meet annual and ozone

¹ CAIR had separate trading programs for annual SO₂ emissions, ozone season NO_x emissions, and annual NO_x emissions.

² For additional background regarding these FIPs, including details specific to Florida, see Proposed Approval of Implementation Plans of Florida: Clean Air Interstate Rule, 72 FR 42344 (August 2, 2007).

season NO_x emission budgets and annual SO₂ emission budgets implemented through new trading programs.

CSAPR also contained provisions that would sunset CAIR-related obligations on a schedule coordinated with the implementation of CSAPR compliance requirements. CSAPR was to become effective January 1, 2012; however, the timing of CSAPR's implementation was impacted by a number of court actions.

On December 30, 2011, the D.C. Circuit stayed CSAPR prior to its implementation, and EPA was ordered to continue administering CAIR on an interim basis.³ In a subsequent decision on the merits, the court vacated CSAPR based on a subset of petitioners' claims.⁴ However, on April 29, 2014, the U.S. Supreme Court reversed that decision and remanded the case to the D.C. Circuit for further proceedings.⁵ Throughout the initial round of D.C. Circuit proceedings and the ensuing Supreme Court proceedings, the stay on CSAPR remained in place, and EPA continued to implement CAIR.

Following the April 2014 Supreme Court decision, EPA filed a motion asking the D.C. Circuit to lift the stay in order to allow CSAPR to replace CAIR in an equitable and orderly manner while further D.C. Circuit proceedings were held to resolve remaining claims from petitioners. Additionally, EPA's motion requested to toll, by three years, all CSAPR compliance deadlines that had not passed as of the approval date of the stay. On October 23, 2014, the D.C. Circuit granted EPA's request, and on December 3, 2014 (79 FR 71663), in an interim final rule, EPA set the updated effective date of CSAPR as January 1, 2015, and tolled the implementation of CSAPR Phase 1 to 2015 and CSAPR Phase 2 to 2017.

In accordance with the interim final rule, the sunset date for CAIR was December 31, 2014, and EPA began implementing CSAPR on January 1, 2015.⁶ However, EPA determined that CSAPR does not apply to Florida after demonstrating that Florida does not contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to the covered NAAQS. *See* 81

FR 74505, 74506.⁷ Because CSAPR replaced CAIR and EPA previously determined that CSAPR does not apply to Florida, neither of these rules have any applicability in Florida today.

II. EPA's Analysis of the Removal of 62–296.470, F.A.C., Implementation of Federal Clean Air Interstate Rule

Rule 62–296.470 was approved by EPA into the Florida SIP on October 12, 2007 (72 FR 58016). Florida repealed this rule on August 14, 2019, through a State regulatory action because CAIR has sunset and, under CSAPR, EPA determined that sources in Florida do not contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to the covered NAAQS. The State has now requested that EPA remove Rule 62–296.470 from the SIP.⁸ EPA proposes to remove this rule from Florida's SIP because CAIR was remanded and eventually replaced by the CSAPR which does not apply to Florida. For these reasons, EPA believes the removal of this rule is appropriate and consistent with all applicable requirements, including CAA section 110(l).⁹

III. Background on 62–296.701, F.A.C., Portland Cement Plants; 62–296.703, F.A.C., Carbonaceous Fuel Burners; 62–296.706, F.A.C., Glass Manufacturing Process; 62–296.709, F.A.C., Lime Kilns; and 62–296.710, F.A.C., Smelt Dissolving Tanks

On March 3, 1978, EPA designated all areas of the country for the 1971 total suspended particulates (TSP) NAAQS. Duval, Seminole, Polk, and Hillsborough Counties in Florida were designated as not meeting the secondary TSP standards. *See* 43 FR 8962, 8980 (March 3, 1978). After several modifications to the designations, EPA determined that portions of Seminole

and Polk Counties were two full-county nonattainment areas for the 1971 TSP standard.¹⁰ Because these two areas were in nonattainment for the 1971 TSP standard, the State was required to develop and submit to EPA plans to attain the standard, including reasonably available control technology (RACT) regulations in the Florida SIP to control TSP. Five of those RACT rules were the predecessor rules to F.A.C. 62–296.701, 62–296.703, 62–296.706, 62–296.709, and 62–296.710, which were approved into the Florida SIP on May 2, 1983 (48 FR 19715).¹¹

On February 1, 1990, as part of implementation of the PM₁₀ NAAQS, EPA approved portions of Florida's PM₁₀ SIP. *See* 55 FR 3403. Additionally, and of relevance to this Notice, EPA explained that regarding Rule 17–2.650—Reasonably Available Control Technology (RACT) (state effective May 30, 1988), “[r]evisions have been made such that RACT for existing sources will continue to be applied in the areas which are presently nonattainment for TSP. The portion addressing RACT for new and modified sources has been rescinded since the areas where this has been applied will have no classification for PM₁₀.” *Id.* at 3406. Rule 17–2.650 was later recodified to become Rules 62–296.700 through 62–296.712.¹² In that same February 1, 1990 rulemaking, EPA designated all remaining TSP nonattainment areas within Florida as

¹⁰ On September 11, 1978 (43 FR 40412), EPA completed a modified designation following comment on the March 3, 1978, final rule, revising the TSP nonattainment areas for Duval and Hillsborough Counties to be partial counties and changing the designation of Polk County to “cannot be classified.” On April 27, 1979 (44 FR 24845), EPA changed the designation of Seminole County to “cannot be classified” for the TSP NAAQS. On November 18, 1982 (47 FR 51866), EPA changed the designation of part of Duval County to attainment for the TSP NAAQS.

¹¹ EPA later promulgated standards more stringent than the prior TSP standards when it adopted the PM₁₀ NAAQS and the PM_{2.5} NAAQS. PM₁₀ is particulate matter with an aerodynamic diameter of 10 microns or less, also referred to as coarse PM; PM_{2.5} is particulate matter with an aerodynamic diameter of 2.5 microns or less, also referred to as fine PM. All areas in Florida have been designated unclassifiable/attainment for the primary and secondary 1987 annual and 24-hour PM₁₀ NAAQS, 1997 annual and 24-hour PM_{2.5} NAAQS, 2006 annual and 24-hour PM_{2.5} NAAQS, and 2012 annual and 24-hour PM_{2.5} NAAQS. The 2012 PM_{2.5} NAAQS is the most recent revision to the suite of PM NAAQS, published on January 15, 2013. The primary annual standard was strengthened from 15.0 micrograms per cubic meter (µg/m³) to 12.0 µg/m³. *See* 78 FR 3086.

¹² For additional detail, please see the Florida rule history posted at <https://www.flrules.org/>. For example, the historical notes for Rule 62–296.701 are available at <https://www.flrules.org/gateway/ruleno.asp?id=62-296.701>; *see also* 64 FR 32346 (June 16, 1999).

³ Order of December 30, 2011, in *EME Homer City Generation, L.P. v. EPA*, D.C. Cir. No. 11–1302.

⁴ *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), cert. granted 133 U.S. 2857 (2013).

⁵ *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600–01 (2014).

⁶ *See* 40 CFR 51.123(ff) (sunsetting CAIR requirements related to NO_x); 40 CFR 51.124(s) (sunsetting CAIR requirements related to SO₂).

⁷ Additional updates were made to the CSAPR trading program following its original approval on August 8, 2011, including the CSAPR Update on October 26, 2016 (81 FR 74504) and Revised CSAPR Update on April 30, 2021 (86 FR 23054) for ozone interstate transport. These subsequent CSAPR rules continued to demonstrate that sources in Florida were not significantly contributing to any maintenance or nonattainment area, therefore, the CSAPR Update and the Revised CSAPR Update do not apply to the State.

⁸ In Florida's April 1, 2022, submittal, the State includes other requested SIP revisions that EPA will address in subsequent rulemakings.

⁹ CAA section 110(l) provides that EPA cannot “approve a [SIP revision] if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement” of the CAA. EPA has reviewed Florida's CAA section 110(l) demonstration and preliminarily agrees that removal of Rule 62–296.470 is compliant with CAA section 110(l).

unclassifiable.¹³ As FDEP notes elsewhere in its SIP submittal in support of proposed revisions to Rule 62–296.700,¹⁴ Florida’s PM RACT rules only apply to emission units that have been issued an air permit on or before May 30, 1988.^{15 16}

IV. EPA’s Analysis of the Removal of 62–296.701, F.A.C., Portland Cement Plants; 62–296.703, F.A.C., Carbonaceous Fuel Burners; 62–296.706, F.A.C., Glass Manufacturing Process; 62–296.709, F.A.C., Lime Kilns; and 62–296.710, F.A.C., Smelt Dissolving Tanks

According to Florida’s submittal, there are no longer any units in the State still in operation covered by Rules 62–296.701, 62–296.703, 62–296.706, 62–296.709, and 62–296.710. Because these rules only apply to existing sources permitted on or before May 30, 1988, and FDEP determined that there are no longer any existing sources subject to these rules, FDEP likewise determined that removing these rules from the SIP will not interfere with attainment or maintenance of the NAAQS, prevention of significant deterioration increments, reasonable further progress, or protection of visibility. FDEP repealed these rules at the State level, effective on February 8, 2017. Because these rules only apply to units that were permitted on or before May 30, 1988, and there are no longer any existing sources subject to these rules, removing these rules from the SIP will have no air quality impacts and is consistent with CAA section 110(l). Therefore, EPA proposes to remove these obsolete rules from the Florida SIP.

V. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule amended regulatory text that includes incorporation by reference. EPA is proposing to remove Rules 62–296.470, F.A.C., *Implementation of Federal Clean Air Interstate Rule*, 62–296.701, F.A.C., *Portland Cement Plants*, 62–296.703,

F.A.C., *Carbonaceous Fuel Burners*, 62–296.706, F.A.C., *Glass Manufacturing Process*, 62–296.709, F.A.C., *Lime Kilns*, and 62–296.710, F.A.C., *Smelt Dissolving Tanks* from the Florida SIP which are incorporated by reference in accordance with the requirements of 1 CFR part 51, and as discussed in Sections I through IV of this preamble. EPA has made, and will continue to make the SIP generally available at the EPA Region 4 Office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information).

VI. Proposed Action

EPA is proposing to approve that portion of the April 1, 2022, Florida SIP revision consisting of the removal of Rules 62–296.470, F.A.C., *Implementation of Federal Clean Air Interstate Rule*, 62–296.701, *Portland Cement Plants*, 62–296.703, *Carbonaceous Fuel Burners*, 62–296.706, *Glass Manufacturing Process*, 62–296.709, *Lime Kilns*, and 62–296.710, *Smelt Dissolving Tanks*, from the Florida SIP.

VII. Statutory and Executive Language

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air 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 Clean Air Act. Accordingly, this proposed 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 proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, 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 FDEP did not evaluate EJ considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this proposed action. Consideration of EJ is not required as part of this proposal, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving EJ for people of color, low-income populations, and Indigenous people.

¹³ EPA approved a recodification to the 62–296.700 rules on October 20, 1994 (59 FR 52916).

¹⁴ EPA will address revisions to this rule in a separate notice.

¹⁵ On May 19, 1988, Florida submitted revisions to the SIP regarding particulate matter. The rules submitted under the May 19, 1988, date were state effective on May 30, 1988. In these revisions, which were approved by EPA on February 1, 1990 (55 FR 3403), EPA approved Florida’s changes to its particulate matter SIP that clarify what areas of the state were covered by the PM RACT rules and the location of PM (TSP) air quality maintenance areas and areas of influence (areas within 50 kilometers outside the boundary of an air quality maintenance area).

¹⁶ EPA will address Florida’s proposed updates to F.A.C. 62–296.700 in a separate rulemaking.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Jeanneane Gettle,

Acting Regional Administrator, Region 4.

[FR Doc. 2023–16966 Filed 8–10–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, 262, 263, 264, 265, 266, 267, 268 and 270

[EPA–HQ–OLEM–2023–0320; FRL: 10001–01–OLEM]

RIN: 2050–AH29

Used Drum Management and Reconditioning Advance Notice of Proposed Rulemaking

AGENCY: Environmental Protection Agency.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The U.S. Environmental Protection Agency (the EPA) is soliciting information and requesting comments to assist in the potential development of non-regulatory and regulatory options that would ensure the proper management of used industrial containers that held hazardous chemicals or hazardous waste, up to and including the drum reconditioning process. Options could include revising the Resource Conservation and Recovery Act (RCRA) regulations or other, non-regulatory options. This Advance Notice of Proposed Rulemaking (ANPRM) does not propose any regulatory requirements or change any existing regulatory requirements.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: *Comments.* You may send comments, identified by Docket ID No. EPA–HQ–OLEM–2023–0320, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.

- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Resource Conservation and Recovery Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on sending comments see the “instructions” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions about this action, contact Kaitlin Franssen, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery (MC 5303P), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–0487; email address: Franssen.Kaitlin@epa.gov.

SUPPLEMENTARY INFORMATION:

Instructions: Submit your comments, identified by Docket ID No. EPA–HQ–OLEM–2023–0320, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), 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). Please visit <https://www.epa.gov/dockets/commenting-epa-dockets> for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

Preamble acronyms and abbreviations. The EPA uses multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for

reference purposes, the EPA defines the following terms and acronyms here:

ANPRM Advance Notice of Proposed Rulemaking
CAA Clean Air Act
CFR Code of Federal Regulation
CWA Clean Water Act
CBI Confidential Business Information
CFR Code of Federal Regulations
DOT Department of Transportation
EPA U.S. Environmental Protection Agency
FR Federal Register
°F degrees Fahrenheit
HMR Hazardous Material Regulations
IBC Intermediate Bulk Container
LQG Large Quantity Generator
NPDES National Pollutant Discharge Elimination System
OMB Office of Management and Budget
PBI Proprietary Business Information
POTWs Publicly-Owned Treatment Works
PPE Personal Protective Equipment
RCRA Resource Conservation and Recovery Act
SOPs Standard Operating Procedures
SPCC Spill Prevention, Control, and Countermeasures
TSDF Treatment, Storage, and Disposal Facility

Organization of this Document: The following outline is provided to aid in locating information in this preamble.

- I. General Information
 - A. What is the purpose of this ANPRM?
 - B. Does this action apply to me?
- II. Background
- III. Overview of the ANPRM and Request for Comments
 - A. ANPRM Overview
 - B. Non-Regulatory Options
 - C. Regulatory Summary Table
- IV. Environmental Justice
- V. Used Drum Generator and Transporter Issues
 - A. Emptying Containers
 - B. Shipping of Non-RCRA Empty Containers
 - C. Container Packaging (Integrity)
- VI. Drum Reconditioner Issues
 - A. Acceptance, Storage, Handling, and Management of Non-RCRA Empty Containers
 - B. Emissions From Drum Furnaces
 - C. Management and Mismanagement of Wastewaters and Other Wastes Generated From Drum Reconditioning
 - D. Emergency Response Training
 - E. Permitting
- VII. End-of-Life Management
- VIII. Transportation Equipment Cleaning Facilities
- IX. Statutory and Executive Order Reviews

I. General Information**A. What is the purpose of this ANPRM?**

An advance notice of proposed rulemaking (ANPRM) is a notice intended to solicit information from the public as the EPA considers proposing a future rule or action. The EPA plans to use this ANPRM as a preliminary way to explore the regulatory and/or non-regulatory options for dealing with the

issues surrounding the management of used containers, such as metal or plastic drums, across their lifecycle, to ensure protection of human health and the environment. Management issues across the lifecycle of used containers can occur at industrial facilities, with hazardous waste generators, and with generators of used containers, as well as with transporters and receiving facilities (*i.e.*, drum reconditioners). This ANPRM will refer to any facilities sending used drums/containers to drum reconditioners as “used drum generators.” As a first step for this ANPRM, the EPA published a report studying the drum reconditioning industry and documented certain damages such as environmental releases, fires, explosions, and employee injuries that occurred at these facilities. This report¹ is available in the docket to this ANPRM.

The name of this ANPRM is Used Drum Management and Reconditioning Advance Notice of Proposed Rulemaking. This document is the same ANPRM as the ANPRM entitled the Drum Reconditioner Advance Notice of Proposed Rulemaking that had been published in the Fall 2022 and Spring 2023 Regulatory Agenda (RIN 2050–AH29). The EPA has decided to change the name of this ANPRM to be more descriptive than the original title and to reflect the breadth of all the topics covered by this ANPRM.

B. Does this action apply to me?

Entities that may be interested in this ANPRM or potentially may be affected by the EPA’s evaluation of the information and comments received include, especially, owners and operators of drum reconditioning facilities, communities where these facilities or operations exist, container transporters, used drum generators, chemicals manufacturers, waste or hazardous waste generators, industrial facilities, and environmental action organizations.

II. Background

Drum reconditioning facilities recondition metal and plastic drums and intermediate bulk containers (IBCs) for resale and reuse by cleaning, restoring, testing, and certifying these industrial containers. These containers previously held a variety of materials including hazardous waste, chemicals, paints, resins, tars, adhesives, foods, oils, soaps, solvents, or related materials. The two main processes used

for reconditioning are burning off residue from metal drums in a drum furnace and washing metal or plastic drums or containers with water and/or a caustic solution to clean out residues.

On September 8, 2022, the EPA published a Drum Reconditioner Damage Case Report that described the EPA’s understanding of how the drum reconditioning industry operates and documents damage case incidents at facilities that have caused significant harm to human health and the environment. The report also serves to inform domestic policymakers, enforcement officials, and the public about the regulatory and waste issues surrounding drum reconditioning facilities and serves as the EPA’s first step to gather information and engage stakeholders on approaches to address and mitigate these issues.

The report examined the existing RCRA regulations, particularly the empty container provision (Title 40 of the Code of Federal Regulation (CFR) in § 261.7), which exempts from regulation hazardous waste residues that remain in a drum or other container as long as (1) All wastes have been removed that can be removed using the practices commonly employed to remove materials from that type of container, *e.g.*, pouring, pumping, and aspirating, AND (2) no more than 2.5 centimeters (one inch) of residue remains or no more than 3% by weight remains if the container is less than or equal to 119 gallons or no more than 0.3% by weight remains if the container is more than 119 gallons. This exemption also states that a container or an inner liner removed from a container that has held an acute hazardous waste listed in §§ 261.31 or 261.33(e) is empty if: (i) The container or inner liner has been triple rinsed using a solvent capable of removing the commercial chemical product or manufacturing chemical intermediate; (ii) the container or inner liner has been cleaned by another method that has been shown in the scientific literature, or by tests conducted by the generator, to achieve equivalent removal; or (iii) in the case of a container, the inner liner that prevented contact of the commercial chemical product or manufacturing chemical intermediate with the container, has been removed. In this ANPRM, we use the term “RCRA empty” to mean that a container has been emptied to meet these definitions in the empty container provision. The report found that despite this provision, and the fact that drums sent to a non-permitted facility should be RCRA empty, non-permitted drum reconditioners are still inadvertently

receiving containers of hazardous waste that are not RCRA empty. Due to the large number of containers that reconditioners process, some of these facilities are likely receiving and managing significant quantities of hazardous waste residues. This volume of residue creates a potentially significant risk to the workers and the environment. Additionally, even if receiving only RCRA empty containers, because of the large volume of residues, drum reconditioners are still potentially receiving and managing significant quantities of hazardous waste residues without being subject to RCRA hazardous waste regulations.

In addition to RCRA, drum reconditioners may be subject to certain regulations under the Clean Air Act (CAA) and Clean Water Act (CWA). Section 129 of the CAA regulations may apply to drum furnaces that process RCRA empty containers. These furnaces may be required to obtain permits under CAA state plan requirements. Under CWA Section 301, it is unlawful for any person to discharge any pollutant into waters of the United States without authorization under specific provisions of the CWA, including Section 402 (which establishes the National Pollutant Discharge Elimination System (NPDES)). CWA Section 307 requires new and existing industrial users to pre-treat wastewater discharged to Publicly-Owned Treatment Works (POTWs) to prevent pollutants in excess of certain limits from passing through POTWs. Either of these CWA regulations may apply to drum reconditioners who use washing methods to clean out their containers. Detailed background information about how RCRA, CAA, and CWA regulations apply to this industry can be found in the introduction to the EPA’s Drum Reconditioner Damage Case Report.

The report’s findings indicate an estimated national drum reconditioning universe of 181 facilities with approximately 40 million total metal and plastic containers being processed each year. The data also indicates that approximately 35% of drums are reconditioned using drum furnaces, and the remaining 65% of containers are reconditioned through washing methods. Of the total 181 drum reconditioning facilities identified by the EPA, 86 had one or more reported damage cases, representing 47.5% of the total industry. The EPA’s data also indicates that 25% of drum reconditioners that are currently operating have had damage cases, 23 facilities experienced damage cases between 2011 and the present, and 58 of the 86 facilities that experienced

¹ EPA 2022 Drum Reconditioner Damage Case Report, September 2022, EPA–530–R–22–003. <https://www.epa.gov/hw/drum-reconditioner-damage-case-report>.

damage cases had at least one incident occur after the empty container provision, found in 40 CFR 261.7, was promulgated in 1980. Damages include fires; drum explosions; hazardous waste spills; leaking caused by improper storage of drums/containers; employee injuries; air, water, or soil contamination; and various combinations of these incidents.

The EPA is evaluating the generation, transportation, and management of used containers, some of which are non-RCRA empty, to assess the extent to which regulatory or non-regulatory actions could reduce the risk of damages. Essentially, all aspects of the used container lifecycle (*i.e.*, generation, transport, and reconditioning) can ultimately contribute to environmental contamination. The reconditioning of used containers is a vital part of the waste management industry and reduces waste overall, but not without unintended, serious consequences. The EPA seeks input through this ANPRM on what further Agency action, regulatory or otherwise, is needed to prevent future damage to human health and the environment from all entities involved in the used container lifecycle.

III. Overview of the ANPRM and Request for Comments

A. ANPRM Overview

The EPA is publishing this ANPRM to facilitate public involvement on this critical issue of used container management and to provide a mechanism for engaging with industry, as well as with affected communities, and to offer a structured opportunity for public comment on how the public believes the EPA should address the issues outlined in the 2022 EPA Drum Reconditioner Damage Case Report, as well as those summarized in Section II

of this ANPRM. The EPA plans to use this ANPRM as a preliminary way to explore the potential regulatory and/or non-regulatory options for dealing with the issues at used drum generators, transporters, and reconditioners. This ANPRM is not a proposal and no changes to the regulations will be promulgated or implemented without the proper notice-and-comment rulemaking process and required analyses.

This ANPRM is organized in order of the potentially affected parties: used drum generators, transporters, and reconditioners, and then by potential issues involving these parties. The EPA is seeking comment on how to address all information and issues discussed in this ANPRM.

B. Non-Regulatory Options

The EPA is looking at potential options to address information and issues documented in its Drum Reconditioner Damage Case Report and outlined in this ANPRM. In addition to potential regulatory changes, the EPA is interested in whether increasing compliance assistance and enforcement of the empty container regulations at used drum generators could help reduce the number of non-RCRA empty containers that are shipped to drum reconditioners and other waste management facilities. Regarding the CAA and CWA statutes, the EPA may also consider non-regulatory approaches at drum reconditioners to address drum furnace emissions and wastewater discharge/handling issues, such as increased inspections, compliance assistance, or voluntary standards and best practices. The development of Standard Operating Procedures (SOPs) (Section V.B and VI.A) at used drum generators, transporters, and drum

reconditioners could also be a non-regulatory option for achieving better compliance with existing regulations and requirements. The Agency is aware of similar SOPs, guidelines, and certifications produced and distributed by the Reusable Industrial Packaging Association (RIPA) which aims to “create uniform operating principles for the reusable industrial packaging community.”² The EPA requests comment on other existing industry standards or SOPs that may be available for the drum reconditioning industry.

The EPA also seeks information on any state compliance assistance programs that have focused on these areas, as well as any industry initiatives or actions, such as incentive programs, that have been successful in decreasing the number of non-RCRA empty containers and/or the amounts of hazardous residues that are shipped from used drum generators. In addition, the EPA is also interested in learning about whether there have been advancements in drum handling or cleaning technologies that industry may have developed, or is pursuing, that would help make the reconditioning process cleaner or more efficient and would be more protective of human health and the environment.

C. Regulatory Summary Table

In addition to non-regulatory actions, this ANPRM provides detail on the potential regulatory options the Agency could consider taking in a future rulemaking. The following table outlines and summarizes the issues that the Agency considers the most pressing and is currently exploring and considering. These options are discussed in more detail in the Section indicated in the table.

TABLE 1—POTENTIAL FUTURE REGULATORY OPTIONS

Potentially affected parties	Issue that would be addressed	Potential future regulatory action	See section
Used Drum Generators and Transporters.	Risks posed by contamination from residues remaining in non-RCRA empty containers.	Reduce the “one-inch” regulatory limit for defining RCRA empty containers. Require rinsing for all containers before they would be considered RCRA empty. Require empty drums to meet structural integrity requirements prior to shipment.	V.A. V.A. V.A.
	Non-RCRA empty drums being sent to drum reconditioners.	Add/strengthen regulatory requirements for used drum generators to ensure all waste has been removed from containers using commonly employed practices prior to being sent to reconditioners, such as: • SOPs for drum emptying. • Certification of empty drums. • Employee training.	V.B.

² Responsible Packaging Management, Reusable Industrial Packaging Association (RIPA), 2010:

[https://www.reusablepackaging.org/wp-content/](https://www.reusablepackaging.org/wp-content/uploads/Responsible-Packaging-Management-2010.pdf)

[uploads/Responsible-Packaging-Management-2010.pdf](https://www.reusablepackaging.org/wp-content/uploads/Responsible-Packaging-Management-2010.pdf).

TABLE 1—POTENTIAL FUTURE REGULATORY OPTIONS—Continued

Potentially affected parties	Issue that would be addressed	Potential future regulatory action	See section
Drum Reconditioners	Risk of fires/explosions from incompatible, reactive, or ignitable residues.	Add regulatory language further clarifying “commonly employed practices” and distinguishing between pourable and non-pourable wastes.	V.B.
		Require used drum generators to track and/or keep records of shipments of empty drums.	V.B.
		Require drum labeling or other documentation conveying the hazard posed by the drum residues.	V.C.
	Non-RCRA empty drums being sent to drum reconditioners.	Add specific regulatory requirements or conditions for a permit exemption for all drum reconditioners such as:	VI.A.
		• SOPs for screening drums prior to acceptance. • Designated non-RCRA empty container storage areas. • Rejected shipment procedures. • Discrepancy reports. • Container management plans.	VI.A.
	Risks posed by contamination from residues remaining in non-RCRA empty containers and in RCRA empty containers.		
	Stockpiling and eventual abandonment of drums.	Require waste analysis plans for characterizing rinsate from RCRA empty containers.	VI.A.
		Require all conditioners to conduct regular inspections and maintain inventory of drums (RCRA empty and non-RCRA empty).	VI.A.
	Emissions from drum furnaces	Require reconditioners to obtain financial assurance	VI.A.
		Add regulatory requirements for drum furnaces, such as:	VI.B.
Drum End-of-Life Management Facilities (e.g., scrap yards and landfills).		• Controls or emission factor limits for drum furnaces. • Limiting the use of drum furnaces to containers that hold non-hazardous residues. • Requiring pre-treatment (for example, triple rinsing) of containers prior to burning. • Require a RCRA permit for drum furnaces that burn containers with residues that would be considered hazardous waste under 40 CFR part 261 by revising or removing the empty container provision in 40 CFR 261.7.	
	Environmental releases to soil, groundwater and surface water from contaminants in mismanaged wastewaters.	Require wastewaters from rinsing containers to be managed in tanks and containers, rather than in land-based units, and to be discharged only in accordance with sections 301 and 402, or section 307 of the Clean Water Act (CWA).	VI.C.
		Limit discharges to surface impoundments to rinsate from drums that only held non-hazardous materials.	VI.C.
		Prohibit sewer disposal of rinsate from drums that previously contained hazardous materials.	VI.C.
	Risk of fires/explosions from incompatible, reactive, or ignitable residues.	Require contingency planning and employee training in responding to emergencies.	VI.D & VI. E.
	Lack of regulatory oversight and public participation.	Require a RCRA Subtitle C Permit or a variance	VI.F.
	Risk from contaminated scrap metal and plastic when recycled or land disposed.	Limit 40 CFR 261.7 empty container provision to containers sent to drum reconditioners (possibly coupled with new regulatory requirements for reconditioning).	VII.
		Require containers to be truly empty (not just “RCRA empty”) before going to scrap recycling or disposal.	VII.
		Require containers with any amount of hazardous residues (including crushed or shredded containers) to meet the hazardous debris alternative treatment standards in 40 CFR 268.45 prior to being land disposed.	VII.

In addition to asking for comment on the substance of possible future regulatory requirements to address the issues described above, the EPA is also requesting comment on the approach for these requirements. One possible approach would be to simply remove the empty container provision, which would impose full RCRA Subtitle C

requirements on residues in drums from the point they are generated to the point that the drums no longer contain any residue.³ Among other outcomes, such a

³ Absent the empty container provision in 40 CFR 261.7, a drum that had held listed hazardous waste, or that had held a material exhibiting one or more characteristics that would be considered hazardous waste when disposed of, would need to either meet

comprehensive change would require drum reconditioners that only process RCRA empty containers, as we currently define empty, to obtain a RCRA permit

the hazardous debris alternative treatment standards in 40 CFR 268.45 or receive a determination per 40 CFR 261.3(f)(2) from the Regional Administrator that the drum is no longer contaminated with hazardous waste.

and would require companies that attempt to empty drums to count any remaining residue towards their monthly hazardous waste generator status and to use a hazardous waste manifest and transporter for shipments of, in most cases, nearly empty drums. However, the risk posed by drums containing residue during storage and transport may not require such extensive regulation to ensure protection of human health and the environment. Additionally, requiring a RCRA permit for drum reconditioners that only process RCRA empty containers could undermine the entire system of reconditioning drums for re-use, potentially resulting in an unintended increase in mismanagement and abandonment of drums containing residue.

Some of the potential regulatory changes discussed in the table above could be added as conditions to the generator regulations in 40 CFR part 262, to the exemptions from RCRA permitting in 40 CFR 264.1(g) and 40 CFR 265.1(c), and/or to the empty container provision 40 CFR 261.7 itself. The advantage of adding conditions to the existing regulations is that they can be tailored to address the specific risks posed by drums containing hazardous waste residue, and the consequence of not meeting these conditions would be full hazardous waste regulation. The EPA could also create specific management standards for [emptied] containers in 40 CFR part 266, as has been done in the past for other specific hazardous wastes and specific types of hazardous waste management facilities. Implementing the potential regulatory changes by adding a new subpart to 40 CFR part 266 would have the advantage of maintaining all the requirements for containers with residue in one place in the regulations.

Finally, the EPA could use the variance procedures in 40 CFR part 260 to develop a variance from permitting requirements for drum reconditioners, provided certain criteria are met. The advantage of using such an approach is that it would increase regulatory oversight of drum reconditioners (because the EPA or the authorized state would need to review and approve the variance petitions) and would also allow for public notice and comment.

While each of the approaches for adding possible regulatory requirements to [emptied] drums containing residue has both advantages and disadvantages from a practical standpoint, they all would have the same goal: to ensure protection of human health and the environment from the management of

hazardous residues in [emptied] containers.

IV. Environmental Justice

The EPA understands that drum reconditioning facilities may raise significant environmental justice concerns for communities that experience disproportionate and adverse human health and environmental burdens, and the Agency intends to ensure any decisions made reflect the importance of protecting the health and well-being of communities who have suffered environmental injustices. Conducted as part of the Drum Reconditioner Damage Case Report, a preliminary analysis using EPA's EJSCREEN tool indicated 94.2% of drum reconditioning facilities with damage cases are located in communities that already bear an environmental burden from other sources of pollution, exhibit characteristics of social vulnerability, or both, with many facilities located in areas where people of color and low-income populations are specifically impacted.⁴ Emissions from drum furnaces and drum cleaning operations, and wastewater discharges from washing operations can threaten the facility's surrounding communities and environment, and the high level of damage incidents also puts communities with environmental justice concerns directly in harm's way, considering the frequency with which emergencies (such as fires and explosions) and abandonment of hazardous materials occur at drum reconditioning facilities.

It is clear from the damage case report that these hazards directly affect the well-being of the communities nearest drum reconditioners. For instance, in one case, investigators found a drum reconditioning facility had thousands of abandoned drums on site, many of which were full and leaking. Investigators even found a bicycle and children's toys strewn amongst the abandoned drums, demonstrating that vulnerable community members such as children were directly exposed to the unknown chemicals spilling from the abandoned drums because the facility had accepted non-RCRA empty drums and failed to control access to the property.⁵ In another case, a drum reconditioner in a low-income, primarily minority community, dumped the contents of drums—which should

have been empty—onto the soil and dug holes on their site to bury hazardous chemicals, leading to widespread soil and water contamination and extensive onsite and offsite damage.⁶

Many of the possible solutions the EPA is seeking comment on in this ANPRM could help address these environmental justice concerns when enacted. Any changes that lead to better compliance, fewer releases, and/or stricter controls would most directly benefit the communities nearest these facilities. For instance, stricter enforcement of existing air or water permits, and expansion of RCRA permit requirements to reconditioners that process RCRA empty containers that still contain residue, could help address some of the environmental justice concerns detailed earlier in this section. Localized air emissions and water discharge issues could be mitigated through stricter controls on those reconditioners that are already required to obtain air and/or water permits. Likewise, requiring drum reconditioners that process empty containers to obtain a RCRA Treatment, Storage, and Disposal Facility (TSDF) permit, or requiring such facilities to obtain a variance, would provide a mechanism for community engagement, as the RCRA permitting process and the variance process requires notice and comment to facilitate public participation before a permit or variance is issued. Implementing these, or any of the other potential changes discussed in this ANPRM, would likely result in environmental justice benefits by reducing the negative effects caused by facilities located in overburdened communities.

Finally, it should be noted that the EPA has limited ability to influence the siting of these facilities because those decisions fall primarily to state and local authorities (e.g., land use decisions like zoning are controlled mostly at the local level). However, the EPA is interested in establishing policies within its authority that would address the environmental justice concerns associated with this industry; in particular, the EPA is requesting public comment on additional ways the Agency could promote environmental justice under our existing authorities. The EPA also encourages commenters providing input on separate issues and solutions discussed in the rest of the ANPRM to incorporate environmental justice considerations into their feedback.

⁴ EPA 2022 Drum Reconditioner Damage Case Report, September 2022, EPA-530-R-22-003. <https://www.epa.gov/hw/drum-reconditioner-damage-case-report>.

⁵ EPA, Damage Case Report, Drumco Drum Dump, [page 87].

⁶ EPA, Damage Case Report, Martin Aaron, Inc., [page 130].

V. Used Drum Generator and Transporter Issues

A. Emptying Containers

Used drum generators are responsible for the hazardous waste they generate, including ensuring its proper disposal. This responsibility extends to hazardous waste that is sent to a drum reconditioner in a non-RCRA empty container. As discussed in Section II, the RCRA regulatory definition of “empty” for regular hazardous waste containers (40 CFR 261.7) has two parts: (1) All wastes have been removed that can be removed using the practices commonly employed to remove materials from that type of container, *e.g.*, pouring, pumping, and aspirating, *AND* (2) no more than 2.5 centimeters (one inch) of residue remains or no more than 3% by weight remains if the container is less than or equal to 119 gallons or no more than 0.3% by weight remains if the container is more than 119 gallons. This section also states that a container or an inner liner removed from a container that has held an acute hazardous waste listed in Sections 261.31 or 261.33(e) is empty if: (i) the container or inner liner has been triple rinsed using a solvent capable of removing the commercial chemical product or manufacturing chemical intermediate; (ii) the container or inner liner has been cleaned by another method that has been shown in the scientific literature, or by tests conducted by the generator, to achieve equivalent removal; or (iii) in the case of a container, the inner liner that prevented contact of the commercial chemical product or manufacturing chemical intermediate with the container, has been removed.

As part of increasing awareness around this issue, the EPA could emphasize the first part of that definition to ensure that used drum generators, transporters, and state regulators are all aware that to be RCRA empty, a container must meet all parts of the definition. The Agency could add regulatory language or guidance explaining the type of practices commonly used to remove residues from containers for both solid and liquid materials. Another option is to take a similar approach as California and add language explaining what it means to empty drums that held pourable versus non-pourable hazardous residues to meet the RCRA empty definition.⁷

A regulatory revision to address this issue might amend the second part of the empty container definition (*i.e.*, change the amount that can remain to less than 2.5 centimeters (1 inch)) by changing the residue level that would still be considered RCRA empty before it leaves the used drum generator site. Alternatively, the regulations could be modified to require some rinsing of a drum that held non-acute hazardous waste, similar to the requirement to triple rinse containers that held P-listed (acutely toxic) hazardous waste.

The EPA is taking comment on all options discussed in this section. In particular, the EPA is interested in any comments on what would be an adequate amount of rinsing and any data that drum reconditioners, chemical manufacturers, or others may have on the degree of rinsing that is necessary to remove common types of hazardous waste, such as spent solvents, U-listed and P-listed commercial chemical products, etc. In addition, the EPA seeks public comment on whether the empty container regulations should be modified to account for different characteristics that may make some materials harder to remove than others, such as viscosity.

B. Shipping of Non-RCRA Empty Containers

The EPA is considering requiring used drum generators to have SOPs that they would use before shipping containers off site for reconditioning. Following the SOPs would ensure that drums are RCRA empty as currently defined in 40 CFR 261.7 and that the used drum generators don't intentionally or inadvertently ship drums that are not RCRA empty. The SOPs could also include procedures for non-RCRA empty containers, including the requirement to manifest ones with regulated hazardous residues to an appropriate RCRA-permitted TSDF if the used drum generator cannot empty the container enough to meet the empty container definition. The TSDF could then accept the non-RCRA empty containers and finish the process of emptying them before sending them on to a drum reconditioner. If the TSDF can ensure the drums are RCRA empty, then they would not need to be manifested from the TSDF to the drum reconditioner. The EPA and state implementing agencies could emphasize having and using the SOP when they do inspections of used drum generators.

The EPA is also interested in whether requiring labeling (similar to 40 CFR 262.17(a)(5)(i)) of empty drums would help ensure proper management not only by the used drum generator, but

also by the transporter and drum reconditioner, particularly regarding the management of incompatible or potentially ignitable residues. In addition, if a non-RCRA empty container comes into a facility, then the information on the label would likely be very helpful in making an accurate hazardous waste determination for the facility to send that non-RCRA empty container on to a TSDF. Another possibility would be to allow the use of a nationally recognized electronic system, such as a bar-coding system or QR coding system that is part of a company's waste profiling system, to include the information that would be needed to ensure proper management of the containers. The Agency is interested in real-world examples of how such electronic systems could be used to provide the same information as a label.

A real-life example of where the lack of information of what was left in a container had tragic consequences was when an employee was killed in an explosion at a drum reconditioner when incompatible wastes were mixed (potentially due to their lack of labeling). The explosion also severely damaged the facility and caused the company to declare bankruptcy.⁸ Lack of information about a container's origins (*i.e.*, who sent it, and from where, contents, etc.) can also create issues such as difficulty for employees at reconditioning facilities to determine proper handling procedures and proper personal protective equipment (PPE), challenges with spill response and clean up during transportation or upon arrival at the drum reconditioner as the nature of the chemicals remaining in the drum are unknown, and the inability of reconditioners to inform their local first responders of the likely hazardous materials present on site. In the preceding example and in other cases, drum reconditioners have ceased operations and left unlabeled drums of unknown material in place when they closed.⁹

The EPA is aware that the Department of Transportation (DOT) labeling requirements may continue to apply to packagings of hazardous materials even after they have been emptied, but the EPA is interested in whether additional labeling should be required for used containers beyond the DOT requirements. The EPA could consider addressing labeling issues by establishing more stringent labeling criteria, such as making the empty

⁷ See Title 22, California Code of Regulations, section 66261.7: Contaminated Containers for specific language.

⁸ EPA, *Damage Case Report*, Chief Supply/Greenway Environmental. [page 63]

⁹ EPA, *Damage Case Report*, Superior Barrel and Drum Co. [page 177]

container provision contingent upon certain labeling standards, which would encourage generators sending containers for reconditioning to also send accompanying information like waste identification, warning placards, or resources for more information about the container's previous contents and the non-regulated residues still in the container.

The EPA could also (or alternatively) require that information such as the identity of the material and its origins follows the container until it is reconditioned. This approach could be performance-based in order to allow existing documents, such as hazardous waste manifests or bills of lading, to be used as identifying paperwork, so long as they provide the required information about the nature of the material, its origin, and any other information deemed critical. Information presented in a standardized format like this could provide a quick reference in the event of a release or emergency, as a specific party would be responsible for taking ownership of the leaking/damaged drum. For example, a used drum generator would produce a bill of lading that details the containers they are sending, the containers' previous contents, any relevant warnings, and information about the used drum generator, then hand off that document to the driver or other transporter, who would then provide it to the reconditioner when the containers are delivered. The Agency is interested in receiving comments on the extent that existing paperwork could be used for this purpose and whether there needs to be additional tracking information that directly links each container to its previous contents, perhaps through a bar-coding or QR-coding system.

The EPA has been told by one stakeholder group that this lack of labeling information is a major issue for drum reconditioners. Therefore, the Agency is requesting further comment on the extent and severity of this issue, as well as the anticipated effects of employing the strategies outlined in this section and other potential solutions to this problem.

Other potential solutions to used drum generators and TSDFs shipping non-RCRA empty containers could be requiring generators and TSDFs to certify that the containers sent to drum reconditioners are empty per the regulatory definition in 40 CFR 261.7. This certification could be included in the shipping papers or in a log maintained at the generator or the TSDF. Another option would be to include the generator/TSDF's certification that the container is RCRA

empty on any required labeling. The Agency is interested in whether requiring the certification on each individual container's labeling would assist inspectors and state implementing agencies.

As part of requiring an SOP or perhaps as a separate requirement, the EPA is interested in whether additional employee training on the empty container requirements is needed at used drum generators, including hazardous waste generators. If an SOP is required of used drum generators, then ensuring employees are properly trained on how to empty containers and make sure the containers sent off-site are RCRA empty would be a required component of the SOP. Other good management practices could be included in the training such as making sure the containers that are sent for reconditioning are in good condition and not leaking, are properly labeled, etc.

The EPA is also interested in whether used drum generators should be required to track their shipments of empty containers sent off site or keep records of these shipments in order to help verify which generators have been properly emptying their drums. The EPA could consider imposing these requirements in instances where drum reconditioners have repeatedly received non-RCRA empty containers from used drum generators.

The EPA is interested in public comment on the need for used drum generators to keep records or track their shipments of containers to drum reconditioners and when it would be appropriate to impose these tracking requirements discussed in this section. For example, if the Agency determined it was not necessary as long as used drum generators were only sending empty containers, then the EPA could propose only to impose the tracking or recordkeeping if there is a history of shipping non-RCRA empty containers off site. The EPA expects that bills of lading would be sufficient and electronic records would be acceptable for this tracking. In addition, the Agency requests comment on how to obtain information on facilities that indicate a history of shipping non-RCRA empty containers, and how the Agency should establish and implement a notification system.

C. Container Packaging (Integrity)

The physical state of container packaging (*i.e.*, the container itself and any accompanying equipment necessary to prevent leakage, spills, etc.) also arose as a major issue causing damage cases in the drum reconditioning process.

This issue occurs when generators of used drums or other containers fail to ensure the container itself is in good physical shape, such that no leaks or spills are liable to occur. Corroded drums and damaged containers are some examples of what the EPA would consider to be in improperly or poorly packaged. Failure to properly close containers (*e.g.*, securing lids or bungs appropriately) may also contribute to this problem.

In addition, transporters of these improperly packaged containers may fail to inspect the packaging offered for transport to ensure they meet certain standards. In particular, the DOT's Hazardous Material Regulations (HMR) outline specific requirements for containers that contain, or once contained, hazardous materials (including hazardous waste). Both generators (referred to by DOT as "offerors" for transportation) and transporters have a responsibility to comply with the HMR and its packaging requirements.

Damaged or otherwise compromised containers are more likely to leak or spill hazardous materials than structurally sound containers. Even though drums and other industrial containers should be RCRA empty before being sent to the drum reconditioner, the residue in a RCRA empty container may present an environmental hazard that could be released through leaks or other failure points. Even though RCRA empty containers are not currently subject to hazardous waste regulation, the cumulative residues from many RCRA empty containers may still present an environmental hazard, especially when millions of containers are being managed. Additionally, in noncompliant scenarios, non-RCRA empty containers may be offered for transportation, creating a risk of a larger spill if the container or packaging is degraded.

Potential solutions to the packaging integrity issue include more stringent packaging regulations and better inspection practices. In the former case, regulatory revisions to the empty container provision could introduce special requirements regarding packaging integrity that must be met in order for a used drum generator/hazardous waste generator to avail themselves of that provision. This regulatory change could outline specific requirements for used drum generators in preparing their empty containers for shipment and provide an enforcement mechanism in cases in which structurally compromised containers are improperly prepared for transport. More

thorough inspections could also help generators offering containers for transport and transporters providing the service to identify improper container packaging that presents an elevated risk because of its degradation or improper closure. Additional actions to address these problems could include providing best management practices or other resources to consult when packaging a drum or IBC to be transported and/or issuing mandatory requirements to ensure that all responsible parties verify the integrity of the packaging before it is sent to a reconditioner.

The EPA is requesting comment on the frequency of such voluntary practices, the anticipated effect of such regulatory changes, and any other information that commenters believe the Agency would need to properly inform future action related to container packaging.

VI. Drum Reconditioner Issues

A. Acceptance, Storage, Handling, and Management of Non-RCRA Empty Containers

As mentioned in Section V.A of this preamble, and as concluded in the EPA's Drum Reconditioner Damage Case Report, drum reconditioners often unintentionally receive containers that previously held a variety of materials, including hazardous chemicals, and are managing drums with hazardous residues that do not meet the 40 CFR 261.7 definition of "empty" without the required RCRA permit to do so. In such situations, the EPA has determined that, though the generator bears responsibility for ensuring that a container is, in fact, RCRA empty when sent offsite (Section V.A), the receiving entity/drum reconditioner also shares responsibility for properly identifying and managing containers that do not meet the RCRA empty definition in accordance with 40 CFR 261.7 and are responsible for managing the container under all pertinent RCRA regulations once it comes under their control.

The residues remaining in these non-RCRA empty containers pose numerous risks, as described in previous sections, and as a result of issues outlined in the EPA's Drum Reconditioner Damage Case Report and listed throughout this ANPRM, the Agency has identified the need to explore possible approaches to update, support, and/or complement the empty container provision at 40 CFR 261.7. These approaches, discussed hereafter, may be used to identify when a non-RCRA empty container is sent to a drum reconditioner; to provide a mechanism for drum reconditioners to properly and safely store, and then

reject, non-RCRA empty containers; and/or to update and enforce procedures and practices to better manage containers within the scope of the existing regulations.

The EPA's Drum Reconditioner Damage Case Report featured several examples of damage cases that were caused by abandoned or stockpiled non-RCRA empty containers on drum reconditioner properties. After acceptance, these containers were left in various states, but many were damaged, unattended, uninspected, and lacked proper container management, storage, or secondary containment. One site had 500 drums known to be abandoned and approximately 50,000 gallons of abandoned hazardous residues, with the estimated cleanup cost for soil and groundwater contamination found to be \$928,000.¹⁰ Another site that had a drum cleaning operation, along with other operations, with several drums, tanks, and other debris abandoned in an open field referred to as the "bone yard," had a fire/explosion, which killed an employee. Approximately 33,000 gallons of hazardous waste remained onsite with many deteriorating containers holding unknown contents after the site was abandoned in 2000.¹¹

Potential approaches to address the issues of improper storage and abandoned drums could include the EPA requiring drum reconditioners to create SOPs to identify, properly store, and reject drums or containers that do not meet the RCRA definition of empty per 40 CFR 261.7. These SOPs could be specific, and include procedures such as steps to evaluate trailers and/or containers integrity/condition and contents that arrive on the reconditioner's properties; the inspection of shipping documents or labels to confirm that the customer signed a certification attesting that the containers are RCRA empty (new requirement); verification that the trailer and/or container's contents match the bill of lading; confirmation that the containers and/or trailers are not leaking; and the use of an arrival log with the date of receipt of the containers and/or trailer, the customer's name and location where the containers came from, and the container quantity.

The EPA could also require drum reconditioners to place suspected and known non-RCRA empty containers (even those whose contents are not yet characterized as hazardous waste) in a

designated "Non-Empty Container Storage Area" immediately after identifying the containers as suspected or actual non-RCRA empty containers. The designated drum storage area would have to meet management and design specifications, such as identification with a marked boundary, either locked and/or secured fencing, and signage to clearly delineate the area's purpose. The design specifications could include a minimum volume requirement for secondary containment, an impervious base surface to prevent or capture runoff, minimum aisle space, and/or a canopy, lid, or other cover to prevent precipitation from entering the area. The EPA could also require inspections of the "Non-Empty Container Storage Area" that would happen at regular time intervals and could require that a drum inventory for RCRA empty and non-RCRA empty containers be maintained.

The EPA has also identified improper management practices and handling procedures of non-RCRA empty and RCRA empty containers at drum reconditioners that have led to various damage cases including, but not limited to, spills and leaks from puncturing or dropping containers, and explosions, fires, fumes, and burns from the mixing of incompatible wastes. Several higher profile damage cases include a fire that occurred when sodium chlorite ignited after an employee punctured a steel drum with a forklift, which required 200 emergency workers from 38 different emergency companies to contain the fire¹² and an on-site explosion occurring at another facility when workers attempted to repack two drums containing ignitable mixtures.¹³

To mitigate poor management and handling at drum reconditioners, the EPA could require drum reconditioners to create and follow new industry-wide SOPs for the receipt and evaluation of all containers to ensure they are properly sealed and not leaking, or do not have the potential to leak, during storage or prior to the reconditioning process. The EPA could also require reconditioners to handle and store all containers in a manner that prevents rupture or leaking, which could include container integrity inspections and secondary containment requirements, prohibition of the consolidation or mixing of materials, chemicals, or wastes in all containers, in addition to a requirement for mandatory materials handling training for all employees on

¹² EPA, *Damage Case Report*, Scranton Cooperage/American Container Processors/Kearny Steel Container, [p. 173].

¹³ EPA, *Damage Case Report*, Aqua-Tech Environmental, Incorporated (Groc Laboratories), [p. 37].

¹⁰ EPA, *Damage Case Report*, Central Steel Drum Co., [p. 60].

¹¹ EPA, *Damage Case Report*, Chief Supply/Greenway Environmental, [p. 63].

a recurring basis. These requirements could be coupled with used drum generator labeling requirements (such as those at 40 CFR 262.17(a)(5)(i)), as discussed in Section V.C, so handlers and reconditioners would know the contents or previous contents of non-RCRA empty containers. The Agency could also include a regulatory mechanism to provide requirements for drum reconditioners to reject non-RCRA empty containers from the transporters.

The EPA could also require the preparation of a waste analysis plan, similar to what is required for RCRA permitted facilities and generators who perform treatment (per 40 CFR 264.13, 265.13, and 268.7); require non-RCRA empty containers containing hazardous waste to be sent to permitted TSDFs within a certain timeframe; require the creation and maintenance of discrepancy reports where drum reconditioners send the report to the used drum generator who sent non-RCRA empty containers and to the implementing agency such as the EPA or state; require the creation of container management plans, which could have specific requirements such as weekly inspections, record keeping, etc.; and/or require drum reconditioners to have financial assurance to demonstrate that they will have the financial resources to respond to contamination, clean up releases, address environmental and human health risks, or properly close the facility or unit when its operational life is over; or provide the appropriate emergency response in the case of an accidental release.

In addition, any of the options listed in this section could be combined with developing new or more tailored requirements focusing specifically on certain aspects of the RCRA regulations applicable to this specific industry (e.g., revising allowable limits in the empty container regulations at 40 CFR 261.7, mentioned in Section V.B).

The EPA could also explore allowing drum reconditioners the option of applying for a variance from RCRA hazardous waste permitting if they meet certain conditions, such as the creation and use of SOPs in drum management areas, more appropriate labeling and handling procedures, and other potential requirements discussed in this section and throughout the ANPRM. Requiring that drum reconditioners apply for a variance, rather than setting up self-implementing procedures, would allow more oversight by the regulatory authority and provide a mechanism for public notice and comment under the existing variance procedures in 40 CFR 260.33.

The EPA requests comment on the issue of the acceptance, management, storage, handling, and improper and potentially unsafe practices and procedures at drum reconditioners for containers that do not meet the definition of RCRA empty in 40 CFR 261.7. The EPA is soliciting information on the prevalence of these problems, existing practices and procedures implemented at facilities, and any practical difficulties or unintended consequences that may arise from the possible regulatory solutions to this problem.

B. Emissions From Drum Furnaces

Of the estimated 17 million steel drums that went to reconditioning in 2021, about 35% were processed in a drum furnace, where the residues remaining in the drums are destroyed through incineration.¹⁴ The thermal process applies heat to open head drums that previously contained viscous and/or organic materials such as paints, resins, tars, and adhesives. These drums are processed through a furnace at approximately 1,200 degrees Fahrenheit (°F) to incinerate residues of the former contents of the drums. It has been reported that exhaust from the combustion process is typically drawn into an afterburner at approximately 1,800 °F.¹⁵

Combustion units that process RCRA empty containers are not required to get hazardous waste incineration permits because the residues remaining within the container are exempt when the container is burned (assuming the containers actually meet the RCRA definition of “empty”).¹⁶ Clean Air Act (CAA) section 129 may apply to these combustion units, but currently there may not be specific regulatory requirements for drum furnaces that process RCRA empty drums. However, these combustion units may be required to obtain permits under CAA requirements and may also be subject to 40 CFR part 63 subpart EEE (or 264 subpart O) if burning hazardous waste from non-RCRA empty containers.

In the EPA’s Drum Reconditioner Damage Case Report, several facilities

with drum furnaces were noted as creating a public nuisance through odorous emissions including emissions from drum washing operations, failing to keep proper records of Hazardous Air Pollutant emissions, and exceeding emission limits for several pollutants, which in several instances resulted in penalties resulting from enforcement cases under the CAA. In one case, a former employee recounted how the facility chose to burn materials before dawn so that nobody would observe the dark, black cloud of emissions that resulted.¹⁷

Possible solutions that the EPA may pursue in a future regulatory action to address emissions at drum reconditioners could include requiring specific emissions controls or emission factor limits for drum furnaces under RCRA section 3004(n) authority to control emissions from the management of hazardous waste, limiting the use of drum furnaces to containers that held non-hazardous materials, requiring a RCRA incineration permit for furnaces that burn containers with residues that would be considered hazardous waste under 40 CFR part 261 (absent the 40 CFR 261.7 empty container provision), and/or requiring pre-treatment (for example, triple rinsing) of containers prior to burning.

The EPA requests comment on the issue of emissions from drum furnaces, including any information on the prevalence of this problem; methods that have been successfully used to address emissions from these types of furnaces, including any state air requirements or programs that addressed these furnaces; and any practical difficulties or unintended consequences that may arise from the possible regulatory solutions to this problem.

C. Management and Mismanagement of Wastewaters and Other Wastes Generated From Drum Reconditioning

One major underlying cause of contamination of soil, groundwater, and surface waters at drum reconditioners is the mismanagement of wastewaters. The greatest source of wastewater from this industry is rinse water from drum cleaning operations. Other sources include interior pre-flushes and washes; spent cleaning solutions; exterior wash water; leak testing wastewater; compressor condensate; boiler blowdown; acid washing emissions

¹⁴ Reusable Industrial Packaging Association. “U.S. Packaging Reconditioning Industry 2021 Survey and Statistics”, December 2022. <https://www.reusablepackaging.org/wp-content/uploads/2022/12/Survey-Report-2021.pdf>.

¹⁵ Sun West Container, A Basco Company. “Reconditioned Drums 101”. <https://sunwestcontainer.com/blog/reconditioned-drums-101>.

¹⁶ EPA 1986. “Burning Of Residues Remaining in Empty Containers,” memo from Alan S. Corson, Branch Chief, Studies and Methods Branch, U.S. Environmental Protection Agency, to Dale D. Parker, Executive Secretary Utah Solid and Hazardous Wastes Committee, January 7, 1986, RO 12535.

¹⁷ EPA, *Damage Case Report*, Columbus Steel Drum Company [p. 70], Drumco of Arkansas [p. 89], Industrial Container Services—MI, LLC [p.119], Meyer Steel Drum, Inc. [p. 137], Mid-America Steel Drum Co, Inc.—Saint Francis [p. 144], Mid-America Steel Drum Co, Inc.—Oak Creek [p. 147].

scrubber water; and label removal. The wastewaters can contain a wide variety of pollutants, including volatile organic compounds, semi-volatile organic compounds, metals, and dioxins and furans.¹⁸

Rinse waters from RCRA empty containers are only regulated as hazardous waste if they exhibit a hazardous waste characteristic, or if the rinsing agent is a listed hazardous waste when used (such as certain spent solvents).¹⁹ Rinse waters can cause environmental problems when mismanaged, as evidenced in the large number of drum reconditioning damage cases resulting from the mismanagement of wastewaters. In some of the damage cases, rinse water was simply dumped on the ground, and in others it was discharged to an unlined surface impoundment (*i.e.*, pond, lagoon, pit, catchment basin, etc.).²⁰ These practices can result in the contamination of soil, groundwater, and adjacent wetlands with various hazardous constituents, including organic compounds, polychlorinated biphenyls, pesticides, and heavy metals. In one damage case, wastewater was managed in open concrete sumps that were connected by open concrete trenches. Caustic wash water from this drum reconditioning process migrated via underground seepage to a nearby elementary school property, resulting in the school being closed.²¹

In other cases, wastewater was discharged to the sewer or to surface waters without a permit or in exceedance of permit limits.²² In one example, workers evacuated the facility for about a half hour after “a horrible

smelling orange cloud” filled the plant after residues were washed down the drain, presumably from incompatible chemicals being mixed.²³ In one extreme case, the EPA documented illegal dumping of caustic waste into the King County sewer system, which ultimately empties into the Puget Sound. The company used a hidden drain, and over ten years, lied to regulators to carry out their illegal dumping.²⁴

One process that contributes to the contamination resulting from wastewater mismanagement is the discharge of contaminated rinse water from cleaning non-RCRA empty containers. Thus, some of the approaches discussed in Sections V.A and VII.A to reduce the number of non-RCRA empty drums sent to reconditioners and to provide a practical system for reconditioners to reject non-RCRA empty drums would also help address potential problems presented by wastewater mismanagement.

However, even without the contribution of residues from non-RCRA empty drums, drum reconditioning rinse water could contain significant levels of contaminants. If all 12.1 million hazardous material-containing drums (plastic and steel estimated from RIPA’s 2021 Industry Survey and Statistics Report) reconditioned each year have up to one-inch of chemicals remaining after emptying, that would mean residues from these drums could amount up to 20.9 million gallons of hazardous materials per year.²⁵ In addition, the rinsing agent itself may present other hazards.

Accordingly, other possible regulatory solutions the EPA may consider include requiring hazardous wastewaters from RCRA empty drums to be managed in tanks and containers rather than in land-based units, and to be discharged only in accordance with sections 301 and 402,²⁶ or section 307,²⁷ of the Clean

Water Act. The EPA may also consider limiting discharges to surface impoundments to rinsate from drums that only held non-hazardous substances, and/or prohibiting sewer disposal of rinsate from drums that previously contained hazardous materials. The EPA may also consider requiring reconditioners to develop and follow waste analysis plans so that the drum reconditioner makes an informed decision in determining the compliant management method for the wastewater, prior to discharge.

The EPA also requests comment on the issue of mismanagement of contaminated wastewaters from empty drums, including any information on the prevalence of this problem, the extent current operations rely on surface impoundments for wastewater management, and any practical difficulties or unintended consequences that may arise from the possible regulatory solutions to this problem.

In addition, the EPA notes that there may be other waste streams generated as a result of drum reconditioning, including ash from drum furnaces and steel shot from drum cleaning operations, which are subject to the hazardous waste determination requirements of 40 CFR 262.11 and, if hazardous, must be managed according to applicable hazardous waste requirements. EPA requests comment on the waste characteristics of non-wastewaters generated from reconditioning processes and any environmental or public health issues identified from their management.

D. Emergency Response

Another issue the EPA would like to hear from the public about is whether there is a need for more information to be made available to the public or to emergency responders related to the activities and chemicals that may be on site at a drum reconditioner. As evidenced by the EPA’s Drum Reconditioner Damage Case Report, there have been a number of fires and other incidents that require emergency response at these industrial facilities. At one facility, a drum exploded in March 2017, resulting in a multi-alarm fire.²⁸ Other drum reconditioners have had fires, including one facility that had at least one large fire in 2014, heavily damaging the facility and endangering workers, firefighters, and nearby residents.²⁹ Another facility had a fire that occurred after an employee

¹⁸ EPA 2006. *Memorandum to Public Record for the 2006 Effluent Guidelines Program Plan: Industrial Container and Drum Cleaning Industry, loadings estimates and pass through analysis* [DCN 03415], September 11, 2006 (updated). <https://www.regulations.gov/document?D=EPA-HQ-OW-2004-0032-2392>.

¹⁹ EPA 2004. *Policy On the Management of Rinsate from Empty Containers*. Letter from Robert Springer, Director Office of Solid Waste, to Casey Coles, Hogan and Hartson, L.L.P., April 12, 2004 (RO #14708) <https://rcrapublic.epa.gov/rcraonline/details.xhtml?rcra=14708>; See also 70 FR 57779, October 4, 2005.

²⁰ EPA, *Damage Case Report, Bay Area Drum Co.*, [p. 45]; *Bayonne Barrel & Drum Co.*, [p. 47]; *Callaway & Son Drum Service*, [p. 54]; *David John Property*, [p. 81]; *Des Moines Barrel & Drum Co.*, [p. 81]; *Hassan Barrel Company Inc.*, [p. 109]; *Helms Drum Service*, [p. 111]; *Metro Container Corporation*, [p. 133]; *Miami Drum Service*, [p. 140]; *New England Container Co.*, [p. 155], and, *Northwestern Barrel Co.*, [p. 157].

²¹ EPA, *Damage Case Report, Cooper Drum Co.*, [p. 172].

²² EPA, *Damage Case Report, Barrel & Drum Service, Inc.*, [p. 42]; *Container Recyclers of South Jersey*, [p. 66]; *Environmental Waste Resources, Inc.*, [p. 99], and *Patrick J. Kelly Drums, Inc.*, [p. 160].

²³ EPA, *Damage Case Report, Mid-America Steel Drum Co., Inc.*, [p. 142].

²⁴ EPA, *Damage Case Report, Seattle Barrel Company*, [p. 175].

²⁵ Based on data from U.S. Packaging Reconditioning Industry 2021 Survey and Statistics, Reusable Industrial Packaging Association, December 20, 2022. Estimate includes 17 million steel drums, 61% used for hazmat, and 2.6 million plastic drums, 68% used for hazmat. Assumes 1.7 gallons per drum, based on 11.25-inch radius for a conventional drum, $V = \pi r^2 h$.

²⁶ Under CWAsec. 301, it is unlawful for any person to discharge any pollutant into waters of the United States without authorization under specific provisions of the CWA, including sec. 402 (NPDES).

²⁷ Section 307 Requires new and existing industrial users to pre-treat wastewater discharged to Publicly-Owned Treatment Works (POTWs) to prevent pollutants in excess of certain limits from passing through POTWs.

²⁸ EPA, *Damage Case Report, Dewitt Barrels*, [p. 85].

²⁹ EPA, *Damage Case Report, Indianapolis Drum Services*, [p.113].

punctured a steel drum with a forklift. It required 200 emergency workers from 38 different emergency companies to contain the fire. As a result of the fire, black smoke was released into the air, water runoff was stained a vibrant purple, and a nearby housing development was evacuated.³⁰ The EPA is interested in hearing from the emergency response community and other interested parties on whether a lack of information hampered any of these or any other emergency responses, and if so, any specifics on what information would be especially critical to have (e.g., information on the hazards and/or chemical composition of the residues).

If there is a need for more information, then the EPA could require drum reconditioners to have a contingency plan, similar to the requirement for hazardous waste large quantity generators (LQGs). The purpose of the plan would be to have all the information in one place for the facility and emergency responders to appropriately respond to a fire, explosion, or other type of release of materials containing hazardous constituents. If the drum reconditioner already has some type of emergency plan, such as a Spill Prevention, Control, and Countermeasures (SPCC) plan or the "One Plan,"³¹ then those plans could be deemed sufficient to fulfill the new requirement. The EPA is interested in whether drum reconditioners already have emergency plans and whether they sufficiently include the hazardous nature of residues from RCRA empty or non-RCRA empty containers.

Other LQG and or permitting preparedness, prevention, and emergency procedures may also be appropriate for drum reconditioners. These include proper maintenance and operation of the facility; emergency communication equipment; adequate fire suppression systems and water; spill control and decontamination equipment; employee access to emergency communication devices; adequate aisle space for emergency responders; and/or proper arrangements with local emergency responders. More details on the LQG and or permitting requirements that could be applied to drum reconditioners can be found in 40 CFR part 262, subpart M and 40 CFR part 264. The EPA is interested in

whether some or all of these emergency preparedness procedures are appropriate for drum reconditioning facilities.

E. Training

An issue related to emergency response is whether employees at drum reconditioners are properly trained. The EPA is interested in whether emergency responders have found lack of employee training to be part of the cause of any of the documented damage cases. The EPA is also interested in what training drum reconditioners currently provide to their employees with respect to hazards that employees may encounter as part of their daily operations and in responding to emergencies that may occur.

Similar to the options for used drum generators, the EPA could require employee training at drum reconditioners as a stand-alone requirement or as a component of a required SOP (as described in Section V.C). The EPA is interested in what the components of training at drum reconditioners should include, the frequency that employees should be trained, and any other relevant considerations that would go into a well-designed training program.

F. Permitting

Many of the drum reconditioning issues discussed in the previous sections could be linked to incomplete regulatory oversight of these facilities. Because residues remaining in containers that meet the empty container provision in 40 CFR 261.7 are not subject to hazardous waste regulations, drum reconditioners who receive containers that meet this provision are not subject to RCRA permitting (40 CFR part 270), which requires the EPA or authorized state review and approval of their operations. Lack of a permit requirement for these facilities also means that reconditioners processing RCRA empty drums are not required to submit a notification under RCRA, which makes it harder to identify these facilities, and poses an additional barrier to regulatory oversight. To address these concerns, the EPA could require all drum reconditioners to obtain a full RCRA Subtitle C TSDF permit and an EPA Identification Number or complete a variance process. The EPA is interested in receiving further input on the potential mechanisms, anticipated success, and associated burdens of such a requirement.

Requiring all drum reconditioners to obtain a RCRA permit would enable the EPA and its implementation partners to

ensure facilities have proper controls in place to reduce the likelihood of releases, explosions, and other such emergencies. Requiring a RCRA TSDF permit would also ensure financial assurance is established, which would help provide funding for site remediation if a facility contaminates its site, thus reducing the likelihood that already disadvantaged communities are further burdened with contaminated properties (e.g., brownfields). The RCRA permitting process also provides a mechanism for public participation, with notice and comment required before a permit is issued.

The EPA could also consider allowing drum reconditioning facilities to apply for a variance from a RCRA hazardous waste permit if certain conditions outlined in a variance are met. The RCRA variance procedures also provide a mechanism for public notice and comment. The EPA is interested in hearing from the public on the potential implementation of both a permitting requirement/process and variance procedures. The EPA recognizes that these actions could create a significant burden on drum reconditioners and could result in unintended consequences of discouraging reconditioning and increasing the potential for mismanagement and abandonment of emptied drums. The EPA is interested in exploring all options to help better protect human health and the environment, while maintaining the environmental advantages of reconditioning and recycling.

VII. End-of-Life-Management

Eventually, used drums can no longer function as packaging and must be either recycled as scrap or disposed of. At the end of life, the used metal drums typically would go to scrapyard that does metal recycling or a landfill for disposal. Reconditioning extends the life of a drum resulting in both economic and environmental benefits. One lifecycle analysis comparing the carbon footprint of a reconditioned open head steel drum to a new open head drum shows that the greenhouse gas emissions of the lifecycle of a reconditioned drum are less than half the greenhouse gas emissions of a newly manufactured drum. For tight head steel drums, the greenhouse gas emissions of the reconditioned drum are about 65% of those of a newly manufactured drum. The advantage of reconditioning a tight head drum is smaller than reconditioning an open head drum due to the higher energy use of reconditioning a tight head drum, but it still represents a significantly lower

³⁰ EPA, *Damage Case Report*, Scranton Cooperage (now known as American Container Processors, Inc.), [p. 173].

³¹ The National Response Team's Integrated Contingency Plan Guidance, 61 FR 28642, June 5, 1996, <https://www.govinfo.gov/content/pkg/FR-1996-06-05/pdf/96-13712.pdf>.

carbon footprint when compared to a newly manufactured drum.³²

However, if the EPA in the future revises the regulations affecting drum reconditioners, then one possible unintended consequence could be to steer used drums away from reconditioners and instead divert them straight to scrap recycling or disposal. The RIPA has raised concerns about direct-to-scrap management of used industrial containers, including the potential for contamination of the scrap metal and plastics from the container residues, and the lost environmental benefits from container reconditioning.³³

Possible solutions to this potential unintended consequence could be to limit the empty container provision found at 40 CFR 261.7 to containers sent to reconditioners, and/or require containers to be clean of all hazardous residues (and not just be “RCRA empty”) prior to going to scrap recycling or to disposal. In addition, the EPA could consider requiring containers with any amount of hazardous residues (including crushed or shredded containers) to meet the hazardous debris alternative treatment standard in 40 CFR 268.45 prior to being land disposed.

The EPA requests comment on end-of-life management of containers with hazardous residues remaining in the containers, including information on the extent that residues in scrapped containers pose an issue for scrap recycling or disposal, existing industry standards that may help prevent contamination from end-of-life containers from posing an environmental or public health risk, how end-of-life issues differ for different types of containers, and any practical difficulties or unintended consequences that may arise from the possible regulatory solutions to the problem of contaminated scrapped containers.

VIII. Transportation Equipment Cleaning Facilities

As with drum reconditioners, transportation equipment (e.g., tanker car/rail car) cleaning facilities, which clean out equipment that once held RCRA hazardous waste and other hazardous materials, can also be the source of contamination and releases. Similar to drum reconditioners, these

facilities can also potentially manage large amounts of hazardous waste residues that remain in the transportation equipment each year. Lack of oversight of these facilities, coupled with systematic non-compliance stemming from gaps in the regulations, may have resulted in environmental and public health impacts to communities where these facilities are located. While each individual transportation equipment tanker or rail car may pose little risk, the EPA estimates that approximately 500 clean out facilities exist, each processing thousands of pieces of transportation equipment per year, resulting in potentially millions of gallons of unmanaged hazardous waste.

While not specifically included in the scope of this ANPRM, the EPA recognizes these facilities have similar issues to drum reconditioners, and potential actions stemming from this ANPRM could be applied to these transportation equipment cleaning facilities. To further investigate, the EPA has started assessing publicly available information on these facilities and the Agency aims to gain an understanding of the total universe, general practices and procedures, waste and tank car operations and management, and potential damage cases.

The Agency is interested in public comment on similar environmental problems with transportation equipment clean out facilities and whether some of the approaches discussed in this ANPRM for drum reconditioners could also be used to address environmental issues at the transportation equipment cleaning facilities.

IX. Statutory and Executive Order Reviews

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for Executive Order 12866 review. Because this action does not propose or impose any requirements, other statutory and executive order reviews that apply to rulemaking do not apply. Should the EPA subsequently determine the Agency will pursue a rulemaking, the EPA will address all the statutes and executive orders as applicable to that rulemaking.

Nevertheless, the Agency welcomes comments and/or information that would help the Agency to assess particularly the following: the potential impact of a rule on small entities pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) and human health or environmental effects

on minority or low-income populations pursuant to Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994). The Agency will consider such comments during the development of any subsequent rulemaking.

Additional information about statutes and executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

Michael S. Regan,
Administrator.

[FR Doc. 2023–16752 Filed 8–10–23; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2022–0115;
FF09E22000 FXES1113090FEDR 234]

RIN 1018–BG94

Endangered and Threatened Wildlife and Plants; Removing the Apache Trout From the List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or USFWS), propose to remove the Apache trout (*Oncorhynchus apache*), a fish native to Arizona, from the Federal List of Endangered and Threatened Wildlife due to recovery. Our review of the best available scientific and commercial data indicates that the threats to the species have been eliminated or reduced to the point that the species no longer meets the definition of a threatened species or an endangered species under the Endangered Species Act of 1973, as amended (Act). If we finalize this rule as proposed, the prohibitions and conservation measures provided by the Act, particularly through section 7 and our regulations would no longer apply to the Apache trout. We request information and comments from the public regarding this proposed rule for the Apache trout.

DATES: We will accept comments received or postmarked on or before October 10, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below), must be received by 11:59 p.m. eastern time on the closing date. We

³² Life Cycle Assessment of Newly Manufactured and Reconditioned Industrial Packaging, Ernst & Young, EY, January 2014. <http://resch-packaging.com/files/Life-Cycle-Analysis-Report-2014.pdf>.

³³ “No More Direct To Scrap”; Reusable Industrial Packaging Association <https://www.reusable-packaging.org/direct-to-scrap/>; retrieved December 21, 2022.

must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by September 25, 2023.

ADDRESSES: You may submit comments on this proposed rule by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <https://www.regulations.gov>. In the Search box, enter FWS-R2-ES-2022-0115, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R2-ES-2022-0115, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: This proposed rule and supporting documents (including the species status assessment (SSA) report, references cited, and 5-year review) are available at <https://www.regulations.gov> under Docket No. FWS-R2-ES-2022-0115.

FOR FURTHER INFORMATION CONTACT: For questions related to the SSA report and associated literature cited: Jess Newton, Project Leader, Arizona Fish and Wildlife Conservation Office, U.S. Fish and Wildlife Service, 2500 S Pine Knoll Drive, Flagstaff, AZ 86001; telephone 928-556-2140.

For questions related to this proposed rule and other supporting documents: Heather Whitlaw, Field Supervisor, Arizona Ecological Services Office, U.S. Fish and Wildlife Service, 9828 North 31st Ave. #C3, Phoenix, AZ 85051-2517; telephone 602-242-0210.

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants delisting if it no longer meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered in the foreseeable future throughout all or a significant portion of its range). The Apache trout is listed as threatened, and we are proposing to delist it. We have determined the Apache trout does not meet the Act's definition of an endangered or threatened species. Delisting a species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. This action proposes to remove the Apache trout from the List of Endangered and Threatened Wildlife due to the species' recovery.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. The determination to delist a species must be based on an analysis of the same factors.

Under the Act, we must review the status of all listed species at least once every five years. We must delist a species if we determine, on the basis of the best available scientific and commercial data, that the species is neither a threatened species nor an endangered species. Our regulations at 50 CFR 424.11 identify three reasons why we might determine a species shall be delisted: (1) The species is extinct; (2) the species does not meet the definition of an endangered species or a threatened species; or (3) the listed entity does not meet the definition of a species. Here, we have determined that the Apache trout does not meet the definition of an endangered species or a threatened species and, therefore, we are proposing to delist it.

Information Requested

We intend that any final action resulting from this proposal will be based on the best scientific and commercial data available and be as accurate and as effective as possible.

Therefore, we request comments or information from other governmental or State agencies, Native American Tribes, the scientific community, industry, or other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) Reasons why we should or should not remove the Apache trout from the List of Endangered and Threatened Wildlife (*i.e.*, "delist" the species);

(2) New biological or other relevant data concerning any threat (or lack thereof) to this fish (*e.g.*, those associated with climate change or nonnative trout);

(3) New information on any efforts by the State or other entities to protect or otherwise conserve the Apache trout or its habitat;

(4) New information concerning the range, distribution, and population size or trends of this fish; and

(5) New information on the current or planned activities in the habitat or range of the Apache trout that may adversely affect or benefit the fish.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <https://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <https://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule,

will be available for public inspection on <https://www.regulations.gov>.

Because we will consider all comments and information we receive during the comment period, our final determination may differ from this proposal. For example, based on the new information we receive (and any comments on that new information), we may conclude that the species should remain listed as threatened, or we may conclude that the species should be reclassified from threatened to endangered.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and location of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Peer Review

A species status assessment (SSA) team prepared an SSA report for the Apache trout. The SSA team was composed of Service biologists, in consultation with other species experts from White Mountain Apache Tribe (WMAT), Arizona Game and Fish Department (AZGFD), U.S. Forest Service (USFS), and Trout Unlimited. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the SSA report. We sent the SSA report to three independent peer reviewers and received responses from all three peer reviewers. Results of this structured peer review process can be found at <https://regulations.gov>. In preparing this proposed rule, we incorporated the

results of the peer reviews, as appropriate, into the final SSA report, which is the foundation for this proposed rule.

Summary of Peer Reviewer Comments

As discussed in Peer Review above, we received comments from three peer reviewers on the draft SSA report. We reviewed all comments received from three peer reviewers for substantive issues and new information regarding the information contained in the SSA report. The peer reviewers generally concurred with our methods and conclusions and did not provide additional information for inclusion in the report. We considered one of these comments to be substantive, which we summarize below.

Comment: A reviewer commented that: (1) only future scenario 3 (the status quo scenario) is likely to occur; and (2) further consideration should be given to Apache trout resiliency within future scenarios given the impacts of climate change.

Our Response: We retained all five future conditions scenarios in the SSA report because we concluded that they cover the entire range of plausible outcomes for the Apache trout given the possible levels of conservation management. For our status determination in this proposed rule we evaluated the two scenarios that we consider to be plausible given the completion of the cooperative management plan (CMP) and current commitments to ongoing species management. We recognize the seriousness of impacts to Apache trout related to climate change and conducted thorough analyses on the possible effects on Apache trout resiliency from warmer stream temperatures, more frequent and severe droughts, increased risk of wildfire and post-fire debris flow, decrease in snowpack but increased rain on snow events, and more intense summer monsoon rains. These analyses are presented in the SSA report and we incorporated them into our future scenarios. Therefore, we conclude that the SSA report adequately addresses consideration of the potential effects of climate change in our analysis of resiliency within the future scenarios.

Previous Federal Actions

The Apache trout was listed as endangered under the Endangered Species Preservation Act in 1967 (32 FR 4001; March 11, 1967) due to threats from overexploitation, habitat degradation (e.g., mining and agricultural development), hybridization with nonnative salmonids, and predation by species

such as the brown trout (*Salmo trutta*). The species was subsequently downlisted to threatened under the Act in 1975 (40 FR 29863; July 16, 1975) after successful culturing in captivity and discovery of additional populations. The 1975 downlisting rule included a 4(d) rule that allows AZGFD to establish and regulate sport fishing opportunities on non-Tribal lands. The WMAT regulates take and sport fishing for Apache trout on the Fort Apache Indian Reservation. There is no critical habitat designation for the Apache trout because listing and reclassification occurred before the 1978 and 1982 amendments to the Act that provide for critical habitat designation. The first recovery plan for the Apache trout was finalized in 1979 (USFWS 1979, entire), and a revised plan was finalized in 1983 (USFWS 1983, entire). A second revision was completed in 2009 (USFWS 2009, entire).

A 5-year review for Apache trout was completed in 2010 (USFWS 2010, entire). While recognizing that many of the threats identified in the recovery plan had been addressed, the persistence of certain threats (such as the invasion by nonnative trout into Apache trout habitat) resulted in a recommendation of “No change” in the species’ status (USFWS 2010, p. 4). On May 5, 2021, we published a notice in the **Federal Register** (86 FR 23976) announcing the initiation of 5-year status reviews and information requests for 23 species, including the Apache trout. On August 29, 2022 (USFWS 2022a, entire), a 5-year review of the Apache trout status was completed. This latest 5-year review concludes that the status of the Apache trout has substantially improved since the time of the species’ listing and recommends that the Apache trout be considered for delisting due to recovery.

Background

A thorough review of the biological information on the Apache trout including taxonomy, life history, ecology, and conservation activities, as well as threats facing the species or its habitat is presented in our SSA report (USFWS 2022b, entire) and the revised Recovery Plan for Apache trout (USFWS 2009, entire), which are available at <https://www.regulations.gov> under Docket No. FWS-R2-ES-2022-0115. The following is a summary of the best available information on Apache trout.

The Apache trout is a salmonid species endemic to the White Mountains region of east-central Arizona. The species is currently found in the White River, Black River, and the Little Colorado River drainages in the

White Mountains of east-central Arizona, although the historical distribution is not known with certainty. Apache trout occupies headwater streams upstream of natural and conservation barriers, which likely reflects a truncated distribution from historical distributions due to nonnative trout, habitat alterations, and other factors (USFWS 2009, pp. 1, 6–16). Distinguishing characteristics of Apache trout include a fusiform (spindle-shaped) body and large dorsal fin, with spots on the body pronounced and often uniformly spaced both above and below the lateral line. Spots are circular in outline, are medium-sized, and appear slightly smaller than most interior subspecies of cutthroat trout (*Oncorhynchus clarkii*) but more like typical cutthroat trout than Gila trout (*O. gilae*) (Miller 1972, pp. 410–411). Yellow or yellow-olive colors predominate, with tints of purple and pink observable on live specimens. Two black spots are located horizontally on the eye before and aft of the pupil, creating the image of a black band through the eye. A red or pink lateral band is usually absent (Miller 1972, p. 414). Dorsal, pelvic, and anal fins have conspicuous cream or yellowish tips. Like most trout occupying small headwater streams, the Apache trout has been described as an opportunistic feeder, primarily feeding on various species of insects such as caddisflies (Trichoptera), mayflies (Ephemeroptera), stoneflies (Plecoptera), and beetles (Coleoptera) (Harper 1978, p. 108).

Recovery Planning and Recovery Criteria

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Under section 4(f)(1)(B)(ii), recovery plans must, to the maximum extent practicable, include objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the List.

Recovery plans provide a roadmap for us and our partners on methods of enhancing conservation and minimizing threats to listed species, as well as measurable criteria against which to evaluate progress towards recovery and assess the species' likely future condition. However, they are not regulatory documents and do not substitute for the determinations and promulgation of regulations required

under section 4(a)(1) of the Act. A decision to revise the status of a species, or to delist a species is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that information differs from the recovery plan.

There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be met. In that instance, we may determine that the threats are minimized sufficiently, and that the species is robust enough that it no longer meets the definition of an endangered species or a threatened species. In other cases, we may discover new recovery opportunities after having finalized the recovery plan. Parties seeking to conserve the species may use these opportunities instead of methods identified in the recovery plan. Likewise, we may learn new information about the species after we finalize the recovery plan. The new information may change the extent to which existing criteria are appropriate for identifying recovery of the species. The recovery of a species is a dynamic process requiring adaptive management that may, or may not, follow all the guidance provided in a recovery plan.

The Apache trout recovery plan identified two major areas of focus to achieve the long-term survival and viability of the species: protection of Apache trout habitat from various watershed alteration activities (e.g., forestry, livestock grazing, reservoir construction, agriculture, road construction, and mining) and protection from introduction of nonnative trout species that have resulted in hybridization, competition, and predation (USFWS 2009, p. v). In order to achieve recovery, the recovery plan identified criteria that will assist in determining whether the Apache trout has recovered to the point that the protections afforded by the Act are no longer needed. These criteria are:

(1) Habitat sufficient to provide for all life functions at all life stages of 30 self-sustaining, discrete populations of pure Apache trout has been established and protected through plans and agreements with responsible land and resource management entities. These plans will address and serve to remedy current and future threats to Apache trout habitat.

(2) Thirty discrete populations of genetically pure Apache trout have been established and determined to be self-sustaining. A population will be

considered self-sustaining by the presence of multiple age classes and evidence of periodic natural reproduction. A population will be considered established when it is capable of persisting under the range of variation in habitat conditions that occur in the restoration stream.

(3) Appropriate angling regulations are in place to protect Apache trout populations while complying with Federal, State, and Tribal regulatory processes.

(4) Agreements are in place between the Service, AZGFD, and WMAT to monitor, prevent, and control disease and/or causative agents, parasites, and pathogens that may threaten Apache trout.

Recovery Plan Implementation

The following discussion summarizes the recovery criteria and information on recovery actions that have been implemented under each delisting criterion.

Delisting Criterion 1: Habitat sufficient to provide for all life functions at all life stages of 30 self-sustaining, discrete populations of pure Apache trout has been established and protected through plans and agreements with responsible land and resource management entities. This criterion has been met. Since the time of listing, the Service, in collaboration with WMAT, AZGFD, USFS, and Trout Unlimited, have worked to maintain and restore riparian habitats where the Apache trout occurs. Multiple age classes are represented across the populations, which are indicative of healthy recruitment and stable populations from year to year. Although the average abundance of adults is fewer than 500 within most populations, the diversity of age classes suggests healthy survival and recruitment rates. Furthermore, adult individuals make up a significant share of the overall population, which is indicative that many fry and juveniles are able to survive to adulthood without the need of restocking from adjacent populations or hatcheries.

The habitat of Apache trout is managed, and land-use impacts on the species are reduced through environmental review of proposed projects. For example, the Apache-Sitgreaves National Forests (ASNF) Land Management Plan incorporates desired conditions for aquatic habitats to contribute to the recovery of federally listed species and to provide self-sustaining populations of native species (ASNF 2015, pp. 16–26). WMAT also has land management plans that help protect Apache trout populations. Alteration of logging practices, road

closure and removal, and ungulate exclusion through fencing or retiring allotments have all been used to manage Apache trout habitat on the ANSFs and Fort Apache Indian Reservation (Robinson et al. 2004, p. 1; USFWS 2009, pp. 23–29).

Delisting Criterion 2: Thirty discrete populations of genetically pure Apache trout have been established and determined to be self-sustaining. This criterion has almost been met. Compared to the time of listing when we identified 14 genetically pure populations, currently, the Apache trout consists of 29 genetically pure populations and one population that is suspected to be genetically pure. These populations are comprised of both relict and replicate populations. A relict population of Apache trout is one that was originally discovered in a stream within the historical range of the species and is the species' original genetic stock. A replicate population of Apache trout is one that was established using individuals from a relict population or another replicate population that represents a relict genetic lineage. Replicate populations are usually established within the historical range of the species, including streams that were originally unoccupied by Apache trout and streams where Apache trout have been extirpated. The relict populations have remained pure and are self-sustaining without the need for restocking since their discovery (Leon 2022, pers. comm.).

Following the initial introduction of 100–200 individuals, most of the replicate populations did not require additional introduction of individuals (USFWS 2022b, p. 58). However, periodic introductions of additional individuals from the same donor streams have been made in subsequent years in several populations to improve genetic diversity within replicated populations and to reduce impacts to donor streams from large, one-time transfers. Replicate populations were established as early as 1967 and as late as 2008.

In order to ensure that genetically pure populations of Apache trout are protected, conservation barriers that prohibit nonnative trout species from accessing upstream portions of occupied Apache trout habitat have been and will continue to be constructed and maintained per the CMP. The prevents nonnative trout from hybridizing with, competing with, and preying on Apache trout.

Delisting Criterion 3: Appropriate angling regulations are in place to protect Apache trout populations while complying with Federal, State, and

Tribal regulatory processes. This criterion has been met. Apache trout streams are protected with fishing closures when populations are small and vulnerable, and with catch-and-release regulations in larger populations where harvest could negatively impact the population. AZGFD does provide put-and-take opportunities for Apache trout in Silver Creek, East Fork Black River, and West Fork Little Colorado River to generate public support for recovery of the species, as does WMAT in the North Fork White River, lower East Fork White River, Cibique Creek, lower Paradise Creek, and lower Diamond Creek. Apache trout fisheries are also established in some lakes (e.g., Big Bear, Hurricane, Christmas Tree, Earl Park) to afford the public opportunities to harvest Apache trout, which also has the benefit of raising public awareness for the species.

Delisting Criterion 4: Agreements are in place between the Service, AZGFD, and WMAT to monitor, prevent, and control disease and/or causative agents, parasites, and pathogens that may affect Apache trout. This criterion has been met. By December 2021, the Service, AZGFD, USFS, WMAT, and Trout Unlimited had all signed the cooperative management plan (CMP) for Apache trout. The goal of the CMP is to ensure the long-term persistence of the Apache trout by monitoring and maintaining existing populations, establishing new populations, restoring and maintaining existing habitats, and conducting disease, parasite, and pathogen prevention and monitoring activities. Although the CMP is a voluntary agreement among the cooperating agencies, it is reasonable to conclude the plan will be implemented into the future for multiple reasons. First, each of the cooperating agencies have established a long record of engagement in conservation actions for the Apache trout. Many of the management activities, such as the construction of conservation barriers, have been ongoing since at least the 1990s (USFWS 2022b, pp. 70–73). Second, implementation of the CMP is already underway. Conservation barriers are being constructed and maintained, invasive species are being removed, planning is underway for restocking Apache trout as needed, and habitats are being repaired and restored. Third, the conservation mission and authorities of these agencies authorize this work even if the species is delisted. Fourth, there is a practical reason to anticipate implementation of the CMP into the future: the plan's actions are technically not complicated to implement, and

costs are relatively low. We also have confidence that the actions called for in the CMP will be effective in the future because they have already proven to be effective as evidenced by the information collected from recent habitat actions and associated monitoring (USFWS 2022b, entire). Lastly, if the CMP is not adhered to by the cooperating agencies or an evaluation by the Service suggests the habitat and population numbers are declining, the Service would evaluate the need to again add the species to the List (i.e., “relist” the species) under the Act. Taken together, it is therefore reasonable to conclude that the CMP will be implemented as anticipated, and that the long-term recovery of Apache trout will be maintained and monitored adequately thus meeting the conditions of this criterion.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019). The Act defines an “endangered species” as a species that is in danger of extinction throughout all or a significant portion of its range, and a “threatened species” as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects. The determination to delist a species must be based on an analysis of the same five factors.

We use the term "threat" to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term "threat" includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term "threat" may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an "endangered species" or a "threatened species." In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an "endangered species" or a "threatened species" only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term "foreseeable future," which appears in the statutory definition of "threatened species." Our implementing regulations

at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term "foreseeable future" extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. "Reliable" does not mean "certain"; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for delisting. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess the viability of the Apache trout, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p.

306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R2–ES–2022–0115 on <https://www.regulations.gov> and at <https://ecos.fws.gov/ecp/species/3532>.

Summary of Biological Status and Threats

We reviewed the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

The primary threats affecting the Apache trout are the invasion of Apache trout habitat by nonnative trout species and the effects of climate change, which are projected to result in more wildfire and debris runoff in streams. Introgression of nonnative trout species into Apache trout habitat has resulted in hybridization of certain populations. Additionally, nonnative trout species also compete with the Apache trout and certain species have been known to prey on the Apache trout. In addition to invasion by nonnative trout, wildfires in the region can result in ash and debris flow, creating unsuitable conditions for the Apache trout and possibly resulting in fatalities and extirpation of populations. To address these major threats, management actions, including construction of conservation barriers, as well as restocking and restoring habitats, have been implemented.

Nonnative Species

Nonnative species, especially nonnative salmonids, remain one of the

largest threats to the Apache trout (Rinne 1996, p. 152). Over 61 million nonnative sport fishes have been stocked into lakes in the Little Colorado and Black River drainages since the 1930s (Rinne and Janisch 1995, p. 398). Over 8 million nonnative sport fishes were introduced directly into the Little Colorado and Black rivers and their tributaries since the 1930s, and many of these were nonnative salmonids (Rinne and Janisch 1995, p. 398). Recent stocking practices have been altered to reduce interactions with, and risks to, native species, such as using triploid (sterile) rainbow trout for stocking into open water systems (EcoPlan Associates 2011, p. 21). However, threats remain due to acclimated nonnative populations from historical stockings.

As discussed below, hybridization with rainbow trout and cutthroat trout can lead to functional extirpation of populations. Competition with and predation by brown trout and brook trout are also of high concern. While no published studies have documented competition and predation impacts on Apache trout by nonnative salmonids such as brown trout and brook trout, it is generally accepted that the negative interaction has led to reduction or extirpation of some populations (Rinne 1996, p. 152). Appendix C of the SSA report analyzes the negative effect of nonnative trout presence on occupancy of juvenile (less than 125 mm total length (TL)) Apache trout at the site scale (approximately 100 m) in fish surveys (USFWS 2022b, p. 134–137).

Genetic Factors (Population)

Discussed below are the three genetic factors that pose a risk to the viability of Apache trout populations: hybridization, inbreeding, and low genetic variability.

Hybridization

Hybridization can introduce traits that are maladaptive, disrupt adaptive gene complexes, or result in outbreeding depression (Hedrick 2000, entire). Hybridization can also lead to the loss of species-specific alleles, and hybridization with Pacific trout species has long been recognized as a threat to the viability of native trout species (or subspecies) (Behnke 1992, p. 54). This has resulted in arguments that only genetically pure populations should be considered a part of the species or subspecies (Allendorf et al. 2004, p. 1212).

A long history of nonnative trout stocking in Arizona has led to hybridization between Apache trout and rainbow trout, even to the extent of genetic extirpation, and it is one of the

main reasons for the historical decline of Apache trout (Rinne and Minckley 1985, pp. 285, 288–291; Carmichael et al. 1993, pp. 122, 128; Rinne 1996, pp. 150–152). The major threat of hybridization is why the 2009 revised recovery plan lists as an objective the establishment and/or maintenance of 30 self-sustaining, discrete populations of genetically pure Apache trout within its historical range (USFWS 2009, pp. vi, vii, 5, 22). That same objective has largely been in place since the first recovery plan was developed for the species in 1979 (USFWS 1979, p. 15). A comprehensive assessment of the genetic purity of naturally reproducing Apache trout populations showed only 11 of 31 streams are deemed to be generically pure (Carmichael et al. 1993, p. 128). At the time the 2009 revised recovery plan was completed, 28 populations of genetically pure Apache trout were extant (USFWS 2009, p. 2). Currently, the Apache trout consists of 29 genetically pure populations and one population suspected to be genetically pure.

Inbreeding and Low Genetic Diversity

As discussed earlier, small populations are more likely to exhibit inbreeding and low genetic diversity. Inbreeding often results in inbreeding depression and expression of recessive and deleterious alleles (Wang et al. 2002, p. 308). Cutthroat trout are an example of inland trout in North America where inbreeding has been documented for some small, isolated populations (Metcalf et al. 2008, p. 152; Carim et al. 2016, pp. 1368–1372). Low genetic diversity limits the ability of populations to adapt to changing and novel environments (Allendorf and Ryman 2002, pp. 62–63).

The only study of genetic diversity in Apache trout showed strong distinction among three genetic lineages (Soldier, Ord, and East Fork White River lineages) represented by the nine populations studied, but genetic diversity was low within populations (Wares et al. 2004, pp. 1896–1897). Low genetic diversity within populations suggests that they were founded with a small number of individuals. Replicate populations of Apache trout have often been established with only a few hundred individuals, with an unknown subset successfully reproducing. Although no studies have evaluated inbreeding in Apache trout populations, or how genetic management (e.g., genetic rescue) may benefit Apache trout populations, these topics remain of management interest given the relatively small size of many extant populations (Wang et al. 2002, pp. 308, 313–315;

Whiteley et al. 2015, pp. 42–48; Robinson et al. 2017, pp. 4418–4419, 4430).

Climate Change, Wildfire, Stream Conditions

The climate has changed when compared to historical records, and it is projected to continue to change due to increases in atmospheric carbon dioxide and other greenhouse gasses (USGCRP 2017, pp. 10–11). The American Southwest has the hottest and driest climate in the United States. The U.S. Fourth National Climate Assessment suggests that warming temperatures will lead to decreasing snowpack, increasing frequency and severity of droughts, and increasing frequency and severity of wildfires, and these in turn will result in warmer water temperatures, reduced streamflows (especially baseflows), and increased risk of fire-related impacts to aquatic ecosystems (Gonzales et al. 2018, pp. 1133–1136; Overpeck and Bonar 2021, p. 139). In fact, the current drought in the western United States is one of the worst in the last 1,200 years and is exacerbated by climate warming (Williams et al. 2020, p. 317). Climate warming will make droughts longer, more severe, and more widespread in the future.

An eight-fold increase in the amount of land burned at high severity during recent wildfires, including in the southwestern United States, has been observed and it is likely that warmer and drier fire seasons in the future will continue to contribute to high-severity wildfires where fuels remain abundant (Parks and Abatzoglou 2021, p. 6). Wildfires have increased in frequency and severity in Arizona and New Mexico primarily due to changes in climate but also because of increased fuel loads (Mueller et al. 2020, p. 1; Parks and Abatzoglou 2021, pp. 5–7), including within the historical range of the Apache trout (Dauwalter et al. 2017b, entire). Larger, more frequent, and more severe wildfires accompanying a changing climate together may drive conversions in vegetation type from forest to shrub or grassland because of higher tree mortality, limited seed dispersal in larger burn patches, soil damage that reduces seedling establishment, and a changing climate that reduces seedling survival—all of which combine to inhibit forest regeneration (Keeley et al. 2019, p. 775; Coop et al. 2020, p. 670). Wildfires can result in ash flows that create unsuitable water quality conditions for salmonids, and high-intensity fires in steep watersheds are likely to result in channel-reorganizing debris flows (Gresswell 1999, pp. 210–

211; Cannon et al. 2010, p. 128).

Approximately 30 percent of forests in the Southwest are projected to have an elevated risk of conversion to shrubland and grassland because of increased fire severity due to climate change (Parks et al. 2019, p. 9). Conifer reduction in the White Mountains could reduce stream shading important for maintaining suitable stream temperatures for Apache trout (Baker and Bonar 2019, pp. 862–864).

In the absence of existing peer-reviewed science on the effects of climate change on the Apache trout itself, we applied the vulnerability assessment approach that was used to evaluate wildfire and temperature warming vulnerability in Gila trout streams and applied it to Apache trout populations (USFWS 2022b, pp. 121–130). The analysis suggests that streams such as West Fork Little Colorado River have a high risk of crown fire (wildfire spreading at the canopy level) and subsequent debris flows. Other streams in the Wallow Fire perimeter have a lower risk of future wildfires due to reduced fuel loads. To evaluate stream temperature risk due to climate warming, we first evaluated Apache trout occupancy across all habitat patches and found that 95% of all occupied patches occurred in reaches at or below 16.5 °C (61.7 °F) mean July water temperatures. Then all streams were modeled to contain reaches where mean July water temperatures were less than or equal to 16.5 °C (61.7 °F), a conservative temperature threshold, based on temperature projections for the 2080s from an ensemble global climate model for the A1B emissions scenario (*i.e.*, middle-of-the-road scenario). Big Bonito Creek, Fish Creek, and Boggy/Lofer Creeks contained the largest amount of habitat with mean July temperatures less than 16.5 °C (61.7 °F) in the 2080s. The East Fork Little Colorado River, Snake Creek, Rock Creek, Rudd Creek, and South Fork Little Colorado River had the lowest percent of habitat with mean July temperatures less than or equal to 16.5 °C (61.7 °F) in the 2080s, highlighting their vulnerability to future climates.

Cumulative Impacts

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future conditions of the species. To assess the current and future

conditions of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Conservation Management and Actions

Several conservation actions are routinely undertaken to protect, restore, and re-establish Apache trout populations across the species' historical range and, in one case, outside of the historical range. Discussed below are the major efforts which include removal of nonnative trout species, reintroduction of Apache trout, habitat maintenance and restoration, hatchery propagation, and angling regulations. These activities are managed under the CMP. The CMP will remain in force until terminated by mutual agreement. Any involved party may withdraw from this plan on 30 days' written notice to the other signatories. Amendments to the CMP may be proposed by any involved party and will become effective upon written approval by all partners.

Nonnative Trout Removal

Removal of nonnative salmonids often occurs after conservation barriers are constructed and before Apache trout are reintroduced, or removals are done when nonnative salmonids have invaded an extant Apache trout population. As noted above, conservation barriers are artificial barriers built to separate upstream populations of Apache trout from downstream populations where other trout species and hybrids are found. These downstream populations are managed to provide sportfishing opportunities. Removal is commonly done using piscicides (chemicals that are poisonous to fish) or electrofishing. A few studies have documented the higher effectiveness of piscicides on removing nonnative salmonids from Apache trout streams, although more than one treatment may be required (Rinne et al. 1981, p. 78; Kitcheyan 1999, pp. 16–17).

Electrofishing (often referred to as mechanical removal) is also used to remove nonnative fishes where piscicides have not been approved for use, or where populations of Apache

trout are sympatric with nonnative trout, and it is not desirable to eliminate Apache trout simultaneously with nonnative trout. For example, electrofishing was used from 2018 to 2021, to remove over 14,670 brook trout and 3,932 brown trout from nine Apache trout streams, with successful eradication suspected in some streams that will be later confirmed with future electrofishing or environmental DNA (eDNA) surveys (Manuell and Graves 2022, p. 8). Piscicides are typically more effective at ensuring all fish are removed, which is important because nonnative populations can become reestablished if only a few individuals survive (Thompson and Rahel 1996, pp. 336–338; Finlayson et al. 2005, p. 13; Meyer et al. 2006, p. 858). Electrofishing removal is most effective in small stream systems with simple habitat (Meyer et al. 2006, p. 858). Environmental DNA surveys are conducted to confirm presence or absence of target organisms; this technique is often used in native trout conservation projects to help locate any remaining nonnative fish and target them for removal using either electrofishing or secondary applications of piscicides (Carim et al. 2020, pp. 488–490).

Reintroduction

Apache trout are typically reintroduced after the habitat is protected by a conservation barrier and nonnative salmonids have been removed. Apache trout populations are usually established using fish from another population, although hatchery stocks have been used to establish populations as well. The donor stream is selected, in part, based on the number of fish in that population so that removing some does not jeopardize donor population viability, but donor stream selection is also based on the need to replicate relict populations to enhance redundancy of those lineages. Planning efforts are underway to establish additional populations where feasible, for example in Fish Creek, Hayground Creek, Home Creek, and the lower West Fork-Black River. Historically, 100–200 fish have been used to establish populations, but there is evidence that this low number of founding individuals has resulted in the low genetic diversity observed in some populations (Wares et al. 2004, pp. 1896–1897). Future populations will be established using larger total numbers over several years to maximize genetic diversity while minimizing impacts to donor populations (USFWS et al. 2021, p. 13).

Habitat Management and Restoration

Past habitat surveys and anecdotal observations have identified stream segments in poor condition and in need of protection and restoration (Carmichael et al. 1995, p. 116; Robinson et al. 2004, pp. 1–3, 14–17). The subbasins where Apache trout are found are managed by multiple agencies at the Federal, State, and Tribal level. The management of the individual subbasins are as follows: Black River (WMAT, USFS/AZGFD), Bonito Creek (WMAT), East Fork White River (WMAT), North Fork White River (WMAT), Diamond Creek (WMAT), Little Colorado River (USFS/AZGFD), and Colorado River (AZGFD). Of the 29 known genetically pure populations and 1 suspected pure population, 16 relic and 6 replicated populations occur only on WMAT lands, 1 relic and 1 replicated population occur on both WMAT and USFS/AZGFD managed lands (Soldier Creek and upper West Fork Black River, respectively), 5 replicated populations occur only on USFS/AZGFD managed lands, and 1 replicated population occurs on both San Carlos Apache Tribe and USFS/AZGFD managed lands (Bear Wallow Creek).

The habitat of Apache trout is managed to ameliorate land-use impacts through environmental review of proposed projects. For example, WMAT has land management plans that help protect Apache trout populations and has implemented habitat restoration projects. Projects occurring on or adjacent to Apache trout habitat include alteration of logging practices, road closure and removal, and ungulate exclusion through fencing or retiring allotments, and all have been reviewed for potential impacts to Apache trout habitat on the ASNF and Fort Apache Indian Reservation (Robinson et al. 2004, entire 1; USFWS 2009, p. 23).

While these actions have reduced land-use impacts, further emphasis should be given to restoration of riparian and aquatic habitats (ASNF 2018, pp. 19–20). The Southwest Region of the U.S. Forest Service has the Riparian and Aquatic Ecosystem Strategy (Strategy; USFS 2019, entire), and restoration of aquatic habitat is identified through site-specific land management actions, such as the currently ongoing Black River Restoration Project (BRRP). Working with partners on such actions is outlined in the Strategy (USFS 2019, pp. 17–18).

Hatcheries

Hatcheries have been used for Apache trout conservation and to establish sportfishing opportunities in lakes and streams. Apache trout from Williams Creek National Fish Hatchery have been used to establish populations including those in the West Fork Little Colorado and West Fork Black rivers, but they have been most often used to provide sportfishing opportunities in lakes and streams on the Fort Apache Indian Reservation. Progeny from the Apache trout broodstock at Williams Creek National Fish Hatchery are also transferred annually, at the direction of WMAT, to be reared at Arizona's Silver Creek and Tonto Creek hatcheries and stocked to support sportfishing on State-managed lands. This broodstock is expected to be used to establish additional recovery populations in the future due to improvements in genetic fitness and representation following implementation of a genetics management plan.

Angling and Harvest Regulations

Apache trout streams are largely protected with fishing closures when populations are small and vulnerable, or by catch-and-release regulations in larger populations where harvest could negatively impact the population. WMAT does not allow any fishing to occur in areas occupied by Apache trout recovery populations. However, both WMAT and AZGFD provide put-and-take opportunities for Apache trout in multiple lakes and streams to afford the public opportunities to harvest Apache trout and generate public awareness and support for recovery of the species.

Emergency Contingency Plan

Wildfire, drought, nonnative trout invasions (e.g., barrier failure), and disease can threaten the viability and genetic integrity of Apache trout populations. We and our partners will track these threats during the monitoring described in the CMP or through other monitoring and reporting systems. If needed, we and our partners in the CMP will transport individuals to other streams or hatcheries with suitable isolation facilities until they can be repatriated into their original or an alternate site (USFWS et al. 2021, p. 13).

Current Condition

Resiliency—Demographic and Habitat Factors

Resiliency references the ability of a species or population to bounce back from disturbances or catastrophic events, and is often associated with population size, population growth rate,

and habitat quantity (patch size) and quality (USFWS 2016, p. 6).

Three demographic and six habitat factors were used to describe the current condition (status) and overall resiliency of Apache trout populations. These factors are commonly used to describe the health and integrity of native trout populations in the western United States (Williams et al. 2007, pp. 478–481; USFWS 2009, pp. 17–22; Dauwalter et al. 2017a, pp. 1–2). The three demographic factors are genetic purity, adult population size, and recruitment variability. The six habitat factors are stream length occupied, July temperature, percent of intermittency, habitat quality, nonnative trout presence, and barrier effectiveness.

Hybridization can introduce traits that are maladaptive or result in outbreeding depression. Thus, often only genetically pure populations are considered to be part of a species for conservation purposes. Apache trout populations were classified using the results of the most recent genetic testing for the presence of nonnative trout alleles (rainbow trout and cutthroat trout) when available (Carmichael et al. 1993, p. 127; Carlson and Culver 2009, pp. 5–9; Weathers and Musmann 2020, pp. 4–7; Weathers and Musmann 2021, pp. 4–7). Genetic material (e.g., fin clips) is often collected during population monitoring, or it is collected during surveys targeting fish for genetic testing if there is evidence that barriers are compromised or other evidence suggest that hybridizing species (rainbow trout and cutthroat trout) or hybrid individuals may be present (e.g., from visual assessment). In the absence of genetic testing, the presence of hybridizing species, presence of hybrid phenotypes, or professional judgment based on putative barrier effectiveness were used to classify populations as being genetically pure or hybridized.

Adult population size is the estimated number of adult Apache trout (greater than or equal to 130-mm TL) in a population in the most recent year of population monitoring. Before 2016, estimates of streamwide adult abundance were made from monitoring data collected under the Basinwide Visual Estimation Technique (BVET) protocol (Dolloff et al. 1993, pp. v–17), and in a few cases, from information collected during general aquatic wildlife surveys (e.g., Robinson et al. 2004, pp. 3–13) or from electrofishing data (catch per single electrofishing pass) when collecting tissues for genetic analysis (such as was used in Carlson and Culver 2009). Since 2016, estimates of adult abundance have been based on an

updated systematic sampling design (Dauwalter et al. 2017a, entire).

Recruitment variability seeks to quantify the number of size classes present. The presence of individuals in more size (and therefore age) classes is indicative of more stable recruitment from year to year, which indicates that populations are more able to withstand year-to-year environmental variability (stochasticity; Maceina and Pereira 2007, pp. 121–123). Length frequency data from monitoring surveys were used to determine the number of size classes present. Before 2016, these data were collected under the BVET (Dolloff et al. 1993, pp. v–17) protocol, during general aquatic wildlife surveys (e.g., Robinson et al. 2004, pp. 3–13), or from electrofishing data when collecting tissues for genetic analysis (such as was used in Carlson and Culver 2009). Since 2016, these data have been based on the updated systematic sampling design (Dauwalter et al. 2017a, entire).

The length of an occupied stream, often referred to as patch size, was measured in kilometers using the National Hydrography Dataset (1:24,000 scale), and upstream and downstream extents were typically defined by experts as the extent of occupancy from fish survey data, suitable habitat, or barriers to fish passage (conservation barriers). Extent of occupied habitat has been shown to be positively associated with the probability of population persistence (e.g., viability, extinction probability) for western native trout (Harig et al. 2000, pp. 997–1000; Hilderbrand and Kershner 2000, pp. 515–518; Finlayson et al. 2005, p. 13), and it has been used as an indicator of persistence in indices of population health and as an indicator of translocation success (Harig and Fausch 2002, pp. 546–548; Williams et al. 2007, pp. 479–480; Cook et al. 2010, pp. 1505–1508).

We selected July temperature as a measurement of habitat quality because the Apache trout, like other salmonids, is a cold-water stenotherm (a species that can survive only within a narrow range of temperature). Under *Climate Change, Wildfire, Stream Conditions*, above, we highlight the thermal tolerance and habitat suitability values derived from several laboratory and field studies of Apache trout. The maximum mean July temperature in habitat extent occupied by each Apache trout population is based on modeled average July temperatures predicted for each 1-km stream segment in Arizona from the NorWeST dataset (Isaak et al. 2017, pp. 7–13). The NorWeST dataset predicts mean August temperatures (average of mean daily temperatures for

the month of August) for each 1-km stream segment in the National Hydrography Dataset (1:100,000 scale). These predictions were adjusted based on an empirical relationship between mean August and mean July (monthly mean of mean daily temperatures) temperatures in Apache trout streams from data collected by USFS on ASNF.

Intermittency percentage is the percent of occupied habitat extent estimated to become intermittent during severe drought years. The percent of stream length occupied that becomes intermittent (dry) during severe drought years due to low natural flows, decreasing flow trends in recent years, anthropogenic impacts to flow, or other factors. The percentage was based on professional judgment and knowledge of the habitat. The southwestern United States is a naturally warm and dry environment with reduced surface water resources that may subside due to low annual precipitation (snowpack and rainfall) and interactions with local geology (Long et al. 2006, pp. 90–94). The region is currently in a megadrought that has large consequences for streamflows (Williams et al. 2020, p. 314), and other researchers highlighted the time period from 2000 to 2003 as a severe drought period (Hoerling and Eischeid 2007, p. 2).

Habitat quality is the condition of riparian and instream habitat throughout the occupied habitat extent. Stream habitat quality was classified based on professional judgment at the whole stream scale or by segment and then computed as a weighted average (weighted by length).

The presence of rainbow trout, brown trout, brook trout, or cutthroat trout within the habitat accessible to the Apache trout population (or defined habitat extent) is either confirmed or not present. Rainbow trout and cutthroat trout have been documented to hybridize with Apache trout (Carmichael et al. 1993, p. 128), and brown trout and brook trout compete with and prey on Apache trout, thus reducing the carrying capacity of habitat to support Apache trout (Carmichael et al. 1995, p. 114). Presence of each species is attributed based on survey data, angler reports, anecdotal information, and, in some cases, barrier effectiveness and proximity of nonnative species and likelihood of invasion upstream of ineffective barriers.

Barriers were classified as functional or nonfunctional, and functionality was classified as known or suspected. Functionality was classified based on documented presence of nonnative trout

above a barrier, documented movement of marked fish from below to above a barrier, known streamflow paths around or through barriers, poor structural integrity, or other factors influencing perceived functionality based on professional judgment. On some streams, more than one conservation barrier has been constructed to provide functional redundancy and security due to possible failure, as well as to allow management flexibility for controlling nonnative trout invasions or conducting nonnative trout removals (mechanical or chemical).

Resiliency

Demographic and habitat factor data show that relict and hybridized Apache trout populations occur in two major river basins (the Black River and White River basins), replicate populations occur in all major basins (including one replicate population outside the species' historical range in the Colorado River), and unoccupied recovery streams occur in the Little Colorado River and Black River basins. Relict populations occur in five of six subbasins to which they are native. Hybridized populations occur in the Black River and Diamond Creek subbasins. As mentioned previously, of the 38 extant populations of Apache trout, 29 populations of Apache trout are known to be pure, with one population suspected to be genetically pure (81.1 percent). One of eight (12.5 percent) populations has been confirmed as hybridized through genetic testing, whereas seven have been assumed to be hybridized because of known barrier failures and invasion of rainbow trout.

A summary of demographic factors showed a majority of Apache trout populations to have adult (greater than 130-mm TL) population sizes that are fewer than 500 individuals (see table 11 in USFWS 2022b, p. 86); one population, East Fork White River, was estimated to have more than 2,200 adults (see table 11 in USFWS 2022b, p. 86). Despite low abundances, most populations showed consistent recruitment, with four or five size classes (and presumably year classes) present, which suggests they are stable and self-sustaining populations (see figure 18C in USFWS 2022b, p. 83).

Habitat factors for Apache trout populations showed a wide range of current conditions. The extent of stream occupied by Apache trout populations ranged from 0.4 (0.25 mi) to 30.1 km (18.7 mi); most were less than 14 km (8.7 mi). Maximum mean July temperatures in occupied habitat were less than or equal to 15.5 °C for relict and replicate populations, whereas

unoccupied streams and hybrid populations had warmer maximum mean July temperatures up to 17.5 °C. Most populations or unoccupied streams exhibited little intermittency during severe drought, but two hybridized populations and one unoccupied stream were estimated to be more than 50 percent intermittent (up to 95 percent). Unoccupied streams and streams occupied by hybrid populations had the lowest habitat quality (in part due to 2011 Wallow Fire), while a majority of relict and replicate populations inhabited high-quality habitat. Nineteen Apache trout populations were sympatric with brown trout, 7 with rainbow trout, and 2 with brook trout. Thirty-six populations or unoccupied recovery streams currently have conservation barriers to isolate them from nonnative fishes downstream, but only 31 populations are protected by barriers that are known or suspected to be functional; 10 populations have a second barrier downstream for added protection across all population types (relict, replicate, hybrid, unoccupied).

Overall, the current condition of the 38 Apache trout populations (excluding the 6 unoccupied recovery streams) rated an average of 2.60 (B – average) on a 4.0 grading scale (USFWS 2022b, p. 7, 88). The 30 genetically pure populations that would count towards recovery averaged 2.89 (B average). Based on the demographic and habitat factor grade point equivalents for each population, Apache trout populations were more often limited by demographic factors than habitat factors. Adult (greater than 130-mm TL) population size was most frequently the limiting demographic factor, as most populations were fewer than 500 adults and received lower grades. Unoccupied streams (e.g., Home Creek) had demographic GPAs (grade point averages) equaling 0.0. East Fork White River had the highest demographic GPA (4.00). Likewise, presence of nonnative trout was frequently a limiting habitat factor. Centerfire and Stinky creeks on the Apache-Sitgreaves National Forests (ASNF) had the lowest habitat factor (GPA of 1.33); Deep Creek (WMAT) had the highest habitat factor (GPA of 3.50).

Redundancy and Representation

Representation and redundancy for Apache trout were evaluated by quantifying the presence of relict populations, and their replication on the landscape, as putative genetic lineages at the subbasin level. Representation was based on presence of genetically pure relict populations from each subbasin. Redundancy was measured as

the replication of relict lineages into new streams by subbasin. Replication of relict populations, and thus redundancy of purported relict subbasin lineages, was measured both within and outside of the native subbasin for each subbasin genetic lineage. The number of populations that meet certain persistence, abundance, and recruitment criteria can also be used to quantify population redundancy by subbasin or a larger basin unit (e.g., geographic management unit). Tracking the representation and redundancy of relict populations by subbasin, as subbasin lineages, is a surrogate for the assumed unique genetic diversity, and presumed unique adaptation potential, that is often found to be structured around the hierarchical nature of drainage basins (Vrijenhoek et al. 1985, pp. 400–402; Wares et al. 2004, pp. 1890–1891, 1897). While such genetic structuring is evident in Apache trout for the 9 populations (and three genetic lineages) that have been studied (Wares et al. 2004, pp. 1895–1896), no comprehensive rangewide study of genetic diversity has been conducted across all genetically pure populations. Accounting for relict Apache trout populations in this way presumably reflects the representation and redundancy of genetic diversity, and thus adaptive potential, of the species in each subbasin in which it is native.

When quantified in this way, extant relict populations exist in 5 of 6 subbasins within the historical range of the Apache trout; only the Little Colorado River subbasin is no longer represented within an extant relict lineage. The East Fork White River subbasin has the highest level of redundancy and representation; it contains six relict populations still extant within the subbasin and four replicated populations in other subbasins that were founded with individuals from relict populations native to the East Fork White River subbasin. Of the subbasins containing relict populations, the Black River and Diamond Creek subbasins contain the lowest level of redundancy and representation, with three populations each occurring on the landscape (Black River: one relict and two replicates; Diamond Creek: two relicts and one replicate).

Future Condition

The primary threats affecting Apache trout viability include invasion by nonnative trout and climate change, which encompasses warmer stream temperatures, more frequent and severe droughts, increased wildfire frequency and post-fire debris flow, reduced

snowpack and increased rain on snow events, and more intense summer monsoon precipitation. A 30-year future (which equates to approximately six generations of Apache trout) was chosen for our future condition projections because within this timeframe it is likely that these primary threats will continue to impact the species, and also because it is biologically reasonable to assess the species' response to these threats within this timeframe. Additionally, this timeframe allows us to reasonably forecast upcoming management activities as they will be implemented through the CMP.

The threats that can be actively managed through implementation of the CMP include introduction of nonnative trout, and wildfire and post-fire debris flow. Nonnative trout impact the Apache trout in multiple ways including hybridization, predation, and competition. Wildfires primarily produce debris flows that render habitat unsuitable for the species. To mitigate these two threats, conservation actions that have been and will continue to be undertaken are most important to the future viability of the Apache trout. These actions include the construction and maintenance of conservation barriers, removal (by physical or chemical means) of nonnative trout species, restocking of Apache trout via hatchery and/or existing relict populations, restoration of Apache trout habitats and reduction of fuel loads to reduce the risk of wildfires, and fish salvages following wildfires per the CMP. Continued construction and maintenance of conservation barriers will be needed to prevent hybridization of the Apache trout with other trout species, as well as to prevent competition with and predation by other fish species. Continued conservation actions, implemented through the CMP as well as by other mechanisms, will therefore play a critical role in determining the overall viability of the Apache trout into the future.

Climate change threats that are more uncertain and difficult to mitigate include warming stream temperatures, more frequent and severe droughts, reduced snowpack with increased rain on snow events, and more intense summer monsoon precipitation. The future scenarios that were developed for Apache trout incorporate these factors in order to evaluate how climate variability might influence future condition for the species.

While the SSA report contains a total of five scenarios, in determining the future condition and status of the species for this rulemaking we

determined that only two of the five scenarios are plausible. Scenarios 1 and 2 in the SSA assumed that no multi-agency CMP would be in place after the species is delisted; however, since the SSA report and the scenarios were developed the CMP has been signed and is currently being implemented, making these scenarios not plausible. Our assessment of scenarios indicated that scenario 5 is also not plausible given the constraints involved with securing funding and commitment from partners for “greatly increased” management of the species to occur (USFWS 2022b, p. 121). Given these factors, we did not consider scenarios 1, 2, and 5 and relied on scenarios 3 and 4 to inform our status determination.

As noted above, a 30-year timeframe was chosen because it encompasses six generations of Apache trout and is, therefore, a biologically reasonable timeframe for assessing the likelihood of threats as well as the species’ response to those threats. Additionally, this timeframe allows us to reasonably forecast upcoming management activities that will be implemented through the CMP. The two scenarios used for our status determination in this proposed rule reflect both exogenous factors such as watershed condition and climatic changes, as well as management action feasibility and volume given funding and other programmatic constraints (funding and other resources) and policy. The scenarios incorporate a status quo level of management through the CMP, as well as potentially increased levels of management through future conservation actions that could take place throughout the future. Each scenario was based on a 30-year timeframe and each includes climate change impacts and other factors impacting the Apache trout, implementation of the CMP, and scientific and technological advancement. The two scenarios from the SSA report that we evaluated are:

Scenario 3 (Sustained Management, i.e., status quo): Recovery and conservation efforts continue at sustained levels, which during the years 2000–2020 were proven to be beneficial to Apache trout recovery. This level of management will be maintained into the future as prescribed by and implemented through the CMP. Thus, actions continue and are effective at reducing some threats. This includes legally required actions and those voluntarily agreed to in the CMP. Barrier construction, population expansion, and nonnative trout removals occur at levels required to meet recovery criteria (30 pure

populations, or similar) and are maintained thereafter. USFWS assistance to the White Mountain Apache Tribe continues. Some funding sources disappear (e.g., National Fish and Wildlife Foundation Apache Trout Keystone Initiative), but other funding sources emerge (e.g., National Fish Habitat Act; Recovering America’s Wildlife Act). This scenario represented the status quo scenario with approximately the same level of resources and management action as a 2000–2020 baseline.

- Barrier installation and maintenance continues at 2000–2020 levels. The number of viable Apache Trout populations and metapopulations increases to meeting recovery goals and is maintained after delisting.

- Effectiveness of land management policies for stream ecosystem and threatened species is initially maintained through de-listing due to the CMP agreement in place. Across the Apache Trout range, watershed functional conditions are maintained or improved, riparian and instream habitat are maintained or improved in quality, and stream temperatures are maintained or improved to support Apache Trout due to protections during land management planning and implementation.

- Because of climate change, stream temperatures become warmer, droughts continue to become more frequent and severe, risk of wildfire and post-fire debris flow increases, snowpack decreases but increased rain on snow events occur, and summer monsoon rains become more intense.

Scenario 4 (Increased Management): Recovery and conservation efforts continue but at levels increased slightly from 2000–2020 baseline levels that are beneficial to the species. Management actions continue and some become effective at reducing some threats. After barrier construction, population expansion, and nonnative trout removals initially occur at levels required to meet recovery criteria (30 pure populations, or similar) and Apache trout are delisted, the level of actions is maintained due to the CMP in place, but also increases due to emergence of new research and technology. USFWS assistance to the White Mountain Apache Tribe continues. Legislation emerges resulting in new funding sources for fish habitat projects (e.g., National Fish Habitat Act; Recovering America’s Wildlife Act), and there is broad implementation of the Four Forest Restoration Initiative, Black River Restoration Environmental Assessment (EA), and FAIR Forest Management Plan (fuels management)

that are beneficial to watershed functional conditions and reduced wildfire risk.

- Barrier installation and maintenance increases slightly from 2000–2020 levels due to new technology that increases effectiveness and reduces cost and maintenance. The number of viable Apache trout populations increases, and one large metapopulation is realized (e.g., WFBR), to meet and exceed recovery goals.

- Effectiveness of land management policies for stream ecosystem and threatened species is initially maintained through de-listing due to the CMP in place. Across the Apache trout range, watershed functional conditions are improved, riparian and instream habitat are improved in quality, and stream temperatures are improved (riparian restoration and recovery) to support Apache Trout due to protections during land management planning and implementation.

- Because of climate change, stream temperatures become warmer, droughts continue to become more frequent and severe, risk of wildfire and post-fire debris flow increases, snowpack decreases but more rain on snow events occur, and summer monsoon rains become more intense.

For each scenario provided in the SSA report, Apache trout core team members indicated in an online survey the overall impact of each scenario on populations across the species’ range, or subsets of the range with which they are familiar, using their best professional judgment. Each core team expert responded to survey questions in terms of what the condition—described as a GPA—of each Apache trout population (or currently unoccupied stream) would be, based on the grading scale used to describe current conditions above, under each of the five future condition scenarios after a 30-year timeframe. GPAs were summarized across populations to assess the influence of each scenario on the rangewide status of Apache trout.

When survey responses of future condition were summarized (averaged) across populations for scenarios 3 and 4 to infer a future rangewide condition of the Apache trout under each scenario, the future condition of the species under scenario 4 (increased management) was expected to improve compared to scenario 3 (sustained management), similar to that of individual populations.

Under scenario 3, which maintains the same level of conservation management and actions as are currently being implemented through the CMP, the condition of the species

was estimated at a GPA score of 2.53. This average score, however, includes variation in populations. Under scenario 3, we project the future condition of the majority of the relict populations would modestly decline, resulting in slightly lower resiliency. These declines are attributed to potential impacts from climate change and its effect on forest fires that are not expected to be offset by other management actions (*e.g.*, nonnative trout eradication) which are generally not currently needed in relict populations. On the other hand, we project that some replicate populations would have slightly better condition in the future compared to current conditions due to completion of ongoing nonnative trout eradication efforts (*e.g.*, West Fork Black River [lower]) and planned replacement of nonfunctional conservation barriers (*e.g.*, West Fork Little Colorado River). Overall, relative to current condition, the species' overall resiliency under scenario 3 may modestly decline. Therefore, even though redundancy would remain the same, representation may be slightly reduced due to the projected decline of the Apache trout relict populations under scenario 3.

Under scenario 4, which evaluates an increased level of conservation management versus what is currently being implemented through the CMP, the future condition of the Apache trout would be essentially unchanged with a GPA score of 2.86. This represents a nominal decrease when compared to the current condition GPA score of 2.89. Under scenario 4, we project slight improvement in future conditions across some populations with other populations remaining essentially unchanged or experiencing slight declines.

Some natural processes (*e.g.*, purging of nonnative alleles) and planned management actions not represented in scenarios 3 and 4 (*e.g.*, new population establishment, metapopulation creation) are expected to occur that will further improve specific and range-wide GPA scores. Further, average grant funding to support field crews and conservation projects obtained during 2020–2022 also far exceeds the average annual funding obtained for similar work during the 2000–2020 baseline period. Thus, future condition scores for scenarios 3 and 4 likely underestimate actual future conditions for the species as additional populations are created and maintained, nonnative trout populations are eradicated, and populations with low levels of introgression purge nonnative alleles over time.

Under both scenarios, the CMP plays an important role in determining the

species' future condition for threats that can be managed. The CMP was drafted and signed to ensure that current conservation efforts will continue in perpetuity. The signing of the CMP has a demonstrable effect on the species' overall status with current management level resulting in only a slight and modest decline under scenario 3 (the status quo scenario). Scenario 4, in which funding for conservation efforts would increase, results in maintaining the species' overall future condition. Overall, the result of our future scenarios analysis demonstrates the importance of continued implementation of the CMP to ensure both the maintenance of current populations and habitat, the restoration of degraded habitat, and the establishment of new populations.

For climate-related threats to Apache trout that are not able to be actively managed, we relied on a model developed to inform the magnitude of effects that these factors might have through the foreseeable future. For increased stream temperatures, our model suggested that most streams currently occupied by Apache trout, or unoccupied but designated as recovery streams, are not temperature limited, and that suitability improved when 2080s projections of temperature alone were considered because some headwater reaches appeared to be currently too cold for occupancy. Most habitat patches were not limited by warm stream temperatures because the habitat designated for species recovery is upstream of protective fish passage barriers (Avenetti et al. 2006, p. 213; USFWS 2009, p. 19; USFWS 2022b, pp. 118–127) that are far enough upstream to not be temperature limiting now or into the 2080s. In fact, the effect of temperature on juvenile Apache trout occupancy suggested that streams can be too cold, and model projections of stream temperature in the 2080s increased the amount of suitable habitat in some streams because of the unimodal response to temperature. This suggests cold temperatures can be limiting Apache trout populations in some streams, and any warming may benefit them in headwater reaches—at least up until the 2080s.

It was only when future changes in precipitation were considered in tandem with stream temperature that habitat suitability decreased into the 2080s. Many habitat patches that are currently occupied by the species are projected to remain suitable into the 2080s, which suggests their resiliency is only limited by the size of the patch they currently occupy (Peterson et al. 2014, pp. 564–268; Isaak et al. 2015, pp.

2548–2551; USFWS 2022b, pp. 135–140). However, when projections of reduced precipitation were also considered, habitat suitability decreased in Apache trout streams. This is not surprising given that stream intermittency and drought have impacted some populations in the past (Robinson et al. 2004, pp. 15–17; Williams et al. 2020, entire), and less precipitation, and thus streamflow, would exacerbate these impacts, especially since the Southwest is anticipated to experience novel and mega-drought conditions in future climates (Crausbay et al. 2020, pp. 337–348; Williams et al. 2020, entire).

Precipitation in the White Mountains primarily falls as winter snow and summer monsoon rain (Mock 1996, pp. 1113–1124). However, decreases in precipitation due to climate change are expected to occur in winter in the form of snow (Easterling et al. 2017, p. 207), and decreases in snowpack are likely to negatively impact stream baseflows and, thus, summer temperatures. Hydrologic models linked to climate models show future precipitation increasingly falling as rain, higher frequency of rain-on-snow, and increased snowmelt rates, all of which lead to increased overland runoff to streams and less infiltration to groundwater. Less groundwater storage leads to less groundwater discharge to streams in late summer and early autumn (Huntington and Niswonger 2012, pp. 16–18). The summer monsoon season can add precipitation, but at much warmer temperatures regardless of whether it occurs as overland flow or through shallow groundwater discharge pathways.

While snow melt can result in overland flow during spring runoff, it also infiltrates into groundwater and does so at near freezing temperatures (at or just above 0 °C (32 °F); Potter 1991, pp. 847, 850). Thus, any groundwater contributions to streams that originate from snowmelt are likely to have a stronger cooling effect on stream temperatures released over longer time periods than overland flow from either snowmelt or monsoon rains. If snowpack is reduced in the future it is likely that groundwater return flows may occur earlier and be less overall, thus providing less of a cooling effect into late summer, especially prior to monsoon rains (Overpeck and Bonar 2021, pp. 139–141).

Determination of Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species

or a threatened species. The Act defines an “endangered species” as a species that is in danger of extinction throughout all or a significant portion of its range, and a “threatened species” as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

The Apache trout is a species endemic to multiple river basins in eastern Arizona. Due to conservation efforts undertaken within these past decades, the Apache trout now encompasses the 29 genetically pure populations and one suspected genetically pure population across three basins and six subbasins. While these populations will continue to be impacted by potential invasion of nonnative trout and debris runoff from wildfire and climate change, construction and maintenance of conservation barriers and restocking efforts have contributed to restoration of habitats and populations. Currently, these 30 Apache trout populations are assessed to possess good conditions (2.89 on a 4.0 grading scale). Within these 30 populations, relict populations have an average GPA of 2.93, and replicate populations have an average GPA of 2.85. These results demonstrate that both types of populations contain moderate to good condition with the relict populations rated slightly better.

Apache trout representation is best demonstrated within the 17 relict populations across five subbasins. While further studies would need to be conducted to ascertain the genetic uniqueness of each relict population, these populations are not derived from known populations, suggesting that some of these populations could represent unique genetic lineages for the species. To further preserve the genetic diversity of the species, the Service and our partners have established replicate populations within and alongside other subbasins, resulting in the total of 30 populations across six subbasins. As noted above in our resiliency

discussion, through continuous monitoring, restoration of habitat, and, if needed, restocking, these populations are rated as being in fair or good condition. The genetic uniqueness of these populations helps maintain the diverse gene pool of the species, giving the species greater adaptive capacity to respond to environmental changes.

The presence of multiple relict and replicate populations across different subbasins demonstrates a high level of redundancy. Redundancy is further enhanced through the creation of new replicate populations from relict populations. These populations are created in adjacent subbasins, providing greater protection for the species against catastrophic events that may impact individual subbasins. Overall, the presence of 30 populations across seven subbasins, with all being rated as fair to good condition, provide the Apache trout with sufficient redundancy to withstand catastrophic events that may impact the species.

Lastly, as noted earlier, we have nearly met all criteria that the recovery plan recommended for delisting. While we have not met the criterion of 30 genetically pure populations within the historical range of the species, 29 genetically pure populations exist within the historical range, and one suspected genetically pure population exists outside of the historical range. This represents a significant recovery of the species and comes close to achieving all criteria spelled out in the recovery plan. Recovery plan criteria are meant to function as guidance for recovery rather than hard metrics that must be met. Instead, we will use the best available information to determine the status of the species. Overall, the Apache trout now consists of multiple, sufficiently resilient populations across subbasins encompassing a large percentage of the species’ historical range. Furthermore, while long-term threats such as nonnative trout species will continue to persist, continued management of conservation barriers will ensure that the threats do not negatively impact the species. Accordingly, we conclude that the species is not currently in danger of extinction, and thus does not meet the definition of an endangered species, throughout its range.

In considering whether the species meets the definition of a threatened species (likely to become an endangered species within the foreseeable future) throughout its range, we identified the foreseeable future of Apache trout to be 30 years based on our ability to reliably predict the likelihood of future threats as well as the species’ response to future

threats. Our analysis of future condition emphasized the importance of continued management of the conservation barriers and removal of nonnative trout. Species viability modestly declined in scenario 3, and increased in scenario 4, due to increases in management efforts. Scenarios 3 and 4 are both scenarios in which the CMP is being implemented. In our assessment, we found that the CMP, while voluntary in nature, plays a vital role in continuing to improve the status of the Apache trout into the future. For example, WMAT, AZGFD, and the Service are working together to mechanically remove brook trout from the upper West Fork Black River population, including Thompson Creek, in case chemical renovation of this system is not ultimately approved.

This effort represents just one of the ongoing efforts to improve the species’ overall condition, as well as the willingness of Federal, State, Tribal, and private partners to continue these efforts into the future. Other collaborative conservation efforts include brook and brown trout removal projects, fish passage improvements, riparian habitat restoration projects, and conservation barrier replacements or old barrier removal projects on Tribal, State, and Federal lands. WMAT and the Service are currently working to eradicate brown trout from Aspen, Big Bonito, Coyote, Little Bonito, and Little Diamond creeks. All partners are working on fish passage improvements including removing four conservation barriers on Hayground, Home, and Stinky creeks and replacing six culverts on Paradise and Thompson creeks to improve fish passage, increase occupied extents, and allow for metapopulation dynamics among connected populations. Riparian habitat restoration projects are underway on Boggy and Lofer creeks and being planned for Flash Creek, South Fork Little Colorado River, and West Fork Black River. Finally, conservation barrier replacements are underway (engineering design development or construction contracting phases) that will protect the populations in Aspen, Boggy/Lofer, Coyote, Crooked, Flash, Little Bonito, Little Diamond, Ord, Paradise, and Wohlenberg creeks.

While there is a need to manage Apache trout habitat in ways that facilitate habitat connectivity and metapopulation dynamics (Williams and Carter 2009, pp. 27–28), conservation barrier management will remain important to the conservation of the species. Because the intent of barriers is to isolate populations of Apache trout from nonnative trout,

many populations will have to persist in place rather than shift in space to adapt to future changes in climate (Thurman et al. 2020, entire). This may restrict the ability of some populations to adapt in place to climate change effects. Adaptation potential should be considered in concert with the reality that many populations reside in small habitat patches. This can constrain long-term viability and is one of the trade-offs that comes with isolation management (Fausch et al. 2009, entire); however, our identification of climate resilient habitats in our climate analysis did incorporate patch size as a driver of long-term persistence.

Apache trout populations with high resiliency will continue to be the focus of active habitat management, such as riparian vegetation management and habitat restoration, to improve or ensure their climate resiliency into the 2080s and potentially beyond. Finally, most habitat patches are not currently limited by warm stream temperatures. Habitat designated for Apache trout recovery largely occurs in colder, upstream areas above conservation barriers (Avenetti et al. 2006, p. 213; USFWS 2009, p. 19), and even with increasing stream temperatures through the foreseeable future many of these areas will not be limited by warmer temperatures into the 2080s. As described previously, the effect of temperature on juvenile Apache trout occupancy suggests that many streams can in fact be too cold, and projections of stream temperature into the 2080s in some cases increased the amount of suitable habitat in some streams because of the unimodal response to temperature.

Overall, the signing of the CMP in 2021 which, while subject to review and termination by the signing parties, ensures that conservation for the Apache trout will remain in perpetuity. With the CMP in place, and considering future effects from climate change and the response of Apache trout to these effects, we conclude that the Apache trout will exhibit sufficient resiliency, redundancy, and representation to maintain viability for the foreseeable future. Accordingly, we conclude that the species is not likely to become in danger of extinction in the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. Having determined that Apache trout is not in danger of

extinction or likely to become so in the foreseeable future throughout all of its range, we now consider whether it may be in danger of extinction (*i.e.*, endangered) or likely to become so in the foreseeable future (*i.e.*, threatened) in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the “significance” question or the “status” question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

In undertaking this analysis for Apache trout, we choose to address the status question first. We began by identifying portions of the range where the biological status of the species may be different from its biological status elsewhere in its range. For this purpose, we considered information pertaining to the geographic distribution of (a) individuals of the species, (b) the threats that the species faces, and (c) the resiliency condition of populations.

We evaluated the range of the Apache trout to determine if the species is in danger of extinction now or likely to become so in the foreseeable future in any portion of its range. Because the range of a species can theoretically be divided into portions in an infinite number of ways, we focused our analysis on portions of the species' range that may meet the definition of an endangered species or a threatened species. Although we assessed current and future conditions at a population scale in the SSA report, interactions between populations within a subbasin can be complex (*i.e.*, in some subbasins, there are genetic exchanges between populations while in others, populations are separated by barriers). Thus, to assess these portions equally, we focus our analysis here at the subbasin scale. That said, the current and future conditions of the populations will be used to discuss the conditions of the subbasins.

Within these portions, we examined the following threats: invasive trout, habitat loss due to wildfire, and the effects from climate change, including synergistic and cumulative effects. As discussed in our rangewide analyses, nonnative trout and wildfire are the main drivers of the species' status.

Looking across the different subbasins, all but one have the mean GPA of 2.83 or above under its current condition (meaning good conditions under our conditions metric). When examining future conditions, even under the worst case scenario where with reduced management and no CMP, all but one subbasin have a future condition status of fair. While there are differences in scoring within each subbasin, at the subbasin scales, these subbasins possess sufficient resiliency such that we do not consider them to be in danger of extinction or likely to become so within the foreseeable future. For these subbasins, we assessed them to possess the same status as our rangewide analysis.

Out of all the subbasins of the Apache trout, the Diamond subbasin has the lowest mean GPA of 2.33 under its current condition. However, under future condition, we project the species will slightly decline from its current condition under scenario 3. Under both scenarios 3 and 4, the subbasin would be on the lower end of the fair rating.

The major driver of a subbasin's status is its habitat condition score. Although future condition scoring does not separate demographic GPA from habitat GPA, we know from the current condition score that the limiting factor for Apache trout within the Diamond subbasin is habitat condition. Three of the four populations within the Diamond subbasin have high demographic GPA with high abundance and multiple age classes. However, the scores for habitat quality are 2.33, 2.00, 1.83, and 1.83, due primarily to shorter occupied stream lengths compared to other populations. Additionally, the streams within the Diamond subbasin experience a higher percentage of intermittency, meaning that larger portions of the stream tend to go dry during periods of drought. Given the continuing effects of climate change, it is likely that these streams will experience periods with intermittent streamflow in some reaches into the future.

Although populations of the Apache trout in the Diamond subbasin are currently rated as being in fair condition, the low habitat quality (primarily due to occupied stream length being less than 11.25 km, estimations of intermittent stream proportions, the presence of brown trout, and current barrier conditions) and the potential for decline due to climate change could lead to elevated risk to populations in the foreseeable future in this portion of the range. Work to eradicate (and prevent reinvasion of) brown trout from two streams in this

subbasin is underway, which, if successful, would result in higher habitat scores once completed (with all other scores remaining unchanged, the subbasin's average habitat GPA would rise to 2.58 once the work is completed) and would reduce the risk of population declines in this portion of the range (USFWS 2022b, p. 101). However, these actions have not yet significantly improved the status of this subbasin, and we assessed this subbasin to be at elevated risk of extinction to a degree that it may be in danger of extinction within the foreseeable future.

Given that the Diamond subbasin may be in danger of extinction within the foreseeable future, we next evaluated if this portion of the range was significant. Although every subbasin provides some contribution to the species' resiliency, representation, and redundancy, as noted above, the Diamond subbasin populations occupy a short stream length (30.2 km (18.8 mi)) that comprises a small portion of the Apache trout's overall range (10.7 percent of the Apache trout's overall range of 281.5 km (174.9 mi)). Ecologically, the habitats where these populations are found are not dissimilar to habitats found in the other subbasins. As in the other subbasins, Apache trout in the Diamond subbasin are found in headwater streams with shallow depth, relatively slow-moving water, and coarse, clean gravel streambeds.

The Diamond subbasin is comprised of a mixture of replicate and relict populations. Although this subbasin contains relict populations, these and the replicate populations are associated with populations in the neighboring subbasins of North Fork White River and East Fork White River. Specifically, relict populations in the adjacent subbasin were used as founder stocks for the replicate populations in the Diamond subbasin, and the relict population in the Diamond subbasin was used to create a replicate population in an adjacent subbasin. Thus, through the process of replication of populations, the genetic contribution of the Diamond subbasin is dispersed across other subbasins.

Overall, the Diamond subbasin's short stream length relative to the species' overall range, lack of ecological uniqueness, close proximity to other subbasins, and existence of replicate populations lead us to conclude that this portion of the Apache trout's range is not significant in terms of its overall contribution to the species' resiliency, redundancy, and representation. Therefore, because we could not answer the significance question in the affirmative, we conclude that the

Diamond subbasin does not warrant further consideration as a significant portion of the range. Therefore, we find that the species is not in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range. This does not conflict with the courts' holdings in *Desert Survivors v. Department of the Interior*, 336 F. Supp. 3d 1131 (N.D. Cal. 2018), and *Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species" (79 FR 37578; July 1, 2014), including the definition of "significant" that those court decisions held to be invalid.

Determination of Status

Our review of the best available scientific and commercial information indicates that the Apache trout does not meet the definition of an endangered species or a threatened species in accordance with sections 3(6) and 3(20) of the Act. In accordance with our regulations at 50 CFR 424.11(e)(2) currently in effect, the Apache trout does not meet the definition of an endangered or a threatened species. Therefore, we propose to remove the Apache trout from the Federal List of Endangered and Threatened Wildlife.

Effects of This Rule

This proposal, if made final, would revise 50 CFR 17.11(h) by removing the Apache trout from the Federal List of Endangered and Threatened Wildlife. Accordingly, we would also remove the Apache trout from the rule issued under section 4(d) of the Act ("4(d) rule") at 50 CFR 17.44(a). The prohibitions and conservation measures provided by the Act, particularly through sections 7 and 9, would no longer apply to this species. Federal agencies would no longer be required to consult with the Service under section 7 of the Act in the event that activities they authorize, fund, or carry out may affect the Apache trout. No critical habitat has been designated for Apache trout, so there would be no effect to 50 CFR 17.95. State laws related to the Apache trout would remain in place, be enforced, and continue to provide protection for this species.

Editorial Corrections

In this proposed rule, we incorporate editorial corrections to the 4(d) rule set forth at 50 CFR 17.44(a) to provide the

correct scientific names for Lahontan cutthroat trout and Paiute cutthroat trout. Those scientific names were updated on the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h) with the 1990 issue of the Code of Federal Regulations, but the scientific names provided in the 4(d) rule were not updated at that time. This action would correct that oversight.

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires us, in cooperation with the States, to implement a monitoring program for not less than 5 years for all species that have been delisted due to recovery. Post-delisting monitoring (PDM) refers to activities undertaken to verify that a species delisted remains secure from the risk of extinction after the protections of the Act no longer apply. The primary goal of a PDM program is to monitor the species to ensure that its status does not deteriorate, and if a decline is detected, to take measures to halt the decline so that proposing it as an endangered or threatened species is not again needed. If at any time during the monitoring period data indicate that protective status under the Act should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

The PDM program for Apache trout would monitor populations following the same sampling protocol used by cooperators prior to delisting. Monitoring would consist of tracking Apache trout distribution and abundance and potential adverse changes to Apache trout habitat due to environmental or anthropogenic factors. Post-delisting monitoring would occur for a 10-year period, beginning after the final delisting rule was published, and would include the implementation of (1) Apache Trout Monitoring Plan ("Monitoring Plan," Dauwalter et al. 2017a, entire) and (2) Apache Trout Cooperative Management Plan (CMP, Apache Trout CMP Workgroup 2021, entire) for the duration of the PDM period. Both plans are currently being implemented and will continue to be implemented into the future. The Monitoring Plan describes population and habitat survey methods, data evaluation methods, and monitoring frequency for each population. The CMP describes roles, responsibilities, and evaluation and reporting procedures by the cooperators. Together these plans would guide collection and evaluation of pertinent information over the PDM period and would be implemented jointly by the Service, WMAT, AZGFD, USFS, and Trout Unlimited. Both documents will be available upon the

publication of this proposed rule at <https://www.regulations.gov>, under the Docket No. FWS-R2-ES-2022-0115.

During the PDM period, if declines in the Apache trout's protected habitat, distribution, or persistence were detected, the Service, together with other PDM partners, would investigate causes of the declines, including considerations of habitat changes, human impacts, stochastic events, or any other significant evidence. The outcome of the investigation would be to determine whether the Apache trout warranted expanded monitoring, additional research, additional habitat protection, or relisting as an endangered or threatened species under the Act. If relisting the Apache trout were warranted, emergency procedures to relist the species may be followed, if necessary, in accordance with section 4(b)(7) of the Act.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the names of the sections or paragraphs that are unclearly written,

which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

The Apache trout occurs on area managed by the White Mountain Apache Tribe (WMAT). As noted above, we have coordinated with WMAT in conserving and protecting the Apache trout's habitat and populations. Furthermore, WMAT was an invited participant in the development of the SSA. Going forward, we anticipate our partnership with WMAT to continue into the future regardless of any potential changes in the Apache trout's status under the Act.

References Cited

A complete list of all references cited in this proposed rule is available on the internet at <https://www.regulations.gov> or upon request from the person listed

under **FOR FURTHER INFORMATION CONTACT**.

Authors

The primary authors of this proposed rule are staff members of the Service's Species Assessment Team and the Arizona Fish and Wildlife Conservation Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

§ 17.11 [Amended]

- 2. In § 17.11, in paragraph (h), amend the List of Endangered and Threatened Wildlife by removing the entry for “Trout, Apache” under FISHES.
- 3. In § 17.44, amend the introductory text of paragraph (a) to read as follows:

§ 17.44 Special rules—fishes.

- (a) Lahontan cutthroat trout and Paiute cutthroat trout (*Oncorhynchus clarkii henshawi* and *Oncorhynchus clarkii seleniris*).

* * * * *

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–15689 Filed 8–10–23; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register

Vol. 88, No. 154

Friday, August 11, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture 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 September 11, 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: Highly Pathogenic Avian Influenza, All Subtypes, and Newcastle Disease; Additional Restrictions.

OMB Control Number: 0579–0245.

Summary of Collection: The Animal Health Protection Act (AHPA), 7 U.S.C 8301, is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The agency is charged with carrying out this disease prevention mission is the Animal and Plant Health Inspection Service (APHIS), through its Veterinary Services (VS) Program. Highly pathogenic avian influenza (HPAI) and Newcastle Disease are extremely infectious and often fatal disease affecting all types of birds and poultry.

Need and Use of the Information: To protect the United States against an incursion of HPAI and Newcastle Disease, APHIS requires the use of several information collection activities, including an USDA–APHIS–VS Application For Permit To Import or Transport Controlled Materials or Organisms or Vectors (VS Form 16–3); a United States Veterinary Permit for Importation and Transportation of Controlled Materials and Organisms and Vectors (VS Form 16–6A); an Approved Warehouse Request And Agreement To Handle Restricted Animal Byproducts (Hunting Trophies & Museum Specimens) (VS Form 16–28); an Agreement for Handling Restricted Imports of Animal Byproducts and Controlled Materials (VS Form 16–29); a Report of Entry, Shipment of Restricted Imported Animal Products and Animal Byproducts and Other Material (VS Form 16–78); a USDA–APHIS–VS Application for Import (VS Form 17–129); an application of seals to shipping containers; recordkeeping by processing establishments; cooperative service agreements; notification of signs of disease in a recently imported bird allowed to enter home quarantine; certificates for eggs from ND regions; government seals; veterinary health certificates; notices of arrive-live animals; and notices of transfer-animal products. APHIS will collect information to ensure that U.S. birds

and poultry undergo appropriate examinations before entering the United States. Without the information, it would be impossible for APHIS to establish an effective line of defense against an introduction of HPAI and Newcastle Disease.

Description of Respondents:

Individuals or households; Business or other for-profit; Not-for-profit institutions; Federal Government.

Number of Respondents: 936.

Frequency of Responses: Reporting and Recordkeeping: On occasion.

Total Burden Hours: 1,814.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–17242 Filed 8–10–23; 8:45 am]

BILLING CODE 3410–34–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 September 11, 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 Plant and Health Inspection Service

Title: Export Certification, Accreditation of Non-Government Facilities.

OMB Control Number: 0579–0130.

Summary of Collection: The Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS) is responsible for preventing plant diseases or insect pests from entering the United States, as well as, the spread of pests not widely distributed in the United States, and eradicating those imported when eradication is feasible. The Plant Protection Act (7 U.S.C. 7701 *et seq.*), authorizes the Department to carry out this mission. In addition to its mission, APHIS provides export certification services to ensure other countries that the plants and plant products they are receiving from the United States are free of plant diseases and insect pests.

Need and Use of the Information: The accreditation process requires the use of several information activities to ensure that nongovernment facilities applying for accreditation processes the necessary qualifications. APHIS will collect information for applications submitted by operator/owner of a non-government facility seeking accreditation to conduct laboratory testing or phytosanitary inspection. The application should contain the legal name and full address of the facility, the name, address, telephone and fax numbers of the facility's operator, a description of the facility, and a description of the specific laboratory testing or phytosanitary inspection services for which the facility is seeking accreditation. If these activities are not conducted properly, APHIS export certification program would be compromised, causing a disruption in plant and plant product exports that could prove financially damaging to U.S. exporters.

Description of Respondents: Business or other for profit; State, local and Tribal government.

Number of Respondents: 9.

Frequency of Responses: Reporting: on occasion.

Total Burden Hours: 209.

Animal and Plant Health Inspection Service

Title: Importation of Live Swine (from Certain Regions), Pork, and Pork Products.

OMB Control Number: 0579–0230.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The regulations under which the Animal and Plant Health Inspection Service (APHIS) conducts disease prevention activities are contained in title 9, chapter 1, subchapter D, part 94. These regulations place certain restrictions on the importation of swine, pork, and pork products into the United States. Regulations regarding other animal products and byproducts can be found at 95 and 112.

Need and Use of the Information: APHIS will collect information to ensure regulatory compliance for mitigation of classical swine fever (CSF) from imports of swine (from certain regions), pork, and pork products into the United States. To ensure this the regulations include information collection activities such as certification for importation of pork or pork products; application of seal; location and reason for breaking seal and application of new seal; termination of agreement; request for approval of defrost facility; request hearing for denial or approval of defrost facility; application for import of small amounts of pork or pork products; cooperative service agreement; notification of Customs and Border Protection inspectors for pork from specific regions; recordkeeping requirements for certificates; certificates for meat processed in tubes; certification for importation of hams; agreement for processing procedures; identification procedures; recordkeeping for processing origin of hams; and program statements.

If this information were collected less frequently or not collected at all, the United States would be at increased risk for the introduction of rinderpest, FMD, SF, CSF and SVD. This would cause serious economic consequences to U.S. Agricultural exports and several U.S. livestock industries, and have potentially serious health consequences for U.S. livestock.

Description of Respondents: Full-time, salaried veterinary officers employed by the governments of Brazil,

Chile, and Mexico; industry representatives; and U.S. importers.

Number of Respondents: 781.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 179,712.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–17193 Filed 8–10–23; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0056]

Notice of Request for Extension of Approval of an Information Collection; Bovine Spongiform Encephalopathy; Importation of Animals and Animal Products

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with activities to prevent the introduction of bovine spongiform encephalopathy into the United States.

DATES: We will consider all comments that we receive on or before October 10, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to www.regulations.gov. Enter APHIS–2023–0056 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–2023–0056, 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 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: For information on the regulations to prevent the introduction of bovine spongiform encephalopathy into the United States, contact Dr. Alexandra MacKenzie, Senior Veterinary Medical Officer, Veterinary Services, APHIS, USDA, 4700 River Road, Unit 40, Riverdale, MD 20737; (301) 851-3411; alexandra.mackenzie@usda.gov. For information on the information collection reporting process, contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851-2483; joseph.moxey@usda.gov.

SUPPLEMENTARY INFORMATION:

Title: Bovine Spongiform Encephalopathy; Importation of Animals and Animal Products.

OMB Control Number: 0579-0393.

Type of Request: Extension of approval of an information collection.

Abstract: The Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) authorizes the Secretary of Agriculture to, among other things, prohibit or restrict the importation and interstate movement of animals and animal products into or through the United States to prevent the introduction and dissemination of animal diseases and pests.

To guard against the introduction of animal diseases, the Animal and Plant Health Inspection Service (APHIS) regulates the importation of animals and animal products into the United States. The regulations in 9 CFR parts 92, 93, 94, 95, and 96 govern the importation of certain animals, birds, poultry, meat, and other animal products and byproducts into the United States to prevent the introduction of various animal diseases, including bovine spongiform encephalopathy (BSE), a chronic degenerative disease that affects the central nervous system of cattle.

Section 92.5 of the regulations provides that all countries of the world are considered by APHIS to be in one of three BSE risk categories: Negligible risk, controlled risk, or undetermined risk. These risk categories are defined in § 92.1. Any region that is not classified by APHIS as presenting either negligible risk or controlled risk for BSE is considered to present an undetermined risk. Under the regulations, APHIS may classify a region for BSE in one of two ways. One way is for countries that have not received a risk classification from the World Organization for Animal Health (WOAH)¹ to request

classification by APHIS. The other way is for APHIS to concur with the classification given to a country by WOAH.

To ensure BSE is not introduced into the United States, the regulations place specific conditions on the importation of animals and animal products. These requirements necessitate the use of several information collection activities, including, but not limited to, certifications, official identification, request for and retention of classification as negligible or controlled risk, declarations of importation, import and export certificates, applications, import and movement permits, agreements, certification statements, seals, notifications, and recordkeeping.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 0.639 hours per response.

Respondents: Shippers, U.S. importers of regulated animal products, herd owners, salaried veterinarians of foreign regions, foreign exporters of processed animal protein and other regulated materials and products, accredited veterinarians, slaughter facility managers, and educators and researchers.

Estimated annual number of respondents: 150.

Estimated annual number of responses per respondent: 6,922.

Estimated annual number of responses: 1,038,336.

Estimated total annual burden on respondents: 663,778 hours. (Due to

averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 2nd day of August 2023.

Michael Watson,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023-17199 Filed 8-10-23; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Forest Service

Alabama Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Alabama Resource Advisory Committee (RAC) will hold a public meeting according to the details shown below. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act (FACA), as amended. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act, as well as to make recommendations on recreation fee proposals for sites on the National Forests in Alabama, consistent with the Federal Lands Recreation Enhancement Act.

DATES: An in-person and virtual meeting will be held on September 21, 2023, 9:30 a.m.–12:30 p.m., Central Standard Time.

Written and Oral Comments: Anyone wishing to provide in-person and virtual oral comments must pre-register by 11:59 p.m. Central Standard Time on September 17, 2023. Written public comments will be accepted by 11:59 p.m. Central Standard Time on September 17, 2023. Comments submitted after this date will be provided to the Forest Service, but the Committee may not have adequate time to consider those comments prior to the meeting.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the

¹ The World Organization for Animal Health internationally follows a British English spelling of "organization" in its name; it was formerly the Office International des Epizooties, or OIE, but on May 28, 2022, the Organization announced that the acronym was changed from OIE to WOAH.

person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: This meeting will be held in-person at the National Forests in Alabama Supervisor's Office located at 2946 Chestnut Street, Montgomery, Alabama 36107. The public may also join virtually via telephone and/or video conference. RAC information and meeting details can be found at the following website <https://www.fs.usda.gov/main/alabama/workingtogether/advisorycommittees> or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written Comments: Written comments must be sent by email to dawn.suiter@usda.gov or via mail (*i.e.*, postmarked) to Dawn Suiter 2946 Chestnut Street, Montgomery, Alabama 36107. The Forest Service strongly prefers comments be submitted electronically.

Oral Comments: Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. Central Standard Time on September 17, 2023, and speakers can only register for one speaking slot. Oral comments must be sent by email to dawn.suiter@usda.gov or via mail (*i.e.*, postmarked) to Dawn Suiter, 2946 Chestnut Street, Montgomery, Alabama 36107.

FOR FURTHER INFORMATION CONTACT: Tammy Freeman Brown, Designated Federal Officer (DFO), by phone at 334-315-4926 or email at tammy.freemanbrown@usda.gov or Dawn Suiter, RAC Coordinator, at 334-224-5336 or email at dawn.suiter@usda.gov.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Hear from Title II project proponents and discuss Title II project proposals; and
2. Make funding recommendations on Title II projects.

The agenda will include time for individuals to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least three days prior to the meeting date to be scheduled on the agenda. Written comments may be submitted to the Forest Service up to 14 days after the meeting date listed under **DATES**.

Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, by or before the deadline, for all questions related to the meeting. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

Meeting Accommodations: The meeting location is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under the **FOR FURTHER INFORMATION CONTACT** section or contact USDA's TARGET Center at (202) 720-2600 (voice and TTY) or USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: August 7, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023-17229 Filed 8-10-23; 8:45 am]

BILLING CODE 3411-15-P

DEPARTMENT OF AGRICULTURE

Forest Service

Idaho Panhandle Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Idaho Panhandle Resource Advisory Committee (RAC) will hold a public meeting according to the details shown below. The committee

is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act (FACA), as amended. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act, as well as to make recommendations on recreation fee proposals for sites on the Idaho Panhandle National Forests within Boundary, Bonner, Kootenai, Shoshone, or Benewah County, consistent with the Federal Lands Recreation Enhancement Act.

DATES: An in-person and virtual meeting will be held on September 15, 2023, 9:00 a.m.–4:00 p.m., Pacific Daylight Time (PDT).

Written and Oral Comments: Anyone wishing to provide in-person or virtual oral comments must pre-register by 11:59 p.m. PDT on September 12, 2023. Written public comments will be accepted by 11:59 p.m. PDT on September 12, 2023. Comments submitted after this date will be provided to the Forest Service, but the Committee may not have adequate time to consider those comments prior to the meeting.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: This meeting will be held in-person and virtually, at the Interagency Natural Resources Center, located at 3232 West Nursery Way, Coeur d'Alene, Idaho 83815. RAC information and meeting details can be found at the following website: <https://www.fs.usda.gov/main/ipnf/workingtogether/advisorycommittees> or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written Comments: Written comments must be sent by email to patrick.lair@usda.gov or via mail (*i.e.*, postmarked) to Patrick Lair, 3232 West Nursery Way, Coeur d'Alene, Idaho 83815. The Forest Service strongly prefers comments be submitted electronically.

Oral Comments: Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. PDT, September 12, 2023, and speakers can only register for one speaking slot. Oral comments must be sent by email to patrick.lair@usda.gov or via mail (*i.e.*, postmarked) to Patrick Lair, 3232 West Nursery Way, Coeur d'Alene, Idaho 83815.

FOR FURTHER INFORMATION CONTACT:

Heather Degeest, Designated Federal Officer (DFO), by phone at 208–303–7458 or email at heather.degeest@usda.gov or Patrick Lair, RAC Coordinator, at 208–765–7211 or email at patrick.lair@usda.gov.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Approve meeting minutes;
2. Hear from Title II project proponents and discuss Title II project proposals;
3. Make funding recommendations on Title II projects; and
4. Schedule the next meeting.

The agenda will include time for individuals to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least three days prior to the meeting date to be scheduled on the agenda. Written comments may be submitted to the Forest Service up to 14 days after the meeting date listed under **DATES**.

Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, by or before the deadline, for all questions related to the meeting. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

Meeting Accommodations: The meeting location is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under the **FOR FURTHER INFORMATION CONTACT** section or contact USDA's TARGET Center at (202) 720–2600 (voice and TTY) or USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: August 7, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023–17228 Filed 8–10–23; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest Advisory Board

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Black Hills National Forest Advisory Board will hold a public meeting according to the details shown below. The Board is authorized under the Forest and Rangeland Renewable Resources Planning Act of 1974, the National Forest Management Act of 1976, the Federal Lands Recreation Enhancement Act, and operates in compliance with the Federal Advisory Committee Act (FACA), as amended. The purpose of the Board is to provide advice and recommendations on a broad range of forest issues such as forest plan revisions or amendments, forest health including fire, insect and disease, travel management, forest monitoring and evaluation, recreation fees, and site-specific projects having forest-wide implications.

DATES: An in-person meeting will be held on September 13, 2023, 1:00 p.m.–4:30 p.m. Mountain Standard Time (MST).

Written and Oral Comments: Anyone wishing to provide in-person oral comments must pre-register by 11:59 p.m. MST on September 8, 2023. Written public comments will be accepted by 11:59 p.m. MST on September 8, 2023. Comments submitted after this date will be provided to the Forest Service, but the Board may not have adequate time to consider those comments prior to the meeting.

All board meetings are subject to cancellation. For status of the meeting

prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: This meeting will be held in person at the U.S. Forest Service Mystic Ranger District Office, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702. Board information and meeting details can be found at the following website: <https://www.fs.usda.gov/main/blackhills/workingtogether/advisorycommittees> or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written Comments: Written comments must be sent by email to scott.j.jacobson@usda.gov or via mail (i.e., postmarked) to Scott Jacobson, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702. The Forest Service strongly prefers comments be submitted electronically.

Oral Comments: Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. MST, September 8, 2023, and speakers can only register for one speaking slot. Oral comments must be sent by email to scott.j.jacobson@usda.gov or via mail (i.e., postmarked) to Scott Jacobson, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702.

FOR FURTHER INFORMATION CONTACT: Toni Strauss, Designated Federal Officer (DFO), by phone at 605–673–9201, or email at toni.strauss@usda.gov, or Scott Jacobson, Committee Coordinator, at 605–440–1409 or email at scott.j.jacobson@usda.gov.

SUPPLEMENTARY INFORMATION: The meeting agenda will include:

1. Board Member Presentations; and
2. Forest Plan Revision update.

The agenda will include time for individuals to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least three days prior to the meeting date to be scheduled on the agenda. Written comments may be submitted to the Forest Service up to 7 days after the meeting date listed under **DATES**.

Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, by or before the deadline, for all questions related to the meeting. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

Meeting Accommodations: The meeting location is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with

disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under the **FOR FURTHER INFORMATION CONTACT** section or contact USDA's TARGET Center at (202) 720-2600 (voice and TTY) or USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Board. To ensure that the recommendations of the Board have taken into account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: August 7, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023-17234 Filed 8-10-23; 8:45 am]

BILLING CODE 3411-15-P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

First Responder Network Authority; Public Combined Board and Board Committees Meeting

AGENCY: First Responder Network Authority (FirstNet Authority), National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce.

ACTION: Announcement of meeting.

SUMMARY: The FirstNet Authority Board will convene an open public meeting of the Board and Board Committees.

DATES: August 23, 2023; 8 a.m. to 10 a.m. Pacific Daylight Time (PDT); Tacoma, Washington.

ADDRESSES: The meeting will be held at the Pierce County Readiness Center, Camp Murray Building 80, Tacoma, Washington. Members of the public are not able to attend in-person but may listen to the meeting and view the presentation by visiting the following URL: <https://stream2.sparkstreetdigital.com/20230823-firstnet.html>. If you experience technical difficulty, contact support@sparkstreetdigital.com. WebEx information can also be found on the FirstNet Authority website ([FirstNet.gov](https://firstnet.gov)).

FOR FURTHER INFORMATION CONTACT:

General information: Janell Smith, (202) 257-5929, Janell.Smith@FirstNet.gov.

Media inquiries: Ryan Oremland, (571) 665-6186, Ryan.Oremland@FirstNet.gov.

SUPPLEMENTARY INFORMATION:

Background: The Middle-Class Tax Relief and Job Creation Act of 2012 (codified at 47 U.S.C. 1401 *et seq.*) (Act) established the FirstNet Authority as an independent authority within NTIA. The Act directs the FirstNet Authority to ensure the building, deployment, and operation of a nationwide interoperable public safety broadband network. The FirstNet Authority Board is responsible for making strategic decisions regarding the operations of the FirstNet Authority.

Matters to be Considered: The FirstNet Authority will post a detailed agenda for the Combined Board and Board Committees Meeting on [FirstNet.gov](https://firstnet.gov) prior to the meeting. The agenda topics are subject to change. Please note that the subjects discussed by the Board and Board Committees may involve commercial or financial information that is privileged or confidential, or other legal matters affecting the FirstNet Authority. As such, the Board may, by majority vote, close the meeting only for the time necessary to preserve the confidentiality of such information, pursuant to 47 U.S.C. 1424(e)(2).

Other Information: The public Combined Board and Board Committees Meeting is accessible to people with disabilities. Individuals requiring accommodations, such as sign language interpretation or other ancillary aids, are asked to notify Janell Smith at (202) 257-5929 or email: Janell.Smith@FirstNet.gov at least five (5) business days (August 16) before the meeting.

Records: The FirstNet Authority maintains records of all Board proceedings. Minutes of the Combined

Board and Board Committees Meeting will be available on [FirstNet.gov](https://firstnet.gov).

Dated: August 7, 2023.

Janell Smith,

Board Secretary, First Responder Network Authority.

[FR Doc. 2023-17207 Filed 8-10-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B-29-2023]

Foreign-Trade Zone (FTZ) 7; Authorization of Production Activity; AbbVie Ltd.; (Pharmaceutical Products); Barceloneta, Puerto Rico

On April 10, 2023, AbbVie Ltd., submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 7I, in Barceloneta, Puerto Rico.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (88 FR 24386, April 20, 2023). On August 8, 2023, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: August 8, 2023.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2023-17232 Filed 8-10-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B-28-2023]

Foreign-Trade Zone (FTZ) 125; Authorization of Production Activity; Jayco, Inc.; (Motorhomes); Middlebury, Indiana

On April 10, 2023, Jayco, Inc. submitted a notification of proposed production activity to the FTZ Board for its facility within FTZ 125, in Middlebury, Indiana.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (88 FR 24162, April 19, 2023). On August 8, 2023, the applicant was notified of the FTZ Board's decision that no further review of the activity is

warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: August 8, 2023.

Elizabeth Whiteman,
Executive Secretary.

[FR Doc. 2023-17231 Filed 8-10-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Public Meeting of the National Sea Grant Advisory Board

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Sea Grant Advisory Board (Board), a Federal Advisory Committee. Board members will discuss and provide advice on the National Sea Grant College Program (Sea Grant) in the areas of program evaluation, strategic planning, education and extension, science and technology programs, and other matters as described in the agenda found on the Sea Grant website. For more information on this Federal Advisory Committee please visit the Federal Advisory Committee database: <https://www.facadatabase.gov/FACA/s/login/?ec=302&inst=3d&startURL=%2FFACA%2FFACAPublicPage>. This notice also responds to the Sea Grant Program Improvement Act of 1976, which requires the Secretary of Commerce to solicit nominations at least once a year for membership on the National Sea Grant Advisory Board. To apply for membership to the Board, applicants should submit a current resume. A cover letter highlighting specific areas of expertise relevant to the purpose of the Board is helpful, but not required. Nominations will be accepted by email. NOAA is an equal opportunity employer.

DATES: The announced meeting is scheduled for Sunday September 10, 2023 from 8:30 a.m.–5:30 p.m. Chamorro Time Zone (Guam Time Zone) and Monday September 11, 2023 from 9:00 a.m.–3:00 p.m. Chamorro Time Zone (Guam Time Zone).

ADDRESSES: The meeting will be held at the Hyatt Regency Guam Hotel in Guam. For more information about the public meeting see below in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: For any questions concerning the meeting, please contact Ms. Donna Brown, National Sea Grant College Program. Email: oar.sq-feedback@noaa.gov Phone Number 301-734-1088.

SUPPLEMENTARY INFORMATION:

Status: The meeting will be open to public participation with a public comment period on Sunday, September 10 at 8:40 a.m. The Board expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of three (3) minutes. Written comments should be received by Ms. Donna Brown by Thursday, August 31, 2023 to provide sufficient time for Board review. Written comments received after the deadline will be distributed to the Board, but may not be reviewed prior to the meeting date.

Special Accommodations: The Board meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Donna Brown by Thursday, August 31, 2023.

The Board, which consists of a balanced representation from academia, industry, state government and citizens groups, was established in 1976 by section 209 of the Sea Grant Improvement Act (Pub. L. 94-461, 33 U.S.C. 1128). The Board advises the Secretary of Commerce and the Director of the National Sea Grant College Program with respect to operations under the Act, and such other matters as the Secretary refers to them for review and advice.

Matters To Be Considered: Board members will discuss and vote on new membership for the Board's Executive Committee, Biennial Report to Congress Committee and Evaluation Committee, as well as discuss and vote on the Allocation Committee report: <https://seagrant.noaa.gov/About/Advisory-Board>.

Privacy Act Statement: Authority. The collection of information concerning nominations to the MCAM FAC is authorized under the FACA, as amended, 5 U.S.C. app. and its implementing regulations, 41 CFR part 102-3, and in accordance with the Privacy Act of 1974, as amended, (Privacy Act) 5 U.S.C. 552a. **Purpose.**

The collection of names, contact information, resumes, professional information, and qualifications is required in order for the Under Secretary to appoint members to the MCAM FAC. **Routine Uses.** NOAA will use the nomination information for the purpose set forth above. The Privacy Act of 1974 authorizes disclosure of the information collected to NOAA staff for work-related purposes and for other purposes only as set forth in the Privacy Act and for routine uses published in the Privacy Act System of Records Notice COMMERCE/DEPT-11, Candidates for Membership, Members, and Former Members of Department of Commerce Advisory Committees, available at <https://www.osec.doc.gov/opog/PrivacyAct/SORNs/dept-11.html>, and the System of Records Notice COMMERCE/DEPT-18, Employees Personnel Files Not Covered by Notices of Other Agencies, available at <https://www.osec.doc.gov/opog/PrivacyAct/SORNs/DEPT-18.html>.

Disclosure: Furnishing the nomination information is voluntary; however, if the information is not provided, the individual would not be considered for appointment as a member of the MCAM FAC.

Dave Holst,

Chief Financial Officer/Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2023-17217 Filed 8-10-23; 8:45 am]

BILLING CODE 3510-KA-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD240]

New England 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 New England Fishery Management Council (Council) is scheduling a public meeting of its Skate Advisory Panel via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Tuesday, August 29, 2023, from 1 p.m. to 5 p.m.

ADDRESSES: Webinar registration URL information: <https://attendee.gotowebinar.com/register/2246157552571506009>.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465-0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Skate Advisory Panel will meet to receive a brief progress update on the 2023 management track stock assessment for skates. They will also receive a progress update on the development of Framework Adjustment 12 to the Northeast Skate Complex Fishery Management Plan (2024–2025 specifications and possession limits) and provide additional recommendations to the Skate Committee on the development of possession limit alternatives. The panel will make recommendations to the Committee for skate-related work in 2024. Other business will be discussed as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465-0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 8, 2023.

Key Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023-17265 Filed 8-10-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD242]

New England 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 New England Fishery Management Council (Council) is scheduling a public meeting of its Skate Committee via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate. **DATES:** This webinar will be held on Wednesday, August 30, 2023, from 9 a.m. to 1 p.m.

ADDRESSES: Webinar registration URL information: <https://attendee.gotowebinar.com/register/4732353454089321819>.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Cate O'Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465-0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Skate Committee will meet to receive Advisory Panel comments on a brief progress update on the 2023 management track stock assessment for skates. They will receive a progress update on the development of Framework Adjustment 12 to the Northeast Skate Complex Fishery Management Plan (2024–2025 specifications and possession limits) and provide additional recommendations to the Council on the development of possession limit alternatives. The Committee will make recommendations to the Council for skate-related work in 2024.

Other business will be discussed as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action

under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Executive Director, at (978) 465-0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 8, 2023.

Key Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023-17266 Filed 8-10-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD245]

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold its Pacific Pelagic Fishery Ecosystem Plan Team, Fishing Industry Advisory Committee, American Samoa Archipelago Fishery Ecosystem Plan (FEP) Advisory Panel (AP), Education Committee, Mariana Archipelago FEP Guam AP, Mariana Archipelago Commonwealth of the Northern Mariana Islands Advisory AP, and the Hawaii Archipelago FEP AP to discuss and make recommendations on fishery management issues in the Western Pacific Region.

DATES: The meetings will be held between August 28 and September 8, 2023. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The Council will hold its Education Committee, and the Mariana Archipelago Fishery Ecosystem Plan (FEP) Advisory Panel (AP) will be held by Webex. The Pacific Pelagic Fishery Ecosystem Plan Team, Fishing Industry Advisory Committee (FIAC), American

Samoa Archipelago Fishery Ecosystem Plan (FEP) Advisory Panel, Mariana Archipelago FEP Guam AP, and the Hawaii Archipelago FEP AP meetings will be held in a hybrid format with in-person and remote participation (Webex) options available for the members and the public. In-person attendance for the American Samoa Archipelago FEP AP members and public will be hosted at the Tradewinds Hotel, M779+HP9, Tafuna, AS, 96799. In-person attendance for Mariana Archipelago FEP Guam AP members and public will be hosted at Cliff Pointe, 304 W. O'Brien Drive, Hagatña, GU, 96910. In person attendance for Pacific Pelagic Fishery Ecosystem Plan Team, FIAC and Hawaii Archipelago FEP AP members and public will be hosted at the Council office, 1164 Bishop Street, Suite 1400, Honolulu, HI, 96813. Instructions for connecting to the web conference and providing oral public comments will be posted on the Council website at www.wpcouncil.org. For assistance with the web conference connection, contact the Council office at (808) 522-8220.

Council address: Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813.

FOR FURTHER INFORMATION CONTACT:

Contact Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; phone: (808) 522-8220.

SUPPLEMENTARY INFORMATION: The Pacific Pelagics Fishery Ecosystem Plan Team will meet on Monday, August 28, from 12:30 p.m. to 5 p.m. FIAC will meet on Wednesday, August 30, from 2 p.m. to 5 p.m.; American Samoa Archipelago FEP AP will meet on Wednesday, August 30, from 6 p.m. to 8 p.m.; the Education Committee will meet on Thursday, August 31, from 1 p.m. to 3 p.m.; Mariana Archipelago FEP Guam AP will meet on Thursday, August 31, from 6 p.m. to 8 p.m.; Mariana Archipelago CNMI AP will meet on Saturday, September 2, from 10 a.m. to 1 p.m.; and the Hawaii Archipelago FEP AP will meet on Friday, September 8, from 9 a.m. to 4 p.m.. All times listed are local island times.

Public Comment periods will be provided in the agendas. The order in which agenda items are addressed may change. The meetings will run as late as necessary to complete scheduled business.

Schedule and Agenda for the Pacific Pelagic Fishery Ecosystem Plan Team Meeting

Monday, August 28, 2023, 12 p.m.–5 p.m. (Hawaii Standard Time)

1. Welcome and Introductions
2. Approval of Draft Agenda
3. Update and Follow-up on May 2023 Recommendations
4. Options and Scenarios for Implementing Electronic Monitoring in Western Pacific Longline Fisheries
5. 2024 U.S. Territorial Bigeye Tuna Catch/Effort Limit & Allocation Specifications
6. Multi-Year Territorial Bigeye Tuna Catch & Allocation Specifications
7. International Fisheries
 - A. 3rd Workshop on Tropical Tuna Longline Management
 - B. Updates International Science Committee 19 and Western and Central Pacific Fishery Commission (WCPFC) Science Committee
8. Revising the Council's Research Plan & Priorities
9. Public Comment
10. Discussion and Recommendations

Schedule and Agenda for the Fishing Industry Advisory Committee Meeting

Wednesday, August 30, 2023, 2 p.m.–5 p.m. (Hawaii Standard Time)

1. Welcome and Introductions
2. Status Report on Previous Fishing Industry Advisory Committee Recommendations
3. Roundtable update on Fishing/Market Issues/Impacts
4. 2024 U.S. Territorial Bigeye Tuna Catch and Effort Limit and Allocation Specifications
5. Options and Scenarios for Electronic Monitoring (EM) in Western Pacific (WP) Longline
6. National Seafood Strategy
7. Saltonstall-Kennedy Project Updates
 - A. Update on Marketing Projects
 - B. Fishery Development Projects
8. Update on Proposed Marine National Sanctuary in Pacific Remote Island Areas
9. Update on Cost-Earnings Survey & Economic Analyses
10. WCPFC Updates
11. Council Program Priorities
12. Other Issues
13. Public Comment
14. Discussion and Recommendations

Schedule and Agenda for the American Samoa Archipelago FEP AP Meeting

Wednesday, August 30, 2023, 6 p.m.–8 p.m. (Samoa Standard Time)

1. Welcome and Introductions

2. Review of the Last Advisory Panel (AP) Recommendations and Meeting
3. Feedback from the Fleet
 - A. American Samoa (AS) Fishermen Observations
 - B. Advisory Panel Fishery Issues and Priorities
4. AS Fishery Issues and Activities
 - A. American Samoa P* and Social, Economic, Ecological and Management Working Group Report
 - B. Options for the Rebuilding Plan and Annual Catch Limits for the AS Bottomfish Management Unit Species
5. Council Fishery Issues and Activities
 - A. 2024 U.S. Territorial Bigeye Tuna Catch and Effort Limit and Allocation Specifications
 - B. Options and Scenarios for EM in WP Longline
6. Updates on Poseidon Fisheries Research Biosampling
7. Council Program Planning 2025–2029
8. Other Business
9. Public Comment
10. Discussion and Recommendations

Schedule and Agenda for the Mariana Archipelago FEP Guam AP Meeting

Thursday, August 31, 2023, 6 p.m.–8 p.m. (Chamorro Standard Time)

1. Welcome and Introductions
2. Review of the Last AP Recommendations and Meeting
3. Guam AP Project and Activities Update
4. Feedback from the Fleet
 - A. Second Quarter Fishermen Observations in the Marianas
 - B. Marianas Archipelago Fishery Issues and Priorities
5. Council Fishery Issues and Activities
 - A. 2024 U.S. Territorial Bigeye Tuna Catch and Effort Limit and Allocation Specifications
6. Updates on the Proposed Rule to Designate Critical Habitat for Green Sea Turtles
7. Council Program Planning 2025–2029
8. Other Business
9. Public Comment
10. Discussion and Recommendations

Schedule and Agenda for the Education Committee Meeting

Thursday, August 31, 2023, 1 p.m.–3 p.m. (Hawaii Standard Time)

1. Welcome and Introductions
2. Education and Outreach Program Overview
 - A. Funding Structure
3. Council Education Committee Memorandum of Understanding Review
 - A. Scholarship Program
 - B. Vocational and Training

- Development Related to Fisheries
- C. Education Plan Development and Classroom Incorporation
- 4. Marine Resource Education Program in Pacific Islands Update
- 5. Other Business
- 6. Public Comment
- 7. Discussion and Recommendations

Schedule and Agenda for the Mariana Archipelago FEP CNMI AP Meeting

Saturday, September 2, 2023, 10 a.m.–1 p.m. (ChST)

1. Welcome and Introductions
2. Review of the Last AP Recommendations and Meeting
3. CNMI AP Project and Activities Update
4. Feedback from the Fleet
 - A. Second Quarter Fishermen Observations in the Marianas
 - B. CNMI Fishery Issues and Priorities
5. Council Fishery Issues and Activities
 - A. 2024 U.S. Territorial Bigeye Tuna Catch and Effort Limit and Allocation Specifications
 - B. CNMI Marine Conservation Plan 2025–2027
6. Updates on the Proposed Rule to Designate Critical Habitat for Green Sea Turtles
7. Council Program Planning 2025–2029
8. Other Business
9. Public Comment
10. Discussion and Recommendations

Schedule and Agenda for the Hawaii Archipelago FEP AP Meeting

Friday, September 8, 2023, 9 a.m.–4 p.m. (HST)

1. Welcome and Introductions
2. Review of the Last AP Recommendations and Meeting
3. Hawaii AP Project and Activities Update
4. Feedback from the Fleet
 - A. Second Quarter Hawaii Fishermen Observations
 - B. Hawaii AP Fisheries Issues and Priorities
5. Hawaii Fishery Issues and Activities
 - A. Options and Scenarios for EM implementation in WP Longline
 - B. Pacific Remote Island Areas Sanctuary Designation Update
6. Main Hawaiian Islands Uku Ecosystem Based Fisheries Management Project
7. Lokahi Fishing App Feature for Fisher Engagement
8. Updates on the Division of Aquatic Resource's Rulemaking on Kona Crab
9. Council Program Planning 2025–2029
10. Other Business
11. Public Comment
12. Discussion and Recommendations

Special Accommodations

These meetings are accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 8, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–17268 Filed 8–10–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Alaska Pacific Halibut Fisheries: Subsistence

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before October 10, 2023.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at NOAA.PRA@noaa.gov. Please reference OMB Control Number 0648–0512 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Gabrielle Aberle, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK, 99802–1668. Telephone 907–586–7356.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS), Alaska Regional Office, is requesting extension of a currently approved information collection for the Alaska Subsistence Halibut Program.

The International Pacific Halibut Commission (IPHC) promulgates regulations governing the North Pacific halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Convention). The IPHC's regulations are subject to approval by the Secretary of State with the concurrence of the Secretary of Commerce. The Northern Pacific Halibut Act of 1982 (Halibut Act; 16 U.S.C. 773c(a)–(b)), provides the Secretary of Commerce with general responsibility for carrying out the Convention and the Halibut Act, including the authority to adopt regulations necessary to carry out the purposes and objectives of the Convention. The Halibut Act, 16 U.S.C. 773c(c), also provides the North Pacific Fishery Management Council (Council) with authority to develop regulations, including limited access regulations, that are in addition to, and not in conflict with, IPHC regulations.

Regulations the Council recommends may be implemented by NMFS only after approval by the Secretary of Commerce. The Council has exercised this authority in the development of subsistence halibut fishery management measures. NMFS has responsibility for managing the subsistence halibut fishery according to regulations approved by the Secretary. Regulations governing the subsistence halibut fishery are at 50 CFR 300.2, 300.4, and subpart E, and in the annual management measures published in the **Federal Register** pursuant to 50 CFR 300.62.

This information collection is necessary for NMFS to manage the Alaska Subsistence Halibut Program. Subsistence halibut means halibut caught by a rural resident or a member of an Alaska Native tribe for direct personal or family consumption as food, sharing for personal or family consumption as food, or customary trade. The Alaska Subsistence Halibut Program is intended to allow eligible persons to practice the long-term customary and traditional harvest of Pacific halibut for food in a non-commercial manner. This program provides NMFS the opportunity to enhance estimates of subsistence removals for stock assessment purposes.

Before fishing under subsistence halibut regulations, a Subsistence Halibut Registration Certificate (SHARC) must be obtained. This information collection contains the forms used by participants in the subsistence halibut fishery to apply for SHARCs, apply for special use permits, and submit harvest information for special use permits. This information collection contains two collections for which no forms are used: the appeals process for denied permits and marking subsistence setline fishing gear.

Information collected by the permit applications includes applicant information and depending on the permit type may include information on the educational program or a description of the cultural or ceremonial occasion the permit will be used for. NMFS uses this information to determine the eligibility of applicants to receive or renew permits.

The permit coordinators submit the harvest logs for Community Harvest Permits, Ceremonial Permits, and Educational Permits. Harvest logs collect identification information and harvest information for the subsistence fishermen fishing under that permit.

An appeals process is provided for an applicant who receives an adverse initial administrative determination related to their permit application.

Subsistence setline gear buoys must be marked with identification information that consists of the participant's name and address and an "S" to indicate subsistence halibut gear. This information is used by NMFS to link fishing gear to the vessel owner or operator and facilitate enforcement of regulations.

II. Method of Collection

The information is collected primarily by mail, fax, and delivery. SHARC renewals may be submitted online through eFISH on the NMFS Alaska Region website. The applications and harvest logs are available as fillable pdfs on the NMFS Alaska Region website at <https://www.fisheries.noaa.gov/permit/alaska-subsistence-halibut-fishery-applications-and-reporting-forms>. The fishing gear identification information is painted on marker buoys and is not submitted to NMFS.

III. Data

OMB Control Number:0648–0512.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Individuals or households; State, local, or Tribal government.

Estimated Number of Respondents: 6,293.

Estimated Time per Response:
Application for SHARC Rural Resident: 10 minutes; Application for SHARC Alaska Native Tribal Member: 10 minutes; Application for SHARC Alaska Native Tribe: 30 minutes; Subsistence Halibut Special Permits Application: 30 minutes; Harvest logs: 30 minutes; Ceremonial or Educational Permit Log: 2 hours; Appeal for permit denial: 4 hours; Gear marking: 15 minutes.

Estimated Total Annual Burden Hours: 1,340 hours.

Estimated Total Annual Cost to Public: \$59,660 in recordkeeping and reporting costs.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: Northern Pacific Halibut Act of 1982 (16 U.S.C. 773c).

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. 2023–17279 Filed 8–10–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD134]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off New Jersey and New York

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to Atlantic Shores Offshore Wind Bight, LLC (Atlantic Shores) to incidentally harass, by Level B harassment only, marine mammals during marine site characterization survey activities offshore of New Jersey and New York.

DATES: This Authorization is effective from August 10, 2023 through August 9, 2024.

ADDRESSES: Electronic copies of the original application and supporting documents (including NMFS Federal Register notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>. In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Jessica Taylor, 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 issued or, if the taking is limited to

harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

History of Request

On April 8, 2022, NMFS received a request from Atlantic Shores for an IHA to take marine mammals incidental to marine site characterization surveys offshore of New Jersey and New York, in the area of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Lease Area (OCS-A 0541) and the associated ECR area. Atlantic Shores requested authorization to take small numbers of 15 species of marine mammals by Level B harassment only. NMFS published a notice of the proposed IHA in the **Federal Register** on June 27, 2022 (87 FR 30867). After a 30-day public comment period and consideration of all public comments received, we subsequently issued the 2022 IHA, which is effective from August 10, 2022, to August 9, 2023 (87 FR 50293, August 16, 2022).

Atlantic Shores completed a subset of the survey work under the 2022 IHA. Atlantic Shores conducted the required marine mammal mitigation and monitoring and did not exceed authorized levels of take under previous IHAs issued for surveys offshore of New York and New Jersey (see 85 FR 21198, April 16, 2020 and 86 FR 21289, April 22, 2021). These previous monitoring results are available to the public on our website: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-atlantic-shores-offshore-wind-llc-marine-site-characterization>.

On March 20, 2023, NMFS received a request from Atlantic Shores for an IHA

to take marine mammals incidental to high-resolution geophysical (HRG) marine site characterization surveys offshore of New Jersey and New York in the areas of Bureau of Ocean Energy and Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the OCS Lease Area (OCS A-0541) and associated ECR area. Following NMFS' review of the application, Atlantic Shores submitted a revised request on April 7, 2023. The application (the 2023 request) was deemed adequate and complete on April 20, 2023. Atlantic Shores' request is for take of 15 species of marine mammals, by Level B harassment only. Neither Atlantic Shores nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

The activities described in Atlantic Shores' request, the overall survey duration, the project location, and the acoustic sources planned for use are identical to what was previously analyzed in support of the IHA issued by NMFS to Atlantic Shores for 2022 site characterization surveys (2022 IHA) (87 FR 38067, June 27, 2022; 87 FR 50293, August 16, 2022). All mitigation, monitoring, and reporting requirements remain the same. While Atlantic Shores' planned activity would have qualified for renewal of the 2022 IHA, due to the availability of updated marine mammal density data (<https://seamap.env.duke.edu/models/Duke/EC/>), which NMFS has determined represents the best available scientific data, NMFS determined to proceed with a new IHA process rather than a renewal, providing a 30-day period for the public to comment on this action.

The 2023 request is identical to the 2022 IHA. In evaluating the 2023 request and to the extent deemed appropriate, NMFS also relied on the information presented in notices associated with issuance of the 2022 IHA (87 FR 38067, June 27, 2022; 87 FR 50293, August 16, 2022).

No changes were made from the proposed IHA to the final IHA.

Description of the Activity and Anticipated Impacts

Overview

Atlantic Shores will conduct HRG marine site characterization surveys in the BOEM Lease Area OCS-A 0541 and along the export cable route (ECR) off of New Jersey and New York. The purpose of surveys is to obtain an assessment of seabed (geophysical, geotechnical, and geohazard), ecological, and archeological conditions within the footprint of a planned offshore wind

facility development area. Surveys are also conducted to support engineering design and to map unexploded ordnance. As many as three survey vessels may operate concurrently as part of the planned surveys. During survey effort, the vessels would operate at a maximum speed of 3.5 knots (kn) (6.5 kilometers (km)). Underwater sound resulting from Atlantic Shores' activities has the potential to result in incidental take of marine mammals in the form of Level B harassment.

The planned activity is estimated to require up to 360 survey days using a maximum of three vessels operating concurrently over the course of the 1-year period of effectiveness of the IHA. It is expected that each vessel would cover approximately 55 km of track line per day based on Atlantic Shores' data acquisition efficiency expectations.

Underwater sound resulting from Atlantic Shores' survey activities during use of specific active acoustic sources has the potential to result in incidental take of marine mammals in the form of behavioral harassment (Level B harassment). Geophysical activities were discussed previously for the 2022 IHA NMFS issued to Atlantic Shores (87 FR 50293, August 16, 2022) and, as no new information has been presented that changed our determinations on these activities, this information will not be reiterated here. The mitigation, monitoring, and reporting measures are described in more detail later in this document (please see Description of Mitigation, Monitoring, and Reporting).

A detailed description of the planned surveys is provided in the **Federal Register** notice for the proposed IHA (88 FR 41912, June 28, 2023) and 2022 **Federal Register** notice (87 FR 50293, August 16, 2022). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to those **Federal Register** notices for the description of the specific activity.

Comments and Responses

A notice of NMFS' proposal to issue an IHA to Atlantic Shores was published in the **Federal Register** on June 28, 2023 (88 FR 41912). That notice described, in detail, Atlantic Shores' proposed activities, the marine mammal species that may be affected by these activities, and the anticipated effects on marine mammals. We requested public input on the request for authorization described therein, our analyses, the proposed authorization, and requested that interested persons submit relevant information, suggestions, and comments.

NMFS received 19 public comment letters. Four of these comment letters were from non-governmental organizations: Clean Ocean Action (COA), Oceana, Sea Life Conservation (SLC), and Green Oceans. The remaining 15 comment letters were from private citizens. The majority of these expressed general opposition to issuance of the IHA or to the underlying associated activities, but without providing specific information relevant to NMFS' request for public comment. Seven of the letters from private citizens provided substantive comments that are addressed below.

We reiterate here that NMFS' action concerns only the authorization of marine mammal take incidental to the planned surveys—NMFS' authority under the MMPA does not extend to the surveys themselves or to wind energy development more generally. Many of the comments requested that NMFS not issue any IHAs related to wind energy development and/or expressed opposition for wind energy development generally without providing information relevant to NMFS' decision to authorize take incidental to Atlantic Shores' survey activities. We do not specifically address comments expressing general opposition to activities related to wind energy development or respond to comments not relevant to the scope of the proposed IHA (88 FR 41912, June 28, 2023), such as comments on other Federal agency processes and activities not authorized under this IHA (e.g., seismic surveys, offshore wind construction, installation of wind turbines, other marine site characterization surveys).

All substantive comments and NMFS' responses are provided below, and all substantive comments are available on NMFS' website: <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. Please see the comment letters for full details regarding the comments and associated rationale.

Comment 1: COA, SLC, and Green Oceans expressed concern regarding ocean noise and the interference it has on communication between whales. In addition, Green Oceans claimed that NMFS failed to "meaningfully consider" the potential for Atlantic Shores' HRG survey activities to mask marine mammal communication. Specifically, Green Oceans stated that the proposed IHA did not address how increasing ocean noise will impact masking of "interspecies cooperation and communication," and their "survival," as a result.

Response: NMFS agrees that noise pollution in marine waters is an issue with the potential to affect marine mammals, including their ability to communicate when noise reaches certain levels. NMFS disagrees that the potential impacts of masking were not properly considered. NMFS acknowledges our understanding of the scientific literature that Green Oceans cited but, fundamentally, the masking effects to any one individual whale from one survey are expected to be minimal. Masking is referred to as a chronic effect because one of the key harmful components of masking is its duration—the fact that an animal would have reduced ability to hear or interpret critical cues becomes much more likely to cause a problem the longer it is occurring. Also, inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the source are in close enough proximity for the effect to occur (and further this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency) and, as our analysis (both quantitative and qualitative components) indicates, because of the relative movement of whales and vessels, we do not expect these exposures with the potential for masking to be of a long duration within a given day. Further, because of the relatively low density of mysticetes, and relatively large area over which the vessels travel, we do not expect any individual whales to be exposed to potentially masking levels from these surveys for more than a few days in a year.

As noted above, any masking effects of this survey are expected to be limited and brief, if present. Given the likelihood of significantly reduced received levels beyond even short distances from the survey vessel, combined with the short duration of potential masking and the lower likelihood of extensive additional contributors to background noise offshore within these short exposure periods, we believe that the incremental addition of the survey vessel is unlikely to result in more than minor and short-term masking effects, likely occurring to some small number of the same individuals captured in the estimate of behavioral harassment.

NMFS does not expect that the generally short-term, intermittent, and transitory marine site characterization survey activities planned by Atlantic Shores will create conditions of acute or chronic acoustic exposure leading to long-term physiological impacts in marine mammals. NMFS' prescribed

mitigation measures are expected to further reduce the duration and intensity of acoustic exposure, while limiting the potential severity of any possible behavioral disruption.

Comment 2: Multiple commenters urged NMFS to deny the proposed project and/or postpone any offshore wind (OSW) activities until NMFS determines effects of all OSW activities on marine mammals in the region and determines that the recent whale deaths are not related to OSW activities. Similarly, some commenters provided general concerns regarding recent whale stranding events on the Atlantic Coast, including speculation that the strandings may be related to wind energy development-related activities and that Atlantic Shores' surveys could lead to marine mammal mortalities. However, the commenters did not provide any specific information supporting these concerns.

Response: NMFS authorizes take of marine mammals incidental to marine site characterization surveys but does not authorize the surveys themselves. Therefore, while NMFS has the authority to modify, suspend, or revoke an IHA if the IHA holder fails to abide by the conditions prescribed therein (including, but not limited to, failure to comply with monitoring or reporting requirements), or if NMFS determines that (1) the authorized taking is having or is likely to have more than a negligible impact on the species or stocks of affected marine mammals, or (2) the prescribed measures are likely not or are not effecting the least practicable adverse impact on the affected species or stocks and their habitat, it is not within NMFS' jurisdiction to impose a moratorium on offshore wind development or to require surveys to cease on the basis of unsupported speculation.

NMFS reiterates that there is no evidence that noise resulting from offshore wind development-related site characterization surveys could potentially cause marine mammal strandings, and there is no evidence linking recent large whale mortalities and currently ongoing surveys. The commenters offer no such evidence. NMFS will continue to gather data to help us determine the cause of death for these stranded whales. We note the Marine Mammal Commission's recent statement: "There continues to be no evidence to link these large whale strandings to offshore wind energy development, including no evidence to link them to sound emitted during wind development-related site characterization surveys, known as HRG surveys. Although HRG surveys have

been occurring off New England and the mid-Atlantic coast, HRG devices have never been implicated or causatively-associated with baleen whale strandings.” (Marine Mammal Commission Newsletter, Spring 2023).

There is an ongoing Unusual Mortality Event (UME) for humpback whales along the Atlantic coast from Maine to Florida, which includes animals stranded since 2016. Partial or full necropsy examinations were conducted on approximately half of the whales. Necropsies were not conducted on other carcasses because they were too decomposed, not brought to land, or stranded on protected lands (e.g., national and state parks) with limited or no access. Of the whales examined (roughly 90), about 40 percent had evidence of human interaction, either ship strike or entanglement. Vessel strikes and entanglement in fishing gear are the greatest human threats to large whales. The remaining 50 necropsied whales either had an undetermined cause of death (due to a limited examination or decomposition of the carcass), or had other causes of death including parasite-caused organ damage and starvation.

Acoustic sources used in these HRG surveys are very different from seismic airguns used in oil and gas surveys and produce much smaller impact zones because, in general, they have lower source levels and produce output at higher frequencies. The area within which HRG sources might behaviorally disturb a marine mammal is orders of magnitude smaller than the impact areas for seismic airguns or military sonar. Any marine mammal exposure would be at significantly lower levels and shorter duration, which is associated with less severe impacts to marine mammals.

The best available science indicates that only Level B harassment, or disruption of behavioral patterns (e.g., avoidance), may occur as a result of Atlantic Shores’ HRG surveys. NMFS emphasizes that there is no credible scientific evidence available suggesting that mortality and/or serious injury is a potential outcome of the planned survey activity. Additionally, NMFS cannot authorize mortality or serious injury via an IHA, and such taking is prohibited under Condition 3(c) of the IHA and may result in modification, suspension, or revocation of the IHA. NMFS notes there has never been a report of any serious injuries or mortalities of a marine mammal associated with site characterization surveys.

We also refer to the Greater Atlantic Regional Fisheries Office (GARFO) 2021 Programmatic Consultation, which finds

that these survey activities are in general not likely to adversely affect Endangered Species Act (ESA)-listed marine mammal species (i.e., GARFO’s analysis conducted pursuant to the ESA finds that marine mammals are not likely to be taken at all (as that term is defined under the ESA), much less be taken by serious injury or mortality). That document is found at <https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-take-reporting-programmatics-greater-atlantic#offshore-wind-site-assessment-and-site-characterization-activities-programmatic-consultation>.

Comment 3: Green Oceans claims that the proposed IHA does not properly value biodiversity in its assessment of harm and that “impacts to the abundance or distribution of marine mammals can disrupt vital systems that regulate the ocean and the climate.” Green Oceans further claims that NMFS dismisses the effects of habitat displacement or abandonment on North Atlantic right whales (NARWs) from the project.

Response: Green Oceans provides no further development of this comment, e.g., in what way it believes that the MMPA requires that “biodiversity” be accounted for in the analyses required under the MMPA, how it believes that these surveys would be likely to impact the abundance or distribution of marine mammals, or how such impacts might be likely to disrupt unspecified “vital systems.” However, we reiterate that the magnitude of behavioral harassment authorized is very low and the severity of any behavioral responses are expected to be primarily limited to temporary displacement and avoidance of the area when some activities that have the potential to result in harassment are occurring (see Negligible Impact Determinations section for our full analysis). NMFS does not anticipate that marine mammals would be permanently displaced or displaced for extended periods of time from the area where Atlantic Shores’ marine site characterization surveys would occur, and commenters do not provide evidence that this effect should be a reasonably anticipated outcome of the specified activity. We expect temporary avoidance to occur, at worst, but that is distinctly different from displacement, which suggests longer-term, reduced usage of habitat. Similarly, NMFS is not aware of any scientific information suggesting that the survey activity would cause meaningful shifts in abundance and distribution of marine mammals and disagrees that this would be a reasonably anticipated effect of the specified activities. The authorized take

of NARWs by Level B harassment is precautionary but considered unlikely as NMFS’ take estimation analysis does not account for the use of mitigation and monitoring measures (e.g., the requirement for Atlantic Shores to implement a shutdown zone for NARWs (500 m) that is more than three times as large as the estimated harassment zone (141 m)). These requirements are expected to largely eliminate the actual occurrence of Level B harassment events and to the extent that harassment does occur, would minimize the duration and severity of any such events. Level B harassment authorized by this IHA is not expected to negatively impact abundance or distribution of other marine mammal species particularly given that it does not account for the suite of mitigation and monitoring measures NMFS has prescribed, and would be comprised of temporary low severity impacts, with no lasting biological consequences. Therefore, even if marine mammals are in the area of the specified activities, a displacement impact is not anticipated.

Comment 4: Commenters stated that NMFS was not utilizing the best available science when assessing impacts to marine mammals. Green Oceans asserted that NMFS had not fully considered the effect of the project on NARWs, claiming that “90% of the population could be affected” by the proposed survey.

Response: NMFS relied upon the best scientific evidence available, including, but not limited to, the most recent Stock Assessment Report (SAR) data, scientific literature, and Duke University’s density models (Roberts *et al.*, 2023), in analyzing the impacts of Atlantic Shores’ specified activities on marine mammals. While commenters suggest generally that NMFS consider the best scientific evidence available, none of the commenters provided additional relevant scientific information for NMFS to consider.

NMFS determined that Atlantic Shores’ surveys have the potential to take marine mammals by Level B harassment and does not anticipate or authorize mortality (death), serious injury, or Level A harassment of any marine mammal species, including NARW. Atlantic Shores requested and NMFS is authorizing only five takes of NARWs by Level B harassment, which is less than 2 percent of the population. Further, NMFS does not expect that the generally short-term, intermittent, and transitory nature of Atlantic Shores’ marine site characterization survey activities will create conditions of acute or chronic acoustic exposure leading to

long-term physiological stress responses in marine mammals.

Comment 5: Green Oceans states that the “precautionary principle” does not allow NMFS to authorize the “introduction of stressors” to populations undergoing an UME, that authorization of take for such species “violates the spirit and intent of the MMPA,” and that NMFS is “precluded from authorizing wind energy development” in habitat utilized by relevant species for which there are active UMEs (*i.e.*, humpback, minke, and North Atlantic right whales).

Response: Green Oceans refers to supposed standards that do not exist in the MMPA, *e.g.*, the MMPA contains no reference to the “precautionary principle,” and fails to adequately explain its supposition that NMFS has violated the “spirit and intent” of the MMPA. As described previously, an IHA does not authorize or allow the activity itself but authorizes the take of marine mammals incidental to the “specified activity” for which incidental take coverage is being sought. In this case, NMFS is responding to Atlantic Shores’ request to incidentally take marine mammals while engaged in marine site characterization surveys and determining whether the necessary findings can be made based on Atlantic Shores’ application. The authorization of Atlantic Shores’ survey activities, or any other activities that introduce stressors, is not within NMFS’ jurisdiction.

Regarding UMEs, the MMPA does not preclude authorization of take for species or stocks with ongoing UMEs. Rather, NMFS considers the ongoing UME as part of the environmental baseline for the affected species or stock as part of its negligible impact analyses. Elevated NARW mortalities began in June 2017 and there is an active UME. Overall, preliminary findings support human interactions, specifically vessel strikes and entanglements, as the cause of death for the majority of NARWs. As noted previously, the survey area overlaps a migratory corridor for NARWs. Due to the fact that the survey activities are temporary and the spatial extent of sound produced by the survey would be very small relative to the spatial extent of the available migratory habitat in the biologically important area (BIA), NARW migration is not expected to be impacted by the survey. Given the relatively small size of the ensonified area, it is unlikely that prey availability would be adversely affected by HRG survey operations. Required vessel strike avoidance measures will also decrease risk of ship strike during migration; no ship strike is expected to

occur during Atlantic Shores’ planned activities. Additionally, only very limited take by Level B harassment of NARWs has been requested and has been authorized by NMFS as HRG survey operations are required to maintain a 500 m shutdown zone for NARWs. The 500 m shutdown zone for NARWs is conservative, considering the Level B harassment isopleth for the most impactful acoustic source (*i.e.*, sparker) is estimated to be 141 m, and thereby minimizes the potential for behavioral harassment of this species. As noted previously, Level A harassment is not expected due to the small permanent threshold shift (PTS) zones associated with HRG equipment types proposed for use. NMFS does not anticipate NARW takes that would result from Atlantic Shores’ activities would impact annual rates of recruitment or survival. Thus, any takes that occur would not result in population level impacts.

Elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January 2016. Of the cases examined, approximately half had evidence of human interaction (ship strike or entanglement). The UME does not yet provide cause for concern regarding population-level impacts. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or distinct population segment (DPS)) remains stable at approximately 12,000 individuals.

Beginning in January 2017, elevated minke whale strandings have occurred along the Atlantic coast from Maine through South Carolina, with highest numbers in Massachusetts, Maine, and New York. This event does not provide cause for concern regarding population level impacts, as the likely population abundance is greater than 20,000 whales. The minke whale UME is currently non-active, with closure pending.

The required mitigation measures are expected to reduce the number and/or severity of takes for all species in Table 2, including those with active UMEs, to the level of least practicable adverse impact. In particular they would provide animals the opportunity to move away from the sound source throughout the survey area before HRG survey equipment reaches full energy, thus preventing them from being exposed to sound levels that have the potential to cause injury (Level A harassment) or more severe Level B harassment. No Level A harassment is anticipated, even in the absence of mitigation measures, or authorized.

NMFS expects that takes would be in the form of short-term Level B behavioral harassment by way of brief startling reactions and/or temporary vacating of the area, or decreased foraging (if such activity was occurring)—reactions that (at the scale and intensity anticipated here) are considered to be of low severity, with no lasting biological consequences. Since both the sources and marine mammals are mobile, animals would only be exposed briefly to a small ensonified area that might result in take. Additionally, required mitigation measures would further reduce exposure to sound that could result in more severe behavioral harassment.

Comment 6: Some commenters objected to NMFS’ small numbers and negligible impact determinations for the numbers of marine mammals, particularly NARWs, taken by Level B harassment under Atlantic Shores’ planned activities. Green Oceans claims that NMFS’ determination is “arbitrary and capricious,” in part because it fails to account for the total amount of take for a given species across all current wind development activities for which NMFS has issued incidental take authorizations (ITAs). Green Oceans also claims that, for Atlantic Shores, NMFS is violating the “intent of the MMPA” by proposing to authorize incidental take for “over 12 percent of the stock for over 8 species.” Green Oceans also states that NMFS’ small numbers finding “fails to consider the conservation status of the [NARW].”

Response: NMFS disagrees with the commenters’ arguments on the topic of small numbers and negligible impact findings, and the commenters do not provide a reasoned basis for finding the effects of the specified activity would be greater than negligible on any species or stock. The Negligible Impact Analysis and Determination section of the proposed and final 2022 IHA (87 FR 38067, April 27, 2022; 87 FR 50293, August 16, 2022) provides a detailed qualitative discussion supporting NMFS’ determination that any anticipated impacts from this action would be negligible. The section contains a number of factors that were considered by NMFS based on the best available scientific data and why we concluded that impacts resulting from the specified activity are not reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Although there is limited legislative history available to guide NMFS and an apparent lack of biological underpinning to the concept, we have

worked to develop a reasoned approach to small numbers. NMFS explains the concept of “small numbers” in recognition that there could also be quantities of individuals taken that would correspond with “medium” and “large” numbers. As such, for an individual incidental take authorization, NMFS considers that one-third of the most appropriate population abundance number—as compared with the assumed number of individuals taken—is an appropriate limit with regard to “small numbers.” This relative approach is consistent with the statement from the legislative history that “[small numbers] is not capable of being expressed in absolute numerical limits” (H.R. Rep. No. 97–228, at 19 (September 16, 1981)), and relevant case law (Center for Biological Diversity v. Salazar, 695 F.3d 893, 907 (9th Cir. 2012) (holding that the U.S. Fish and Wildlife Service reasonably interpreted “small numbers” by analyzing take in relative or proportional terms)). As noted above, there is no biological significance associated with “small numbers” and, as such, NMFS appropriately does not consider “conservation status” or other issues related to the status of a species or stock in making its small numbers finding. Instead, these concepts are appropriately considered as part of the negligible impact analysis—consideration of “conservation status” as part of the small numbers finding, as Green Oceans suggests, would inappropriately conflate these two independent findings.

Atlantic Shores requested, and NMFS proposed to authorize, incidental take that amounts to less than 2 percent of the Western Atlantic stock of NARWs, Gulf of Maine stock of humpback whales, and Western North Atlantic stock of gray seals, and less than 1 percent of all other stocks, values which do not align with those presented by Green Oceans—which do not appear to relate to the proposed action.

NMFS has made the necessary small numbers finding for all affected species and stocks, specifically for the issuance of the Atlantic Shores IHA.

Comment 7: Oceana and Green Oceans noted that chronic stressors are an emerging concern for NARW conservation and recovery, and stated that chronic stress may result in energetic effects for North Atlantic right whales. Oceana and Green Oceans suggested that NMFS has not fully considered both the use of the area and the effects of both acute and chronic stressors on the health and fitness of North Atlantic right whales, as disturbance responses in North Atlantic

right whales could lead to chronic stress or habitat displacement, leading to an overall decline in their health and fitness.

Response: NMFS agrees with Oceana and Green Oceans that both acute and chronic stressors are of concern for NARW conservation and recovery. We recognize that acute stress from acoustic exposure is one potential impact of these surveys, and that chronic stress can have fitness, reproductive, *etc.* impacts at the population-level scale. NMFS has carefully reviewed the best available scientific information in assessing impacts to marine mammals, and recognizes that Atlantic Shores’ surveys have the potential to impact marine mammals through behavioral effects, stress responses, and auditory masking. However, NMFS does not expect that the generally short-term, intermittent, and transitory marine site characterization survey activities planned by Atlantic Shores will create conditions of acute or chronic acoustic exposure leading to long-term physiological stress responses in marine mammals. NMFS has prescribed a robust suite of mitigation measures, including extended distance shutdowns for NARW that are expected to further reduce the duration and intensity of acoustic exposure, while limiting the potential severity of any possible behavioral disruption, and may prevent any actual harassment from occurring under this IHA. The potential for chronic stress was evaluated in making the determinations presented in NMFS’ negligible impact analyses. Although Green Oceans correctly states that Atlantic Shores’ surveys would occur in the NARW migratory corridor, they incorrectly claim that the project area is a known feeding habitat for NARWs and that any displacement would have “devastating effects on the species.” NMFS does not anticipate that NARWs would be displaced from the area where Atlantic Shores’ marine site characterization surveys would occur, and neither comment provides evidence that this effect should be a reasonably anticipated outcome of the specified activity.

Similarly, NMFS is not aware of any scientific information suggesting that the survey activity would drive marine mammals out of the survey area, and disagrees that this would be a reasonably anticipated effect of the specified activities. The take by Level B harassment authorized by NMFS is precautionary and also considered unlikely to actually occur, as NMFS’ take estimation process does not account for the use of extremely precautionary mitigation measures, *e.g.*,

the requirement for Atlantic Shores to implement a Shutdown Zone that is more than 3 times as large as the estimated harassment zone. These requirements are expected to largely eliminate the actual occurrence of Level B harassment events and, to the extent that harassment does occur, would minimize the duration and severity of any such events. Therefore, even if a NARW was in the area of Atlantic Shores’ surveys, a displacement impact is not anticipated.

Because NARW generally use this location in a transitory manner, specifically for migration, any potential impacts from these surveys are lessened for other behaviors due to the brief periods where exposure is possible. Thus, the transitory nature of occurrence of NARWs as they migrate means it is unlikely for any exposure to cause chronic effects, as Atlantic Shores’ planned survey area and ensonified zones are small relative to the overall migratory corridor. As such, NMFS does not expect acute or cumulative stress to be a detrimental factor to NARWs from Atlantic Shores’ described survey activities. The potential for impacts related to an overall increase in the amount of other OSW development activities is separate from the aforementioned analysis of potential for impacts from the specified survey activities and is not discussed further as it is outside the scope of this specific action.

Comment 8: Green Oceans criticized NMFS’s use of the 160-decibel (dB) root mean square (rms) Level B harassment threshold, stating that the threshold is based on outdated information and that the best available science shows that behavioral impacts can occur at levels below the threshold. Criticism of our use of this threshold also focused on its nature as a step function, *i.e.*, it assumes animals don’t respond to received noise levels below the threshold but always do respond at higher received levels. Green Oceans also suggests that reliance on this threshold results in consistent underestimation of impacts because it is “not sufficiently conservative” and that any determination that relies on this threshold is “arbitrary and capricious.” Green Oceans implied that NMFS should revise its generalized behavioral take thresholds to mirror linear risk functions to account for intraspecific and contextual variability, and potential impacts at lower received levels (particularly for baleen whales).

Response: NMFS acknowledges that the 160-dB rms step-function approach is simplistic, and that an approach reflecting a more complex probabilistic function may more effectively represent

the known variation in responses at different levels due to differences in the receivers, the context of the exposure, and other factors. Green Oceans suggested that our use of the 160-dB threshold implies that we do not recognize the science indicating that animals may react in ways constituting behavioral harassment when exposed to lower received levels. However, we do recognize the potential for Level B harassment at exposures to received levels below 160 dB rms, in addition to the potential that animals exposed to received levels above 160 dB rms will not respond in ways constituting behavioral harassment. These comments appear to evidence a misconception regarding the concept of the 160-dB threshold. While it is correct that in practice it works as a step-function, *i.e.*, animals exposed to received levels above the threshold are considered to be “taken” and those exposed to levels below the threshold are not, it is in fact intended as a sort of mid-point of likely behavioral responses (which are extremely complex depending on many factors including species, noise source, individual experience, and behavioral context). What this means is that, conceptually, the function recognizes that some animals exposed to levels below the threshold will in fact react in ways that are appropriately considered take, while others that are exposed to levels above the threshold will not. Use of the 160-dB threshold allows for a simple quantitative estimate of take, while we can qualitatively address the variation in responses across different received levels in our discussion and analysis.

We also note Green Oceans’ statement that the 160-dB threshold is “not sufficiently conservative.” Green Oceans does not further describe the standard of conservatism that it believes NMFS must attain, or how that standard relates to the legal requirements of the MMPA. Green Oceans goes on to imply that use of the 160-dB threshold is inappropriate because it addresses only exposures that cause disturbance, versus those exposures that present the potential to disturb through disruption of behavioral patterns. Green Oceans does not further develop this comment or offer any justification for this contention. NMFS affirms that use of the 160-dB criterion is expected to be inclusive of acoustic exposures presenting the potential to disturb through disruption of behavioral patterns, as required through the MMPA’s definition.

Green Oceans cites reports of changes in vocalization, typically for baleen whales, as evidence in support of a

lower threshold than the 160-dB threshold currently in use. A mere reaction to noise exposure does not, however, mean that a take by Level B harassment, as defined by the MMPA, has occurred. For a take to occur requires that an act have “the potential to disturb by causing disruption of behavioral patterns,” not simply result in a detectable change in motion or vocalization. Even a moderate cessation or modification of vocalization might not appropriately be considered as being of sufficient severity to result in take (Ellison *et al.*, 2012). Green Oceans claims these reactions result in biological consequences indicating that the reaction was indeed a take but does not provide a well-supported link between the reported reactions at lower received levels and the claimed consequences.

Overall, there is a lack of scientific consensus regarding what criteria might be more appropriate. Defining sound levels that disrupt behavioral patterns is difficult because responses depend on the context in which the animal receives the sound, including an animal’s behavioral mode when it hears sounds (*e.g.*, feeding, resting, or migrating), prior experience, and biological factors (*e.g.*, age and sex). Other contextual factors, such as signal characteristics, distance from the source, and signal to noise ratio, may also help determine response to a given received level of sound. Therefore, levels at which responses occur are not necessarily consistent and can be difficult to predict (Southall *et al.*, 2007, 2019; Ellison *et al.*, 2012; Bain and Williams, 2006; Gomez *et al.*, 2016).

Green Ocean references linear risk functions developed for use specifically in evaluating the potential impacts of Navy tactical sonar. However, Green Oceans provides no suggestion regarding a risk function that it believes would be appropriate for use in this case. There is currently no agreement on these complex issues, and this threshold has remained in use in part because of the practical need to use a relatively simple threshold based on available information that is both predictable and measurable for most activities.

Comment 9: Oceana raised objections to NMFS’ proposed renewal process for potential extension of the 1-year IHA with an abbreviated 15-day public comment period. Oceana recommended that an additional 30-day public comment period is necessary for any IHA renewal request.

Response: NMFS’ IHA renewal process meets all statutory requirements. In prior responses to comments about IHA renewals (*e.g.*, 84

FR 52464, October 2, 2019; 85 FR 53342, August 28, 2020), NMFS explained the IHA renewal process is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, and further, promotes NMFS’ goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue to implement the existing renewal process.

All IHAs issued, whether an initial IHA or a renewal, are valid for a period of not more than 1 year. The public has 30 days to comment on proposed IHAs, with a cumulative total of 45 days for IHA renewals. The notice of the proposed IHA published in the **Federal Register** on June 28, 2023 (88 FR 41912) provided a 30-day public comment period and made clear that NMFS was seeking comment on the proposed IHA and the potential issuance of a renewal for this survey. As detailed in the **Federal Register** notice for the proposed IHA and on the agency’s website, eligibility for renewal is determined on a case-by-case basis, renewals are subject to an additional 15-day public comment period, and the renewal is limited to up to another year of identical or nearly identical activities as described in the Description of Proposed Activities section of the proposed IHA notice or the activities described in the Description of Proposed Activities section of the proposed IHA 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 of the proposed IHA (88 FR 41912, June 28, 2023). NMFS’ analysis of the anticipated impacts on marine mammals caused by the applicant’s activities covers both the initial IHA period and the possibility of a 1-year renewal. Therefore, a member of the public considering commenting on a proposed initial IHA also knows exactly what activities (or subset of activities) would be included in a proposed renewal IHA, the potential impacts of those activities, the maximum amount and type of take that could be caused by those activities, the mitigation and monitoring measures that would be required, and the basis for the agency’s negligible impact determinations, least practicable adverse impact findings, small numbers findings, and (if applicable) the no unmitigable adverse impact on subsistence use finding—all the information needed to provide complete and meaningful comments on a possible renewal at the time of considering the

proposed initial IHA. Reviewers have the information needed to meaningfully comment on both the immediate proposed IHA and a possible 1-year renewal, should the IHA holder choose to request one.

While there would be additional documents submitted with a renewal request, for a qualifying renewal these would be limited to documentation that NMFS would make available and use to verify that the activities are identical to those in the initial IHA, are nearly identical such that the changes would have either no effect on impacts to marine mammals or decrease those impacts, or are a subset of activities already analyzed and authorized but not completed under the initial IHA. NMFS would also need to confirm, among other things, that the activities would occur in the same location; involve the same species and stocks; provide for continuation of the same mitigation, monitoring, and reporting requirements; and that no new information has been received that would alter the prior analysis. The renewal request would also contain a preliminary monitoring report, in order to verify that effects from the activities do not indicate impacts of a scale or nature not previously analyzed. The additional 15-day public comment period, which includes NMFS' direct notice to anyone who commented on the proposed initial IHA, provides the public an opportunity to review these few documents, provide any additional pertinent information, and comment on whether they think the criteria for a renewal have been met. Combined together, the 30-day public comment period on the initial IHA and the additional 15-day public comment period on the renewal of the same or nearly identical activities, provides the public with a total of 45 days to comment on the potential for renewal of the IHA.

In addition to the IHA renewal process being consistent with all requirements under section 101(a)(5)(D) of the MMPA, it is also consistent with Congress' intent for issuance of IHAs to the extent reflected in statements in the legislative history of the MMPA. Through the description of the process and express invitation to comment on specific potential renewals in the Request for Public Comments section of each proposed IHA, the description of the process on NMFS' website, further elaboration on the process through responses to comments such as these, posting of substantive documents on the agency's website, and provision of 30 or 45 days for public review and comment on all proposed initial IHAs and renewals respectively, NMFS has

ensured that the public is "invited and encouraged to participate fully in the agency's decision-making process," as Congress intended.

Comment 10: Several commenters asserted that NMFS must fully consider the discrete effects of each activity and the cumulative effects of the suite of approved, proposed and potential activities on marine mammals and North Atlantic right whales in particular and ensure that the cumulative effects are not excessive before issuing or renewing an IHA.

Response: Neither the MMPA nor NMFS' codified implementing regulations call for consideration of other unrelated activities and their impacts on marine mammal populations. The preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989) states in response to comments that the impacts from other past and ongoing anthropogenic activities are to be incorporated into the negligible impact analysis via their impacts on the baseline. Consistent with that direction, NMFS has factored into its negligible impact analysis the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline, e.g., as reflected in the density, distribution and status of the species, population size and growth rate, and other relevant stressors. The 1989 final rule for the MMPA implementing regulations also addressed public comments regarding cumulative effects from future, unrelated activities. There, NMFS stated that such effects are not considered in making findings under MMPA section 101(a)(5) concerning negligible impact. In this case, this IHA, as well as other IHAs currently in effect or proposed within the specified geographic region, are appropriately considered an unrelated activity relative to the others. The IHAs are unrelated in the sense that they are discrete actions under section 101(a)(5)(D), issued to discrete applicants.

Section 101(a)(5)(D) of the MMPA requires NMFS to make a determination that the take incidental to a "specified activity" will have a negligible impact on the affected species or stocks of marine mammals. NMFS' implementing regulations at 50 CFR 216.104(a)(1) require applicants to include in their request a detailed description of the specified activity or class of activities that can be expected to result in incidental taking of marine mammals. Thus, the "specified activity" for which incidental take coverage is being sought under section 101(a)(5)(D) is generally defined and described by the applicant. Here, Atlantic Shores was the applicant

for the IHA, and we are responding to the specified activity as described in that application and making the necessary findings on that basis.

Through the response to public comments in the 1989 implementing regulations, NMFS also indicated (1) that we would consider cumulative effects that are reasonably foreseeable when preparing a National Environmental Policy Act (NEPA) analysis, and (2) that reasonably foreseeable cumulative effects would also be considered under section 7 of the ESA for ESA-listed species, as appropriate. Accordingly, NMFS has written Environmental Assessments (EA) that addressed cumulative impacts related to substantially similar activities, in similar locations (e.g., the 2019 Avangrid EA for survey activities offshore North Carolina and Virginia; the 2017 Ocean Wind, LLC EA for site characterization surveys off New Jersey; and the 2018 Deepwater Wind EA for survey activities offshore Delaware, Massachusetts, and Rhode Island). Cumulative impacts regarding issuance of IHAs for site characterization survey activities such as those planned by Atlantic Shores have been adequately addressed under NEPA in prior environmental analyses that support NMFS' determination that this action is appropriately categorically excluded from further NEPA analysis. NMFS independently evaluated the use of a categorical exclusion (CE) for issuance of Atlantic Shores' IHA, which included consideration of extraordinary circumstances.

Separately, the cumulative effects of substantially similar activities in the northwest Atlantic Ocean have been analyzed in the past under section 7 of the ESA when NMFS has engaged in formal intra-agency consultation, such as the 2013 programmatic Biological Opinion for BOEM Lease and Site Assessment Rhode Island, Massachusetts, New York, and New Jersey Wind Energy Areas (<https://repository.library.noaa.gov/view/noaa/29291>). Analyzed activities include those for which NMFS issued previous IHAs (82 FR 31562, July 7, 2017; 85 FR 21198, April 16, 2020; 86 FR 26465, May 10, 2021), which are similar to those planned by Atlantic Shores under this current IHA request. This Biological Opinion (BiOp) determined that NMFS' issuance of IHAs for site characterization survey activities associated with leasing, individually and cumulatively, are not likely to adversely affect listed marine mammals. NMFS notes that, while issuance of this IHA is covered under a different consultation, this BiOp remains valid.

Comment 11: SLC states its opposition to the use of a categorical exclusion under NEPA, asserting that, at minimum, an Environmental Assessment is the appropriate level of review.

Response: NMFS does not agree with SLC's comment. A CE is a category of actions that an agency has determined does not individually or cumulatively have a significant effect on the quality of the human environment, and is appropriately applied for such categories of actions so long as there are no extraordinary circumstances present that would indicate that the effects of the action may be significant. Extraordinary circumstances are situations for which NOAA has determined further NEPA analysis is required because they are circumstances in which a normally excluded action may have significant effects. A determination of whether an action that is normally excluded requires additional evaluation because of extraordinary circumstances focuses on the action's potential effects and considers the significance of those effects in terms of both context (consideration of the affected region, interests, and resources) and intensity (severity of impacts). Potential extraordinary circumstances relevant to this action include (1) adverse effects on species or habitats protected by the MMPA that are not negligible; (2) highly controversial environmental effects; (3) environmental effects that are uncertain, unique, or unknown; and (4) the potential for significant cumulative impacts when the proposed action is combined with other past, present, and reasonably foreseeable future actions.

The relevant NOAA CE associated with issuance of incidental take authorizations is CE B4, "Issuance of incidental harassment authorizations under Section 101(a)(5)(A) and (D) of the MMPA for the incidental, but not intentional, take by harassment of marine mammals during specified activities and for which no serious injury or mortality is anticipated." This action falls within CE B4. In determining whether a CE is appropriate for a given incidental take authorization, NMFS considers the applicant's specified activity and the potential extent and magnitude of takes of marine mammals associated with that activity along with the extraordinary circumstances listed in the Companion Manual for NOAA Administrative Order (NAO) 216-6A and summarized above. The evaluation of whether extraordinary circumstances (if present) have the potential for significant environmental effects is limited to the decision NMFS

is responsible for, which is issuance of the incidental take authorization. While there may be environmental effects associated with the underlying action, potential effects of NMFS' action are limited to those that would occur due to the authorization of incidental take of marine mammals. NMFS prepared numerous EAs analyzing the environmental impacts of the categories of activities encompassed by CE B4 which resulted in Findings of No Significant Impact (FONSI) and, in particular, EAs prepared in support of issuance of IHAs related to similar survey actions are part of NMFS' administrative record supporting CE B4. These EAs demonstrate the issuance of a given incidental harassment authorization does not affect other aspects of the human environment because the action only affects the marine mammals that are the subject of the incidental harassment authorization. These EAs also addressed factors in 40 CFR 1508.27 regarding the potential for significant impacts and demonstrate the issuance of incidental harassment authorization for the categories of activities encompassed by CE B4 do not individually or cumulatively have a significant effect on the human environment.

Specifically for this action, NMFS independently evaluated the use of the CE for issuance of Atlantic Shores' IHA, which included consideration of extraordinary circumstances. As part of that analysis, NMFS considered whether this IHA issuance would result in cumulative impacts that could be significant. In particular, the issuance of an IHA to Atlantic Shores is expected to result in minor, short-term behavioral effects on marine mammal species due to exposure to underwater sound from site characterization survey activities. Behavioral disturbance is possible to occur intermittently in the vicinity of Atlantic Shores' survey area during the 1-year timeframe. Level B harassment will be reduced through use of mitigation measures described herein. Additionally, as discussed elsewhere, NMFS has determined that Atlantic Shores' activities fall within the scope of activities analyzed in GARFO's programmatic consultation regarding geophysical surveys along the U.S. Atlantic coast in the three Atlantic Renewable Energy Regions (completed June 29, 2021; revised September 2021), which concluded surveys such as those planned by Atlantic Shores are not likely to adversely affect ESA-listed species or adversely modify or destroy critical habitat. Accordingly, NMFS has determined that the issuance of this IHA

will result in no more than negligible (as that term is defined by the Companion Manual for NAO 216-6A) adverse effects on species protected by the ESA and the MMPA.

Further, the issuance of this IHA will not result in highly controversial environmental effects or result in environmental effects that are uncertain, unique, or unknown because numerous entities have been engaged in site characterization surveys that result in Level B harassment of marine mammals in the United States. This type of activity is well documented; prior authorizations and analysis demonstrates issuance of an IHA for this type of action only affects the marine mammals that are the subject of the specific authorization and, thus, no potential for significant cumulative impacts are expected, regardless of past, present, or reasonably foreseeable actions, even though the impacts of the action may not be significant by itself. Based on this evaluation, we concluded that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

Comment 12: SLC asserts that NMFS is permitting the proposed activities without any empirically-determined benchmark for what is the injury-causing sound pressure level ("SPL") against which to measure the proposed activities. In addition, SLC indicates that basing the shutdown and clearance distances on PTS thresholds is insufficient as PTS thresholds are modeled from temporary threshold shift (TTS) data and threshold for tissue injury may occur at a lower level than TTS.

Response: NMFS does not agree with the commenter that shutdown and clearance distances based upon PTS thresholds are insufficient due to thresholds being modeled from TTS data. Marine mammal PTS thresholds are appropriately extrapolated from marine mammal TTS data and data from terrestrial mammals, as described in NMFS' 2018 Technical Guidance. We refer the commenter to that guidance. Further, TTS is not considered injury, as defined for Level A harassment under the MMPA, because it is fully recoverable.

Comment 13: Oceana states that NMFS must make an assessment of which activities, technologies and strategies are truly necessary to achieve site characterization to inform development of the offshore wind projects and which are not critical, asserting that NMFS should prescribe the appropriate survey techniques. In general, Oceana stated that NMFS must require the IHA applicant to avoid

adverse effects on NARWs in and around the survey site, and then minimize and mitigate the impacts of underwater noise to the fullest extent feasible, including through the use of best available technology and methods to minimize sound levels from geophysical surveys such as through the use of technically and commercially feasible and effective noise reduction and attenuation measures.

Response: The MMPA requires that an IHA include measures that will effect the least practicable adverse impact on the affected species and stocks and, in practice, NMFS agrees that the IHA should include conditions for the survey activities that will first avoid adverse effects on NARWs in and around the survey site, where practicable, and then minimize the effects that cannot be avoided. NMFS has determined that the IHA meets this requirement to effect the least practicable adverse impact. As part of the analysis for all marine site characterization survey IHAs, NMFS evaluated the effects expected as a result of the specified activity, made the necessary findings, and prescribed mitigation requirements sufficient to achieve the least practicable adverse impact on the affected species and stocks of marine mammals. It is not within NMFS' purview to set the activities, technologies, and strategies that applicants may employ to meet their objectives. As explained above, the "specified activity" for which incidental take coverage is being sought under section 101(a)(5)(D) is defined and described by the applicant, not by NMFS.

Comment 14: Oceana suggests that NMFS require the use of Protected Species Observers (PSOs) and that PSOs complement their survey efforts using additional technologies, such as infrared detection devices when in low-light conditions. In addition, COA noted a lack of standardization for PSOs which could result in differences in recorded take responses, and urged NMFS to incorporate updated guidance on national standards for PSOs and data management into the take authorization process.

Response: NMFS agrees with the commenters regarding these suggestions and requirements to utilize PSOs for monitoring, for PSOs to use a thermal (infrared) device during low-light conditions, and to include updated standardization of PSO requirements and data management. These requirements were included in the proposed **Federal Register** Notice as well as in the issued IHA.

The report that COA references, National Standards for a Protected Species Observer and Data Management Program: A Model Using Geological and Geophysical Surveys (Baker *et al.*, 2013), currently serves as a basis for NMFS' current standardized PSO requirements, specifically review of PSO qualifications as well as collecting and reporting data.

Comment 15: Oceana recommended that NMFS restrict all vessels of all sizes associated with the proposed survey activities to speeds less than 10 knots (kn) (18.5 km/hour) at all times due to the risk of vessel strikes to NARWs and other large whales.

Response: While NMFS acknowledges that vessel strikes can result in injury or mortality, we have analyzed the potential for vessel strike resulting from Atlantic Shores' activity and have determined that based on the nature of the activity and the required mitigation measures specific to vessel strike avoidance included in the IHA, potential for vessel strike is so low as to be discountable. The required mitigation measures, all of which were included in the proposed IHA and are now required in the final IHA, include: A requirement that all vessel operators comply with 10 kn (18.5 km/hour) or less speed restrictions in any Seasonal Management Area (SMA), Dynamic Management Area (DMA), or Slow Zone while underway, and check daily for information regarding the establishment of mandatory or voluntary vessel strike avoidance areas (SMAs, DMAs, Slow Zones) and information regarding NARW sighting locations; a requirement that all vessels greater than or equal to 19.8 meters (m) in overall length operating from November 1 through April 30 operate at speeds of 10 kn (18.5 km/hour) or less; a requirement that all vessel operators reduce vessel speed to 10 kn (18.5 km/hour) or less when any large whale, any mother/calf pairs, pods, or large assemblages of non-delphinid cetaceans are observed near the vessel; a requirement that all survey vessels maintain a separation distance of 500 m or greater from any ESA-listed whales or other unidentified large marine mammals visible at the surface while underway; a requirement that, if underway, vessels must steer a course away from any sighted ESA-listed whale at 10 kn (18.5 km/hour) or less until the 500 m minimum separation distance has been established; a requirement that, if an ESA-listed whale is sighted in a vessel's path, or within 500 m of an underway vessel, the underway vessel must reduce speed and shift the engine to neutral; a requirement that all vessels underway must maintain a minimum

separation distance of 100 m from all non-ESA-listed baleen whales; and a requirement that all vessels underway must, to the maximum extent practicable, attempt to maintain a minimum separation distance of 50 m from all other marine mammals, with an understanding that at times this may not be possible (*e.g.*, for animals that approach the vessel). We have determined that the vessel strike avoidance measures in the IHA are sufficient to ensure the least practicable adverse impact on species or stocks and their habitat. Furthermore, no documented vessel strikes have occurred for any marine site characterization surveys which were issued IHAs from NMFS during the survey activities themselves or while transiting to and from survey sites.

Comment 16: Oceana suggests that NMFS require vessels maintain a separation distance of at least 500 m from NARWs at all times.

Response: NMFS agrees with Oceana regarding this suggestion and a requirement to maintain a separation distance of at least 500 m from NARWs at all times was included in the proposed **Federal Register** Notice and as a requirement in the issued IHA.

Comment 17: Oceana recommended that the IHA should require all vessels supporting site characterization to be equipped with and using Class A Automatic Identification System (AIS) devices at all times while on the water. Oceana suggested this requirement should apply to all vessels, regardless of size, associated with the survey.

Response: NMFS is generally supportive of the idea that vessels involved with survey activities be equipped with and using Class A Automatic Identification System (devices) at all times while on the water. Indeed, there is a precedent for NMFS requiring such a stipulation for geophysical surveys in the Atlantic Ocean (38 FR 63268, December 7, 2018); however, these activities carried the potential for much more significant impacts than the marine site characterization surveys to be carried out by Atlantic Shores, with the potential for both Level A and Level B harassment take. Given the small isopleths and small numbers of take authorized by this IHA, NMFS does not agree that the benefits of requiring AIS on all vessels associated with the survey activities outweigh and warrant the cost and practicability issues associated with this requirement and therefore the agency has not included this within the issued IHA.

Comment 18: Oceana asserts that the IHA must include requirements to hold

all vessels associated with site characterization surveys accountable to the IHA requirements, including vessels owned by the developer, contractors, employees, and others regardless of ownership, operator, and contract. They state that exceptions and exemptions will create enforcement uncertainty and incentives to evade regulations through reclassification and redesignation. They recommend that NMFS simplify this by requiring all vessels to abide by the same requirements, regardless of size, ownership, function, contract or other specifics.

Response: NMFS agrees with Oceana and required these measures in the proposed IHA and final IHA. The IHA requires that a copy of the IHA must be in the possession of Atlantic Shores, the vessel operators, the lead PSO, and any other relevant designees of Atlantic Shores operating under the authority of this IHA. The IHA also states that Atlantic Shores must ensure that the vessel operator and other relevant vessel personnel, including the PSO team, are briefed on all responsibilities, communication procedures, marine mammal monitoring protocols, operational procedures, and IHA requirements prior to the start of survey activity, and when relevant new personnel join the survey operations.

Comment 19: Oceana stated that the IHA must include a requirement for all phases of site characterization to subscribe to the highest level of transparency, including frequent reporting to Federal agencies. Oceana recommended requirements to report all visual and acoustic detections of NARWs and any dead, injured, or entangled marine mammals to NMFS or the Coast Guard as soon as possible and no later than the end of the PSO shift. Oceana states that to foster stakeholder relationships and allow public engagement and oversight of the permitting, the IHA should require all reports and data to be accessible on a publicly available website.

Response: NMFS agrees with the need for reporting and indeed, the MMPA calls for IHAs to incorporate reporting requirements. As included in the proposed IHA, the final IHA includes requirements for reporting that supports Oceana's recommendations. Atlantic Shores is required to submit a monitoring report to NMFS within 90 days after completion of survey activities that fully documents the methods and monitoring protocols, and summarizes the data recorded during monitoring. PSO datasheets or raw sightings data must also be provided with the draft and final monitoring report.

Further, the draft IHA and final IHA stipulate that if a NARW is observed at any time by any survey vessels, during surveys or during vessel transit, Atlantic Shores must immediately report sighting information to the NMFS NARW Sighting Advisory System within 2 hours of occurrence, when practicable, or no later than 24 hours after occurrence. Atlantic Shores may also report the sighting to the U.S. Coast Guard. Additionally, Atlantic Shores must report any discoveries of injured or dead marine mammals to the NMFS Office of Protected Resources and to the New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. This includes entangled animals. All reports and associated data submitted to NMFS are included on the website for public inspection.

Daily visual and acoustic detections of NARWs and other large whale species along the Eastern Seaboard, as well as Slow Zone locations, are publicly available on WhaleMap (<https://whalemap.org/WhaleMap/>). Further, recent acoustic detections of NARWs and other large whale species are available to the public on NOAA's Passive Acoustic Cetacean Map website <https://apps-nefsc.fisheries.noaa.gov/pacm/#/narw>.

Comment 20: Oceana recommended that for site characterization activities that have the potential to injure or harass NARWs, NMFS require a visual clearance and exclusion zone of at least 1,000 m for NARWs around each vessel conducting activities with noise levels that could result in injury to or harassment of large whales, and also require an acoustic clearance and exclusion zone of at least 1,000 m for NARWs around each vessel conducting activities with noise levels that could harass NARWs.

Response: NMFS notes that the 500 m clearance Zone for NARWs exceeds the modeled distance to the largest 160 dB Level B harassment isopleth (141 m during sparker use) by a substantial margin. Oceana does not provide a compelling rationale for why the clearance zone should be even larger. Given that these surveys are relatively low impact and that, regardless, NMFS has prescribed a NARW clearance zone that is significantly larger (500 m) than the conservatively estimated largest harassment zone (141 m), NMFS has determined that the clearance zone is appropriate.

Comment 21: Oceana recommends a shutdown requirement if a NARW or other ESA-listed species are detected in the clearance zone as well as a publicly available explanation of any exemptions

allowing the applicant not to shut down in these situations.

Response: NMFS reiterates that use of the planned sources is not expected to have any potential to cause injury of any species, including NARW, even in the absence of mitigation. Consideration of the anticipated effectiveness of the mitigation measures (*i.e.*, clearance zones and shutdown measures) discussed below and in the Description of Mitigation, Monitoring, and Reporting Measures section of this notice further strengthens the conclusion that injury is not a reasonably anticipated outcome of the survey activity. Nevertheless, there are several shutdown requirements described in the **Federal Register** notice of the proposed IHA (88 FR 41912, June 28, 2023), and which are included in the final IHA, including the stipulation that geophysical survey equipment must be immediately shut down if any marine mammal is observed within or entering the relevant Clearance Zone while geophysical survey equipment is operational. There is no exemption for the shutdown requirement for NARW and ESA-listed species.

Atlantic Shores is required to implement a 30-minute pre-start clearance period prior to the initiation of ramp-up of specified HRG equipment. During this period, clearance zones will be monitored by the PSOs using the appropriate visual technology. Ramp-up may not be initiated if any marine mammal(s) is within its respective clearance zone. If a marine mammal is observed within a clearance zone during the pre-start clearance period, ramp-up may not begin until the animal(s) has been observed exiting its respective exclusion zone or until an additional time period has elapsed with no further sighting (*i.e.*, 15 minutes for small odontocetes and seals, and 30 minutes for all other species). If the acoustic source is shut down for reasons other than mitigation (*e.g.*, mechanical difficulty) for less than 30 minutes, it may be activated again without ramp-up if PSOs have maintained constant observation and no detections of any marine mammal have occurred within the respective clearance zones.

In regards to reporting, Atlantic Shores must notify NMFS if a NARW is observed at any time by any survey vessels during surveys or during vessel transit. Additionally, Atlantic Shores is required to report the relevant survey activity information, such as the type of survey equipment in operation, acoustic source power output while in operation, and any other notes of significance (*i.e.*, pre-clearance survey, ramp-up, shutdown, end of operations, *etc.*) as

well as the estimated distance to an animal and its heading relative to the survey vessel at the initial sighting and survey activity information. We note that if a NARW is detected within the Clearance Zone before a shutdown is implemented, the NARW and its distance from the sound source, including if it is within the Level B harassment zone, would be reported in Atlantic Shores' final monitoring report and made publicly available on NMFS' website. Atlantic Shores is required to immediately notify NMFS of any sightings of NARWs and report upon survey activity information. NMFS believes that these requirements address the commenter's concerns.

Comment 22: Oceana recommended that NMFS should require Passive Acoustic Monitoring (PAM) to establish a clearance zone and maximize the probability of detection for NARWs.

Response: NMFS does not agree that a measure to require PAM is warranted, as it is not expected to be effective for use in detecting the species of concern. It is generally accepted that, even in the absence of additional acoustic sources, using a towed passive acoustic sensor to detect baleen whales (including NARWs) is not typically effective because the noise from the vessel, the flow noise, and the cable noise are in the same frequency band and will mask the vast majority of baleen whale calls. Vessels produce low-frequency noise, primarily through propeller cavitation, with main energy in the 5–300 Hertz (Hz) frequency range. Source levels range from about 140 to 195 decibel (dB) re 1 μ Pa (micropascal) at 1 m (NRC, 2003; Hildebrand, 2009), depending on factors such as ship type, load, and speed, and ship hull and propeller design. Studies of vessel noise show that it appears to increase background noise levels in the 71–224 Hz range by 10–13 dB (Hatch *et al.*, 2012; McKenna *et al.*, 2012; Rolland *et al.*, 2012). PAM systems employ hydrophones towed in streamer cables approximately 500 m behind a vessel. Noise from water flow around the cables and from strumming of the cables themselves is also low-frequency and typically masks signals in the same range. Experienced PAM operators participating in a recent workshop (Thode *et al.*, 2017) emphasized that a PAM operation could easily report no acoustic encounters, depending on species present, simply because background noise levels rendered any acoustic detection impossible. The same workshop report stated that a typical eight-element array towed 500 m behind a vessel could be expected to detect delphinids, sperm whales, and beaked whales at the

required range, but not baleen whales, due to expected background noise levels (including seismic noise, vessel noise, and flow noise).

Comment 23: Oceana recommended that when HRG surveys are allowed to resume after a shutdown event, the surveys should be required to use a ramp-up procedure to encourage any nearby marine life to leave the area.

Response: NMFS agrees with this recommendation and included this requirement in the **Federal Register** notice of the proposed IHA (88 FR 41912, June 28, 2023) and the final IHA as a stipulation that when technically feasible, survey equipment must be ramped up at the start or restart of survey activities. Ramp-up must begin with the power of the smallest acoustic equipment at its lowest practical power output appropriate for the survey. When technically feasible the power must then be gradually turned up and other acoustic sources added in a way such that the source level would increase gradually. NMFS notes that ramp-up is not required for short periods where acoustic sources were shut down (*i.e.*, less than 30 minutes) if PSOs have maintained constant visual observation and no detections of marine mammals occurred within the applicable Shutdown Zones.

Comment 24: COA states that there is no legal authority for permitting offshore geotechnical and geophysical survey activities under BOEM, based on text from the proposed BOEM Renewable Energy Modernization proposed rule (88 FR 5968, January 30, 2023; 88 FR 19578, April 3, 2023). They further state that this has allowed for no oversight with regards to surveys off New Jersey and New York and that they do not understand how BOEM can make assertions without regulations/guidance for HRG survey work.

Response: NMFS' statutory authority for this particular action is limited to authorizing incidental take of marine mammals. NMFS respectfully refers the commenter to BOEM, the agency with responsibility for managing development of U.S. Outer Continental Shelf energy and mineral resources in an environmentally and economically responsible way.

Comment 25: COA is concerned regarding the number of species that could be impacted by the activities, as well as a lack of baseline data available for species in the area, specifically for harbor seals.

Response: We appreciate the concern expressed by COA. NMFS utilizes the best available science when analyzing which species may be impacted by an applicant's proposed activities. Based

on information found in the scientific literature, as well as based on density models developed by Duke University, all marine mammal species included in the proposed **Federal Register** notice have some likelihood of occurring in Atlantic Shores' survey areas. Furthermore, the MMPA requires us to evaluate the effects of the specified activities in consideration of the best scientific evidence available and, if the necessary findings are made, to issue the requested take authorization. The MMPA does not allow us to delay decision making in hopes that additional information may become available in the future.

Regarding the lack of baseline information cited by COA, with specific concern pointed out for harbor seals, NMFS points to two sources of information for marine mammal baseline information: the Ocean/Wind Power Ecological Baseline Studies, January 2008–December 2009 completed by the New Jersey Department of Environmental Protection in July 2010 (<https://dspace.njstatelib.org/xmlui/handle/10929/68435>) and the Atlantic Marine Assessment Program for Protected Species (AMAPPS; <https://www.fisheries.noaa.gov/new-england-mid-atlantic/population-assessments/atlantic-marine-assessment-program-protected>) with annual reports available from 2010 to 2020 (<https://www.fisheries.noaa.gov/resource/publication-database/atlantic-marine-assessment-program-protected-species>) that cover the areas across the Atlantic Ocean. NMFS has duly considered this and all available information.

Based on the information presented, NMFS has determined that no new information has become available, nor do the commenters present additional information, that would change our determinations since the publication of the proposed notice.

Comment 26: COA and SLC assert that Level A harassment may occur, and that this was not accounted for by NMFS.

Response: NMFS acknowledges the concerns brought up regarding the potential for Level A harassment of marine mammals. However, no Level A harassment is expected to result, even in the absence of mitigation, given the characteristics of the sources planned for use. This is additionally supported by the required mitigation, which further reduces the unlikely potential for any Level A harassment to occur, and very small estimated Level A harassment zones described in Atlantic Shores' 2022 **Federal Register** notice (87 FR 50293, August 16, 2022) and carried through to the 2023 IHA (88 FR 41912,

June 28, 2023). Furthermore, the commenter does not provide any support for the apparent contention that Level A harassment is a potential outcome of these activities.

As discussed in the notice of proposed IHA, NMFS considers this category of survey operations to be near *de minimis*, with the potential for Level A harassment for any species to be discountable.

Comment 27: COA and Green Oceans expressed concerns regarding the increased amount of vessel traffic associated with the offshore wind project and its impacts on protected resources, as well as concern for vessel noise.

Response: Atlantic Shores did not request authorization for take incidental to vessel traffic during their marine site characterization survey. Nevertheless, NMFS analyzed the potential for vessel strikes to occur during the survey, and determined that the potential for vessel strike is so low as to be discountable. NMFS does not authorize any take of marine mammals incidental to vessel strike resulting from the survey. If Atlantic Shores were to strike a marine mammal with a vessel, this would be an unauthorized take in violation of the MMPA. This gives Atlantic Shores a strong incentive to operate its vessels with all due caution and to effectively implement the suite of vessel strike avoidance measures required by the IHA. Atlantic Shores proposed a very conservative suite of mitigation measures related to vessel strike avoidance, including measures specifically designed to avoid impacts to NARWs. Section 4(g) in the IHA contains a suite of non-discretionary requirements pertaining to vessel strike avoidance, including vessel operation protocols and monitoring. To date, NMFS is not aware of any site characterization vessel from surveys reporting a vessel strike within the United States. When considered in the context of low overall probability of any vessel strike by Atlantic Shores vessels, given the limited additional survey-related vessel traffic relative to existing traffic in the survey area, the comprehensive visual monitoring, and other additional mitigation measures described herein, NMFS believes these measures are sufficiently protective to avoid vessel strike. These measures are described fully in the Description of Mitigation, Monitoring, and Reporting section below, and include, but are not limited to: training for all vessel observers and captains, daily monitoring of NARW Sighting Advisory System, WhaleAlert app, and USCG Channel 16 for situational awareness

regarding NARW presence in the survey area, communication protocols if whales are observed by any Atlantic Shores personnel, vessel operational protocol should any marine mammal be observed, and visual monitoring.

The potential for impacts related to an overall increase in the amount of vessel traffic due to offshore wind development is separate from the aforementioned analysis of potential for vessel strike during Atlantic Shores' specified survey activities. For more information, please see the response to comment 11 discussing cumulative impacts.

Comment 28: SLC asserts that NMFS' assessment of sound propagation from the proposed activities does not adequately account for sound bouncing off the underside of the water's surface and other surface reflection.

Response: NMFS does not agree with the commenter that NMFS' analysis of sound propagation is insufficient. While the transmission loss model (*i.e.*, spherical spreading) used for HRG sources is fairly simplistic and does not directly account for reflections at the surface, it adequately accounts for how sound would propagate through the environment (note that NMFS' isopleth estimates also account for frequency-dependent absorption), and thus provides a realistic approximation of how sounds from these sources are believed to travel through the environment. Accounting for scattering at the surface is heavily dependent on the roughness of the sea surface, with rougher surfaces resulting in more propagation loss (dB) per bounce as the sound hits the water surface (*i.e.*, this additional dB loss is not accounted for in more simple models). Only flat surfaces would allow for complete reflection of sound.

Comment 29: SLC claims that the weighting curves for low frequency (LF) cetaceans do not align with mysticetes' infrasonic hearing, and urged NMFS to incorporate better estimations for low frequency cetaceans and corresponding thresholds based upon the best available data.

Response: NMFS disagrees that the current low-frequency (LF) cetacean weighting functions are not based on the best available science. While there are very limited data to inform our understanding of mysticete hearing, the generalized hearing range used by NMFS for mysticetes extends from 7 Hz up to 35 kHz, which reflects recommendations made by Southall *et al.* 2007 and Southall *et al.* 2019. Hearing predictions for mysticetes are based on other methods including: anatomical studies and modeling

(Houser *et al.*, 2001; Parks *et al.*, 2007; Tubelli *et al.*, 2012; Cranford and Krysl, 2015); vocalizations (see reviews in Richardson *et al.*, 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008); taxonomy; and behavioral responses to sound (Dahlheim and Ljungblad, 1990; see review in Reichmuth, 2007). The existing weighting functions reflect LF cetacean infrasonic hearing capabilities to the greatest extent allowed by available data.

Comment 30: Green Oceans suggests that the surveys may result in acute injury of whales as a result of rectified diffusion, *i.e.*, bubble growth caused by acoustic exposure.

Response: With regard to Green Oceans' suggestion that acute injury of whales could occur as a result of bubble formation, this effect is extremely unlikely to occur in the circumstances considered here, *i.e.*, relatively low-level sound exposure in shallow waters. We acknowledge that non-auditory physiological effects or injuries can theoretically occur in marine mammals exposed to high level underwater sound or as a secondary effect of extreme behavioral reactions (*e.g.*, change in dive profile as a result of an avoidance reaction) caused by exposure to sound. These include neurological effects, resonance effects, and other types of organ or tissue damage (Cox *et al.*, 2006; Southall *et al.*, 2007; Zimmer and Tyack, 2007). The bubble formation, or rectified diffusion, referenced by Green Oceans is another such effect (*e.g.*, Houser *et al.*, 2001; Tal *et al.*, 2015). However, the survey activities considered here do not involve the use of devices such as explosives or mid-frequency tactical sonar that produce the high-intensity sounds that are associated with these types of effects. While these bubble formation effects remain a theoretical potential cause of marine mammal stranding, it is important to note that theoretical analysis of this potential considers as necessary precedent the condition of deep diving and slow ascent/descent speed, which contributes to increased gas-tissue saturation, prior to high-intensity sound exposure. The survey conditions here, aside from the absence of the high-intensity sound that would be expected to be necessary to cause this effect, preclude the deep diving conditions in which gas supersaturation and the potential for bubble growth might occur—as noted previously, the maximum survey depth is 38 meter (m). Houser *et al.* (2001) emphasize the importance of dive depth to the rectified diffusion concept in marine mammals, stating that beaked whales and sperm whales (species not expected to be

impacted by the proposed survey) may be at greatest risk, with other odontocete species at lesser potential risk. Green Oceans focused its concern on “whales,” which we presume to mean mysticete species, which would be at even lower risk due to typically shallow dive patterns. In summary, the concern raised by Green Oceans regarding potential injury resulting from rectified diffusion is unwarranted due to the shallow survey depths, which preclude the gas-tissue saturation conditions necessary to potentially lead to bubble formation, and the lack of high-intensity sounds necessary to cause bubble expansion.

Description of Marine Mammals

A description of the marine mammals in the area of the activities can be found in the previous documents and notices for the 2022 IHA (87 FR 38067, June 27, 2022; 87 FR 50293, August 16, 2022), which remain applicable to this IHA. NMFS reviewed the most recent draft Stock Assessment Reports (SARs, found on NMFS’ website at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>), up-to-date information on relevant Unusual

Mortality Events (UMEs; <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-unusual-mortality-events>), and recent scientific literature and determined that no new information affects our original analysis of impacts under the 2022 IHA. More general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS’s website (<https://www.fisheries.noaa.gov/find-species>).

NMFS notes that, since issuance of the 2022 IHA, a new SAR is available for the NARW. We note that the estimated abundance for the species declined from 368 to 338. However, this change does not affect our analysis of impacts, as described under the 2022 IHA.

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. Current data indicate

that 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) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. 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 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 1.

TABLE 1—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 on Marine Mammals and Their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the

2022 IHA (87 FR 38067, June 27, 2022; 87 FR 50293, August 16, 2022). NMFS has determined that there is no new information on potential effects that would impact our analysis.

Estimated Take

A detailed description of the methods used to estimate take anticipated to occur incidental to the project is found in the previous Federal Register notices (87 FR 38067, June 27, 2022; 87 FR 50293, August 16, 2022). The methods of estimating take are identical to those used in the 2022 IHA. Atlantic Shores updated the marine mammal densities based on new information (Roberts *et al.*, 2016; Roberts *et al.*, 2023), available online at: <https://seamap.env.duke.edu/models/Duke/EC/>. We refer the reader to

Table 6 in Atlantic Shores’ 2023 IHA request for specific density values used in the analysis. The IHA request is available online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>.

The take that NMFS has authorized can be found in Table 2, which presents the results of Atlantic Shores’ density-based calculations for the survey area. For comparative purposes, we have provided the 2022 IHA authorized take (87 FR 50293, August 16, 2022). NMFS notes that take by Level A harassment was not requested nor does NMFS anticipate that it could occur. Therefore, NMFS has not authorized any take by Level A harassment. Mortality or serious

injury is neither anticipated to occur nor authorized.

TABLE 2—TOTAL AUTHORIZED TAKE, BY LEVEL B HARASSMENT ONLY, RELATIVE TO POPULATION SIZE

Species	Scientific name	Stock	Abundance	2022 IHA authorized take	2023 IHA	
					Authorized take ¹	Max percent population
North Atlantic right whale	<i>Eubalaena glacialis</i>	Western Atlantic	338	24	5	1.5
Humpback whale	<i>Megaptera novaeangliae</i>	Gulf of Maine	1,396	8	⁶ 8 (16)	1.2
Fin whale	<i>Balaenoptera physalus</i>	Western North Atlantic	6,802	16	9	<1
Sei whale ²	<i>Balaenoptera borealis</i>	Nova Scotia	6,292	2	4	<1
Minke whale	<i>Balaenoptera acutorostrata</i>	Canadian East Coastal	21,968	8	46	<1
Sperm whale ²	<i>Physeter macrocephalus</i>	Western Atlantic	4,349	3	2	<1
Long-finned pilot whale ³	<i>Globicephala melas</i>	Western North Atlantic	39,215	20	8 (20)	<1
Bottlenose dolphin	<i>Tursiops truncatus</i>	Western North Atlantic Off-shore Stock.	62,851	232	179	<1
Common dolphin	<i>Delphinus delphis</i>	Western North Atlantic	172,974	911	588	<1
Atlantic white-sided dolphin	<i>Lagenorhynchus acutus</i>	Western North Atlantic	93,233	108	63	<1
Atlantic spotted dolphin	<i>Stenella frontalis</i>	Western North Atlantic	39,921	100	42 (100)	<1
Risso's dolphin	<i>Grampus griseus</i>	Western North Atlantic	35,215	30	7 (30)	<1
Harbor porpoise	<i>Phocoena phocoena</i>	Gulf of Maine/Bay of Fundy	95,543	357	281	<1
Harbor seal ⁴	<i>Phoca vitulina</i>	Western North Atlantic	61,336	263	374	<1
Gray seal ^{4,5}	<i>Halichoerus grypus</i>	Western North Atlantic	27,300	263	374	1.37

¹ Parentheses denote take authorization where different from calculated take estimates. Increases from calculated values are based on average group size for the following species: humpback whale, King *et al.*, 2021; long-finned pilot whale and Risso's dolphin, NOAA, 2022; and Atlantic spotted dolphin, Jefferson *et al.*, 2008.

² Where calculated takes for a species in a given survey area were less than 1 individual, the number was rounded up to 1 take in each survey area.

³ Roberts *et al.* (2023) only provides density estimates for pilot whales as a guild. Given the project's location, NMFS assumes that all take will be of long-finned pilot whales.

⁴ Roberts *et al.* (2023) only provides density estimates for seals without differentiating by species. Harbor seals and gray seals are assumed to occur equally in the survey area; therefore, density values were split evenly between the 2 species, *i.e.*, total estimated take for "seals" is 748.

⁵ NMFS' stock abundance estimate (and associated PBR value) applies to U.S. population only. Total stock abundance (including animals in Canada) is approximately 451,600.

⁶ According to recent findings that humpback whales were the most commonly sighted species in the New York Bight (King *et al.*, 2021), the number of modeled exposures (4) for each of the lease area and ECR is multiplied by an average whale size of two for a total of eight estimated takes in the lease area and eight estimated takes in the ECR. The total request (16) represents the sum of estimated take in the lease area (8) and ECR (8).

Description of Mitigation, Monitoring and Reporting Measures

The required mitigation, monitoring, and reporting measures are identical to those included in the **Federal Register** notice announcing the final 2022 IHA and the discussion of the least practicable adverse impact included in that document remains accurate. The measures are found below.

Atlantic Shores must also abide by all the marine mammal relevant conditions in the NOAA Fisheries GARFO programmatic consultation (specifically Project Design Criteria (PDC) 4, 5, and 7) regarding geophysical surveys along the U.S. Atlantic coast in the three Atlantic Renewable Energy Regions (NOAA GARFO, 2021; <https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-take-reporting-programmatics-greater-atlantic#offshore-wind-site-assessment-and-site-characterization-activities-programmatic-consultation>), pursuant to Section 7 of the Endangered Species Act.

Additionally, on August 1, 2022, NMFS announced proposed changes to the existing NARW vessel speed regulations to further reduce the likelihood of mortalities and serious injuries to endangered NARWs from vessel collisions, which are a leading cause of the species' decline and a primary factor in an ongoing Unusual

Mortality Event (87 FR 46921, August 1, 2023). Should a final vessel speed rule be issued and become effective during the effective period of this IHA (or any other MMPA incidental take authorization), the authorization holder would be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders would be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization would remain in place. The responsibility to comply with the applicable requirements of any vessel speed rule would become effective immediately upon the effective date of any final vessel speed rule and, when notice is published of the effective date, NMFS would also notify Atlantic Shores if the measures in the speed rule were to supersede any of the measures in the MMPA authorization such that they were no longer applicable.

Establishment of Shutdown Zones (SZ)—Marine mammal SZs must be established around the HRG survey

equipment and monitored by NMFS-approved PSOs as follows:

- 500-m SZ for NARWs during use of specified acoustic sources (impulsive: Sparkers; non-impulsive: Non-parametric sub-bottom profilers); and,
- 100-m SZ for all other marine mammals (excluding NARWs) during use of specified acoustic sources (except as specified below). The only exception for this is for pinnipeds (seals) and small delphinids (*i.e.*, those from the genera *Delphinus*, *Lagenorhynchus*, *Stenella* or *Tursiops*).

If a marine mammal is detected approaching or entering the SZs during the HRG survey, the vessel operator will adhere to the shutdown procedures described below to minimize noise impacts on the animals. During use of acoustic sources with the potential to result in marine mammal harassment (sparkers and non-parametric sub-bottom profilers; *i.e.*, anytime the acoustic source is active, including ramp-up), occurrences of marine mammals within the monitoring zone (but outside the SZs) must be communicated to the vessel operator to prepare for potential shutdown of the acoustic source.

Visual Monitoring—Monitoring must be conducted by qualified PSOs who are trained biologists, with minimum qualifications described in the **Federal Register** notices for the 2022 project (87 FR 38067, June 27, 2022; 87 FR 50293,

August 16, 2022). Atlantic Shores must have one PSO on duty during the day and a minimum of two NMFS-approved PSOs must be on duty and conducting visual observations when HRG equipment is in use at night. Visual monitoring must begin no less than 30 minutes prior to ramp-up of HRG equipment and continue until 30 minutes after use of the acoustic source. PSOs must establish and monitor the applicable clearance zones, SZs, and vessel separation distances as described in the 2022 IHA (87 FR 38067, June 27, 2022; 87 FR 50293, August 16, 2022). PSOs must coordinate to ensure 360-degree visual coverage around the vessel from the most appropriate observation posts, and must conduct observations while free from distractions and in a consistent, systematic, and diligent manner. PSOs are required to estimate distances to observed marine mammals. It is the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate.

Pre-Start Clearance—Marine mammal CZs will be established around the HRG survey equipment and monitored by NMFS-approved PSOs prior to use of sparkers and non-parametric sub-bottom profilers as follows:

- 500-m CZ for all ESA-listed species; and,
- 100-m CZ for all other marine mammals.

Prior to initiating HRG survey activities, Atlantic Shores will implement a 30-minute pre-start clearance period. The operator must notify a designated PSO of the planned start of ramp-up where the notification time should not be less than 60 minutes prior to the planned ramp-up to allow the PSOs to monitor the CZs for 30 minutes prior to the initiation of ramp-up. Prior to ramp-up beginning, Atlantic Shores will receive confirmation from the PSO that the CZs are clear prior to preceding. Any PSO on duty has the authority to delay the start of survey operations if a marine mammal is detected within the applicable pre-start clearance zones.

During this 30-minute period, the entire CZ must be visible. The exception to this would be in situations where ramp-up must occur during periods of poor visibility (inclusive of nighttime) as long as appropriate visual monitoring has occurred with no detections of marine mammals in 30 minutes prior to the beginning of ramp-up. Acoustic source activation must only occur at night where operational planning

cannot reasonably avoid such circumstances.

If a marine mammal is observed within the relevant CZs during the pre-start clearance period, initiation of HRG survey equipment must not begin until the animal(s) has been observed exiting the respective clearance zone, or until an additional period has elapsed with no further sighting (*i.e.*, minimum 15 minutes for small odontocetes and seals; 30 minutes for all other species). The pre-start clearance requirement includes small delphinids. PSOs must also continue to monitor the zone for 30 minutes after survey equipment is shut down or survey activity has concluded.

Ramp-Up of Survey Equipment—When technically feasible, a ramp-up procedure must be used for geophysical survey equipment capable of adjusting energy levels at the start or re-start of survey activities. The ramp-up procedure must be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals near the project area by allowing them to detect the presence of the survey and vacate the area prior to the commencement of survey equipment operation at full power. Ramp-up of the survey equipment must not begin until the relevant SZs have been cleared by the PSOs, as described above. HRG equipment operators must ramp up acoustic sources to half power for 5 minutes and then proceed to full power. If any marine mammals are detected within the SZs prior to or during ramp-up, the HRG equipment must be shut down (as described below).

Shutdown Procedures—If an HRG source is active and a marine mammal is observed within or entering a relevant SZ (as described above), an immediate shutdown of the HRG survey equipment is required. When shutdown is called for by a PSO, the acoustic source must be immediately deactivated and any dispute resolved only following deactivation. Any PSO on duty has the authority to delay the start of survey operations or to call for shutdown of the acoustic source if a marine mammal is detected within the applicable SZ. The vessel operator must establish and maintain clear lines of communication directly between PSOs on duty and crew controlling the HRG source(s) to ensure that shutdown commands are conveyed swiftly while allowing PSOs to maintain watch. Subsequent restart of the HRG equipment may only occur after the marine mammal has been observed exiting the relevant SZ, or, until an additional period has elapsed with no further sighting of the animal within the relevant SZ.

Upon implementation of shutdown, the HRG source may be reactivated after the marine mammal that triggered the shutdown has been observed exiting the applicable SZ or following a clearance period of 15 minutes for small odontocetes and seals and 30 minutes for all other species with no further observation of the marine mammal(s) within the relevant SZ. If the HRG equipment is shut down for brief periods (*i.e.*, less than 30 minutes) for reasons other than mitigation (*e.g.*, mechanical or electronic failure), the equipment may be re-activated as soon as is practicable at full operational level, without 30 minutes of pre-clearance, only if PSOs have maintained constant visual observation during the shutdown and no visual detections of marine mammals occurred within the applicable SZs during that time. For a shutdown of 30 minutes or longer, or if visual observation was not continued diligently during the pause, pre-clearance observation is required, as described above. The acoustic source(s) must be deactivated when not acquiring data or preparing to acquire data, except as necessary for testing. Unnecessary use of the acoustic source shall be avoided.

The shutdown requirement is waived for pinnipeds (seals) and certain genera of small delphinids (*i.e.*, *Delphinus*, *Lagenorhynchus*, *Stenella*, or *Tursiops*) under certain circumstances. If a delphinid(s) from these genera is visually detected within the SZ, shutdown would not be required. If there is uncertainty regarding identification of a marine mammal species (*i.e.*, whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived), PSOs must use best professional judgment in making the decision to call for a shutdown.

If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within the area encompassing the Level B harassment isopleth (141 m), shutdown must occur.

Vessel Strike Avoidance—Atlantic Shores must comply with vessel strike avoidance measures as described in the **Federal Register** notice for the 2022 IHA (87 FR 50293, August 16, 2022). This includes speed restrictions (10 kn (18.5 km/hour) or less) when mother/calf pairs, pods, or large assemblages of cetaceans are spotted near a vessel; species-specific vessel separation distances; appropriate vessel actions when a marine mammal is sighted (*e.g.*, avoid excessive speed, remain parallel

to animal's course, *etc.*); and monitoring of the NMFS NARW reporting system and WhaleAlert daily.

Throughout all phases of the survey activities, Atlantic Shores must monitor NOAA Fisheries NARW reporting systems for the establishment of a DMA. If NMFS establishes a DMA in the surrounding area, including the project area or export cable routes being surveyed, Atlantic Shores is required to abide by the 10-kn (18.5 km/hour) speed restriction.

Seasonal Operating Requirements—Atlantic Shores will conduct HRG survey activities in the vicinity of a NARW Mid-Atlantic SMA. Activities must comply with the seasonal mandatory speed restriction period for this SMA (November 1 through April 30) for any survey work or transit within this area.

Training—Project-specific training is required for all vessel crew prior to the start of survey activities.

Reporting—PSOs must record specific information as described in the **Federal Register** notice of the issuance of the 2022 IHA (87 FR 50293, August 16, 2022). Within 90 days after completion of survey activities, Atlantic Shores must provide NMFS with a monitoring report, which must include summaries of recorded takes and estimates of the number of marine mammals that may have been harassed.

In the event of a ship strike or discovery of an injured or dead marine mammal, Atlantic Shores must report the incident to the Office of Protected Resources (OPR), NMFS and to the New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. The report must include the information listed in the **Federal Register** notice of the issuance of the initial IHA (87 FR 50293, August 16, 2022).

Determinations

Atlantic Shores' HRG survey activities are unchanged from those analyzed in support of the 2022 IHA. The effects of the activity, taking into consideration the mitigation and related monitoring measures, remain unchanged from those evaluated in support of the 2022 IHA, regardless of the minor increases in estimated take for two marine mammal species (humpback whale and minke whale). NMFS expects that all potential takes would be short-term Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging (if such activity was occurring), reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.*, Southall *et al.*, 2007). In addition to being

temporary, the maximum expected harassment zone around a survey vessel is 141 m from use of the AA Dura-spark sparker. Although this distance is assumed for all survey activity evaluated here and in estimating authorized take numbers, in reality, much of the survey activity would involve use of non-impulsive acoustic sources with a reduced acoustic harassment zone of up to 56 m, producing expected effects of particularly low severity. The ensounded area surrounding each vessel is extremely small compared to the overall distribution of the animals in the area and the available habitat.

Feeding behavior is not likely to be significantly impacted as prey species are mobile and are broadly distributed throughout the survey area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the temporary nature of the disturbance and the availability of similar habitat and resources in the surrounding area, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations. Even considering the increased estimated take for some species, the impacts of these lower severity exposures are not expected to accrue to a degree that the fitness of any individuals would be impacted and, therefore, no impacts on the annual rates of recruitment or survival would result.

As previously discussed in the 2022 IHA (87 FR 50293, August 16, 2022), impacts from the survey are expected to be localized to the specific area of activity and only during periods when Atlantic Shores' acoustic sources are active. There are no rookeries, mating or calving grounds, or any feeding areas known to be biologically important to marine mammals within the survey area. There is no designated critical habitat for any marine mammals listed under the ESA in the survey area.

As noted for the 2022 IHA (87 FR 50293, August 16, 2022), the survey area overlaps a migratory corridor BIA and migratory route SMA (Port of New Jersey/New York) for NARWs. As the survey activities would be temporary and the spatial acoustic footprint produced by the survey would be very small relative to the spatial extent of the available migratory habitat in the BIA (269,448 km²), NMFS does not expect NARW migration to be impacted by the

survey. Required vessel strike avoidance measures would also decrease risk of ship strike during migration; no ship strike is expected to occur during Atlantic Shores' activities. Atlantic Shores would be required to comply with seasonal speed restrictions of these SMAs, and in any DMA, should NMFS establish one (or more) in the survey area. Additionally, Atlantic Shores requested, and NMFS has authorized, only five takes by Level B harassment of NARWs. This amount is less than the 24 Level B harassment takes authorized in the 2022 IHA due to the updated Duke University density data (Roberts *et al.*, 2023).

Although take by Level B harassment of NARWs has been authorized by NMFS, we anticipate such take may not actually occur, and should it occur, we anticipate a very low level of harassment because Atlantic Shores is required to maintain a shutdown zone of 500 m if a NARW is observed. The authorized takes account for any missed animals wherein the survey equipment is not shut down immediately. As shutdown would be called for immediately upon detection (if the whale is within 500 m), it is likely the exposure time would be very limited and received levels would not be much above the harassment threshold. Further, the 500-m SZ for NARWs is conservative, considering the Level B harassment isopleth for the most impactful acoustic source (*i.e.*, AA Dura-spark sparker) is estimated to be 141 m, and thereby minimizes the potential for behavioral harassment of this species. As noted previously, Level A harassment is not expected due to the small PTS zones associated with HRG equipment types planned for use. NMFS does not anticipate NARW takes that would result from Atlantic Shores' activities would impact annual rates of recruitment or survival. Thus, any takes that occur would not result in population level impacts.

We also note that our findings for other species with active UMEs that were previously described for the 2022 IHA remain applicable to this project. Therefore, in conclusion, there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures would effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes would have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine

mammals relative to the affected stock abundances; (4) Atlantic Shores' activities would not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action; and (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

NMFS has authorized the incidental take of four species of marine mammals which are listed under the ESA, the North Atlantic right, fin, sei, and sperm whale, and has determined that this activity falls within the scope of activities analyzed in NMFS Greater Atlantic Regional Fisheries Office's programmatic consultation regarding geophysical surveys along the U.S. Atlantic coast in the three Atlantic Renewable Energy Regions (completed June 29, 2021; revised September 2021).

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 determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

Authorization

NMFS has issued an IHA to Atlantic Shores for the potential harassment of small numbers of 15 marine mammal species incidental to marine site

characterization surveys offshore of New Jersey and New York, provided the previously mentioned mitigation, monitoring, and reporting requirements are followed.

Dated: August 8, 2023.

Kimberly Damon-Randall,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC506]

Final 2022 Marine Mammal Stock Assessment Reports

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

ACTION: Notice; response to comments.

SUMMARY: As required by the Marine Mammal Protection Act (MMPA), NMFS has considered public comments for revisions of the 2022 marine mammal stock assessment reports (SARs). This notice announces the availability of 25 final 2022 SARs that were updated and finalized.

ADDRESSES: The 2022 Final SARs are available in electronic form via <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>.

Copies of the Alaska Regional SARs may be requested from Nancy Young, Alaska Fisheries Science Center; copies of the Atlantic, Gulf of Mexico, and Caribbean Regional SARs may be requested from Sean Hayes, Northeast Fisheries Science Center; and copies of the Pacific Regional SARs may be requested from Jim Carretta, Southwest Fisheries Science Center (see **FOR FURTHER INFORMATION CONTACT** below).

FOR FURTHER INFORMATION CONTACT: Zachary Schakner, Office of Science and Technology, 301-427-8106, Zachary.Schakner@noaa.gov; Nancy Young, 206-526-4297, Nancy.Young@noaa.gov, regarding Alaska regional stock assessments; Sean Hayes, 508-495-2362, Sean.Hayes@noaa.gov, regarding Atlantic, Gulf of Mexico, and Caribbean regional stock assessments; or Jim Carretta, 858-546-7171, Jim.Carretta@noaa.gov, regarding Pacific regional stock assessments.

SUPPLEMENTARY INFORMATION:

Background

Section 117 of the MMPA (16 U.S.C. 1361 *et seq.*) requires NMFS and the U.S. Fish and Wildlife Service (FWS) to prepare stock assessments for each stock of marine mammals occurring in waters under the jurisdiction of the United States, including the U.S. Exclusive Economic Zone (EEZ). These SARs must contain information regarding the distribution and abundance of the stock, population growth rates and trends, estimates of annual human-caused mortality and serious injury (M/SI) from all sources, descriptions of the fisheries with which the stock interacts, and the status of the stock. Initial SARs were completed in 1995.

The MMPA requires NMFS and FWS to review the SARs at least annually for strategic stocks and stocks for which significant new information is available, and at least once every 3 years for non-strategic stocks. The term "strategic stock" means a marine mammal stock: (A) for which the level of direct human-caused mortality exceeds the potential biological removal level or PBR (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); (B) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act (ESA) within the foreseeable future; or (C) which is listed as a threatened species or endangered species under the ESA or is designated as depleted under the MMPA. NMFS and FWS are required to revise a SAR if the status of the stock has changed or can be more accurately determined.

In order to ensure that marine mammal SARs are based on the best scientific information available, the updated SARs under NMFS' jurisdiction are peer-reviewed within NOAA Fisheries Science Centers and by members of three regional independent Scientific Review Groups (SRGs) established under the MMPA to independently advise NMFS and FWS on marine mammal issues. Because of the time it takes to review, revise, and assess available data, the period covered by the 2022 Final SARs is 2016 through 2020. While this results in a time lag, the extensive peer review process ensures that the SARs are based on the best scientific information available.

NMFS reviewed the status of all marine mammal strategic stocks and considered whether significant new information was available for all non-

strategic stocks under NMFS' jurisdiction. As a result of this review, NMFS revised reports for 25 stocks in the Alaska, Atlantic, and Pacific regions to incorporate new information. The 2022 revisions to the SARs include revisions to stock structures, updated or revised human-caused mortality/serious injury (M/SI) estimates, and updated abundance estimates. With the publication of these SARs, the revised stock structure for all North Pacific humpback whale stocks and Southeast Alaska harbor porpoises is finalized. The revisions to stock structure and the addition of new reports resulted in five newly designated strategic stocks and three newly designated non-strategic stocks. No stocks changed in status from "non-strategic" to "strategic." One Western North Atlantic common bottlenose dolphin stock, the Northern South Carolina Estuarine System Stock, changed from "strategic" status to "non-strategic." A technical update was made to the Northern Gulf of Mexico Bay, Sound, and Estuary stocks of common bottlenose dolphin SAR that covers 23 Northern Gulf of Mexico stocks to move Florida Bay from the Western North Atlantic to the Gulf of Mexico. Florida Bay is now included within Table 1 and Figure 1 of the SAR, and the number of stocks in the Gulf of Mexico has been updated accordingly. No other changes or updates were made to that SAR.

NMFS received comments on the draft 2022 SARs from the Marine Mammal Commission (Commission); the Department of Fisheries and Oceans Canada (DFO); the Washington Department of Fish and Wildlife (WDFW); the Alaska Department of Fish and Game (ADFG); seven fishing industry associations (California Coast Crab Association (CCCA), West Coast Pelagic (WCP), Maine Lobstermen's Association (MLA), Washington Dungeness Crab Fishermen's Association (WDCFA), United Fishermen of Alaska (UFA), Southeast Alaska Fishermen's Alliance (SEAFSA), and United Southeast Alaska Gillnetters (USAG)); a non-governmental organization (Natural Resources Defense Council (NRDC)); and two letters from the public. Responses to substantive comments are below. Responses to comments not related to the SARs are not included. Comments suggesting editorial or minor clarifying changes were incorporated in the reports, but they are not included in the summary of comments and responses. We did not reply to comments outside the scope of the SARs (e.g., regulating impacts of offshore wind). In some cases, NMFS' responses state that comments would be

considered or incorporated in future revisions of the SARs rather than being incorporated into the final 2022 SARs.

Comments on National Issues

Comment 1: The Commission recommends that NMFS secures the resources necessary to conduct the surveys required to produce complete and up-to-date SARs and work with other agencies to collect the information needed. Additionally, the Commission recommends NMFS provide sufficient personnel and resources to maximize the value of surveys by allowing for photo-identification, biopsy sampling, satellite tagging, acoustic monitoring, and other efforts, which provide valuable information for understanding marine mammal distribution, habitat use, health, and behavior.

Response: NMFS acknowledges the Commission's comment and will continue to prioritize our efforts to collect needed data, as resources allow.

Comment 2: The Commission recommends that NMFS set a deadline to make draft SARs available for public review no later than the end of September each year and allow for more thoughtful review by interested parties.

Response: NMFS thanks the Commission for the recommendation; we strive to keep the SARs on schedule and released to the public as quickly as possible.

Comment 3: A member of the public comments that the SARs fail to provide information on whether dolphin populations are increasing, decreasing, or staying the same. They state that the lack of information on population trends in these reports makes them of little use to scientists trying to protect dolphins.

Response: NMFS agrees that long-term time series trend analyses are useful while also acknowledging that it is difficult to achieve the appropriate precision and accuracy needed to detect trends (Authier *et al.* 2020). When sufficient information is available to evaluate trends, the information is included within the SAR. We will continue to prioritize our efforts to collect data to address abundance estimates and trends as resources allow.

Comments on Atlantic Issues

Comment 4: The Commission comments that the change to the status of four bottlenose dolphin stocks from "strategic" to "non-strategic" lacks adequate justification. The Commission notes estimates of human-caused M/SI are based on minimum counts and are likely to be higher in reality and is concerned about the proposed changes. Also, the Commission notes that Wells

et al. (2015) estimated the proportion of carcasses recovered to be 0.33 for common bottlenose dolphins near Sarasota, Florida, but less populated areas and those with intricate networks of marsh habitat likely have substantially lower carcass detections. The Commissions recommends the following: reevaluate the strategic status of these four stocks, considering all available scientific information regarding plausible human-caused M/SI beyond the minimum count of detected strandings and at-sea observations; substantially increase efforts to investigate alternative strategies for collecting information on human-caused M/SI for bays, sounds, and estuaries (BSE) common bottlenose dolphin stocks for which entanglements are difficult to detect or quantify, and for which observer programs are lacking.

Response: NMFS had proposed to change the status of four stocks of bottlenose dolphin (the Northern South Carolina Estuarine System, the Central Georgia Estuarine System, the Southern Georgia Estuarine System, and the Biscayne Bay—88 FR 4162 01–24–34). Based on the Commission's comment, NMFS reevaluated the strategic status of the four stocks. We revisited Wells *et al.* (2015) and implemented a lower stranded carcass recovery rate for some stocks as recommended by the Commission. We estimated M/SI (NMFS 2023) based on two carcass recovery rate estimates: 0.33 for Sarasota Bay (Wells *et al.* 2015) and 0.16 for Barataria Bay (DWH MMIQT 2015). Using the best available scientific information on the minimum abundance for each of these stocks, we concluded that annual human-caused M/SI for three stocks (Central Georgia Estuarine System, Southern Georgia Estuarine System, and Biscayne Bay) exceed PBR. Hence, these stocks' strategic status will remain unchanged. Regardless of the stranded carcass recovery rate, the Northern South Carolina Estuarine System Stock is non-strategic. An additional explanation for the rationale of each stock's status was provided within the Status of Stock sections.

Comment 5: The DFO strongly disagrees with the gear origin country assignment given to North Atlantic right whale (NARW) #3920. The gear removed from #3920 was reviewed by the DFO and country/fishery of origin was found to be inconclusive. The cases which DFO disagrees with the country of origin assignment are as follows: Mortalities—right whale #3893, #3694, #3920 and Serious Injury—right whale #4094 and #3125.

Response: NMFS responds to the specific cases below and looks forward

to continuing work with Canada on transboundary gear analyses to further our understanding of incident origins. Right whale cases #3893, #3694, and #3125 would benefit from bilateral gear analysis; but without new incident documentation, under longstanding NMFS protocols (<https://www.greateratlantic.fisheries.noaa.gov/policyseries/index.php/GARPS/article/view/30/26>), NMFS would not change the current attribution. Regarding #3920 and the potential uncertainties described in the DFO report “Recovered Gear Analysis of North Atlantic Right Whale Eg #3920 ‘Cottontail’”—references multiple isolated gear elements. The collective evidence (see report here <https://media.fisheries.noaa.gov/2022-10/E22-20Cottontail-gear-analysis-updated-draft-GARFO.pdf>) supports the conclusion that the recovered gear is consistent with the 2018/2019 Canadian Snow Crab Fishery. Regarding #4094, NMFS would consider changing the status to XC if Canada revises the published incident report (of which DFO are contributing authors) that identified this as Canadian snow crab gear.

Comment 6: MLA comments that the Pace model’s initial estimated population decline from 2011–2015 occurred during a time when NARW geographic distribution shifted to areas lacking survey effort and may be an underestimate of the population. MLA requests NMFS discuss the model’s limitations and ensure they are taken into account as new data from the realigned survey effort are incorporated into the model. The draft SAR underweights the existence of natural predation as demonstrated by Taylor (2013), Curtis (2014), and Sharp (2019). MLA comments that the SAR must cite relevant literature on natural mortality in both NARW and closely related species, and discuss how the treatment of this significant factor affects population models. Finally, MLA believes Pace (2021) incorrectly assumes an equal sex ratio and probability of mortality. Males are known to make up a larger portion of the population and are statistically more likely to encounter and become entangled in a vertical line.

Response: The Pace *et al.* (2017) and slightly updated Pace (2021) Mark-Recapture-Resight (MRR) model have been reviewed by both a journal peer review process for publication as well as more than 6 years of Atlantic SRG meetings across 20 expert members. Its contents are publicly available to review as the documents are cited within the SAR.

The MRR model published by Pace *et al.* (2017) uses the sighting histories of

individuals (adults and subadults) to estimate interval (in this case, annual) capture probabilities, which are allowed to vary at each interval. Indeed, the estimated capture probabilities since 2011 of NARW have shown considerable variation compared with the previous decade. The statistical methodology employed simultaneously estimates rates of survival and capture and estimates the number of whales still alive. Additionally, the MRR model allows individual animals to have unique catchability parameters, thus reducing biases in capture rates found in simpler MRR models. The model does not assume an equal sex ratio and allows survival and capture rates to differ between the sexes. Although there is no accommodation for permanent emigration, there is no evidence that even modest numbers of NARW have permanently left all the areas surveyed in the United States and Canada, and all individuals identified in extralimital sightings have been seen in U.S. waters again following their oceanic sojourns. Hence, NMFS concludes that the estimated survival rates presented in the SAR and reflected in the abundance estimates represent actual survival rates of the stock and not merely apparent survival rates. Finally, it is important to note that the Pace *et al.* (2017) model relies on individual animals being photographically identifiable from their callosity patterns in order for them to be recruited into the population. Since these patterns do not typically stabilize until animals are at least 1 year old, the resulting abundance estimates, as well as the associated estimated total mortality estimated *sensu* Pace *et al.* (2021), only represent adult and subadult animals.

Regarding natural mortality, NMFS and the SAR acknowledge that some natural mortality of calves exists, which is not inconsistent with the documented shark predation on calves, as noted by the commenter (Taylor 2013; Curtis 2014). However, we cannot speak to the comments related to a Sharp *et al.* (2019) reference. Our reading of Sharp *et al.* (2019) included a review of only 70 NARW incidents, and the paper does not support the cited incident designations. There are no observations that attribute adult or subadult mortality to natural causes and only these age classes are included in the Pace *et al.* (2021) model estimates of total mortality. NMFS reviewed relevant data, existing models, and the literature with the Atlantic SRG on September 2, 2021, and requested their expert guidance on how to attribute estimated total mortality (adults and sub adults) to

cause. The Atlantic SRG recommended NMFS continue to assign 100 percent of the total estimated mortalities of non-calf NARW (*i.e.*, adult and subadult) to anthropogenic origins (Atlantic SRG letter to NMFS September 16, 2021).

Comment 7: MLA asserts that NMFS’ determination that 87 percent of undetected, assumed carcasses represent whales killed by fishing entanglements is unsupported and arbitrary. The draft 2022 SAR includes new text that entanglement is more likely to be detected than vessel strikes, which raises concern with NMFS’ method of apportioning unknown sources of human-caused mortality. MLA questions NMFS’ conclusion that because 87 percent of the observed, seriously injured right whales are caused by an entanglement, then 87 percent of assumed, undetected carcasses are similarly killed by entanglements. MLA believes it is more likely that the observed data with respect to carcass status as discussed in Pace (2021) are correct—that entanglements and vessel strikes kill whales in roughly equal proportions as reported in Sharp (2019). MLA thinks it is also plausible that when a whale is struck by a vessel, it is more likely to be killed than it is to be seriously injured. In contrast, MLA notes a majority of entanglements are of minor severity, when an incident occurs it is less likely to result in death, and mortality as a result of entanglement would probably be detected due to the amount of time that elapses between when an animal is entangled and when the animal ultimately dies.

Response: NMFS continues to agree that no empirical study supports that whale carcasses are more likely to be detected when caused by vessel strikes, as opposed to entanglement. However, SARs provide published information on our current understanding of the right whale population, including trends in strandings and sightings data and a published hypothesis suggesting a disparity between detected entanglement/vessel strike serious injuries. Moore *et al.*’s (2020) hypothesis is founded in the physics of buoyancy on marine mammal bodies under varying conditions. There may be factors that increase the likelihood of detection of entanglements due to serious injuries. Lacking sufficient evidence regarding the likelihood of detecting vessel strikes or entanglements to inform an understanding of the cause of unseen, estimated mortalities of adults and sub adults, NMFS proposed many alternative scenarios to the Atlantic SRG on how best to apportion cryptic

mortality (NMFS intersessional September 21, 2021). The Atlantic SRG recommended that the ratio between entangled and vessel-struck NARW, 70 percent (Table 2, NARW SAR), calculated from documented observations of Serious Injuries and Mortalities over the last 5 years, be used to apportion cause. NMFS scientists will continue to review published literature and work on improving methods of apportioning causes of estimated but unseen mortalities of adults and subadults. The Atlantic SRG will continue to consider the evidence presented as part of their responsibility in peer reviewing the SARs.

Comment 8: MLA requests the draft SAR present the annual mortality and serious injury estimates by each fishery and describe area differences in such injuries. By lumping Canadian and U.S. fisheries together in the annual summaries presented in Table 2, MLA feels NMFS misleads the public with the implication that all of these injuries are attributable to U.S. fisheries. MLA requests that NMFS describe the observed M/SI by fishery for each year of the relevant 5-year reporting period. Specifically, MLA requests Table 2 to include summarized data concerning the country of origin of NARW entanglements during the relevant time period, taking into account scientific observations of entangling gear, the differentiating attributes of that gear, such as rope diameter and strength which influence comparative lethality, and describe the differences between the conservation programs and relative effectiveness of measures to protect NARW in each country.

Response: NMFS continues to provide all available details on locations where right whale serious injury and mortality incidents are first observed and, when available, where the incidents originated (see Table 3, NARW SAR). Additionally, NMFS attempts to provide the maximum precision and resolution in apportioning all M/SI to fishery, vessel, or other causes following practices that have been peer-reviewed and recommended by the Atlantic SRG. However, sufficient evidence to assign entanglements to a specific country or fishery is usually lacking, given the rare instances of recovered gear with sufficient markings to distinguish initial entanglement location, gear type, or fishery. Because right whales are able to travel thousands of miles in short periods of time, even when trailing gear, it is very difficult to attribute entanglement based on the region of the initial sighting. Upon conferring with the Atlantic SRG, NMFS determined that there was insufficient information

to provide guidance on the apportionment of estimated entanglements to a country of origin. We believe the expansion of gear marking and reporting requirements will assist us in this area moving forward.

NMFS has invested considerable effort in developing better methods for apportioning M/SI to appropriate sources in light of increased mortality overall, including increasing observations determined to have occurred in Canadian fisheries. We are also working to improve our ability to quantify unseen (estimated) mortality of adults and subadults and to evaluate if and how to apportion natural versus anthropogenic mortality. As mentioned above, as part of this effort, the agency convened a special session of the Atlantic SRG in September 2021 for scientific and technical input. The Atlantic SRG supported its prior position that 100 percent of the mortalities of non-calf NARW should be considered to be of anthropogenic origin. The Atlantic SRG also considered the various approaches provided by NMFS for apportioning M/SI between the United States and Canada but did not have enough information to provide a robust scientific alternative. Therefore, NMFS continues to use the best available information available to assign documented (and unobserved, estimated) mortalities and serious injuries (those identified as likely to result in mortality) to country and type of fishery. We continue to work with Canada on transboundary retrieved gear analyses and risk modeling. As science advances and more data become available, NMFS will consider assigning M/SI with greater resolution if scientifically appropriate, and if resources allow.

Comment 9: MLA believes the NARW SAR should describe interactions between NARW and commercial fisheries, and this must include the information called for in section 117(a)(4) of the MMPA. MLA comments the SAR should also include data on the severity of entanglements, and MLA believes the SAR does not provide understanding of scarring data for the relevant time period.

Response: The fisheries are summarized in “Appendix 3—Fishery Descriptions” because there are multiple species interactions with multiple fisheries. They are also available online at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables> with table II category I and II fisheries referenced. NMFS cites our annual report that

documents the details of our determination process for all reported injuries during the SAR time frame. Analyses of gear retrieved from large whales are also available online at <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-plan>. However, because only a small fraction of entanglements have gear recovered and a smaller fraction of that is traceable to the fishery, we have not been able to estimate the annual M/SI to the resolution of fishery and region of origin. Given new recommendations for the Atlantic SRG at the 2021 meeting and additional analysis from Pace *et al.* (2021), we are working to improve our understanding of this issue toward the resolution requested above for future SARs. We address this to the extent that data can support in Table 3. We discuss non-serious injuries in the third paragraph of the section titled “Fishery-Related Mortality and Serious Injury.” The report cites Knowlton *et al.* (2016) and, more recently, Hamilton *et al.* (2019), which indicate that the percentage of the population experiencing non-serious injuries is increasing (26 and 30 percent, respectively). Despite roughly 100 injuries per annum in recent years, the incidents causing injuries are rarely observed. Wounds can persist for years, while animals may travel thousands of miles. Therefore, NMFS takes a conservative approach to not apportion injury by fishery or areas where data are unavailable. Additional language to address this concern has been added to the first paragraph of the “Fishery-Related Mortality and Serious Injury” section of the SAR.

Comment 10: MLA asserts that the draft NARW SAR should include additional available scientific information about NARW behavior and associated risk of harm from fishing gear. MLA believes there are areas where NARW are rarely, if ever, observed and so NMFS’ characterization of NARW year-round presence in the Gulf of Maine is misleading. These findings were most recently summarized and reported in Meyer-Gutbrod (2021); MLA requests this paper be referenced and discussed in the draft SAR. Additionally, Crowe (2021) determined that the Gulf of St. Lawrence is currently an important habitat for 40 percent of the right whale population.

Response: The distribution changes and observations in the comment are correct. However, they are based on the assumption that NARW are only subject to mortality when they occur in dense aggregations and that those areas are the

only regions that should be managed for NARWs. In reality, dense aggregations in limited, small regions only occur during a portion of the year, and at no time of year are all right whales detected within known aggregations. NMFS recognizes that management measures must also reflect the documented acoustic presence of NARW during much of the year across their entire range, including areas of overlap with the Maine lobster fishery. There has been more recent acoustic monitoring, but these surveys cannot detect mortality/injury, determine the number of animals, or detect the presence of animals if they are not calling. Thus, gaps in visual survey data contribute to gaps in our understanding of NARW distribution and the locations of M/SI events. Recent congressional appropriations to increase surveillance in the Gulf of Maine may result in refining the identification of risk areas.

Comment 11: MLA comments that the NARW SAR's reference to "New England" waters must specify that these important areas are located in southern New England. Also, MLA notes that the draft SAR under-reports recent calving data, stating that "despite high survey effort, only 5 and 0 calves were detected in 2017 and 2018, respectively," and adding that 7 were born in 2019 and 10 in 2020. The draft SAR omits the most recent calf detections from 2021, 2022, and 2023 (to date) with 20, 15 and 12 calves detected, respectively. The section summarizing M/SI should be renamed "Vessel Strike-Related Mortality and Serious Injury" as is done for the section on M/SI from fishery-related M/SI. In the 2020 SAR, NMFS removed language stating that the majority of right whale sightings occur within 90 kilometers (km) of the shoreline of the southeastern United States. NMFS correspondingly added a sentence stating that "telemetry data have shown rather lengthy excursions, including into deep water off the continental shelf (Mate *et al.* 1997; Baumgartner and Mate 2005)." Both statements should be included and NMFS can simply add a sentence explaining the effort discrepancy. Finally, the SAR should report recent findings from the Canadian government that determined: "[T]he movement behaviour of individual NARW [in the Gulf of St. Lawrence] was highly variable. Some individuals did not move far between successive days while others moved considerable distances. Some whales in the southwestern Gulf of St. Lawrence were estimated to move as much as 50 km in a single day."

Response: The description of NARW feeding grounds reflects NMFS' current

understanding. Acoustic monitoring in the central Gulf of Maine indicates right whales are present in areas besides southern New England. The calves born during 2021–2023 fall outside of the reporting period for this report. The "Other Mortality" heading has been a standard heading for stock assessment reports for all species. The "vessel strike" classification is accounted for in Table 3. NMFS believes our description of right whale sightings, distribution, and movement is as comprehensive and accurate as the data and available analyses currently allow.

Comment 12: MLA states that the draft NARW SAR continues to cite Kenney (2018) and asserts that this reference is fundamentally flawed. Specifically, MLA believes the methods used in the study fail to account for basic biological processes—namely, natural death. Further, calves have natural mortality rates that are ignored during scenarios when they are included in this model.

Response: As stated in previous responses to public comments, the Kenney (2018) reference is a relevant, peer-reviewed study that helps provide context to the impacts of fishery-related mortality on the NARW population. The study does account for non-fisheries mortality (e.g., vessel strikes, calving declines, resource limitation, etc.), removing only confirmed fishery-related deaths and serious injuries (likely to result in death). Several scenarios are provided with varying levels of hypothetically-reduced entanglement mortality rates corresponding to degrees of compliance with MMPA regulations. While the paper presents a simple representation of complex processes, the model parameters are reasonable, and the results are informative for the reader to appreciate the cumulative impact of entanglement on the population. Any element of natural mortality or other processes affecting the population other than documented entanglement mortality is accounted for by using the time series of abundance estimates as a baseline.

The inclusion of the unrealized calves in the paper acknowledges basic population biology and the outsized effect of removing productive females on a population's trajectory cannot be ignored. Kenny (2018) treats this effect conservatively. Proven female calving intervals have varied between 3 and 10 years, but are primarily in the 3- to 7-year range, so the choice of a 5-year calving interval is well-founded. The paper's total of 26 calves lost due to the deaths of 15 females over 27 years equals an unrealized population increase of much less than 0.01 per year

(1 divided by the average annual population size). This undoubtedly underrepresents the actual value, given that only known females documented as dead or seriously injured were used in the analysis.

Comment 13: MLA notes that the draft NARW SAR includes recent research by Stewart *et al.* (2021) without stating that the NARW body size since 1981 does not correlate with calving rates. MLA believes there are limitations to the study's sample size of seven individuals with severe maternal entanglement injuries, particularly when these instances are conflated by the primary factor driving body size—birth year (*i.e.*, oceanographic conditions). To this point, MLA comments that the draft SAR should not only cite Christiansen (2020) when drawing inferences from the southern population of right whales, but also Miller *et al.* (2011). Additionally, in the years following 1998–2002 (the time period sampled by Miller *et al.* (2011)), there were 9 consecutive above-average years in NARW calving rate.

Response: NMFS agrees that prey availability is likely an important contributor to the observed decrease in right whales' size. Decreased size also appears to be related to reduced fecundity, with smaller and less robust females less likely to calve (Stewart *et al.* 2022). Miller *et al.* (2011) is a good addition to this section, along with Fortune *et al.* (2013). The impact of injury on the physiological state of females is also well documented (*i.e.*, Rolland *et al.* 2016; Pettis *et al.* 2017; van der Hoop 2017), so it is likely the population's fecundity is being impacted by injury as well. Variation in birth rates should be expected for capital breeders in a variable environment, and the current downward trend in calving corresponds to documented shifts in right whale prey. However, the impacts of injury must be considered. Mortality rates have increased significantly during the same period, and sublethal injuries have likely increased as well.

Bryde's Whale, Gulf of Mexico Stock (Rice's Whale)

Comment 14: Natural Resource Defense Council (NRDC) is concerned by the draft's assessment of scientific information on Rice's whale habitat use in the western Gulf of Mexico, and particularly by its suggestion that the whale's regularity of occurrence there is "unknown." The persistent occurrence of some Rice's whales in the northwestern Gulf of Mexico has recently been documented using passive acoustics. This evidence of regular use

of the continental shelf break by at least a portion of the Rice's whale population complements newly available habitat suitability predictions as well as forthcoming habitat suitability and prey condition analyses from NOAA, all of which indicate an extension of the whale's habitat between the 100 and 400 meter (m) isobaths across the northwestern Gulf. NRDC recommends that the draft be lightly edited to make this distinction clear, and also recommends that the present distribution map be replaced with one that displays the species' extended habitat, with the hydrophone locations from Soldevilla *et al.* (2022a, 2022b) and the 3 western Gulf sightings also indicated, if desired.

Response: NMFS has slightly edited the "Stock Definition and Geographic Range" section per the suggestion to remove "unknown" and better clarify that there is some information regarding Rice's whale distribution in the northwestern Gulf. The distribution map includes the genetically confirmed sighting in the northwestern Gulf off Texas, and the core habitat is shaded. All information about known distribution, including the genetically confirmed sighting, is included within the text. We believe that including the locations of high-frequency acoustic recording packages (HARP) on the map, which typically includes locations of visual sightings only, could confuse readers. We refer those interested in details of the calls detected from HARPs to see Soldevilla *et al.* (2022a), which we reference and summarize within the SAR.

Comment 15: NRDC recommends that NMFS update the Rice's whale draft SAR to align with the 2023 revisions to the Guidelines for Preparing Stock Assessment Reports Pursuant to the MMPA and report PBR as 0.07.

Response: NMFS has edited the SAR to report PBR as 0.07, per this public comment.

Comment 16: NRDC recommends including information on the potential for disturbance from vessel noise and activity in the draft SAR for Rice's whale.

Response: Per the comment, NMFS has edited the "Habitat Issues" text to include the anecdotal evidence from Soldevilla *et al.* (2022b) regarding Rice's whales that temporarily stopped calling when approached by the research vessel.

Comments on Pacific Issues

North Pacific Humpback Whale Stocks

Comment 17: The Commission recommends using a maximum net

productivity rate (R_{max}) of 8.2 percent for the Mainland Mexico-CA/OR/WA stock and a default R_{max} value of 4 percent for the Central America/Southern Mexico-CA/OR/WA stock.

Response: Current estimated annual rates of increase for the Central America/Southern Mexico-CA/OR/WA stock (1.6 percent, incorrectly stated as 1.8 percent in the draft SAR) should not be confused with the R_{max} . Where annual rates of increase have been estimated for different humpback populations, they have consistently been higher than the MMPA default of 4.0 percent (Zerbini *et al.* 2010 [7.3 percent and 8.6 percent annually, using 2 different approaches], Zerbini *et al.* 2006 [6.6 percent], Barlow and Clapham 1997 [6.5 percent], Calambokidis and Barlow 2020 [8.2 percent]). Zerbini *et al.* (2010) proposed an upper 99th percentile of 11.8 percent annually. Still, this value has not been utilized in MMPA stock assessments due to the availability of region and/or stock-specific estimates for U.S. waters. Based on the best available data on estimated rates of increase for multiple humpback populations, use of the MMPA default of 4.0 percent for the Central America/Southern Mexico-CA/OR/WA is unnecessarily conservative, given the spatial and temporal overlap with the larger Mainland Mexico-CA/OR/WA stock of humpbacks, both of which are exposed to the same types of anthropogenic threats along the U.S. West Coast. The mean estimate of annual growth rate of 8.2 percent reported by Calambokidis and Barlow (2020) for all humpbacks in U.S. West Coast waters also includes anthropogenic-related mortality; thus, the true R_{max} is likely to be higher than that observed. Additionally, the PBR calculated for the Central America/Southern Mexico-CA/OR/WA stock is conservative, based on a recovery factor of 0.1 to reflect its endangered status. Therefore, NMFS will continue to use an R_{max} of 8.2 percent.

Comment 18: The Commission notes that the PBR levels for the Mainland Mexico-CA/OR/WA and Central America/Southern Mexico-CA/OR/WA Stocks are divided by two to produce a "U.S. PBR" to assess the status of each stock. The Commission emphasizes there are no data, analyses, or references to support the conclusion that each stock spends approximately half its time outside the U.S. EEZ. The Commission recommends that NMFS use information on the timing of arrival to and departures from the U.S. EEZ by these two humpback whale stocks, as well as information on seasonal occupancy rates within the U.S. EEZ, to

provide a more precise estimate of the "proportion of time spent in U.S. waters" for calculating the U.S. PBRs for these two humpback whale stocks.

Response: NMFS agrees that a more refined estimate of humpback residency time in California, Oregon, and Washington, is required to prorate PBR for the Mainland Mexico-CA/OR/WA and Central America/Southern Mexico-CA/OR/WA Stocks. Ryan *et al.* (2019) provides both sighting and acoustic data suggesting that: (1) humpbacks are present in central California waters at least 8/12 months annually, and (2) December and April represent "transition months," where whales are moving out of or into the central California region (see Figure 5d in Ryan *et al.* 2019). Counting December and April each as $\frac{1}{2}$ of a month of residency time during migration, plus the 7 months of May through November when sightings are abundant, yields 8/12 months of residency time, or $\frac{2}{3}$ of the year. This may be considered as a minimum residency time, as some whales are still present within the U.S. EEZ in waters north or south of the central California study area. NMFS has implemented this new PBR proration in the final SARs, which increased the calculated PBR for the Central America/Southern Mexico-CA-OR-WA stock from 2.6 to 3.5, and for the Mainland Mexico-CA-OR-WA stock, from 32.5 to 43.

Comment 19: The Commission comments that the Mainland Mexico-California/Oregon/Washington and Central America/Southern Mexico-California/Oregon/Washington SARs do not estimate or apply an appropriate correction factor to account for the undetected "cryptic mortality" of humpbacks due to fisheries interactions, and recommends that NMFS revise the SARs to provide estimates of total fisheries M/SI for these stocks using appropriate correction factors to account for undetected whale carcasses.

Response: There are no published estimates of carcass detection rates for humpback whales in this region. Some range-wide estimates were made for gray whales (Punt and Wade 2012), including remote coastlines of Mexico, Canada, and Alaska that are not directly applicable to the U.S. West Coast. As such, these estimates are not applied to gray whale strandings involving anthropogenic sources in U.S. waters. Most cases of humpback whale injury and mortality due to fishery entanglements are based on opportunistic detection of injured whales at sea, stranded animals, and floating carcasses. This detection process does not include quantifiable "search effort," which is needed to

estimate the undetected portion. Methods used to estimate carcass detection for more coastal species, such as bottlenose dolphins (Wells *et al.* 2015; Carretta *et al.* 2016), are also not applicable to humpback whales, given the differences in detection processes. With regard to vessel strikes, NMFS is already using the estimated vessel strike deaths reported by Rockwood *et al.* (2017) in the Central America/Southern Mexico-CA-OR-WA and Mainland Mexico-CA-OR-WA SARs; thus, no correction is necessary for that source of anthropogenic mortality. We also compare reported numbers with estimates from Rockwood *et al.* (2017) to give the reader a sense of the detected fraction of vessel strikes. NMFS continues to work on the issue of undetected injury and mortality and states in SARs that reported entanglement cases represent a minimum accounting of total interactions.

Comment 20: WDFW comments pertain to the Central America/Southern Mexico-CA-OR-WA, Mainland Mexico-CA-OR-WA and Hawaii stocks of humpback whales in the Pacific. WDFW is concerned about the exclusion of whales that summer in WA state waters from the Hawai'i distinct population segment (DPS), which affects estimates of M/SI for Washington fisheries. WDFW recommends that estimates of total mortality and proration to ESA-listed stocks include an estimate of non-listed stocks off Washington, and that more research is conducted on understanding the stock and DPS/Demographically Independent Population (DIP) composition of whales in Southern British Columbia (SBC), northern WA, and the Salish Sea.

Response: NMFS agrees that more research will aid in determining the relative fractions of whales summering in WA State waters that winter in Hawai'i waters. In the final SAR, we revised the proration scheme to prorate WA State human-caused M/SI to all three stocks that occur in these waters (Central America/Southern Mexico-CA/OR-WA, Mainland Mexico-CA/OR-WA, and Hawai'i) based on summer to winter area movement probabilities in Wade (2021). Human-caused M/SI from CA/OR-WA waters for the Hawai'i stock (based on movement probabilities from WA/SBC to Hawai'i) has now been added to the Hawai'i stock SAR published in the Alaska stock assessments (Young *et al.* 2023).

Comment 21: WDCFA comments that the SARs contradict previous studies by Wade in 2016 and 2021 in relation to the composition of humpback populations that forage off the coast of

Washington. WDCFA believes that Wade's analysis revealed that the humpback populations off Washington differ significantly from those in California and Oregon. Instead of two distinct populations (both ESA-listed), WDCFA comments that Washington's foraging humpbacks consist of three distinct population segments (two listed and one not). Also, WDCFA comments that the exclusion of the SBC/WA stock (estimated at 1,593 distinct animals) from the SARs' total estimated humpback whale abundance for the U.S. West Coast (4,973 humpback whales) is problematic. WDCFA believes a more accurate calculation for the minimum population estimate ($N_{\min}$) and PBR would benefit and be more reflective of population abundance from a proportional inclusion of SBC/WA populations.

Response: The 1,593 whales noted by the commenters are partially included in the estimate of abundance for CA/OR-WA waters because three stocks (Central America/Southern Mexico-CA/OR-WA, Mainland Mexico-CA/OR-WA, and Hawai'i) use CA/OR-WA waters during summer and autumn. Becker *et al.* (2020) estimated humpback abundance in 2018 for all CA/OR-WA waters to be 4,784 whales. Becker *et al.*'s estimate is lower than that of Calambokidis and Barlow (2020) for CA/OR mark-recapture data (4,973), which lends support to Calambokidis and Barlow (2020) noting that their estimate likely represents whales in WA waters (representing multiple stocks), as there is interchange between CA/OR and WA. The fraction of SBC/WA whales attributable to the Hawai'i stock that occur north of the U.S. EEZ is unknown; thus, it is incorrect to imply that the 1,593 SBC/WA whales should be added to the estimates of either Becker *et al.* (2020) or Calambokidis and Barlow (2020). NMFS has changed the language in the SAR to reduce this confusion, now noting that some whales from the Hawai'i stock are present in U.S. west coast waters during the summer. We have also prorated CA/OR-WA human-caused M/SI for Hawai'i stock whales in addition to Central America/Southern Mexico-CA/OR-WA and Mainland Mexico-CA/OR-WA whales, based on movement probabilities in Wade (2021). The Hawai'i stock M/SI totals derived from the U.S. West Coast fisheries and vessel strikes in Washington State are summarized in the Hawai'i SAR, published with the Alaska marine mammal stock assessments (Young *et al.* 2023).

Comment 22: CCCA notes that while the M/SI data are averaged over the period from 2016 to 2020, 22 humpback

whale interactions occurred in 2016 out of the 34 reported in the SAR. CCCA requests NMFS to acknowledge in the final SAR that the interaction rates and M/SI rates for the fishery are skewed higher due to the spike in 2015–2016, and do not accurately reflect the current lower interaction rates based on the best available scientific information.

Response: The entanglement data for 2016–2020 reported in the SAR are based on the number of reported cases, presumably related to fishing effort and the number of people on the water (or beaches) that detect entangled whales. In order to assess the “rate of interactions” (and any change thereof), both the number of entanglement cases and total fishing effort are required. Information on the total number of traps set annually is lacking; therefore, it is unclear if the decline in reported entanglement cases after 2016 is related to reduced fishing effort, a change in humpback distribution, or both. The 5-year total entanglement summary also includes the year 2020, with the lowest number of pot-trap fishery entanglements recorded for the period. This is likely a reflection of reduced economic activity due to COVID–19 shutdowns. Thus, NMFS believes the additional text requested is not warranted.

Comment 23: CCCA believes that the Mainland Mexico-CA/OR-WA humpback whale stock is too narrowly defined, and that the stock should include all animals that interbreed when mature. CCCA emphasizes that the draft SAR improperly skews the impact of fisheries that interact with the stock because it compares the M/SI from those fisheries against a PBR that is based only on a portion of the actual stock.

Response: NMFS disagrees. Martien *et al.* (2021) note that humpback whale stocks in the North Pacific were previously designated at large geographically defined scales with names referring to feeding grounds (for example, the CA/OR-WA stock). However, these feeding ground aggregations do not represent DIPs. Rather, they comprise animals originating from multiple wintering grounds, which NMFS has recognized as different DPSs under the ESA. Martien *et al.* (2020) suggest that humpback research and management under the MMPA should focus on “migratory whale herds,” defined as groups of animals that share the same feeding ground and wintering ground. Recruitment into a herd is almost entirely through maternally directed learning of the migratory destinations. Photographic and genetic data show

strong fidelity of animals to a given feeding and wintering area and, therefore, to a herd, suggesting very little dispersal (permanent movement of animals) between herds. If dispersal between herds is low enough to render them demographically independent, a migratory whale herd is a particular case of a DIP. Two strong lines of evidence (movements and genetics) support that the Mainland Mexico-CA/OR/WA unit of humpback whales meet the DIP definition, with levels of movement and genetic differentiation similar to those used to define DPSs.

Comment 24: CCCA comments that the Central America Stock is not being prevented from reaching or maintaining its optimum sustainable population. Curtis *et al.* (2022) estimate that the “Central America CA/OR/WA DIP” (which corresponds to the Central America Stock) has been growing at an annual rate of 4.8 percent from the period of 2004–2006 to the more recent period of 2019–2021. Although there is uncertainty with that estimated growth rate, the most recent population numbers indicate that there are approximately 1,494 whales that are part of the Central America Stock (Curtis *et al.* 2022), which is a significant increase of 1,083 whales since the Central America DPS (which also corresponds to the Central America Stock) was listed 7 years ago. CCCA argues that NMFS should revisit the assumptions it has made for this stock because the low PBR proposed in the draft SAR does not reflect the fact that this population is growing significantly despite the M/SI rates reported in the draft SAR.

Response: NMFS disagrees. The PBR reference point has several features that allow for a population to be increasing while human-caused M/SI exceed PBR. The calculation of PBR involves using: (1) One-half of the theoretical or estimated maximum net productivity level (instead of the point estimate); (2) The minimum population size estimate (or 20th percentile, rather than the point estimate); (3) A recovery factor below 1 for all stocks that are not at an optimum sustainable population (OSP) level. The goal of keeping M/SI below PBR is to ensure populations reach or maintain OSP. There is no evidence that the Central America/Southern Mexico-CA/OR/WA stock is at OSP. The depletion level of this population is unknown; if the population is well below OSP, it is possible for it to be increasing now, but may level off and not reach OSP if M/SI is too high. NMFS also notes that the estimated population growth rate for this population is lower than that of other humpback whale populations in

the North Pacific (Curtis *et al.* 2022; Calambokidis and Barlow 2020; Mizroch *et al.* 2004; Zerbini *et al.* 2010).

Comment 25: WCP comments that it is difficult to accurately compile population numbers for transboundary stocks, and that sampling a mixture of similar populations is challenging for assessments. WCP believes counting these animals when they return to their birth-origin habitat should predominate other methods for censuses.

Response: Conducting wintering area surveys is not always feasible, but NMFS notes that estimates of wintering area abundance are available for multiple DPSs (*e.g.*, Central America, Hawai’i). In cases where wintering area abundance is not available, it is necessary to assess human-caused M/SI against summering area abundance determined from U.S. waters, where anthropogenic threats from U.S. fisheries and vessel strikes are well-documented.

Comments on Alaska Issues

Eastern Bering Sea Beluga Whales

Comment 26: The Commission recommends that NMFS use the default $R_{\max}$ value of 4.0 percent for the Eastern Bering Sea (EBS) beluga whale stock until uncertainties are resolved or an $R_{\max}$ value specific to the EBS stock is available. The draft 2022 SAR for the EBS beluga whale stock suggests that the default $R_{\max}$ value of 4.0 percent should be used for the stock, as an $R_{\max}$ value specific to the EBS beluga whale is not available. Although an $R_{\max}$ of 4.8 percent was calculated for the Bristol Bay beluga whale stock, the most recently published SAR for that stock rejected the 4.8 percent value in favor of the 4.0 percent default due to the large coefficient of variation (CV) associated with the estimate.

Response: NMFS has considered the concern raised in the comment and decided to continue to use 4.8 percent for $R_{\max}$ for the EBS beluga stock for the following reasons. As stated in the draft SAR, NMFS’ “Guidelines for Preparing Stock Assessment Reports Pursuant to the MMPA” (Guidelines) suggest that, in general, substitution of other values for the default $R_{\max}$ value should be made with caution and when reliable stock-specific information is available on $R_{\max}$ (NMFS 2023). However, the NMFS Guidelines also state that for stocks subject to subsistence harvests, NMFS will consult with appropriate Alaska Native co-management partners regarding scientific and other information relevant to preparing SARs, including information used to calculate PBR. Co-management of the EBS beluga

whale stock is conducted by the Alaska Beluga Whale Committee (ABWC) and NMFS. Through the co-management process, NMFS, in consultation with ABWC, determined that the nearby Bristol Bay beluga whale stock has similar environmental conditions and habitat to the EBS beluga whale stock. Since the Bristol Bay beluga stock exhibited an estimated rate of increase of 4.8 percent per year (95 percent confidence interval (CI): = 2.1–7.5 percent), and despite the large CV associated with this estimate, NMFS determined that the actual realized value for the growth rate of the Bristol Bay beluga population is a more accurate value to use for the EBS beluga whale stock’s $R_{\max}$ than the default value. The Alaska SRG supported the use of 4.8 percent for $R_{\max}$ for the EBS beluga whale stock.

Southeast Alaska Harbor Porpoise

Comment 27: ADFG, SEAFA, USAG, and two members of the public expressed concern regarding NMFS’ genetic analyses of Southeast Alaska (SEAK) harbor porpoise. They assert that the genetic differences observed between stocks is, at least in part, an artifact of limitations in the spatial distribution of the collected environmental DNA (eDNA) samples (Parsons *et al.* in prep). In addition, they state that based on the methodology described in Zerbini *et al.* (2022b), the eDNA samples could not have resulted in independently identifiable individuals. Zerbini *et al.* (2022b) and the SAR treat the sampled haplotypes as independently sampled individuals for analysis when it is likely that a large portion of samples were pseudo-replicates. They assert that this makes it impossible to verify if the results presented reflect a genuine biological pattern, and said additional genetic analyses based on appropriate independent sampling are necessary to assess harbor porpoise stock structure in SEAK.

Response: NMFS appreciates the concerns raised in the comment. Regarding the spatial distribution of the eDNA sample collection, we note that samples included in the analysis of population genetic structure included both tissue and eDNA samples (using the methods presented in Parsons *et al.* 2018). The eDNA samples were collected during several vessel surveys, between July 2016 and September 2019. eDNA samples were used to capture mitochondrial DNA (mtDNA) genetic diversity across geographic regions where harbor porpoise aggregations were detected. The data generated from eDNA included an informative section

of the mitochondrial control region that is comparable to that sequenced from tissue samples. eDNA samples were collected immediately after a porpoise sighting, directly in the fluke prints of individuals, or small groups of harbor porpoise. Individual genotypes were not generated from eDNA samples; however, both tissue and eDNA samples were collected over multiple days, months, and years in both Northern-SEAK (N-SEAK) and Southern-SEAK (S-SEAK) inland water stocks, minimizing the likelihood that the same individual would be sampled more than once. Surveys were conducted throughout inland waters of SEAK, whereby eDNA sampling reflects the locations of harbor porpoise aggregations at the time of the survey. Regarding the concerns of pseudo-replication, while the possibility of genetic recaptures (or pseudo-replicates) cannot be completely excluded, efforts were made to minimize possible pseudo-replicates by moving away from small groups of porpoises between consecutive sample collections. In addition, the elusive or evasive nature of harbor porpoise behavior limits the likelihood of repeated close approaches by the sampling vessel of the sampled individuals. Samples of eDNA collected in the fluke prints of cetaceans often result in the discovery of multiple unique mtDNA haplotypes from a single sample. This highlights the likelihood of capturing eDNA from multiple individuals in a single sample, even when sample collections target the fluke prints of a single animal. This is not surprising given that shed cellular material can diffuse (and decay) in the marine environment in which it has been shed. Treating each sampled mtDNA haplotype as a single occurrence is a conservative approach adopted when samples represent an unknown number of unique individuals. This approach offers a valuable method for generating genetic haplotypes from eDNA samples, but likely results in an underestimate of the true haplotype frequency, particularly for common haplotypes.

Comment 28: ADFG requests NMFS reevaluate the harbor porpoise population structure in N-SEAK and S-SEAK SARs, and reconsider the calculations for the PBR. Dahlheim *et al.* (2015) found differing trends in abundance between N-SEAK and S-SEAK harbor porpoise populations, with an unusually high growth rate of 25 percent in S-SEAK between 2006 and 2007, and 2010 and 2012. The study acknowledged that such an increase is not biologically possible for a closed

population, implying immigration into the area. However, the authors used this influx to hypothesize fine-scale population structure, which contradicts the evidence of significant immigration. This discrepancy necessitates a reevaluation of the population structure and PBR calculations.

Response: NMFS appreciates this comment and the opportunity to provide more context. The increasing trend in abundance of 25 percent per year implied by the estimates of abundance of S-SEAK between 2006 and 2007 and 2010 and 2012 presented in Dahlheim *et al.* (2015) applies only for the high density areas of harbor porpoise near Zarembo Island and the town of Wrangell, not the entire range of the S-SEAK DIP. It is conceivable that the unusual trend occurred because animals from areas within the range of the DIP that were not surveyed in 2006–2007 by Dahlheim *et al.* (2015) may have moved towards the region around Zarembo Island and Wrangell and may have been sampled in the early 2010s. Additionally, taking the CIs of the abundance estimate in Wrangell/Zarembo in 2006–2007 and 2010–2012 into consideration, the trend implied by the data is still within biologically plausible values. For example, the trend between the upper CI for the 2006–2007 estimate (317 individuals) and the lower CI of the 2010–2012 estimate (392 individuals) is approximately 4.7 percent per year, which is biologically feasible given the reproductive potential for harbor porpoise and has been documented in other regions (*e.g.*, California, Forney *et al.* 2021). Finally, the differential trend between N-SEAK and S-SEAK was used as supporting, not primary, evidence that harbor porpoise in these two areas should be considered two separate DIPs. Other lines of evidence (*e.g.*, differences in mitochondrial DNA between the two regions and areas of low density/potential gaps in distribution between N-SEAK and S-SEAK) provide stronger support for the separation of the two regions into two DIPs. Given all this, NMFS has determined that a reevaluation of the population structure in N-SEAK and S-SEAK is not warranted at this time.

Comment 29: ADFG comments that NMFS should assess the degree of intermixing between harbor porpoise populations using a more rigorous sampling design and appropriate genetic methods and data. The distribution of harbor porpoise is not discontinuous, with high-density areas and regular observations outside these hotspots. Although no harbor porpoise were observed in Wrangell Narrows during

aerial or boat-based surveys (Zerbini *et al.* 2022b), an eDNA sample was collected there (Parson *et al.*, in prep). ADFG notes that a more comprehensive assessment using proper sampling design and genetic methods is needed to better understand their population structure.

Response: NMFS agrees that additional genetic samples throughout the region would be helpful to better understand putative genetic boundaries and seasonal variances in porpoise density and distribution. However, existing information on the genetics of harbor porpoise in the inland waters of SEAK is currently sufficient to separate stocks following NMFS' process for reviewing and designating stocks (NMFS 2019). NMFS acknowledges that harbor porpoise are notoriously difficult to study and approach for genetic sampling, requiring considerable resources and limiting the number of genetic samples available for analysis. Moreover, the movement of harbor porpoise can result in temporary spatial aggregations in response to tidal cycles and prey concentrations. As a result, the distribution of harbor porpoise is often patchy and variable on relatively small scales, which is reflected in the spatial distribution of samples and the large number of surveys conducted to collect the represented samples. Ideally, population genetic analyses would make use of tissue samples collected by remote biopsy sampling approaches; however, dedicated efforts to collect tissue samples from SEAK harbor porpoise demonstrated that this method is not efficient enough to be feasible. The tissue samples included in Zerbini *et al.* (2022b) were collected over multiple decades, highlighting the challenges of amassing a representative sample size for this species. Vessel-based surveys for eDNA samples were conducted throughout inshore waters of SEAK in 2016 (July and September) and 2019. Samples of eDNA collected during these surveys are representative of regions where harbor porpoise were encountered in those years. Rough boundaries between marine mammal stocks can be identified using known low-density areas or discontinuities. Of the boundaries identified using this approach, two boundaries between the northern and southern stocks were identified. These include the boundary at the north end of Wrangell Narrows and the boundary at Keku Strait. Low harbor porpoise density, not a lack of harbor porpoise, is implied. Known low-density areas or discontinuities in distribution have been used to identify boundaries for other harbor porpoise

stocks (Carretta *et al.* 2002). Therefore, NMFS continues to rely on the original methodology and resulting stock structure at this time.

Comment 30: ADFG, SEAFA, UFA, USAG, and two members of the public request that NMFS reevaluate the bycatch estimation methods for harbor porpoise in the SEAK salmon drift gillnet fishery, taking into account interannual variability and adequacy of survey effort, and reassess whether the PBR level is being exceeded for the proposed S–SEAK stock. The current bycatch estimation is based on the 2012–2013 Alaska Marine Mammal Observer Program (AMMOP), which only observed 6–7 percent of the drift gillnet fishery. The large CVs for serious injury and mortality indicate a lack of precision in the estimate. The draft SAR does not account for interannual variability, with no observed bycatch in 2012 but documented interactions in 2013. The low survey coverage and potential for Type I or Type II errors make it difficult to determine if the PBR level is being exceeded or if the documented interactions were merely a fluke. A member of the public commented that the fishery had changed significantly since it was observed, thus invalidating the estimates, and a new observer program to monitor fishery takes should be undertaken.

Response: NMFS acknowledges the concerns raised in the comment. Analyses predicting the expected precision of the SEAK AMMOP for given levels of effort were conducted prior to the implementation of the observer program. The achieved effort level (~6.5 percent observer coverage for the three observed fishing districts) was considered sufficient to detect harbor porpoise bycatch if it was occurring at a level greater than the PBR level. For example, if the true bycatch level was 1.5 times PBR, there is a very low (2 percent) probability that no harbor porpoise bycatch would be observed. The estimated bycatch does take into account the lack of observations of bycatch in 2012; the estimate from 2013 is averaged with the zero from 2012 to estimate an annual bycatch. The effect of averaging with the zero in 2012 is included in the estimated CVs for the annual average, which are still 0.7 and 1.0 for the two stocks. Although the CVs of the estimated bycatch are high, this is well within the range of CVs tested in the development of the PBR framework (*i.e.*, a robustness trial was run with CV of bycatch estimate equal to 1.2). Therefore, it is still appropriate to use these estimates in the SAR. The Guidelines specify that the recovery

factor should be lowered to a value less than 0.5 in situations such as these, where the CV of bycatch is relatively high. This adjustment will be evaluated for incorporation in the next SAR revision.

The bycatch estimate presented in the SAR should be considered a minimum. AMMOP only operated in fishing districts six, seven, and eight, representing only a fraction (*i.e.*, 16 percent of fish landed, the metric used to represent effort in the fishery) of the SEAK salmon drift gillnet fishery. The other fishing districts represent 84 percent of the landings, and bycatch estimates from districts six, seven, and eight were not extrapolated to those other areas. In other words, bycatch has not been estimated for the other districts. If one were to extrapolate the observed bycatch estimates in districts six, seven, and eight to the effort in the other districts, the estimated bycatch for the entire fishery would be six times higher, indicating that the current estimate of bycatch could be substantially underestimated. Another reason why the estimated bycatch should be considered a minimum estimate, with the potential for substantial negative bias, is that the observers were on a separate boat from the fishing vessel and their view of the gear during hauls was usually poor. In more than 90 percent of the hauls: (1) the observer's view of the portion of the net being pulled was obstructed for 25–50 percent of the time and (2) the observer could not see the net underwater. This means that the detection rate may not have been 100 percent in observed hauls and that the observations should be considered minimums. Less than a 100 percent detection would lead to a negative bias in the bycatch estimates.

It is worthwhile to consider Type I and II error rates in planning survey effort levels. To evaluate whether the estimated M/SI level would cause a fishery to be considered Category I in the List of Fisheries, the most important metric to measure accurately is whether the number of M/SI harbor porpoise per year is below 50 percent of the PBR level for S–SEAK harbor porpoise. Using binomial probabilities, the false positive rate (incorrectly estimating M/SI to be above PBR) for this situation would be 0.236. Similarly, it is important to measure accurately when M/SI is well above PBR (*e.g.*, 150 percent of PBR), and the false negative rate for that situation (incorrectly estimating M/SI to be below PBR) would be 0.298. These error rates are similar and not exceptionally high, and could be improved by increasing observer

coverage relative to what was conducted previously. NMFS acknowledges the age of available data; regardless, without additional data, it remains the best available data on bycatch in the fishery. Planning efforts are underway for the AMMOP to consider new observer effort in the SEAK salmon drift gillnet fishery to gather more recent bycatch information for the fishery, as resources allow.

Comment 31: ADFG, SEAFA, UFA, USAG, and two members of the public request that NMFS reevaluate the most recent boat-based survey estimate for harbor porpoise in SEAK, considering potential biases such as the species' elusive nature, avoidance of approaching boats, and inadequate sampling in nearshore shallow waters and known concentration areas, and one member of the public recommended that a new aerial-based survey be completed. Harbor porpoise are known to be shy, elusive, and difficult to detect, which may lead to underestimation in boat-based surveys. The assumption of perfect detection at a Beaufort wind scale of 0 is unrealistic for such an elusive species. The survey's effective strip width does not appear to account for the effects of the sun's position on the detection probability. The vessel size used in the survey may have limited sampling in shallow waters where harbor porpoise are known to frequent. Furthermore, the survey did not include Duncan Canal, a known concentration area in S–SEAK (Parsons *et al.* in prep), because it was assumed to have no harbor porpoise based on results from other S–SEAK inlets.

Response: NMFS acknowledges the concerns raised in the comment and agrees that harbor porpoise is an elusive species that tends to avoid vessels. We considered this in the 2019 survey sampling design. Highly experienced observers participated in the 2019 survey in SEAK with the goal of minimizing the negative effect of animal behavior during data collection. Search effort for porpoise during the survey was performed in a manner that maximized detection before the porpoise responded to the vessel. Search effort was focused several hundred meters ahead of the vessel. Vessel avoidance can typically be detected in line transect surveys when examining histograms of perpendicular distance data (*e.g.*, Buckland *et al.* 2001). In such circumstances (presence of negative responsive movement by the porpoise), the number of sightings is expected to be greater farther away from the survey line than on or very near the survey line. Inspection of the perpendicular distance data in the 2019

survey in SEAK did not provide any evidence of responsive movement. On the contrary, it suggested porpoise groups were detected prior to showing any response to the presence of the vessel (see Zerbini *et al.* 2022a, detection function in the Supplemental Material: <https://www.frontiersin.org/articles/10.3389/fmars.2022.966489/full>).

NMFS disagrees that sampling was inadequate. The survey was designed using advanced, well-established, and robust statistical methods to minimize bias in survey coverage. Sampling transects followed a systematic “zig-zag” design that covered most known habitats of harbor porpoise within SEAK inland waters, either near the shore or in the center of channels and inlets. In the past, NMFS was criticized for not sampling small bays and narrow inlets, and time was allocated in the 2019 survey to sample and estimate abundance within these areas. Given the resources available at the time, it was not practical to sample the large number of small bays and inlets (~170) in SEAK. Therefore, an algorithm was implemented to randomly select inlets and bays for sampling, allowing for nearly 40 percent survey coverage in the area of all inlets and bays combined. The proportion of bays and inlets sampled in the N–SEAK and S–SEAK areas was approximately the same.

The estimated average effective search width of harbor porpoise in SEAK (700–900 m) is substantially greater than that of open ocean surveys (130–375 m) (see detailed discussion and relevant literature in Zerbini *et al.* 2022a), suggesting that it is much easier to see harbor porpoise in enclosed environments such as inland waters of SEAK. Greater detectability of harbor porpoise in SEAK likely occurs because survey conditions in inland waters improve visibility of this species. For example, the presence of land in most of the region allows observers to focus on a smaller search area ahead of the vessel, likely increasing their detectability. Perhaps more importantly, sea conditions provided confidence in detectability during the 2019 surveys (92 percent of the sampling effort occurred in Beaufort state conditions varying between 0 and 3) and a rigorous protocol was implemented to stop sampling in poor visibility conditions to ensure the quality of the data were appropriate to develop density estimates of harbor porpoise. In addition, large swells, which greatly affect detection of cetaceans at sea, were extremely rare within most of SEAK inland waters where harbor porpoise were documented in the 2019 survey.

Because detection of harbor porpoise is imperfect, a method was used to estimate the proportion of animals missed on the survey line—a quantity known as $g(0)$ —under the assumption that observers will detect all porpoise in flat, calm conditions (Beaufort 0). NMFS determined this approach is appropriate, especially in a region where the environmental conditions favor the detectability of harbor porpoise.

The effect of many covariates in the probability of detecting harbor porpoise were considered as described in Zerbini *et al.* (2022a). The effect of the sun’s position can affect the detectability of cetaceans, but other covariates considered in that study are typically more important (e.g., sea state, group size, observer, swell height, cue; Barlow *et al.* 2001). In addition, most of the survey was conducted under cloudy or partially cloudy conditions, when the effect of glare is substantially reduced or is non-existent given the sun is not visible. The vessel used was small (~27.4 m long) compared to the size of other vessels used in similar surveys in SEAK in the past and allowed for sampling most of the habitats identified prior to completing the 2019 survey. Note that nearly all regions proposed for sampling were surveyed (Fig. 1 in Zerbini *et al.* 2022a). In addition, the vessel used in the 2019 survey towed a small rigid hull inflatable boat (RHIB) for collecting eDNA samples. This RHIB was launched to visit certain areas where depth was such that the larger survey vessel was unable to survey. One of these areas was Duncan Canal, where aggregations of harbor porpoise had been previously documented. No porpoise were seen in Duncan Canal during the small boat survey. It is important to note that Duncan Canal is adjacent to eastern Sumner Strait, an area of high density of harbor porpoise. It is possible that animals move in and out of the canal and were sampled by the survey vessel in Sumner Strait, even if they regularly occur in Duncan Canal. Therefore, the fact that the primary survey vessel did not visit Duncan Canal (and potentially other areas) does not mean that porpoise that visit the canal were not seen and are not accounted for in the estimates of abundance.

Finally, NMFS agrees that additional surveys are important to improve our knowledge of abundance and stock structure of harbor porpoise in SEAK; study platform and survey design depends on many factors, including the purpose of the project, the desired level of precision, and need for consistency with previous surveys. Studies to better

understand the population identity of porpoise along the outer coast are also extremely useful to assess whether animals in inland waters are separate from those in more offshore habitats.

Comment 32: ADFG and UFA request that NMFS assess trends in harbor porpoise abundance in SEAK stocks, comparing historical and recent data, and evaluate the impact of drift gillnet fishery bycatch on the population. Despite differences in survey and analytical methods, the uncorrected abundance estimates from Zerbini *et al.* (2022a) can be compared with earlier surveys to analyze trends in abundance. The comparison suggests that harbor porpoise abundance increased in N–SEAK and remained constant in S–SEAK between 2013 and 2019. Historical abundance trends can inform assessments of stock status, potential threats, and the impact of bycatch. Considering the drift gillnet fishery occurred across the time series of harbor porpoise surveys, and the most recent abundance estimates for the Wrangell and Zarembo Island area are comparable to early 1990s estimates, bycatch in the drift gillnet fishery does not seem to be a driving factor affecting abundance. The rapid increase in abundance between 2006 and 2007, and 2010 and 2012, indicates that the drift gillnet fishery may not hinder harbor porpoise population growth in the area, suggesting that the stock may be able to reach its optimum sustainable population.

Response: NMFS recognizes the need to assess trends in abundance and to evaluate the impact of the drift gillnet fishery on harbor porpoise. The latter requires calculating new estimates of mortality through a fisheries monitoring program (e.g., to place the estimates of mortality in perspective with more recent abundance estimates). The uncorrected abundance from Zerbini *et al.* (2022a) cannot be directly compared to those from previous surveys because the area covered in 2019 differs from the area covered in previous years. For example, by comparing the trackline design and area coverage in Fig. 1 in Zerbini *et al.* (2022a) and those in Figs. 2, 3, and 4 in Dahlheim *et al.* (2015), one can see the differences in the spatial coverage between the two surveys, which demonstrate the potential comparability issues between estimates from the two studies. For example, note that Chatham Strait, Lynn Canal, and lower Clarence Strait were not surveyed in 2006, 2007, and 2010, whereas high coverage was achieved in these areas in 2019. The most accurate way to assess the current trend would be to conduct a survey comparable to that done in

2019 and evaluate the trend based on two recent, comparable surveys; resources to do this are currently unavailable. Nonetheless, the depletion level of this population is unknown; if it is well below OSP, it is possible for the population to be increasing now, but may level off and not reach OSP if M/SI is too high.

Comment 33: ADFG emphasizes that the timeliness and transparency of data availability should be improved to ensure that stakeholders have adequate time to review and comment on proposed changes to the SARs. A member of the public commented that the State of Alaska should be provided with all data to peer review. ADFG commented that despite a data availability statement in Zerbini *et al.* (2022a), the data were provided late in the comment period, leaving insufficient time for thorough review. Similarly, the data from Parsons *et al.* (in prep) and the associated eDNA genetic sampling and analysis methods were provided with less than 10 working days left in the comment period. ADFG stated that the lack of timely data and methods sharing hinders transparency and the ability to properly assess the potential impacts of proposed changes to the SAR, particularly in relation to the small exceedance of PBR estimated for the proposed S–SEAK stock.

Response: Data availability is important and NMFS strives to make data available in a timely manner. We experienced significant set-backs and limitations in the years between tissue and eDNA sample collection and publication of genetics results due to restrictions imposed during the global pandemic. These delays impacted progress on the publication of the genetics results, which in turn impacted the release of the data. Summary genetic data were provided to the requestor to the best of the agency's ability; raw genetic data will be made available after the results are published in a peer-reviewed journal. We note that key information used in the draft harbor porpoise SAR was included in a peer-reviewed scientific paper (Zerbini *et al.* 2022a) and a NOAA technical memorandum (Zerbini *et al.* 2022b), and those documents were also made available to the public and to the Alaska SRG during their review of the draft SARs. In addition, Alaska SRG meetings held in 2018–2022 involved discussions about new studies on abundance and genetics of harbor porpoise, and the results of those studies. Minutes from the Alaska SRG meetings include considerable detail and are available to the public at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/scientific-review-groups#alaska-scientific-review-group>.

Comment 34: ADFG, UFA, and SEAFA request that NOAA carefully consider the potential economic impacts of proposed changes to the SEAK harbor porpoise SAR on the salmon gillnet fishery and coastal communities before implementing any changes. The proposed changes in the draft SAR would split the SEAK harbor porpoise stock into three separate stocks and categorize the proposed S–SEAK stock as a strategic stock under the MMPA. This categorization would require the establishment of a take reduction plan, leading to changes in regulation and operation of the salmon gillnet fishery. These changes could result in significant economic costs for the fishery and the coastal communities that rely on it, and should only be pursued if deemed necessary.

Response: NMFS' policies for delineating demographically independent populations and designating stocks under the MMPA section 117 is made on the basis of the best available science and is independent of any future agency actions under MMPA section 118 for establishing a take reduction plan that may or may not occur in the future. If a take reduction plan were implemented, NMFS recognizes that there may be economic implications for the fishery and the coastal communities that rely on the relevant stocks. Those implications would be considered as appropriate in other processes that flow from these determinations.

Comment 35: A member of the public commented that NMFS' proposal to split harbor porpoise stocks with lines of demarcation at Dry Straights, Rocky Pass, Cape Decision, and Wrangell Narrows is arbitrary and unproven, lacking in robust genetic data to support it clearly. The commenter asserted that additional sampling from multiple areas is needed to better establish a delineation between stocks.

Response: NMFS has concluded that the available evidence supports placing the boundaries between the N–SEAK and the S–SEAK stocks in Dry Strait, Wrangell Narrows, Keku Strait (Rocky Pass), and Cape Decision. These are areas with extremely low density or no recent records of harbor porpoise in the last 20 years as summarized in Zerbini *et al.* (2022b) and likely represent natural geographic/ecological boundaries supporting demographic independence of harbor porpoise between Frederick Sound and Sumner Strait. Despite being relatively wide (1.2 km), Dry Strait is shallow (~0.4–0.5 m)

and strongly influenced by the shoaling waters of the Stikine River Delta. The Stikine River Delta is continually expanding and depositing sediment on the ocean floor, creating tidal flats throughout the strait. It is unclear whether harbor porpoise use Dry Strait; the area has not been surveyed by vessel because of navigational constraints, but no harbor porpoise were there during aerial surveys in 1997 (Hobbs and Waite 2010). Harbor porpoise were documented in the Wrangell Narrows in the early 1990s, but infrequently since then (only one sighting in the lower portion of the Narrows in 2011) (Hobbs and Waite 2010; Dahlheim *et al.* 2015; Zerbini *et al.* 2022). Keku Strait is a narrow channel with complex bathymetry and shallow areas in its narrowest portion. The northern end of Keku Strait (near the town of Kake) was surveyed in 2019 and data generated from eDNA samples collected there suggest that harbor porpoise in that area are genetically more similar to harbor porpoise in Glacier Bay and Icy Strait (Parsons *et al.* in prep., Zerbini *et al.* 2022b) than those in Sumner Strait. It is unclear whether harbor porpoise cross the narrow parts of Keku Strait (Rocky Pass) towards Sumner Strait. No porpoise were seen there during aerial surveys in 1997 (Hobbs and Waite 2010). The geography and the bathymetry in the narrow reaches could represent a geographic barrier, separating animals from the northern and southern inland water DIPs. The passage between Cape Decision and Coronation Island separates two relatively large straits in SEAK: lower Chatham and lower Sumner straits. Harbor porpoise have been documented in lower Sumner Strait, to the east of Cape Decision (Dahlheim *et al.* 2015; Zerbini *et al.* 2022a) and occasionally in lower Chatham Strait (Hobbs and Waite 2010), but occurrence in these regions is uncommon. Whether harbor porpoise move between the two straits (or whether animals from offshore areas move into the straits) is presently unknown. It is important to note that demographic independence does not require a complete lack of interchange of animals between two or more DIPs. NMFS (2023) defines the term “demographic independence” to mean that “the population dynamics of the affected group is more a consequence of births and deaths within the group (internal dynamics) rather than immigration or emigration (external dynamics). Thus, the exchange of individuals between population stocks is not great enough to prevent the depletion of one of the populations as

a result of increased mortality or lower birth rates.”

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Dated: August 7, 2023.

Karl Ibrahim Moline,

Acting Director, Office of Science and Technology, National Marine Fisheries Service.

[FR Doc. 2023–17219 Filed 8–10–23; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; 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 deletes product(s) to the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Date added to and deleted from the Procurement List: September 10, 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: Michael R. Jurkowski, Telephone: (703) 785–6404 or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION:

Deletions

On 7/14/2023, 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):

7520–01–620–3317—Hole Punch, Paper, Light Duty, 3-Hole, Adjustable, 11 sheet capacity, Black Base, Metallic Handle
Designated Source of Supply: AbilityFirst, Pasadena, CA

Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR (2, NEW YORK, NY

NSN(s)—Product Name(s):

7520–01–451–9183—Pen, Ballpoint, Retractable, Essential LVX, Blue, Fine Point
7520–01–451–9177—Pen, Ballpoint, Retractable, Essential LVX, Red, Fine Point

Designated Source of Supply: Industries for the Blind and Visually Impaired, Inc., West Allis, WI

Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR (2, NEW YORK, NY

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–17240 Filed 8–10–23; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to the procurement list.

SUMMARY: The Committee is proposing to add 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 previously furnished by such agencies.

DATES: Comments must be received on or before: September 10, 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) and service(s) listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following product(s) and service(s) are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Product(s)

NSN(s)—Product Name(s):

7930–00–NIB–2226—Dispenser, Handheld, 1:40 Dilutions, Blue/White
7930–00–NIB–2227—Dispenser, Handheld, 1:128 and 1:256 Dilutions, Red/White
7930–00–NIB–2228—Degreaser, Heavy-Duty, All-Purpose, 2 Liter Bottle, Yellow
7930–00–NIB–2236—Cleaner, Bathroom, 2 Liter Bottle, Teal
7930–00–NIB–2237—Cleaner, Neutral, Floor, 2 Liter Bottle, Red
7930–00–NIB–2238—Cleaner, Glass, Mirror, 2 Liter Bottle, Blue
7930–00–NIB–2239—Cleaner, Multipurpose, 2 Liter Bottle, Clear

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

Service(s)

Service Type: Janitorial

Mandatory for: UNICOR, Federal Prison Industries, Inc., Central Office, Washington, DC

Designated Source of Supply: Fedcap Rehabilitation Services, Inc., New York, NY

Contracting Activity: FEDERAL PRISON INDUSTRIES/UNICOR, CO BUSINESS OFFICE

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–17241 Filed 8–10–23; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****Request for Project Proposals Pursuant to the Water Resources Development Act of 2020, Pilot Program for Continuing Authority Projects in Small or Disadvantaged Communities—Extension of Time To Submit Proposals**

AGENCY: U.S. Army Corps of Engineers, Department of Defense.

ACTION: Notice; request for pilot project proposals; extension of time.

SUMMARY: Section 165 of the Water Resources Development Act of 2020 directs the Secretary of the Army to implement a pilot program for carrying out projects under a continuing authority program for economically disadvantaged communities at 100% Federal cost. The Department of the Army is requesting pilot project proposals. The Secretary is authorized to select up to 20 pilot projects. Proposals previously submitted do not need to be resubmitted.

DATES: The period to submit proposals was originally scheduled to end on August 21, 2023 (88 FR 40229, June 21, 2023). In response to request for time extension for submittals, the period to submit proposals is extended by 60 days to October 20, 2023. Written proposals must be submitted on or before November 19, 2023.

ADDRESSES: You may submit proposals in writing to using any of these methods:

- **Mail:** HQ, U.S. Army Corps of Engineers, ATTN: Ms. Amy Babey, at 441 G Street NW, Washington, DC 20314.

Email: wrda20cap165a@usace.army.mil. Please include Section 165 Project Proposal in the subject line of the message.

Due to security requirements, we cannot receive comments by hand delivery or courier.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Babey at wrda20cap165a@usace.army.mil or by phone at 502-645-7199.

SUPPLEMENTARY INFORMATION: Section 165 of the Water Resources Development Act of 2020 requires the Secretary to implement a pilot program for carrying out up to 20 projects under a continuing authority program for economically disadvantaged communities at 100 percent Federal cost. Additional information on the section 165 pilot program can be found in the Assistant Secretary of the Army

for Civil Works (ASA(CW)) policy guidance issued on June 12, 2023. A copy of the guidance can be obtained at https://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/wrda_2020/.

The term “economically disadvantaged community” means as defined in the ASA(CW) memorandum, Implementation Guidance for Section 160 of the Water Resources Development Act of 2020, Definition of Economically Disadvantaged Community, dated 14 March 2023. A copy of the guidance can be obtained at <https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll5/id/36002>.

The term “continuing authority program” (CAP) means any of the following:

1. Section 14 of the Flood Control Act of 1946 (33 U.S.C. 701r).

2. Section 3 of the Act of August 13, 1946 (33 U.S.C. 426g). This authority is commonly identified as “Section 103” by the U.S. Army Corps of Engineers (USACE).

3. Section 107 of the River and Harbor Act of 1960 (33 U.S.C. 577).

4. Section 111 of the River and Harbor Act of 1968 (33 U.S.C. 426i).

5. Section 204 of the Water Resources Development Act of 1992 (33 U.S.C. 2326).

6. Section 205 of the Flood Control Act of 1948 (33 U.S.C. 701s).

7. Section 206 of the Water Resources Development Act of 1996 (33 U.S.C. 2330).

8. Section 2 of the Act of August 28, 1937 (33 U.S.C. 701g). This authority is commonly identified as “Section 208” by USACE.

9. Section 1135 of the Water Resources Development Act of 1986 (33 U.S.C. 2309a).

Notwithstanding the cost share authorized for the applicable CAP section, pursuant to section 165(a), the Federal share of the cost of a project selected under this authority shall be 100 percent. Therefore, the maximum total Federal cost of a project implemented under section 165(a) will be the sum of the applicable statutory per project Federal participation limit (see table below) plus the amount that the non-Federal interest would pay as its cost share.

Authority	Statutory per project Federal participation limit
Section 14	\$10,000,000
Section 103	10,000,000
Section 107	10,000,000
Section 111	12,500,000
Section 204	10,000,000

Authority	Statutory per project Federal participation limit
Section 205	10,000,000
Section 206	10,000,000
Section 208	500,000
Section 1135	10,000,000

Non-Federal interest requirements:

1. Provide all required lands, easements, rights-of-way, relocations, and disposal areas (LERRDs) required for the project.

2. Perform and pay for all costs associated with any required hazardous, toxic, and radioactive wastes (HTRW) cleanup and response in, on, or under any real property interest required for the project.

3. Operate and maintain the project at full non-Federal expense (except for a project for commercial navigation).

4. Hold and save the United States free from all damages arising from the project that are not due to the fault or negligence of the United States or its contractors.

5. For a project for navigation, provide all required local service facilities.

6. Pay all costs of planning, design, and construction that exceed the sum of the statutory per project Federal participation limit for the applicable CAP section plus the amount that the non-Federal interest would normally provide as its cost share.

Project Proposals: All information provided in a proposal is public information. Therefore, information that is confidential business information, information that should not be disclosed because of statutory restrictions, or other information that a non-Federal interest would not want to appear publicly should not be included in the submittal. Proposals to convert an active CAP or specifically authorized study or project to a section 165 pilot program study or project will not be considered. The authority to initiate a project under the pilot program terminates on December 27, 2030.

Entities submitting proposals for a project must include the following information:

1. Name, location, and description of the proposed project.

2. Description of the Economically Disadvantaged Community. The proposal must include a map and a narrative description of the economically disadvantaged community that will be benefited by the proposed project. The narrative description must include sufficient information to validate the community’s classification as economically disadvantaged. The narrative must also describe the type

and complexity of the urbanization in the community and identify any existing infrastructure in the community that is related to the purpose of the proposed project.

3. Description of the non-Federal interest for the proposed project. The description must include sufficient information to validate the non-Federal interest's eligibility as an applicant for the pilot program.

4. A letter of intent to partner with USACE in conducting a study, completing a design, constructing the project, and the long-term operation and maintenance of the constructed project. The letter of intent must include information demonstrating the non-Federal interest ability to be a partner in the study and project.

5. Description of the need for the proposed project and what the project would provide to the disadvantaged community.

6. For a project for flood risk management or coastal storm risk management (CSRM) purposes, the proposal must include a description of the history of flooding and the population at risk in the economically disadvantaged community. The narrative should include the dates of flood events and describe the property damages and life loss attributable to each event. It should also include a qualitative description or range of how deep the water was and how fast it was flowing. The description should identify any characteristics of the population that have a bearing on risk, such as the total number of people subject to flooding or a coastal storm, low per capita income, or unemployment rate above the national average.

7. A proposal for a project for CSRM purposes must include assurance of local willingness and capability to establish conditions of public use and access to beaches and shores. The proposal must identify whether the proposed project may result in a CSRM project that benefits beaches or shores the majority of which are private. In such cases, the applicant must provide assurance in the proposal that it is capable and willing to establish sufficient conditions of public use and access as a condition of Federal financial participation in a project.

8. For a project for ecosystem restoration, the proposal must describe the degraded habitat targeted for restoration and the causes of the degradation. Regionally and nationally significant habitat or natural resources should be identified.

9. For a project under section 14, the proposal must describe the ownership and function of the facility to be

protected and the nature of the damage caused by flooding adjacent to the facility.

10. For a project under section 111, the proposal must describe the shoreline damage and identify the Federal navigation project responsible for the damage.

11. For a project for commercial navigation under Section 107, the proposal must describe existing facilities, vessel traffic, and the navigation problem the proposed project will address.

Michael L. Connor,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2023-17225 Filed 8-10-23; 8:45 am]

BILLING CODE 3720-58-P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2023-SCC-0055]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Higher Education Act (HEA) Title II Report Cards on State Teacher Credentialing and Preparation

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before September 11, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link www.reginfo.gov/public/do/PRAMain to access the site. Find this information collection request (ICR) by selecting "Department of Education" under "Currently Under Review," then check the "Only Show ICR for Public Comment" checkbox. Reginfo.gov provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the "View Information Collection (IC) List" link. Supporting statements and other supporting documentation may be found by clicking on the "View Supporting Statement and Other Documents" link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection

activities, please contact Freddie Cross, (202) 987-0430.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Higher Education Act (HEA) Title II Report Cards on State Teacher Credentialing and Preparation.

OMB Control Number: 1840-0744.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments; private sector.

Total Estimated Number of Annual Responses: 2,283.

Total Estimated Number of Annual Burden Hours: 185,000.

Abstract: This request is for a revision of the State Report Card and Institution and Program Report Card required by the Higher Education Act of 1965, as amended in 2008 by the Higher Education Opportunity Act (HEOA). States must report annually on criteria and assessments required for initial teacher credentials using a State Report Card (SRC), and institutions of higher education (IHEs) with teacher preparation programs (TPP), and TPPs outside of IHEs, must report on key program elements on an Institution and Program Report Card (IPRC). IHEs and TPPs outside of IHEs report annually to their states on program elements, including program numbers, type, enrollment figures, demographics, completion rates, goals and assurances to the state. States, in turn, must report on TPP elements to the Secretary of Education in addition to information on assessment pass rates, state standards, initial credential types and requirements, numbers of credentials issued, TPP classification as at-risk or low-performing. The information from states, institutions, and programs is published annually in The Secretary's Report to Congress on Teacher Quality.

The revisions to the IPRC consist of the following:

- A new sub-section about the impact of COVID-19 in Section I: Program

Information. The section would have four questions in the first data collection year in which it is implemented, due to retrospective questions going back to academic year 2019–20, but only one question in subsequent data collection years.

- A new question about student completion rate in Section I: Program Information.
- Minor revisions to the gender and race/ethnicity categories in Section I: Program Information.

The revisions to the SRC consist of the following:

- Two new items showing completion rate, total and by program, pre-loaded from the IPRC for state review, in Section I: Program Information.
- Five new multiple choice questions in Section VII: Teacher Shortages and Teacher Preparation, which are replacing three open text items.
- A new “other” response option for a multiple choice item in Section IX: Improvement Efforts.
- A new multiple choice and open text item in Section IX: Improvement Efforts.

- A new section (Section X) about the impact of COVID–19. The section would have three questions in the first data collection year in which it is implemented, due to retrospective questions going back to academic year 2019–20, but only one question in subsequent data collection years.

- Minor revisions to the gender and race/ethnicity categories in Section I: Program Information.

Dated: August 8, 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. 2023–17245 Filed 8–10–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Intent and Request for Information Regarding Launching a Responsible Carbon Management Initiative

AGENCY: Office of Fossil Energy and Carbon Management, Department of Energy.

ACTION: Notice of intent (NOI); request for information (RFI).

SUMMARY: The Department of Energy (DOE), Office of Fossil Energy and Carbon Management (FECM) is issuing this NOI to notify interested parties of

its intent to launch a “Responsible Carbon Management Initiative” to recognize and encourage project developers and others in industry to pursue the highest levels of safety, environmental stewardship, accountability, community engagement, and societal benefits in carbon management projects. The Department also seeks input from all stakeholders through this RFI regarding the draft Principles for Responsible Carbon Management Projects and the Initiative.

DATES: Written comments and information are requested by September 11, 2023.

ADDRESSES: Interested parties may submit comments electronically to *responsiblecarbonmanagementinitiative@hq.doe.gov* and include “Responsible Carbon Management Initiative” in the subject line of the email. Responses must be provided as attachments to an email. Only electronic responses will be accepted.

FOR FURTHER INFORMATION CONTACT:

Questions may be addressed to Stephanie Hutson, *responsiblecarbonmanagementinitiative@hq.doe.gov* or 202–287–6832.

SUPPLEMENTARY INFORMATION:

I. Background

In November 2021, Congress passed and President Joseph R. Biden, Jr. signed the Infrastructure Investment and Jobs Act (IIJA, Pub. L. 117–58), also known as the Bipartisan Infrastructure Law (BIL).¹ The BIL provides historic levels of funding to modernize and upgrade American infrastructure to enhance U.S. competitiveness, drive the creation of good-paying jobs, tackle the impacts of climate change, and ensure strong access to economic, environmental, and other benefits for disadvantaged communities.² The BIL appropriates more than \$62 billion to the U.S. Department of Energy (DOE)³

¹ Infrastructure Investment and Jobs Act, Public Law 117–58 (November 15, 2021). <https://www.congress.gov/bill/117th-congress/house-bill/3684>. This FOA uses the more common name Bipartisan Infrastructure Law.

² Pursuant to E.O. 14008, “Tackling the Climate Crisis at Home and Abroad,” January 27, 2021, and the Office of Management and Budget’s Interim Justice40 Implementation Guidance M–21–28 and M–23–09, DOE recognizes disadvantaged communities as defined and identified by the White House Council on Environmental Quality’s Climate and Economic Justice Screening Tool (CEJST), located at <https://screeningtool.geoplatform.gov/>. DOE’s Justice40 Implementation Guidance is located at energy.gov/sites/default/files/2022-07/FinalDOEJustice40GeneralGuidance072522.pdf.

³ U.S. Department of Energy. November 2021. “DOE Fact Sheet: The Bipartisan Infrastructure Deal Will Deliver for American Workers, Families and Usher in the Clean Energy Future.” *DOE Fact Sheet: The Bipartisan Infrastructure Deal Will Deliver For*

to invest in American manufacturing and workers; expand access to energy efficiency and clean energy; deliver reliable, clean, and affordable power to more Americans; and demonstrate and deploy clean energy technologies.

To support the goal of building a clean and equitable energy economy, the BIL-funded projects are required to (1) support meaningful community and labor engagement; (2) invest in America’s workforce; (3) advance diversity, equity, inclusion, and accessibility; and (4) contribute to the President’s goal that 40% of the overall benefits flow to disadvantaged communities.

Carbon management approaches such as carbon capture, transport, and storage and carbon dioxide removal are essential climate tools for meeting 1.5 °C targets. When deployed responsibly, these approaches are complementary, and not a replacement for, parallel efforts to reduce emissions through the deployment of energy efficiency, renewables, nuclear power, clean hydrogen, etc.

As part of the BIL, DOE will deploy approximately \$12 billion in new carbon management funding over five years, largely for direct air capture and carbon capture, transport, use, and storage. And the 2022 Inflation Reduction Act (IRA, Pub. L. 117–169), which features a comprehensive package of clean energy and industrial tax credits, includes the most ambitious incentives in the world to date for the deployment of carbon management technologies.⁴ Taken together, BIL and IRA have the potential to incentivize large scale commercial deployment of carbon management projects.

II. Responsible Carbon Management Initiative

DOE FECM intends to launch a “Responsible Carbon Management Initiative” (Initiative) to recognize and encourage project developers and others in industry to pursue the highest levels of safety, environmental stewardship, accountability, community engagement, and societal benefits in carbon management projects. The Initiative will also aim to encourage transparency and learning through greater data and information sharing among industry, governments, communities, and other stakeholders.

This Initiative will be sequenced in two phases. In Phase 1, FECM intends to publish Principles for Responsible

American Workers, Families and Usher in the Clean Energy Future, Department of Energy.

⁴ Inflation Reduction Act, Public Law 117–169 (August 16, 2022). <https://www.congress.gov/117/plaws/publ169/PLAW-117publ169.pdf>.

Carbon Management Projects (Principles). Companies can pledge to abide by the Principles, which include the following categories: Community Engagement, Workforce Development and Quality Jobs, Tribal Consultation, Environmental Justice, Environmental Responsibility, Air and Water Quality, Regulatory Requirements, Health and Safety, Emergency Response, Transparency, and Long-Term Stewardship. The Principles apply to the full range of carbon management technologies—including carbon capture, transport, use, and storage, as well as carbon dioxide removal technologies. *A draft of the Principles can be found in Section III.* FECM's goal for this initial phase of the Initiative is to facilitate industry intention and transparency regarding responsible carbon management deployment.

Project developers interested in demonstrating their commitment to responsible carbon management projects will complete an intake form, which may require describing how they plan to meet the Principles. FECM plans to publish the information from the completed intake forms on DOE's website. In addition, FECM will encourage project developers to publish information on how they are implementing the Principles on their own websites.

FECM will also encourage nongovernmental organizations, labor, State and local officials, and Tribal leaders (non-industry stakeholders) to consider formally endorsing the Principles. By endorsing, these stakeholders will affirm the important role that carbon management plays in meeting climate goals but also the importance of delivering societal and environmental co-benefits to communities hosting carbon management projects. FECM intends to publish non-industry stakeholder endorsements on DOE's website.

Interested industry and non-industry stakeholders can indicate their early support of the Principles and the Initiative by contacting *responsiblecarbonmanagementinitiative@hq.doe.gov*. In Phase 2, FECM intends to provide technical assistance through a Funding Opportunity Announcement (FOA). Through this FOA, FECM would provide resources to support project developers seeking to meet the Principles or other aspects of this effort (including increasing transparency or third-party verification). FECM intends Phase 2 to focus on evaluation of Principle implementation, accountability, and leadership. FECM does not anticipate requiring

participation in Phase 1 as a prerequisite for participation in Phase 2.

Provided that Phases 1 and 2 are successful, FECM may consider developing a robust recognition program to increase and maintain visibility of industry leaders and projects that significantly advance responsible carbon management. The program would include more detailed guidance and metrics on what qualifies for recognition and would be subject to the availability of sufficient resources and funding. There may be the possibility for a FOA to be issued as part of this recognition program.

III. DOE Principles for Responsible Carbon Management Projects

Community Engagement—Project developers will be considerate of parties who are or may reasonably be affected by project deployment and will share project-related information in a timely and transparent way. Project developers will include robust two-way community engagement plans, including training on carbon management technology risks and benefits, so that communities can understand and weigh the potential opportunities and risks of hosting a project—including the social, economic, environmental, and cultural effects. Project developers will provide clear mechanisms for modifying aspects of their projects in response to community priorities and concerns raised through engagement and will provide benefits to communities and workers.

Workforce Development and Quality Jobs—Project developers will seek to create jobs within host communities and the surrounding region that provide good pay, benefits, predictable schedules, a safe work environment, and with assurances that workers will have a free and fair chance to join or form a union. Project developers will foster broad access to these jobs by making investments in training and career awareness through partnerships that serve workers (e.g., apprenticeship programs, schools, and universities). Project developers will also prioritize providing long-term employment for workers when possible and support the mobility of workers to advance in their careers.

Tribal Consultation—Project developers will respect Tribal sovereignty and self-determination, lands, assets, resources, treaty, and other federally recognized and reserved rights, considering sacred tribal lands and other areas and resources of religious or cultural significance. Project developers will consult Tribes in a manner that recognizes tribal sovereignty.

Environmental Justice—Through all phases of carbon management deployment—including siting, design, operation, and decommissioning—project developers will pursue fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income. Project developers will embrace environmental justice principles and comply with Federal requirements and guidance on these issues. In particular, project developers will consider the cumulative impacts on communities hosting carbon management projects.

Environmental Responsibility—Project developers will thoroughly evaluate and mitigate environmental impacts using best practices with respect to planning, implementation, monitoring, and closure. Project developers will publish environmental impact analyses and project monitoring data in a way that is timely and easy for the public to access. Environmental analysis will include energy use and life-cycle environmental impacts, including greenhouse gases (GHGs), to ensure that projects meet their intended emissions reduction goals.

Air and Water Quality—Project developers will implement operational practices or equipment to monitor and mitigate potential non-greenhouse gas air and water emissions. Monitoring and reporting will be inclusive of N-amines and changes in co-pollutants. Project developers for carbon dioxide storage projects will thoroughly evaluate risks and avoid impacts to groundwater and other subsurface resources.

Regulatory Requirements—Project developers will rigorously and transparently adhere to all applicable regulatory requirements for protecting human health and the environment, and apply best practices developed by regulatory authorities or other standard-setting bodies. This includes timely public reporting of any regulatory violations.

Health and Safety—Project developers will site, design, construct, and operate their projects in a safe and secure manner that is protective of human health, including worker and public health and safety.

Emergency Response—Project developers will develop emergency response and remediation plans, including timely emergency alert provisions; make the plans publicly available; and provide training and resources to local emergency responders.

Transparency—Project developers will implement robust mechanisms for transparency—before, during, and after the project ceases. In particular, project

developers will ensure that the siting process is open to public input and transparent with respect to how decisions are made. Project developers will work with communities to identify the types of data that will be collected and shared with the public, including the level of detail, frequency of monitoring and reporting, response to findings, and means of disseminating information.

Long-Term Stewardship—Project developers of carbon dioxide storage projects will develop closure and post-operational monitoring and reporting plans and ensure financial responsibility for any future stewardship.

IV. Questions for Request for Information

FECM is requesting comment on the Principles and the Initiative. The Principles are intended to provide project developers with a high-level framework for executing carbon management projects responsibly. DOE specifically welcomes comment on the following questions:

1. Would the Initiative and the Principles be likely to meaningfully advance responsible carbon management? If not, what changes could be made to better advance this goal?
2. At a high level, do the Principles address what is needed for responsible carbon management? If not, what additional principles may be needed?
3. In what ways, if any, could the Principles be revised to better reflect responsible carbon management?
4. Once finalized, would you agree to pledge to abide by or endorse the Principles? If not, what changes could be made to Phase 1 to encourage you to pledge to abide by or endorse the Principles?
5. How could Phase 2 and a recognition program be structured and executed to maximize adoption of the Principles?
6. Would the technical assistance envisioned in Phase 2 be helpful to advance responsible carbon management projects? Would you take advantage of this service or encourage others to take advantage? If not, why not?

V. Response Guidelines

NOI/RFI responses shall include:

1. NOI/RFI title and reference number;
2. Name(s), phone number(s), and email address(es) for the principal point(s) of contact;
3. Institution or organization affiliation and postal address; and

4. Clear indication of the specific question(s) to which you are responding.

Responses including confidential business information will be handled per guidance in Section VI.

VI. Confidential Business Information

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: One copy of the document marked “confidential” including all the information believed to be confidential, and one copy of the document marked “non-confidential” with the information believed to be confidential deleted. Submit these documents via email. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Signing Authority

This document of the Department of Energy was signed on August 4, 2023, by Brad Crabtree, Assistant Secretary, Office of Fossil Energy and Carbon Management, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on August 8, 2023.

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

[FR Doc. 2023–17218 Filed 8–10–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP23–840–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Technical Conference

On July 14, 2023, the Commission issued an order directing Commission staff to convene a technical conference

to discuss Transcontinental Gas Pipe Line Company, LLC’s revisions to the rates, charges, and certain terms and conditions of service at the Washington Storage Field in St. Landry Parish, Louisiana.¹ The technical conference will be held on Wednesday, September 13, 2023, from 9:00 a.m. to 4:00 p.m. Eastern Standard Time. The conference will be held virtually and in person at a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. All interested persons are permitted to attend.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to accessibility@ferc.gov, call toll-free (866) 208–3372 (voice) or (202) 208–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

All interested parties that are not able to attend in person are invited to participate remotely. Staff will use the WebEx platform to view supporting documents related to this docket using the following link—<https://ferc.webex.com/ferc/j.php?MTID=m6642c4c3eb3c3c97ed6dc3cc03527e8d>. For more information about this technical conference, please contact Sorita Ghosh at sorita.ghosh@ferc.gov or at (202) 502–8522 by September 12, 2023.

Dated: August 7, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–17247 Filed 8–10–23; 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: EC23–115–000.

Applicants: Stony Creek Wind Farm, LLC, RWE Investco Mgmt, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Stony Creek Wind Farm, LLC.

Filed Date: 8/4/23.

Accession Number: 20230804–5182.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: EC23–116–000.

¹ *Transcontinental Gas Pipe Line Company, LLC*, 184 FERC ¶ 61,035 (2023).

Applicants: Sun Streams, LLC, Sunshine Valley Solar, LLC, Potentia US Solar Fund 2, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Sun Streams, LLC, et al.

Filed Date: 8/4/23.

Accession Number: 20230804–5184.

Comment Date: 5 p.m. ET 8/25/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2507–019; ER10–2074–009; ER10–2097–011.

Applicants: KCP&L Greater Missouri Operations Company, Kansas City Power & Light Company, Westar Energy, Inc.

Description: Notice of Change in Status of Evergy Kansas Central, Inc., et al.

Filed Date: 7/28/23.

Accession Number: 20230728–5242.

Comment Date: 5 p.m. ET 8/18/23.

Docket Numbers: ER23–1241–002.

Applicants: IP Oberon, LLC.

Description: Notice of Non-Material Change in Status of IP Oberon, LLC.

Filed Date: 7/28/23.

Accession Number: 20230728–5241.

Comment Date: 5 p.m. ET 8/18/23.

Docket Numbers: ER23–2139–001.

Applicants: Interstate Power and Light Company.

Description: Tariff Amendment: Interstate Power and Light Lansing Retirement Amendment to be effective 8/14/2023.

Filed Date: 8/7/23.

Accession Number: 20230807–5015.

Comment Date: 5 p.m. ET 8/28/23.

Docket Numbers: ER23–2509–000.

Applicants: Southwestern Public Service Company.

Description: § 205(d) Rate Filing: SPS–TTC–Utility Reloc Agrmt-729 R1–0.1.0 to be effective 7/29/2023.

Filed Date: 7/28/23.

Accession Number: 20230728–5170.

Comment Date: 5 p.m. ET 8/18/23.

Docket Numbers: ER23–2572–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original WMPA, SA No. 7025; Queue No. AG1–193 to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5134.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2573–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original WMPA, SA No. 7026; Queue No. AF2–243 to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5137.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2574–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Notice of Cancellation of WMPA, SA No. 6328; Queue No. AG2–399 re: Breach to be effective 10/6/2023.

Filed Date: 8/7/23.

Accession Number: 20230807–5055.

Comment Date: 5 p.m. ET 8/28/23.

Docket Numbers: ER23–2575–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: 2nd Amended LGIA, Sagebrush Solar 2-Cancel eTariff Record (TOT818/SA243) to be effective 10/7/2023.

Filed Date: 8/7/23.

Accession Number: 20230807–5057.

Comment Date: 5 p.m. ET 8/28/23.

Docket Numbers: ER23–2576–000.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii): O’Neal Solar (Solar + BESS) LGIA Filing to be effective 7/28/2023.

Filed Date: 8/7/23.

Accession Number: 20230807–5061.

Comment Date: 5 p.m. ET 8/28/23.

Docket Numbers: ER23–2577–000.

Applicants: Arizona Public Service Company.

Description: § 205(d) Rate Filing: Service Agreement No. 193, Amendment No. 5 to be effective 10/7/2023.

Filed Date: 8/7/23.

Accession Number: 20230807–5110.

Comment Date: 5 p.m. ET 8/28/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES23–65–000.

Applicants: GridLiance West LLC.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of GridLiance West LLC.

Filed Date: 8/3/23.

Accession Number: 20230803–5135.

Comment Date: 5 p.m. ET 8/24/23.

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: August 7, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–17248 Filed 8–10–23; 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: RP23–959–000.

Applicants: Equitrans, L.P.

Description: § 4(d) Rate Filing: Amended Negotiated Rate Agreement—8/5/2023 to be effective 8/5/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5143.

Comment Date: 5 p.m. ET 8/16/23.

Docket Numbers: RP23–960–000.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (WTG August 2023) to be effective 8/8/2023.

Filed Date: 8/7/23.

Accession Number: 20230807–5049.

Comment Date: 5 p.m. ET 8/21/23.

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.

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Dated: August 7, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-17246 Filed 8-10-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4472-031]

Union Falls Hydro Power, L.P.; Notice of Settlement Agreement and Soliciting Comments

Take notice that the following settlement agreement has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Settlement Agreement.

b. *Project No.:* 4472-031.

c. *Date Filed:* August 3, 2023.

d. *Applicant:* Union Falls Hydro Power, L.P. (Union Falls).

e. *Name of Project:* Saranac Hydroelectric Project (project).

f. *Location:* The existing project is located on the Saranac River, in the town of Franklin in Franklin County

and the town of Black Brook in Clinton County, New York.

g. *Filed Pursuant to:* Rule 602 of the Commission's Rules of Practice and Procedure, 18 CFR 385.602.

h. *Applicant Contact:* Ms. Sherri Loon, Coordinator—Operations USA, Kruger Energy, 423 Brunswick Ave., Gardiner, ME 04345; phone: (207) 203-3026; email: Sherri.Loan@kruger.com.

i. *FERC Contact:* Joshua Dub, 202-502-8138, or Joshua.Dub@ferc.gov.

j. *Deadline for filing comments:* September 6, 2023. Reply comments due: September 21, 2023.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at <https://ferconline.ferc.gov/FEROnline.aspx>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/QuickComment.aspx>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FEROnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P-4472-031.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. Union Falls filed a Settlement Agreement for the project's relicense proceeding, on behalf of itself; the U.S. Fish and Wildlife Service; the New York State Department of Environmental Conservation; and Trout Unlimited. The purpose of the Settlement Agreement is to resolve, among the signatories, relicensing issues related to project operation, water quantity, fish and aquatic resources, terrestrial resources, and recreation. The Settlement Agreement includes proposed

protection, mitigation, and enhancement measures to address: (1) impoundment surface elevations; (2) bypassed reach and minimum base flows; (3) operation compliance and monitoring; (4) fish exclusion; (5) recreation; (6) freshwater mussel protection; (7) bald eagle protection; and (8) invasive species management. Union Falls requests that any new license issued by the commission for the project contain conditions consistent with the provisions of the Settlement Agreement and within the scope of its regulatory authority.

l. A copy of the Settlement Agreement is available for review on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field, to access the document (*i.e.*, P-4472). At this time, the Commission has suspended access to the Commission's Public Reference Room. For assistance, contact FERC at FEROnlineSupport@ferc.gov or call toll free, (866) 208-3676 or TTY (202) 502-8659.

You may also register online at <https://www.ferc.gov/ferc-online/overview> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

m. 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: August 7, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-17236 Filed 8-10-23; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP-OFA-081]

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 31, 2023 10 a.m. EST Through August 7, 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. 20230097, Draft Supplement, USACE, IL, City of Springfield Aquatic Recreation and Supplemental Water Supply Project Draft SEIS, Comment Period Ends: 09/25/2023, Contact: James C. Kelley 309-794-5373.

EIS No. 20230098, Draft, NPS, MT, Yellowstone National Park Bison Management Plan Draft Environmental Impact Statement, Comment Period Ends: 09/25/2023, Contact: Morgan Warthin, Public Affairs Specialist, Yellowstone National Park 307-344-2010.

EIS No. 20230099, Draft, BLM, UT, Grand Staircase Escalante National Monument Draft Resource Management Plan and Environmental Impact Statement, Comment Period Ends: 11/09/2023, Contact: Scott Whitesides 801-598-8669.

EIS No. 20230100, Final, NRCS, GA, Final Environmental Impact Statement and Supplemental Watershed Plan for Etowah River Watershed Dam No. 13-A, Review Period Ends: 09/11/2023, Contact: Eric Harris 706-546-2217.

EIS No. 20230101, Final Supplement, TVA, AL, Browns Ferry Nuclear Plant Subsequent License Renewal Project Supplemental Environmental Impact Statement, Review Period Ends: 09/11/2023, Contact: J. Taylor Johnson 423-751-2732.

Dated: August 7, 2023.

Cindy S. Barger,
Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2023-17235 Filed 8-10-23; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS23-11]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of special closed meeting.

Description: In accordance with section 1104(b) of title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) met for a Special Closed Meeting on this date.

Location: Virtual meeting via Webex.

Date: August 2, 2023.

Time: 10:55 a.m. ET.

Action and Discussion Item

Personnel Matter

The ASC convened a Special Closed Meeting to discuss a personnel matter. No action was taken by the ASC.

James R. Park,

Executive Director.

[FR Doc. 2023-17251 Filed 8-10-23; 8:45 am]

BILLING CODE 6700-01-P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551-0001, not later than August 28, 2023.

A. Federal Reserve Bank of Atlanta (Erien O. Terry, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309; Comments can also be sent electronically to Applications.Comments@atl.frb.org:

1. *John Adam Robertson, Speedwell, Tennessee*; to retain voting shares of Robertson Holding Company, L.P., Harrogate, Tennessee, and thereby indirectly retain voting shares of Commercial Bancgroup, Inc., and its subsidiary bank Commercial Bank, both of Harrogate, Tennessee, and AB&T Financial Corporation and its subsidiary bank Alliance Bank & Trust Company, both of Gastonia, North Carolina.

B. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) One Memorial Drive, Kansas City, Missouri 64198-0001. Comments can also be sent electronically to KCApplicationComments@kc.frb.org:

1. *The Luck and Guts Trust, and Trudi Holthouse as trustee, both of Casper, Wyoming*; to acquire voting shares of Jonah Bankshares, Inc., and thereby indirectly acquire voting shares of Jonah Bank, both of Casper, Wyoming.

C. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414. Comments can also be sent electronically to Comments.applications@chi.frb.org:

1. *The William C. Talen Revocable Trust, and Darlys Hulme, as trustee, both of Vinton, Iowa; Mary June Talen, Omaha, Nebraska; Deborah Talen and Ruth Erickson, both of Minneapolis, Minnesota; the William Talen III Revocable Trust, William Talen III and Savitri Durkee, as co-Trustees, and Julie Talen, all of New York, New York; and Robert Lassiter, Marthaville, Louisiana*; to retain additional voting shares of Talen, Inc., and thereby indirectly retain voting shares of Farmers Savings Bank & Trust, both of Traer, Iowa.

Board of Governors of the Federal Reserve System.

Margaret McCloskey Shanks,
Deputy Secretary of the Board.

[FR Doc. 2023-17285 Filed 8-10-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS-10305]

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 September 11, 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: Revision of a currently approved collection; *Title of Information Collection:* Medicare Part C and Part D Data Validation; *Use:* Sections 1857(e) and 1860D-12 of the Social Security Act ("the Act") authorize CMS to establish information collection requirements with respect to MAOs and Part D sponsors. Section 1857(e)(1) of the Act requires MAOs to provide the Secretary of the Department of Health and Human Services (DHHS) with such information as the Secretary may find necessary and appropriate. Section 1857(e)(1) of the Act applies to Prescription Drug Plans (PDPs) as indicated in section 1860D-12. Pursuant to statutory authority, CMS codified these information collection requirements in regulation at §§ 422.516(g) Validation of Part C Reporting Requirements, and 423.514(j) Validation of Part D Reporting Requirements, respectively.

Data collected via Medicare Part C and Part D reporting requirements are an integral resource for oversight, monitoring, compliance and auditing activities necessary to ensure quality provision of Medicare benefits to beneficiaries. CMS uses the findings collected through the data validation process to substantiate the data reported via Medicare Part C and Part D reporting requirements. Data validation provides CMS with assurance that plan-reported data are credible and consistently collected and reported by Part C and D SOs. CMS uses validated data to respond to inquiries from Congress, oversight agencies, and the public about Part C and D SOs. The validated data also allows CMS to effectively monitor and compare the performance of SOs over time. Validated plan-reported data may be used for Star Ratings, Display measures and other performance measures. Additionally, SOs can take advantage of the DV process to effectively assess their own performance and make improvements to their internal operations and reporting processes. *Form Number:* CMS-10305 (OMB control number: 0938-1115); *Frequency:* Yearly; *Affected Public:*

State, local, or Tribal governments; *Number of Respondents:* 809; *Total Annual Responses:* 809; *Total Annual Hours:* 10,500. For policy questions regarding this collection contact Chanelle Jones at 410-786-8008.

Dated: August 2, 2023.

William N. Parham, III,
Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023-16804 Filed 8-10-23; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Formative Data Collections for ACF Research and Evaluation (Office of Management and Budget #0970-0356)

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families (ACF) proposes to extend data collection under the existing overarching generic clearance for Formative Data Collections for ACF Research and Evaluation (Office of Management and Budget (OMB) #0970-0356). There are no changes proposed.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing OPREinfocollection@acf.hhs.gov. Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: ACF programs promote the economic and social well-being of families, children, individuals, and communities. The Office of Planning, Research, and Evaluation (OPRE) studies ACF programs, and the populations they serve, through rigorous research and evaluation projects. These include evaluations of existing programs, evaluations of innovative approaches to helping low-income children and families, research syntheses, and descriptive and exploratory studies. OPRE's research

offers further understanding of current programs and service populations, explores options for program improvement, and assesses alternative policy and program designs. OPRE anticipates undertaking a variety of new research projects related to welfare, employment and self-sufficiency, Head Start, child care, healthy marriage and responsible fatherhood, family and youth services, home visiting, child welfare, trafficking, community services, and other areas of interest to ACF. Some ACF program offices conduct their own research and evaluation projects and may utilize this generic.

Under this generic clearance, ACF engages in a variety of formative data collections with researchers, practitioners, technical assistance providers, service providers, and potential participants throughout the field to fulfill the following goals: (1) inform the development of ACF research, (2) maintain a research agenda that is rigorous and relevant, (3) ensure that research products are as current as possible, and (4) inform the provision of

technical assistance and supports around research and evaluation. ACF envisions using a variety of techniques including semi-structured discussions, focus groups, surveys, and telephone or in-person interviews, in order to reach these goals. Information collected under this overarching generic is meant to inform ACF research activities and may be incorporated into documents or presentations that are made public.

The following are some examples of ways in which we may share information resulting from these data collections: research design documents or reports; research or technical assistance plans; background materials for technical workgroups; concept maps, process maps, or conceptual frameworks; contextualization of research findings from a follow-up data collection that has full PRA approval; informational reports to TA providers; or project specific reports, or other documents relevant to the field, such as federal leadership and staff, grantees, local implementing agencies.

Following standard OMB requirements, ACF has and will

continue to submit to OMB information about individual information collection activities proposed under the generic clearance. ACF will provide OMB with a copy of the individual instruments or questionnaires, as well as other materials describing the project. ACF requests OMB's review within 10 days of submission of individual requests under this generic.

Respondents: Respondents could include key groups involved in ACF projects and programs, state or local government officials, service providers, participants in ACF programs or similar comparison groups, experts in fields pertaining to ACF research and programs, or others involved in conducting ACF research or evaluation projects.

Annual Burden Estimates

Find currently approved information collections here: <https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=0970-0356>. The request to OMB will include an extension request for approved information collections that are planned to continue beyond November 2023.

ANNUAL BURDEN ESTIMATES—NEW REQUESTS

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Average burden per response (in hours)	Total burden (in hours)
Semi-Structured Discussions and Focus Groups	3,000	1	2	6,000
Interviews	1,500	1	1	1,500
Questionnaires/Surveys	1,125	1	.5	563
Total .....	.....	.....	.....	8,063

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2023-17205 Filed 8-10-23; 8:45 am]

BILLING CODE 4184-79-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2022-E-1865]

Determination of Regulatory Review Period for Purposes of Patent Extension; Vercise Genus Deep Brain Stimulation System

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for VERCISE GENUS DEEP BRAIN STIMULATION SYSTEM (VERCISE GENUS DBS SYSTEM) and is publishing this notice of that determination as required by law. FDA has made the determination because of

the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that medical device.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by October 10, 2023. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by February 7, 2024. See "Petitions" in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be

considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of October 10, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2022-E-1865 for "Determination of Regulatory Review Period for Purposes of Patent Extension; VERCISE GENUS DBS SYSTEM." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly

viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years

so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA has approved for marketing the medical device VERCISE GENUS DBS SYSTEM. VERCISE GENUS DBS SYSTEM is indicated for use in bilateral stimulation of the subthalamic nucleus (STN) as an adjunctive therapy in reducing some of the symptoms of moderate to advanced levodopa-responsive Parkinson's disease (PD) that are not adequately controlled with medication. Subsequent to this approval, the USPTO received a patent term restoration application for VERCISE GENUS DBS SYSTEM (U.S. Patent No. 8,606,362) from Boston Scientific Neuromodulation Corporation, and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated September 8, 2022, FDA advised the USPTO that this medical device had undergone a regulatory review period and that the approval of VERCISE GENUS DBS SYSTEM represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for VERCISE GENUS DBS SYSTEM is 274 days. Of this time, 0 days occurred during the testing phase of the regulatory review period, while

274 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption for this device, under section 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(g)), became effective:* Not Applicable. The applicant claims no investigational device exemption (IDE) for the regulatory review period.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* April 23, 2020. FDA has verified the applicant's claim that the premarket approval application (PMA) for VERCISE GENUS DBS SYSTEM was initially submitted April 23, 2020.

3. *The date the application was approved:* January 21, 2021. FDA has verified the applicant's claim that PMA P150031 S034 was approved on January 21, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 273 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: August 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17259 Filed 8–10–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–2853]

Agency Information Collection Activities; Proposed Collection; Comment Request; Recordkeeping and Reporting Requirements for Human Food and Cosmetics Manufactured From, Processed With, or Otherwise Containing Material From Cattle

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. 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 of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of existing FDA regulations concerning FDA-regulated human food, including dietary supplements, and cosmetics manufactured from, processed with, or otherwise containing material derived from cattle.

DATES: Either electronic or written comments on the collection of information must be submitted by October 10, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of October 10, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2023–N–2853 for “Agency Information Collection Activities; Proposed Collection; Comment Request; Recordkeeping and Reporting Requirements for Human Food and Cosmetics Manufactured From, Processed With, or Otherwise Containing Material From Cattle.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two

copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

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: Under the PRA (44 U.S.C. 3501-3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(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 provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB

for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Recordkeeping and Reporting Requirements for Human Food and Cosmetics Manufactured From, Processed With, or Otherwise Containing Material From Cattle—21 CFR 189.5 and 700.27

OMB Control Number 0910-0623—Extension

This information collection supports FDA regulations in §§ 189.5 and 700.27 (21 CFR 189.5 and 700.27), which set forth bovine spongiform encephalopathy (BSE)-related restrictions applicable to FDA-regulated human food and cosmetics. The regulations designate certain materials from cattle as "prohibited cattle materials," including specified risk materials (SRMs), the small intestine of cattle not otherwise excluded from being a prohibited cattle material, material from nonambulatory disabled cattle, and mechanically separated (MS) beef. Sections 189.5(c) and 700.27(c) set forth the requirements for recordkeeping and records access for FDA-regulated human food, including dietary supplements, and cosmetics manufactured from, processed with, or otherwise containing material derived from cattle. FDA issued these recordkeeping regulations under the adulteration provisions in sections 402(a)(2)(C), (a)(3), (a)(4), (a)(5), 601(c), and 701(a) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 342(a)(2)(C), (a)(3), (a)(4), (a)(5), 361(c), and 371(a)). Under section 701(a) of the FD&C Act, we are authorized to issue regulations for the FD&C Act's efficient enforcement. With regard to records concerning imported human food and cosmetics, FDA relied on our authority

under sections 701(b) and 801(a) of the FD&C Act (21 U.S.C. 371(b) and 381(a)). Section 801(a) of the FD&C Act provides requirements with regard to imported human food and cosmetics and provides for refusal of admission of human food and cosmetics that appear to be adulterated into the United States. Section 701(b) of the FD&C Act authorizes the Secretaries of Treasury and Health and Human Services to jointly prescribe regulations for the efficient enforcement of section 801 of the FD&C Act.

These requirements are necessary because once materials are separated from an animal it may not be possible, without records, to know the following: (1) whether cattle material may contain SRMs (brain, skull, eyes, trigeminal ganglia, spinal cord, vertebral column (excluding the vertebrae of the tail, the transverse processes of the thoracic and lumbar vertebrae, and the wings of the sacrum), and dorsal root ganglia from animals 30 months and older and tonsils and distal ileum of the small intestine from all animals of all ages); (2) whether the source animal for cattle material was inspected and passed; (3) whether the source animal for cattle material was nonambulatory disabled, or MS beef; and (4) whether tallow in human food or cosmetics contain less than 0.15 percent insoluble impurities.

FDA's regulations in §§ 189.5(c) and 700.27(c) require that manufacturers and processors of human food and cosmetics manufactured from, processed with, or otherwise containing material from cattle establish and maintain records sufficient to demonstrate that the human food or cosmetics are not manufactured from, processed with, or otherwise contain prohibited cattle materials. These records must be retained for 2 years at the manufacturing or processing establishment or at a reasonably accessible location. Maintenance of electronic records is acceptable, and electronic records are considered to be reasonably accessible if they are accessible from an onsite location. Records required by these sections and existing records relevant to compliance with these sections must be available to FDA for inspection and copying. Existing records may be used if they contain all of the required information and are retained for the required time period.

Because we do not easily have access to records maintained at foreign establishments, FDA regulations in §§ 189.5(c)(6) and 700.27(c)(6), respectively, require that when filing for entry with U.S. Customs and Border Protection, the importer of record of

human food or cosmetics manufactured from, processed with, or otherwise containing, cattle material must affirm that the human food or cosmetics were manufactured from, processed with, or otherwise contains, cattle material and must affirm that the human food or cosmetics were manufactured in accordance with the applicable requirements of §§ 189.5 or 700.27. In addition, if human food or cosmetics were manufactured from, processed with, or otherwise contains cattle material, the importer of record must provide within 5 business days records sufficient to demonstrate that the human food or cosmetics were not manufactured from, processed with, or otherwise contains prohibited cattle material, if requested.

Under FDA's regulations, we may designate a country from which cattle materials inspected and passed for human consumption are not considered prohibited cattle materials, and their use does not render human food or cosmetics adulterated. Sections 189.5(e)

and 700.27(e) provide that a country seeking to be designated must send a written request to the Director of the Center for Food Safety and Applied Nutrition. The information the country is required to submit includes information about a country's BSE case history, risk factors, measures to prevent the introduction and transmission of BSE, and any other information relevant to determining whether SRMs, the small intestine of cattle not otherwise excluded from being a prohibited cattle material, material from nonambulatory disabled cattle, or MS beef from the country seeking designation should be considered prohibited cattle materials. We use the information to determine whether to grant a request for designation and to impose conditions if a request is granted.

Sections 189.5 and 700.27 further state that countries designated under §§ 189.5(e) and 700.27(e) will be subject to future review by FDA to determine whether their designations remain appropriate. As part of this process, we

may ask designated countries to confirm their BSE situation and the information submitted by them, in support of their original application, has remained unchanged. We may revoke a country's designation if we determine that it is no longer appropriate. Therefore, designated countries may respond to periodic FDA requests by submitting information to confirm their designations remain appropriate. We use the information to ensure their designations remain appropriate.

Description of Respondents: Respondents to this information collection include manufacturers, processors, and importers of FDA-regulated human food, including dietary supplements, and cosmetics manufactured from, processed with, or otherwise containing material derived from cattle, as well as, with regard to §§ 189.5(e) and 700.27(e), foreign governments seeking designation under those regulations.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN¹

21 CFR section; activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
189.5(c)(6) and 700.27(c)(6); affirmation of compliance.	54,825	1	54,825	0.033 (2 minutes)	1,809
189.5(e) and 700.27(e); request for designation	1	1	1	80	80
189.5(e) and 700.27(e); response to request for review by FDA.	1	1	1	26	26
Total .....	.....	.....	.....	.....	1,915

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN¹

Type of respondent	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeper	Total hours
Domestic Facilities	697	52	36,244	0.25 (15 minutes)	9,061
Foreign Facilities	916	52	47,632	0.25 (15 minutes)	11,908
Total .....	.....	.....	.....	.....	20,969

¹ There are no capital or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for

OMB approval, we have made no adjustments to our burden estimate.

Dated: August 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17273 Filed 8–10–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration**

[Docket No. FDA-2020-N-0145]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Animal Drug and Animal Generic Drug User Fee Submissions**AGENCY:** Food and Drug Administration, HHS.**ACTION:** Notice.

SUMMARY: The Food and Drug Administration (FDA 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 September 11, 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 0910–0540. 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, 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.

Animal Drug and Animal Generic Drug User Fee Submissions

OMB Control Number 0910–0540—Extension

This information collection helps support implementation of the Animal Drug User Fee Act of 2003 (ADUFA) (Pub. L. 108–130) and Animal Generic Drug User Fee Act of 2008 (AGDUFA) (Pub. L. 110–316), established in sections 740 and 741 of the Federal Food, Drug, and Cosmetic Act (FD&C

Act) (21 U.S.C 379j–12 and 21 U.S.C. 379j–21), respectively. Under ADUFA, FDA assesses and collects user fees for certain new animal drug applications and supplements, products, establishments, and sponsors of new animal drug applications and/or investigational new animal drug file submissions. The ADUFA program is currently reauthorized through September 30, 2023, and FDA efforts to engage interested stakeholders in the 2023 reauthorization is ongoing. More information can be found at <https://www.fda.gov/industry/fda-user-fee-programs/animal-drug-user-fee-act-adufa>, including current user fee rates applicable to animal drug submissions. Under AGDUFA, FDA assesses and collects user fees for certain abbreviated (generic) new animal drug applications and supplements, products, and sponsors of generic new animal drug applications and/or generic investigational new animal drug file submissions. The AGDUFA program is currently reauthorized through September 30, 2023, and FDA efforts to engage interested stakeholders in the 2023 reauthorization is ongoing. More information regarding the AGDUFA program can be found at <https://www.fda.gov/industry/fda-user-fee-programs/animal-generic-drug-user-fee-act-agdufa>, including current user fee rates applicable to generic animal drug submissions.

These user fee program resources support FDA’s responsibilities to ensure that new animal drugs are safe and effective for animals, as well as ensuring the safety of food from treated animals. Sponsors of new animal drug applications complete a user fee cover sheet and submit it through the Center for Veterinary Medicine (CVM) eSubmitter. The Animal Drug User Fee cover sheet (Form FDA 3546) is designed to collect the minimum necessary information to determine whether a fee is required for the review of an application or supplement or whether an application fee waiver was granted, to determine the amount of the fee required, and to ensure that each animal drug user fee payment is appropriately linked to the animal drug application for which payment is made. The form, when completed electronically, results in the generation of a unique payment identification number used by FDA to track the payment. The information collected is used by FDA’s CVM to initiate the administrative screening of new animal drug applications and supplements.

Similarly, sponsors of abbreviated new animal drug applications also complete a user fee cover sheet and

submit it through CVM’s eSubmitter. The AGDUFA cover sheet (Form FDA 3728) is also designed to collect the minimum necessary information to determine whether a fee is required for review of an application, to determine the amount of the fee required, and to ensure that each animal generic drug user fee payment is appropriately linked to the abbreviated new animal drug application for which payment is made. The form, when completed electronically, results in the generation of a unique payment identification number used by FDA to track the payment. The information collected is used by CVM to initiate the administrative screening of abbreviated new animal drug applications.

Both sections 740 and 741 of the FD&C Act provide for waivers, reductions, and exemptions of fees. To assist respondents with submitting requests for waivers or reductions of ADUFA user fees, we developed guidance for industry (GFI) #170 entitled “Animal Drug User Fees and Fee Waivers and Reductions” (April 2023), available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/cvm-gfi-170-animal-drug-user-fees-and-fee-waivers-and-reductions>. This document discusses the types of fees FDA is authorized to collect under section 740 of the FD&C Act, and how to request waivers or reductions from these fees. Further, this guidance also describes what information FDA recommends be submitted in support of a request for a fee waiver or reduction, a request for reconsideration of denial of a fee waiver or reduction request, or an appeal of the denial decision in accordance with 21 CFR 10.75; how to submit such a request or appeal; and FDA’s process for reviewing such requests or appeals.

Similarly, we developed guidance for industry (GFI) #199 entitled “Animal Generic Drug User Fees and Fee Waivers and Reductions” (May 2009), available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/cvm-gfi-199-animal-generic-drug-user-fees-and-fee-waivers-and-reductions>. This document discusses the types of fees FDA is authorized to collect under section 741(a)(1) of the FD&C Act, and how to request waivers or reductions from these fees. Further, this guidance also describes what information FDA recommends be submitted in support of a request for a fee waiver or reduction, a request for reconsideration of denial of a fee waiver or reduction request, or an appeal of the denial decision in accordance with 21 CFR 10.75; how to submit such a

request or appeal; and FDA's process for reviewing such requests or appeals.

We use the information submitted by respondents to determine whether requests for waiver or reduction of user

fees, reconsideration requests, or appeals may be granted.

In the **Federal Register** of April 27, 2023 (88 FR 25658), we published a 60-day notice soliciting public comment on the proposed information collection.

One general comment was received encouraging FDA in its mission to promote and protect animal health.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN ¹

FD&C Act section; activity	FDA form No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
User fee cover sheets, by type:						
740(a)(1); Animal Drug User Fee cover sheet.	3546	15	1	15	1	15
741(a)(1); Animal Generic Drug User Fee cover sheet.	3728	22	2	44	0.08 (5 minutes)	3.5
Waiver and other requests, by type:						
740(d)(1)(A); Significant barrier to innovation.	N/A	65	1	65	2	130
740(d)(1)(B); Fees exceed cost.	N/A	8	3.75	30	0.5 (30 minutes)	15
740(d)(1)(C); Free choice feeds.	N/A	4	1	4	2	8
740(d)(1)(D); Minor use or minor species.	N/A	73	1	73	2	146
740(d)(1)(E); Small business.	N/A	1	1	1	2	2
741(d)(1); Minor use or minor species.	N/A	2	1	2	2	4
Request for reconsideration of a decision.	N/A	1	1	1	2	2
21 CFR 10.75; Appeal of a decision.	N/A	1	1	1	2	2
Total .....	.....	.....	.....	.....	.....	327.5

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 increase. We attribute this adjustment to an increase in the number of submissions we have received since our last evaluation. The total number of annual responses is based on the average number of submissions received by FDA in fiscal years 2019 to 2021. The estimated time we attribute to the hours per response is based on our experience with the various submissions and reflects the average burden we attribute to all respondents.

Dated: August 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-17260 Filed 8-10-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2023-N-1006]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Medical Devices; Reports of Corrections and Removals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, 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 September 11, 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 0910-0359. 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.

Medical Devices; Reports of Corrections and Removals—21 CFR Part 806

OMB Control Number 0910–0359—
Revision

This information collection supports implementation of provisions of section 519(g) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360i(g)) requiring device manufacturers and importers to report promptly to FDA certain actions concerning device corrections and removals and to maintain associated records. Applicable regulations are found in 21 CFR part 806 and set forth definitions, prescribe format and required content elements for reporting, and identify actions that

are exempt from the reporting requirements. The information collected is used by FDA to identify marketed devices that have serious problems and to ensure that defective devices are removed from the market. The information also helps ensure that FDA has current and complete information regarding these corrections and removals to determine whether recall action is adequate.

Reports of corrections and removals may be submitted to FDA via mail, email, or using FDA's Electronic Submission Gateway (ESG). To assist respondents with submitting reports of corrections or removals, we developed a fillable PDF electronic submission

template entitled, "Device Correction/Removal Report for Industry," that transmits required data to FDA's Recall Enterprise System. Instructions for the fillable template are provided in pop-up text boxes that appear over each data field. We expect that use of the fillable template will expedite processing of the reports of corrections or removals submitted to FDA.

In the **Federal Register** of April 11, 2023 (88 FR 21677), we published a 60-day notice soliciting comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

21 CFR part; collection activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours	Total operating and maintenance costs
Electronic process setup	517	1	517	3.08	1,592	\$25,850
806; Submission of corrections and removals	1,033	1	1,033	10	10,330	.....
4.102(c)(1)(iii); Submitting correction or removal reports (including any sharing of information with other constituent part applicants as required under 4.103)	20	1	20	10	200	.....
Total					12,122	25,850

For respondents who submit corrections and removals using the ESG, the operating and maintenance costs associated with this information collection are approximately \$50 per year to purchase a digital verification

certificate (certificate must be valid for 1 to 3 years). This burden may be reduced if the respondent has already purchased a verification certificate for other electronic submissions to FDA. This burden may also be reduced if

respondents utilize the new PDF template and submit it to the Agency using email, mitigating the need for a digital verification certificate.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN^{1 2}

21 CFR part; collection activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
806; Records of corrections and removals	93	1	93	10	930
4.105(b); recordkeeping by device-led combination products	279	1	279	0.5 (30 minutes)	140
Total					1,070

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

² Figures have been rounded.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate, however we have revised the collection to include the new electronic reporting instrument "Device Correction/Removal Report for Industry." We estimate that 50 percent of submitters will use the ESG to submit the required information. Our estimate of the reporting and recordkeeping burden is based on Agency records and our experience with this program, as well as similar

programs that utilize FDA's ESG. For the purposes of estimating the burden, we assume that all respondents who submit corrections and removals using the electronic process will establish a new WebTrader account and purchase a digital verification certificate.

Dated: August 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17264 Filed 8–10–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration**

[Docket No. FDA–2018–D–1922]

Formal Meetings Between the Food and Drug Administration and Sponsors or Applicants of Biosimilar User Fee Act Products; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled “Formal Meetings Between the FDA and Sponsors or Applicants of BsUFA Products.” This draft guidance provides recommendations to industry on formal meetings between FDA and sponsors or applicants relating to the development and review of biosimilar or interchangeable biosimilar products regulated by the Center for Drug Evaluation and Research (CDER) or the Center for Biologics Evaluation and Research (CBER). This draft guidance for industry revises and replaces the draft guidance of the same name issued in June 2018.

DATES: Submit either electronic or written comments on the draft guidance by October 10, 2023 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and

Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA-2018-D-1922 for “Formal Meetings Between the Food and Drug Administration and Sponsors or Applicants of Biosimilar User Fee Act Products.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management

Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002, or the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Sandra Benton, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 1132, Silver Spring, MD 20993, 301-796-1042, Sandra.Benton@fda.hhs.gov; or Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled “Formal Meetings Between the FDA and Sponsors or Applicants of BsUFA Products.” This draft guidance provides recommendations to industry on formal meetings between FDA and sponsors or applicants relating to the development and review of biosimilar or interchangeable biosimilar products regulated by CDER or CBER. This draft guidance does not apply to meetings associated with the development of products intended for submission in, or review of, new drug applications or abbreviated new drug applications under section 505 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355), biologics license applications (BLAs) under section 351(a) of the Public Health Service Act (PHS Act) (42 U.S.C. 262(a)), or submissions for devices under the FD&C Act. For the purposes of this draft guidance, a formal meeting includes any meeting that is requested by a sponsor or applicant following the procedures provided in this draft guidance and includes meetings conducted in any

format (*i.e.*, in-person, virtual (video conference), teleconference, or written response only). This guidance discusses the principles of good meeting management practices and describes standardized procedures for requesting, preparing, scheduling, conducting, and documenting such formal meetings.

This draft guidance for industry revises and replaces the draft guidance of the same name issued on June 5, 2018 (83 FR 26060). This revision includes:

- Changes to the data expectations in Biosimilar Initial Advisory meeting requests
- Addition of Biological Product Development (BPD) Type 2a meeting
- Changes to when the meeting background package is submitted for BPD Type 4 meeting
- Changes to the description of the available meeting formats
- Addition of an option for a request for clarification

FDA also made certain clarifying and editorial changes. Editorial changes were made primarily for clarification.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on "Formal Meetings Between the FDA and Sponsors or Applicants of BsUFA Products." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 312 regarding sponsor requests to FDA related to the submission of an investigational new drug application have been approved under OMB control number 0910–0014. The collections of information in section 351(a) of the PHS Act and part 601 (21 CFR part 601) relating to the submission of a BLA have been approved under OMB control number 0910–0338. The collections of information in section 351(k) of the PHS Act and part 601 relating to the submission of biosimilar applications and biosimilar user fee applications

have been approved under OMB control number 0910–0718.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17261 Filed 8–10–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–D–2629]

Postmarketing Approaches To Obtain Data on Under-Represented Populations in Clinical Trials; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled "Postmarketing Approaches to Obtain Data on Under-Represented Populations in Clinical Trials." The purpose of this draft guidance is to describe FDA requirements and provide recommendations for obtaining safety and effectiveness information on drug and biological products, when appropriate, in the postmarketing setting in historically under-represented patient populations in clinical trials.

DATES: Submit either electronic or written comments on the draft guidance by October 10, 2023 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically,

including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2022–D–2629 for "Postmarketing Approaches to Obtain Data on Under-Represented Populations in Clinical Trials." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information

redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002; or Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Nicole Gormley, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave, Bldg. 22, Silver Spring, MD 20993–0002, 240–402–0210; or Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301,

Silver Spring, MD 20993–0002, 240–402–7911, Anne.Taylor@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled “Postmarketing Approaches to Obtain Data on Under-Represented Populations in Clinical Trials.” The purpose of this draft guidance is to describe FDA requirements and provide recommendations for obtaining safety and effectiveness information on drug and biological products, when appropriate, in the postmarketing setting in historically underrepresented patient populations in clinical trials. FDA regulations require sponsors to present information from premarket clinical trials on the safety and effectiveness of drugs in terms of gender, age, and racial subgroups. These clinical trials should include patient populations that are historically underrepresented in clinical research, including but not limited to, populations based on race, ethnicity, sex, age, geographic location, gender identity, socioeconomic status, disability, pregnancy status, lactation status, and co-morbidity. Obtaining information early in development can be advantageous in that information may help inform subsequent clinical trials and ultimately result in more efficient, informative, and successful drug development. However, if despite the sponsor’s best efforts, these populations are not adequately represented in premarket clinical trials or if the data suggests there may be serious safety concerns in these populations, it may be appropriate to collect such data in the postmarketing setting. Reviews of clinical trial data indicate that there is often underrepresentation of patient populations, based on race, ethnicity, sex, or age. The draft guidance discusses mechanisms by which FDA can require or request information on safety and effectiveness be collected in the postmarketing setting; design and statistical considerations for subpopulation analyses; and postmarketing approaches to obtain information on the benefit-risk profile in underrepresented clinical trial populations.

Underrepresentation in clinical trials remains a significant issue despite the Agency’s efforts to encourage sponsors and investigators to improve representation of historically underrepresented patient populations. We welcome further dialogue in other settings or collaborative efforts to

explore methods to enhance representation in clinical trials.

This draft guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on “Postmarketing Approaches to Obtain Data on Under-Represented Populations in Clinical Trials.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in 21 CFR parts 50 and 56 have been approved under OMB control number 0910–0130; the collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001; the collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338; and the collections of information pertaining to submission of a biologics license application (BLA) under section 351(k) of the Public Health Service Act have been approved under OMB control number 0910–0338.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>, <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>.

Dated: August 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17267 Filed 8–10–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–1954]

Classification Categories for Certain Supplements Under the Biosimilar User Fee Amendments of 2022; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled “Classification Categories for Certain Supplements Under BsUFA III.” This draft guidance provides recommendations for applicants and FDA review staff on classification categories A, B, C, D, E, and F for original and resubmitted prior approval supplements submitted to approved applications under the Public Health Service Act (PHS Act). The commitment letter associated with the Biosimilar User Fee Amendments of 2022 (BsUFA III) sets forth these supplement classification categories and their associated review performance goals. This draft guidance is intended to help applicants identify the appropriate classification category and review goal date of the supplement being submitted.

DATES: Submit either electronic or written comments on the draft guidance by October 10, 2023 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your

comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2023–D–1954 for “Classification Categories for Certain Supplements Under BsUFA III.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80

FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:

Sandra Benton, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 1132, Silver Spring, MD 20993, 301–796–1042, sandra.benton@fda.hhs.gov; or Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled “Classification Categories for Certain Supplements Under BsUFA III.” This draft guidance provides recommendations for applicants and FDA review staff on classification categories A, B, C, D, E, and F for original and resubmitted prior approval supplements (hereafter “supplements”) submitted to approved applications under section 351(k) of the PHS Act (42 U.S.C. 262(k)).

These classification categories pertain to supplements for biosimilar and interchangeable biosimilar products seeking the following:

- To update prescribing information and, if applicable, FDA-approved patient labeling (e.g., Patient Package Insert, Medication Guide, Instructions for Use) with safety information that has been updated in the reference product labeling and is applicable to one or more indications for which the biosimilar or interchangeable biosimilar product is licensed
- To receive licensure for an additional indication
- To remove an approved indication
- To receive an initial determination of interchangeability

This draft guidance is intended to help applicants identify the appropriate classification category and review goal date of the supplement being submitted. Section I.A. of the commitment letter associated with the BsUFA III sets forth these supplement classification categories and their associated review performance goals. The full text of the proposed BsUFA III Commitment Letter can be found on the Agency's web page "BsUFA III: Fiscal Years 2023–2027," available at <https://www.fda.gov/industry/biosimilar-user-fee-amendments/bsufa-iii-fiscal-years-2023-2027>.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on "Classification Categories for Certain Supplements Under BsUFA III." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information pertaining to the Biosimilar User Fee Program and for the submission of biologics license applications under section 351(k) of the PHS Act regarding biosimilar product applications, interchangeable biosimilar product applications, and supplemental applications have been approved under OMB control number 0910–0718. The collections of information in 21 CFR 201.56 and 201.57 for the submission of labeling have been approved under OMB control number 0910–0572. The

collections of information pertaining to Medication Guides for prescription human drug and biological products have been approved under OMB control number 0910–0393. The collections of information in 21 CFR part 601 for the submission of biologics license applications, supplemental applications, and Form FDA 356h have been approved under OMB control number 0910–0338.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>, <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17262 Filed 8–10–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–P–0915]

Determination That ANJESO (Meloxicam) Solution, 30 Milligrams/Milliliter, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) has determined that ANJESO (meloxicam) solution, 30 milligrams (mg)/milliliter (mL), was not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for meloxicam solution, 30 mg/mL, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Donna Tran, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6213, Silver Spring, MD 20993–0002, 301–796–3600, Donna.Tran@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Section 505(j) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C.

355(j)) allows the submission of an ANDA to market a generic version of a previously approved drug product. To obtain approval, the ANDA applicant must show, among other things, that the generic drug product: (1) has the same active ingredient(s), dosage form, route of administration, strength, conditions of use, and (with certain exceptions) labeling as the listed drug, which is a version of the drug that was previously approved, and (2) is bioequivalent to the listed drug. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

Section 505(j)(7) of the FD&C Act requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the "Approved Drug Products With Therapeutic Equivalence Evaluations," which is known generally as the "Orange Book." Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

ANJESO (meloxicam) solution, 30 mg/mL, is the subject of NDA 210583, held by Baudax Bio, Inc., and initially approved on February 20, 2020.

ANJESO is indicated for use in adults for the management of moderate-to-severe pain, alone or in combination with non-steroidal anti-inflammatory drug analgesics. ANJESO (meloxicam) solution, 30 mg/mL, is currently listed in the "Discontinued Drug Product List" section of the Orange Book.

Emprise Pharma, LLC submitted a citizen petition dated March 11, 2023 (Docket No. FDA–2023–P–0915), under 21 CFR 10.30, requesting that the Agency determine whether ANJESO (meloxicam) solution, 30 mg/mL, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under

§ 314.161 that ANJESO (meloxicam) solution, 30 mg/mL, was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that ANJESO (meloxicam) solution, 30 mg/mL, was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of ANJESO (meloxicam) solution, 30 mg/mL, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have found no information that would indicate that this drug product was withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list ANJESO (meloxicam) solution, 30 mg/mL, in the “Discontinued Drug Product List” section of the Orange Book. The “Discontinued Drug Product List” delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to ANJESO (meloxicam) solution, 30 mg/mL, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: August 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17263 Filed 8–10–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Mental Health Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and

Podcasting website (<http://videocast.nih.gov/>).

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Mental Health Council.

Date: September 7–8, 2023.

Closed: September 7, 2023, 12:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, NSC Building, Rooms 1255 & 1265, 6001 Executive Blvd., Rockville, MD 20852.

Open: September 8, 2023, 12:00 p.m. to 4:00 p.m.

Agenda: Presentation of the NIMH Director's Report and discussion of NIMH programs.

Place: National Institutes of Health, Neuroscience Center, Rooms 1145 & 1155, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Tracy L. Waldeck, Ph.D., Director, Division of Extramural Activities, National Institute of Mental Health, NIH, DHHS Neuroscience Center, 6001 Executive Boulevard, Bethesda, MD 20892, (301) 480–6833, tracy.waldeck@nih.gov

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: www.nimh.nih.gov/about/advisory-boards-and-groups/namhc/index.shtml, where an agenda and any additional information for the meeting will be posted when available. (Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: August 8, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17255 Filed 8–10–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Deafness and Other Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting website (<http://videocast.nih.gov/>).

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Deafness and Other Communication Disorders Advisory Council.

Date: September 14–15, 2023.

Closed: September 14, 2023, 9:00 a.m. to 11:00 a.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: Porter Neuroscience Research Center, Building 35A, Room 620/630, 35 Convent Drive, Bethesda, MD 20892.

Open: September 14, 2023, 1:00 p.m. to 4:35 p.m.

Agenda: Staff reports on divisional, programmatic, and special activities.

Place: Porter Neuroscience Research Center, Building 35A, Room 620/630, 35 Convent Drive, Bethesda, MD 20892.

Closed: September 15, 2023, 9:00 a.m. to 9:40 a.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: Porter Neuroscience Research Center, Building 35A, Room 620/630, 35 Convent Drive, Bethesda, MD 20892.

Open: September 15, 2023, 10:00 a.m. to 11:50 a.m.

Agenda: Staff reports on divisional, programmatic, and special activities.

Place: Porter Neuroscience Research Center, Building 35A, Room 620/630, 35 Convent Drive, Bethesda, MD 20892.

Contact Person: Rebecca Wagenaar-Miller, Ph.D., Director, Division of Extramural Activities, NIDCD/NIH, 6001 Executive Boulevard, Bethesda, MD 20892, (301) 496-8693, rebecca.wagenaar-miller@nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at <https://www.nih.gov/about-nih/visitor-information/campus-access-security> for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit. Information is also available on the Institute's/Center's home page: <https://www.nidcd.nih.gov/about/advisory-council>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: August 8, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-17252 Filed 8-10-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council for Nursing Research.

This will be a hybrid meeting held in-person and virtually and will be open to the public as indicated below. Individuals who plan to attend in-person or view the virtual meeting and need special assistance or other reasonable accommodations, should

notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIH Videocast at the following link: <https://videocast.nih.gov/watch=51158>.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Nursing Research.

Date: September 12, 2023.

Open: 9:00 a.m. to 10:30 a.m.

Agenda: Call to Order and Opening Remarks, NINR Director's Report, NCATS Updates, Priorities, and Opportunities for Collaboration.

Place: National Institutes of Health, Building 31, C-Wing, Sixth Floor, Rooms A&B, 31 Center Drive, Bethesda, MD 20892 (Hybrid Meeting).

Open: 10:45 a.m. to 12:30 p.m.

Agenda: Community Partnerships to Advance Science for Society (CompPASS) Initiative, Artificial Intelligence/Machine Learning Consortium to Advance Health Equity and Researcher Diversity (AIM-AHEAD) Program.

Place: National Institutes of Health, Building 31, C-Wing, Sixth Floor, Rooms A&B, 31 Center Drive, Bethesda, MD 20892 (Hybrid Meeting).

Open: 1:00 p.m. to 3:00 p.m.

Agenda: CSR Initiatives Related to Strengthening Review Panel Diversity, Addressing Bias, and Evaluating Panel Quality, Implementing a Maternal health and Pregnancy Outcomes Vision for Everyone (IMPROVE) Initiative, Concepts, Council Open Discussion, Adjournment.

Place: National Institutes of Health, Building 31, C-Wing, Sixth Floor, Rooms A&B, 31 Center Drive, Bethesda, MD 20892 (Hybrid Meeting).

Closed: 3:00 p.m. to 3:20 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, C-Wing, Sixth Floor, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Elizabeth Tarlov, Ph.D., RN, Director, Division of Extramural Science Programs (DESP), National Institute of Nursing Research, Bethesda, MD 20892, (301) 594-1580, elizabeth.tarlov@nih.gov.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of an organization may submit a letter of intent, a brief description of the organization represented and a short description of the oral presentation. Only one representative of an organization may be

allowed to present oral comments and presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at <https://www.nih.gov/about-nih/visitor-information/campus-access-security> for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: <https://www.ninr.nih.gov/aboutninr/nacnr>, where an agenda and any additional information for the meeting will be posted when available. (Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: August 8, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-17253 Filed 8-10-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive Patent License: Manufacture, Distribution, Sale and Use of T-Cell-Based Immunotherapies for Solid Tumors

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The *Eunice Kennedy Shriver* National Institute of Child Health and Human Development and the National Cancer Institute, both institutes of the National Institutes of Health, Department of Health and Human Services, are 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 EnZeta Immunotherapies, Inc. of the State of Delaware.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute's Technology Transfer Center

on or before August 28, 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: Richard T. Girards, Jr., Esq., MBA, Senior Technology Transfer Manager, National Institutes of Health, NCI Technology Transfer Center by email (richard.girards@nih.gov) or phone (240-276-6825).

SUPPLEMENTARY INFORMATION:

Intellectual Property

E-010-2021: Enhanced Antigen Reactivity of Immune Cells Expressing a Mutant Non-Signaling CD3 Zeta Chain

1. United States Provisional Patent Application No. 63/113,428, filed 13 November 2020 (HHS Reference No. E-010-2021-0-US-01);

2. International Patent Application No. PCT/US2021/059109, filed 12 November 2021 (HHS Reference No. E-010-2021-0-PCT-02);

3. United States Patent Application No. 18/036,112, filed 09 May 2023 (HHS Reference No. E-010-2021-0-US-02);

4. European Patent Application No. 21824143.8, filed 30 March 2023 (HHS Reference No. E-010-2021-0-EP-01); and

5. any and all other U.S. and ex-U.S. patents and patent applications claiming priority to any one of the foregoing, now or in the future.

The patent and patent application rights in these inventions have been assigned and/or exclusively licensed to the Government of the United States of America.

The prospective exclusive license territory may be worldwide and the fields of use may be limited to the following: manufacture, distribution, sale and use of T-cell-based immunotherapies for solid tumors.

These technologies disclose, e.g., cells expressing a modified CD3 subunit chain comprising at least one ITAM deletion. The inventive cells and populations thereof can be formulated into a composition, such as a pharmaceutical composition. Such cells and compositions thereof can be utilized to treat a wide variety of conditions, including but not limited to the indications within the scope of the contemplated exclusive license.

This Notice is made in accordance with 35 U.S.C. 209 and 37 CFR 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 Cancer Institute 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 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: August 8, 2023.

Richard U. Rodriguez,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2023-17256 Filed 8-10-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Secretary; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Interagency Autism Coordinating Committee.

The meeting will be open to the public to attend in person or virtually. In person attendance is limited to space available. Advanced registration is recommended. Virtual viewing will be accessible via NIH Videocast (<http://videocast.nih.gov/>). Individuals who plan to attend in person or virtually and need special assistance or other reasonable accommodations should submit a request to the Contact Person listed on this notice at least seven (7) days prior to the meeting.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Date: October 11, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To discuss business, updates, and issues related to autism research and services activities.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, First Floor Conference Room, Rockville, MD 20852.

Cost: The meeting is free and open to the public.

Registration: A registration web link will be posted on the IACC website (www.iacc.hhs.gov) prior to the meeting. Pre-registration is recommended.

Deadlines: Public Comment Due Date: Wednesday, September 20, 2023, by 5:00 p.m. ET.

Public Comment Guidelines: For public comment instructions, see below.

Contact Person: Ms. Rebecca Martin, Office of National Autism Coordination, National Institute of Mental Health, NIH, Phone: 301-435-0886, Email: IACCPublicInquiries@mail.nih.gov.

Public Comments: The IACC welcomes written and oral public comments from members of the autism community and asks the community to review and adhere to its *Public Comment Guidelines*. In the 2021-2023 IACC Strategic Plan, the IACC lists the "Spirit of Collaboration" as one of its core values, stating that, "We will treat others with respect, listen with open minds to the diverse lived experiences of people on the autism spectrum and their families, consider multiple solutions, and foster discussions where participants can comfortably share different opinions." In keeping with this core value, the IACC and the NIMH Office of National Autism Coordination (ONAC) ask that members of the public who provide public comments or participate in meetings of the IACC also adhere to this core value.

A limited number of slots are available for individuals to provide a ~3-minute summary or excerpt of their written comment to the Committee during the meeting. For those interested in that opportunity, please indicate "Interested in providing oral comment" in your written submission, along with your name, address, email, phone number, and professional/organizational affiliation so that ONAC staff can contact you if a slot is available for you to provide a summary or excerpt of your comment during the meeting.

For any given meeting, priority for comment slots will be given to individuals and organizations that have not previously provided comments in the current calendar year. This will help ensure that as many individuals and organizations as possible have an opportunity to share comments. Commenters going over their allotted 3-minute slot may be asked to conclude immediately in order to allow other comments and the rest of the meeting to proceed on schedule.

Public comment submissions received by 5:00 p.m. ET on Wednesday, September 20, 2023, will be provided to the Committee prior to the meeting for their consideration. Any written comments received after 5:00 p.m. ET, Wednesday, September 20, 2023, may be provided to the Committee either before or after the meeting, depending on the volume of comments received and the time required to process them in accordance with privacy regulations and other applicable Federal policies. The Committee is not able to respond individually to comments. All public comments become part of the public record. Attachments of copyrighted publications are not permitted, but web links or citations for any copyrighted works cited may be provided. For public comment guidelines, see: <https://iacc.hhs.gov/meetings/public-comments/guidelines/>.

Technical issues: If you experience any technical problems with the webcast, please email IACCPublicInquiries@mail.nih.gov.

Disability Accommodations: All IACC Full Committee Meetings provide Closed Captioning through the NIH videocast website. Individuals whose full participation in the meeting will require special accommodations (e.g., sign language or interpreting services, etc.) must submit a request to the Contact Person listed on the notice at least seven (7) business days prior to the meeting. Such requests should include a detailed description of the accommodation needed and a way for the IACC to contact the requester if more information is needed to fill the request. Special requests should be made at least seven (7) business days prior to the meeting; last-minute requests may be made but may not be possible to accommodate.

Security: Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit. Also, as a part of security procedures, attendees should be prepared to present a photo ID at the meeting registration desk during the check-in process. Pre-registration is recommended. Seats will be on a first come, first served basis, with expedited check-in for those who are pre-registered.

Meeting schedule subject to change.

Additional Information: Information about the IACC is available on the website: <http://www.iacc.hhs.gov>.

Dated: August 8, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-17254 Filed 8-10-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2023-0585]

National Merchant Marine Personnel Advisory Committee; September 2023 Meetings

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The National Merchant Marine Personnel Advisory Committee (Committee) will conduct a series of meetings over two days in Bronx, NY to discuss issues relating to personnel in the United States Merchant Marine including the training, qualifications, certification, documentation, and fitness of mariners.

DATES:

Meetings: The National Merchant Marine Personnel Advisory Committee is scheduled to meet on Wednesday, September 6, 2023, from 9:00 a.m. until 4:30 p.m. Eastern Daylight Time Zone (EDT) and Thursday, September 7, 2023,

from 9:00 a.m. until 4:45 p.m. EDT. The Committee meeting on Wednesday, September 6, 2023, will include periods during which the Committee will break into subcommittees. These meetings may adjourn early if the Committee has completed its business.

Comments and supporting documentation: To ensure your comments are received by Committee members before the meeting, submit your written comments no later than August 30, 2023.

ADDRESSES: The meeting will be held at the Maritime Academic Center at the State University of New York Maritime College, additional information about the facility can be found at: <https://www.sunymaritime.edu/aboutpublic-programsconference-services/conference-and-meeting-rentals>.

The National Merchant Marine Personnel Advisory Committee is committed to ensuring all participants have equal access regardless of disability status. If you require reasonable accommodation due to a disability to fully participate, please email Mrs. Megan Johns Henry at megan.c.johns@uscg.mil or call at (202) 372-1255 as soon as possible.

Instructions: You are free to submit comments at any time, including orally at the meetings as time permits, but if you want Committee members to review your comment before the meeting, please submit your comments no later than August 30, 2023. We are particularly interested in comments on the topics in the "Agenda" section below. We encourage you to submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. If your material cannot be submitted using <https://www.regulations.gov>, email the individual in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. You must include the docket number USCG-2023-0585. Comments received will be posted without alteration at <http://www.regulations.gov>, including any personal information provided. You may wish to review the Privacy and Security Notice found via a link on homepage of <https://www.regulations.gov>. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Docket Search: Documents mentioned in this notice as being available in the

docket, and all public comments, will be in our online docket at <https://www.regulations.gov> and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign-up for email alerts, you will be notified when comments are posted.

FOR FURTHER INFORMATION CONTACT: Mrs. Megan Johns Henry, Alternate Designated Federal Officer of the National Merchant Marine Personnel Advisory Committee, telephone (202) 372-1255, or email megan.c.johns@uscg.mil.

SUPPLEMENTARY INFORMATION: Notice of these meetings is in compliance with the *Federal Advisory Committee Act* (Pub. L. 117-286, 5 U.S.C. ch. 10). The National Merchant Marine Personnel Advisory Committee is authorized by section 601 of the *Frank LoBiondo Act of 2018* (Pub. L. 115-282, 132 Stat. 4192) and is codified in 46 U.S.C. 15103. The Committee operates under the provisions of the *Federal Advisory Committee Act* and 46 U.S.C. 15109. The National Merchant Marine Personnel Advisory Committee provides advice and recommendations to the Secretary of Homeland Security through the Commandant of the United States Coast Guard on matters relating to personnel in the United States Merchant Marine including the training, qualifications, certification, documentation, and fitness of mariners.

Agenda: The National Merchant Marine Personnel Advisory Committee will meet on Wednesday, September 6, 2023, and Thursday, September 7, 2023 to review, discuss, deliberate and formulate recommendations, as appropriate on the following topics:

Day 1

The agenda for the September 6, 2023 meeting is as follows:

(1) The full Committee will meet briefly to discuss the subcommittees business and task statements, which are listed under paragraph (10) under Day 2 below.

(2) During the morning session of the meeting, subcommittees will separately address and work on the following task statements, which are available for viewing at [https://homeport.uscg.mil/missions/federal-advisory-committees/national-merchant-marine-personnel-advisory-committee-\(nmerpac\)/task-statements](https://homeport.uscg.mil/missions/federal-advisory-committees/national-merchant-marine-personnel-advisory-committee-(nmerpac)/task-statements):

(a) Task Statement 21-2, Communications Between External Stakeholders and the Mariner Credentialing Program;

(b) Task Statement 23-X2, Critical Skills for Navigation Using Nautical

Charts and Training and Assessments of Skills Using Electronic Navigational Charts; and

(c) Task Statement 23–X3, Critical Skills for Radar Navigation and Collision Avoidance and Training and Assessment of Skills Using Radar and Automatic Radar Plotting Aids (ARPA).

(3) During the afternoon session of the meeting, subcommittees will separately address and work on the following task statements, which are available for viewing at [https://homeport.uscg.mil/missions/federal-advisory-committees/national-merchant-marine-personnel-advisory-committee-\(nmerpac\)/task-statements](https://homeport.uscg.mil/missions/federal-advisory-committees/national-merchant-marine-personnel-advisory-committee-(nmerpac)/task-statements):

(a) Task Statement 22–1, Propulsion Power Limitations;

(b) Task Statement 23–X2, Critical Skills for Navigation Using Nautical Charts and Training and Assessments of Skills Using Electronic Navigational Charts; and

(c) Task Statement 23–X3, Critical Skills for Radar Navigation and Collision Avoidance and Training and Assessment of Skills Using Radar and Automatic Radar Plotting Aids (ARPA).

(d) Report of subcommittees. At end of the day, the Chair or Co-Chairs of the subcommittees will report to the full Committee on what was accomplished. The full Committee will not take action on this date and the Chair or Co-Chairs of the subcommittees will present a full report to the Committee on Day 2 of the meeting.

(4) Adjournment of meeting.

Day 2

The agenda for the September 7, 2023 meeting is as follows:

- (1) Introduction.
- (2) Designated Federal Officer and Coast Guard Leadership remarks.
- (3) Swearing In of New Members.
- (4) Roll call of Committee members and determination of a quorum.
- (5) Adoption of the agenda.
- (6) Election of Vice Chair.
- (7) Acceptance of Minutes from Committee Meeting Four (March 31, 2023).
- (8) Introduction of new tasks.
- (9) Public comment period.
- (10) Reports from the subcommittee Chair or Co-Chairs.

The Committee will review the information presented on the following Task Statements and deliberate on any recommendations presented by the subcommittees. Recommendations may be approved and completed tasks may be closed. Official action on these topics may be taken:

(a) Task Statement 21–1, Review of IMO Model Courses Being Validated by the IMO HTW Subcommittee;

(b) Task Statement 21–2, Communication Between External Stakeholders and the Mariner Credentialing Program, including amendment Task Statement 21–2A, Reviewing Assessments in NVICS for STCW;

(c) Task Statement 21–3, Military Education, Training, and Assessment for STCW and National Mariner Endorsement;

(d) Task Statement 21–4, STCW Convention and Code Review;

(e) Task Statement 21–5, Review of Merchant Mariner Rating and Officer Endorsement Job Task Analyses, including amendment Task Statement 21–5A, JTA to Mass Mapping;

(f) Task Statement 21–6, Sea Service for Merchant Mariner Credential Endorsements;

(g) Task Statement 21–8, Remote Operators of Maritime Autonomous Surface Ships;

(h) Task Statement 21–9, Sexual Harassment and Sexual Assault-Prevention and Culture Change in the Merchant Marine, including amendment Task Statement 21–9A, Training for Sexual Assault and Sexual Harassment Prevention and Response;

(i) Task Statement 22–1, Propulsion Power Limitations; and

(j) Task Statement 22–2, Alternative Methods for Meeting STCW Training Requirements at the Operational Level;

(k) Task Statement 23–1, Review of Navigation and Vessel Inspection Circular (NVIC) 03–14, Guidelines for Approval of Training Courses and Programs;

(l) Task Statement 23–X2, Critical Skills for Navigation Using Nautical Charts and Training and Assessments of Skills Using Electronic Navigational Charts; and

(m) Task Statement 23–X3, Critical Skills for Radar Navigation and Collision Avoidance and Training and Assessment of Skills Using Radar and Automatic Radar Plotting Aids (ARPA).

(11) Office of Merchant Mariner Credentialing update presentation.

(12) National Maritime Center update presentation.

(13) Closing remarks.

(14) Adjournment of meeting.

A copy of all meeting documentation will be available at [https://homeport.uscg.mil/missions/federal-advisory-committees/national-merchant-marine-personnel-advisory-committee-\(nmerpac\)](https://homeport.uscg.mil/missions/federal-advisory-committees/national-merchant-marine-personnel-advisory-committee-(nmerpac)) by August 30, 2023. Alternatively, you may contact the individual noted in the **FOR FURTHER INFORMATION CONTACT** section above.

Public comments or questions will be taken throughout the meetings as the Committee discusses the issues, and

prior to deliberations and voting. There will also be a public comment period during the meeting on September 7, 2023 at approximately 12:30 p.m. EDT. Public comments will be limited to 3 minutes per speaker. Please note that the public comments period will end following the last call for comments.

Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to register as a speaker.

Dated: August 8, 2023.

Jeffrey G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. 2023–17284 Filed 8–10–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2022–0037; OMB No. 1660–NW163]

Agency Information Collection Activities: Submission for OMB Review, Comment Request; Generic Clearance for Notice of Loss and Proof of Loss

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice of new collection and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission seeks comments concerning the Generic Clearance for the Collection of the Notice of Loss and Proof of Loss for claimants who file a claim with the Agency seeking compensation for injury or loss of property resulting from fires.

DATES: Comments must be submitted on or before September 11, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection

should be made to Director, Information Management Division, 500 C St SW, Washington, DC 20472, email address: FEMA-Information-Collections-Management@fema.dhs.gov or Angelica Searls, Emergency Management Specialist, Recovery Directorate, Federal Emergency Management Agency, 202–701–9021, fema-hermits-peak@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: FEMA proposes to collect information from parties who apply for compensation under FEMA-established fire claims programs stemming from its role providing financial assistance and direct services to individuals applying for disaster assistance benefits in the event of a federally declared disaster as specified by the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), Public Law 93–288, as amended (42 U.S.C. 5121–5207). On September 30, 2022, President Biden signed into law the Hermit's Peak/Calf Canyon Fire Assistance Act ("Act") Public Law 117–180, Division G—Hermit's Peak/Calf Canyon Fire Assistance Act. Congress passed the Act to compensate those claimants who suffered injury and loss of property from the Hermit's Peak/Calf Canyon Fire. A generic clearance will help minimize delays in FEMA's ability to respond to future fire incidents resulting in the establishment of claims offices.

This proposed information collection previously published in the **Federal Register** on May 5, 2023, at 88 FR 29144 with a 60-day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Generic Clearance for Notice of Loss and Proof of Loss.

Type of Information Collection: New information collection.

OMB Number: 1660–NW163.

FEMA Forms: None.

Abstract: The Federal Emergency Management Agency (FEMA) will use the collected information to commence the process and procedures for claimants to seek compensation for injury or loss of property resulting from the Hermit's Peak/Calf Canyon Fire, and other fires that meet the criteria. Affected State, local and Tribal governments, private sector businesses, not-for-profit organizations, and individuals and households that suffered injuries resulting from fires will

be eligible to apply for compensation. Claimants will submit a Notice of Loss to the Agency, meet with a FEMA Claims Reviewer, obtain documentation needed to substantiate claims, sign a Proof of Loss, and complete and return a Release and Certification form.

Affected Public: Individuals or households, State, local or Tribal government, private sector businesses, and not-for-profit organizations.

Estimated Number of Respondents: 287,250.

Estimated Number of Responses: 287,250.

Estimated Total Annual Burden Hours: 732,489.

Estimated Total Annual Respondent Cost: \$31,606,900.

Estimated Respondents' Operation and Maintenance Costs: \$0.

Estimated Respondents' Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$65,103,002.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (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.

Millicent L. Brown,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–17282 Filed 8–10–23; 8:45 am]

BILLING CODE 9111–68–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0019; OMB No. 1660–0058]

Agency Information Collection Activities: Proposed Collection; Comment Request; Fire Management Assistance Grant Program

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on an extension, with change, of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the information collected as required for Fire Management Assistance Grant Program (FMAGP) eligibility determinations, grants management, and compliance with other Federal laws and regulations.

DATES: Comments must be submitted on or before October 10, 2023.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at www.regulations.gov under Docket ID FEMA–2023–0019. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: To ensure your comments, and or recommendations are directed to the best point of contact, as well as to provide internal quality assurance measures, please direct all inquiries to Antonio Jones, FMAG Program Manager, at (540) 326–1928 or fema-recovery-pa-policy@fema.dhs.gov. You may contact the Information Management Division for copies of the

proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov*.

SUPPLEMENTARY INFORMATION: The information collected is required for Fire Management Assistance Grant Program (FMAGP) eligibility determinations, grants management, and compliance with other Federal laws and regulations. The FMAGP was established under section 420 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C 5187, as amended by § 303 of the Disaster Mitigation Act of 2000 and authorizes the President to provide assistance to any state or local government for the mitigation, management, and control of any fire on public or private forest land or grassland that threatens such destruction as would constitute a major disaster. 44 CFR part 204 specifies the information collections necessary to facilitate the provision of assistance under the FMAGP. Additionally, the information collection is used by both FEMA Regional and State staff to facilitate the declaration request and grant administration processes of FMAGP, as well as end of year internal reporting of overall declaration requests and estimated grant outlays.

Collection of Information

Title: Fire Management Assistance Grant Program.

Type of Information Collection: Extension, with change, of a currently approved information collection.

OMB Number: 1660-0058.

FEMA Forms: FEMA Form FEMA Form FF-104-FY-21-165 (formerly FEMA Form 078-0-1), Principal Advisor's Report; FEMA Form FF-104-FY-21-166 (formerly FEMA Form 078-0-1), Request for Fire Management Assistance Declaration; FEMA Form FF-104-FY-21-167 (formerly FEMA Form 089-0-24), Request for Fire Management Assistance Subgrant; FEMA Form FF-104-FY-23-100, Application for Management Costs; FEMA Form FF-104-FY-23-101, Project Application for Emergency Protective Measures; FEMA Form FF-104-FY-23-102, Project Application for Firefighting Activities; FEMA Form FF-104-FY-23-103 Time Extensions; No form, FEMA-State Agreement and Amendment; No form, State Administrative Plan for Fire Management Assistance; No form, Appeal Letter; No form, Duplication of Benefits Letter; and No form, Training Sessions.

Abstract: The information collected is required for Fire Management Assistance Grant Program (FMAGP)

eligibility determinations, grants management, and compliance with other Federal laws and regulations. The FMAGP was established under the Robert T. Stafford Disaster Relief and Emergency Assistance Act and authorizes the President to provide assistance to any state or local government for the mitigation, management, and control of any fire on public or private forest land or grassland that threatens such destruction as would constitute a major disaster. Federal regulations specify the information collections necessary to facilitate the provision of assistance under the FMAGP. Additionally, the information collection is used by both FEMA Regional and State staff to facilitate the declaration request and grant administration processes of FMAGP, as well as end of year internal reporting of overall declaration requests and estimated grant outlays.

Affected Public: State, local or Tribal government.

Estimated Number of Respondents: 278.

Estimated Number of Responses: 953.

Estimated Total Annual Burden Hours: 1,211.

Estimated Total Annual Respondent Cost: \$105,406.

Estimated Respondents' Operation and Maintenance Costs: \$0.

Estimated Respondents' Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$682,930.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (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.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023-17280 Filed 8-10-23; 8:45 am]

BILLING CODE 9111-24-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA-2023-0010; OMB No. 1660-NW131]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Generic Clearance for the Multi-Modal Mixed Methods Collection of Information To Inform Agency Marketing and Outreach

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice of new collection and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission seeks comments concerning gathering insights from customers and stakeholders about their perceptions, experiences, and expectations that can improve the marketing and outreach of the Agency's services and programs.

DATES: Comments must be submitted on or before September 11, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C St. SW, Washington, DC 20472, email address *FEMA-Information-Collections-Management@fema.dhs.gov* or Joshua Heath, Insurance Communications

Specialist, Marketing & Outreach, Federal Insurance, Federal Insurance and Mitigation Administration, 202–322–6215, joshua.heath@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: E.O. 12862 directs Federal Agencies to provide service to the public that matches or exceeds the best service available. Section 1(b) of E.O. 12862 requires government agencies to “survey customers to determine the kind and quality of services they want.” In addition, the Foundations for Evidence-Based Policymaking Act of 2018 (“Evidence Act”) enables agencies to collect and analyze data to use as evidence in policymaking, as well as assess the effectiveness and efficiency of current programs. To work continuously to ensure that our programs are effective and meet our customers’ needs, FEMA seeks to obtain the Office of Management and Budget’s (OMB) approval of a generic clearance to collect information through mixed methods (quantitative and qualitative) to improve marketing, outreach, and other promotional activities of services, programs, and opportunities offered by FEMA.

This proposed information collection previously published in the **Federal Register** on May 5, 2023, at 88 FR 29143 with a 60-day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Generic Clearance for the Multi-Modal Mixed Methods Collection of Information to Inform Agency Marketing and Outreach.

Type of Information Collection: New information collection.

OMB Number: 1660–NW131.

FEMA Forms: Not applicable.

Abstract: In accordance with the Evidence Act, the collected information will equip FEMA with vital feedback from the general public and stakeholders that will allow for evidence-based improvements to FEMA’s programs and services. FEMA will collect, analyze, and interpret information to identify strengths and weaknesses of programs based on current stakeholder experience and make improvements in the marketing and other promotional activities based on feedback.

Affected Public: Individuals and households, business or other for-profit, Federal Government, State, local or Tribal government, non-profit institutions.

Estimated Number of Respondents: 45,600.

Estimated Number of Responses: 45,600.

Estimated Total Annual Burden Hours: 7,861.

Estimated Total Annual Respondent Cost: \$374,020.

Estimated Respondents’ Operation and Maintenance Costs: \$0.

Estimated Respondents’ Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$748,830.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the Agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (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.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–17281 Filed 8–10–23; 8:45 am]

BILLING CODE 9111–52–P

DEPARTMENT OF HOMELAND SECURITY

[CIS No. 2754–23; DHS Docket No. USCIS–2014–0013]

RIN 1615–ZC03

Implementation of Changes to the Haitian Family Reunification Parole Process

AGENCY: Department of Homeland Security (DHS).

ACTION: Notice of changes to Haitian Family Reunification Parole.

SUMMARY: This notice announces that the Secretary of Homeland Security (Secretary) has authorized updates to modernize Haitian Family Reunification Parole (HFRP). HFRP provides a lawful,

safe, and orderly pathway for certain Haitians to seek parole into the United States, allowing them to reunite with family as they wait for their immigrant visas to become available so they may apply to adjust status to lawful permanent resident (LPR). The Secretary has authorized these updates to HFRP in light of technological advancements and process efficiencies created since the HFRP’s inception in 2014. Every step of the updated process will be completed online with the exception of a medical exam by a panel physician and the parole determination made upon arrival at an interior U.S. port of entry (POE).

DATES: DHS will begin using the Form I–134A, Online Request to be a Supporter and Declaration of Financial Support, for this process on August 11, 2023.

FOR FURTHER INFORMATION CONTACT:

Rená Cutlip-Mason, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Drive, Camp Springs, MD 20746, or by phone at 800–375–5283.

SUPPLEMENTARY INFORMATION:

I. Background

In 2014, U.S. Citizenship and Immigration Services (USCIS) launched HFRP to expedite family reunification through lawful, safe, and orderly channels of migration to the United States, increase existing avenues for lawful migration from Haiti, and help Haiti in its recovery from the long-term impacts of the January 12, 2010 earthquake that devastated the country.¹ Under HFRP, the U.S. Government (USG) invites certain eligible United States citizen (U.S.C.) and LPR petitioners to file a request and initiate consideration for parole for certain family members in Haiti who are the beneficiaries of an approved Form I–130, Petition for Alien Relative. Since it was established in 2014, HFRP has allowed certain beneficiaries of family-based immigrant petitions that were approved on or before December 18, 2014 to request a discretionary grant of parole to enter the United States up to approximately two years before their immigrant visas become available,

¹ *Implementation of Haitian Family Reunification Parole Program*, 79 FR 75581 (Dec. 18, 2014). Note that, consistent with other processes described in this notice, DHS now refers to HFRP as a process rather than a program.

¹³ Throughout this notice “immediate family members” is used as a shorthand for the derivative beneficiary spouse and children of a principal beneficiary. See the Immigration and Nationality Act (INA), sec. 203(d), 8 U.S.C. 1153(d); see also INA sec. 101(b)(1), 8 U.S.C. 1101(b)(1) (defining “child” in general, as meaning “an unmarried person under twenty-one years of age”).

part of the review process, the petitioner must also pass security and background vetting, including for public safety, national security, human trafficking, and exploitation concerns.

B. Beneficiaries

Previously, the HFRP process limited eligibility to Haitian principal beneficiaries of Forms I–130 and their immediate family members that were approved by USCIS on or before December 18, 2014 and for whom an immigrant visa was not currently available. The volume of invitations issued was limited based on operational capacity and other factors, as described above. The revised process is open to all Haitian principal beneficiaries of an approved Form I–130 and their immediate family members who have not yet received an immigrant visa regardless of the date on which USCIS approved the Form I–130. However, as mentioned above, the process will still be available on an invitation-only basis.

In addition, individuals whose immigrant visas were not available but were expected to become available within a specific time range were previously sent invitations to participate in the HFRP process. USCIS will no longer apply a time limit for expected immigrant visa availability. However, USCIS will consider when a beneficiary's immigrant visa is expected to become available when determining which petitioners will receive invitations to initiate this process on behalf of the beneficiary of their approved Form I–130.

To be eligible to be considered under this process, a beneficiary must not have been issued an immigrant visa at the time the invitation issues to the petitioner and, if authorized to travel, must now travel by commercial air with sufficient documentation (e.g., international passport) to an interior POE.

In addition, as with the 2014 HFRP process, each beneficiary must undergo and pass national security and public safety vetting and must demonstrate that they otherwise merit a favorable exercise of discretion by DHS. Under this updated process, U.S. Customs and Border Protection (CBP) will consider a beneficiary's previous immigration history, encounters with USG entities, and the results of national security and public safety vetting when determining a beneficiary's eligibility to be issued advance authorization to travel to the United States. CBP will determine, on a case-by-case basis, whether to exercise discretion to grant parole to the beneficiary at an interior POE upon their arrival. CBP also will consider

other factors in making discretionary determinations consistent with longstanding policy and practice.

Upon arrival at an interior POE, each beneficiary must demonstrate to CBP that a grant of parole is warranted based on a significant public benefit or for urgent humanitarian reasons and that the beneficiary merits a favorable exercise of discretion. Each beneficiary must also comply with all additional requirements, including vaccination requirements and other public health guidelines, prior to traveling to the United States.

Participation in this process is not limited to beneficiaries currently living in Haiti. However, as noted above, beneficiaries must be outside the United States to participate in the process, and the principal beneficiaries must be Haitian nationals.

A beneficiary of this process who enters the United States between POEs rather than being considered for parole under this process will be processed under Title 8 of the U.S. Code and face appropriate consequences. For example, they may be subject to potential criminal prosecution,¹⁴ expedited removal proceedings,¹⁵ or removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. In addition, beneficiaries who enter the United States between POEs rather than being considered for parole under this process may already be, or may become, ineligible for adjustment of status¹⁶ or for an immigrant visa¹⁷ as a result of entering without inspection and not having been admitted or paroled.¹⁸

¹⁴ 8 U.S.C. 1325, 1326 (for illegal entry and reentry, respectively).

¹⁵ INA sec. 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i).

¹⁶ INA sec. 245(a), 8 U.S.C. 1255(a) (requiring adjustment of status applicants to be inspected and admitted or inspected and paroled, as well as be admissible); INA sec. 245(c), 8 U.S.C. 1255(c)(2) (adjustment of status applicants are ineligible if they are in unlawful immigration status on the date of filing the application for adjustment of status or fail to maintain continuously a lawful status since entry into the United States); INA sec. 212(a), 8 U.S.C. 1182(a) (grounds of inadmissibility that render applicants for adjustment of status ineligible).

¹⁷ INA sec. 221(g), 8 U.S.C. 1201(g) (immigrant visa applicants are ineligible for immigrant visas if inadmissible under INA sec. 212(a), 8 U.S.C. 1182(a); INA sec. 212(a), 8 U.S.C. 1182(a) (grounds of inadmissibility that render applicants for immigrant visas ineligible).

¹⁸ For example, an applicant for adjustment of status who previously accrued more than one year of unlawful presence, departed, and thereafter reentered the United States without admission or parole is inadmissible and ineligible for adjustment unless they apply for and obtain consent to reapply for admission from outside the United States after waiting ten years after their last departure from the United States. See INA sec. 212(a)(9)(C)(i)(I), 8 U.S.C. 1182(a)(9)(C)(i)(I). In addition, an applicant for an immigrant visa who accrued more than 180

C. Description of Updated Process for HFRP

DHS announces these updates to the HFRP process in light of lessons learned, technological advancements made, and efficiencies created in parole processes developed and implemented since HFRP's inception in 2014. Except for the medical exam by a panel physician and the ultimate parole determination made in person, on a case-by-case basis, by CBP at an interior POE, all steps of the updated HFRP process will generally be completed online. As a result, the process will no longer require an in-country interview for each beneficiary.

Step 1: Invitation Sent to Petitioner

An invitation may be sent to a petitioner who has filed an approved Form I–130 on behalf of the principal beneficiary and any derivative beneficiaries listed on the Form I–130. The decision whether to send the invitation is based on multiple discretionary factors. Such factors may include operational capacity considerations, the expected period of time until the beneficiary's immigrant visa becomes available, as well as other measures calibrated to best achieve the policy aims of this process as described in this notice.

Only after receiving an invitation may the petitioner file a Form I–134A request to initiate consideration under this HFRP process. Participation in the process will continue to be voluntary. The invitation will instruct the petitioner on next steps to initiate this process on behalf of the beneficiaries, including instructions on documentation to include in their Form I–134A filing. Each invitation will include an identifying number that the petitioner must include in the Form I–134A for each beneficiary on whose behalf they wish to request to be a supporter.

Step 2: Petitioner Files Form I–134A Online

After receiving an invitation to initiate this process, the U.S. citizen

days of unlawful presence in the United States, departed (or is removed, as applicable), and again seeks admission (by filing an immigrant visa application) within 3 or 10 years of departure (or removal) is inadmissible and ineligible for an immigrant visa unless they apply for and obtain a waiver of inadmissibility. See INA sec. 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). Additionally, an applicant for an immigrant visa who was ordered removed, departed, and again seeks admission within certain periods of time thereafter is inadmissible and therefore ineligible for an immigrant visa unless they apply for and obtain consent to reapply for admission. See INA sec. 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A).

(U.S.C.) or LPR petitioner who filed the approved Form I-130 on behalf of the beneficiaries will submit a Form I-134A for each beneficiary with USCIS through the USCIS online web portal. The petitioner must submit a separate Form I-134A for each beneficiary, including derivatives of the principal beneficiary. The petitioner will not be required to pay a fee to file Form I-134A. The Form I-134A identifies and collects information on both the petitioner and the beneficiary.

The petitioner must submit evidence establishing their income and assets and commit to provide financial support to the beneficiary for the duration of parole. The petitioner must also submit evidence establishing the family relationships between the principal beneficiary and all derivative beneficiaries.

USCIS will perform background checks on the petitioner and verify their financial information to ensure that the petitioner is able to financially support the beneficiary. If the petitioner's Form I-134A is confirmed, the request proceeds to the next step.

Step 3: Beneficiary Electronically Provides Information To Support the Request

If a petitioner's Form I-134A is confirmed by USCIS, the beneficiary named in the Form I-134A will receive an email from USCIS with instructions to create a USCIS online account and next steps for completing the request. The beneficiary will be required to confirm their biographic information in their online account and attest to meeting eligibility requirements.

As part of confirming eligibility in their USCIS online account, a beneficiary who seeks advance authorization to travel to the United States will need to confirm that they meet public health requirements, including certain vaccination requirements.

Step 4: Beneficiary Submits Request in CBP One Mobile Application

After confirming biographic information in their USCIS online account and completing required eligibility attestations, the beneficiary will receive instructions through their USCIS online account for accessing the CBP One mobile application. The beneficiary must enter certain biographic and biometric information—including a “live” facial photograph—into CBP One.

Step 5: Approval To Travel to the United States

A beneficiary who establishes eligibility for this process, passes all the requisite vetting, and demonstrates that they otherwise warrant a favorable exercise of discretion, may receive an electronic advance authorization from CBP to travel to the United States. This will facilitate their ability to travel to the United States to seek a discretionary grant of parole, on a case-by-case basis, at an interior POE.

The beneficiary will receive a notice in their USCIS online account confirming whether CBP has, in its discretion, provided the beneficiary with advance authorization to travel to the United States. If approved, the beneficiary is responsible for securing their own travel via commercial air to an interior POE inside a U.S. airport.¹⁹

Approval of advance authorization to travel does not guarantee a beneficiary will be paroled into the United States upon inspection at the POE. Whether to parole the beneficiary is a discretionary, case-by-case determination made by CBP at the time the beneficiary arrives at the interior POE.

Step 6: Beneficiary Seeks Parole at the POE

To use the advance authorization to travel to the United States, the beneficiary must have sufficient documentation (e.g., international passport) to travel on a commercial airline. Beneficiaries under the age of 18 to whom CBP issues advance authorization to travel under this process may be subject to additional screening and/or travel parameters in coordination with U.S. authorities to ensure appropriate travel arrangements and coordination with their parent(s) or legal guardian(s). This FRP process does not affect CBP's legal obligations regarding the identification and processing of unaccompanied children.²⁰

CBP will inspect each beneficiary arriving at an interior POE under this process and consider each individual, on a case-by-case basis, for a grant of discretionary parole for a period of up to three years. Upon arrival at an interior POE, the beneficiary will be required to submit additional biometrics to DHS, including another photograph and fingerprints. This biometric

¹⁹ Air carriers can validate an approved and valid travel authorization submission using the same mechanisms that are currently in place to validate that a traveler has a valid visa or other documentation to facilitate issuance of a boarding pass for air travel.

²⁰ See 6 U.S.C. 279(g)(2) (defining “unaccompanied alien child”).

information will support additional vetting against available databases to inform an independent determination by CBP officers as to whether parole is warranted on a case-by-case basis and whether the beneficiary merits a favorable exercise of discretion.

A beneficiary who is determined to pose a national security or public safety threat will be denied parole. A beneficiary who otherwise does not warrant parole pursuant to section 212(d)(5)(A) of the INA, 8 U.S.C. 1182(d)(5)(A), as a matter of discretion upon inspection, will be processed under an appropriate disposition and may be referred to U.S. Immigration and Customs Enforcement (ICE) for detention.

Step 7: Parole

If granted parole at the POE, on a case-by-case basis, parole will generally be granted for a period of up to three years, subject to satisfying applicable health and vetting requirements, and the parolee will be eligible to apply for employment authorization for the duration of the parole period.²¹

Parole may be terminated upon notice at DHS's discretion, and the noncitizen may be placed into removal proceedings and/or detained if, for example, the parolee fails to maintain the conditions for the parole or other derogatory information emerges during the parole period. A noncitizen paroled into the United States under this process may request additional periods of parole. DHS will determine whether an additional period is warranted, on a case-by-case basis, for urgent humanitarian reasons or significant public benefit. All of the steps in this process, including the decision to confirm or non-confirm the Form I-134A, as well as the decision whether to issue advance authorization to travel and make the parole decision at the interior POE, are entirely discretionary and not subject to appeal on any grounds.

D. Termination, No Private Rights, and Severability

The Secretary retains the sole discretion to terminate this HFRP process at any point. This process is being implemented as a matter of the Secretary's discretion. It is not intended to and does not create any rights, substantive or procedural, enforceable by any party in any matter, civil or criminal. The 2014 decision to implement this process remains unchanged and is severable from the

²¹ 8 CFR 274a.12(c)(11).

procedural updates announced in this notice.

III. Regulatory Requirements

A. Administrative Procedure Act

The changes to the HFRP process announced in this notice are exempt from notice-and-comment rulemaking and delayed effective date requirements on multiple grounds and are therefore amenable to immediate issuance and implementation.

First, the HFRP process, and these updates to that process, constitute a general statement of policy,²² *i.e.*, a “statement issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”²³ As section 212(d)(5)(A) of the INA, 8 U.S.C. 1182(d)(5)(A), provides, parole decisions are made by the Secretary “in his discretion.” This policy creates a process for making discretionary, case-by-case parole decisions. The updates to the process do not change the nature of the policy and fall under the exception for general statements of policy. Additionally, this falls under the separate exception for rules of agency organization, procedure, or practice²⁴ because it sets forth updates to how agencies will implement the HFRP process.

Second, even if the updates to this process were considered to be a legislative rule that will normally be subject to requirements for notice-and-comment rulemaking and a delayed effective date, the updates are exempt from such requirements because they involve a foreign affairs function of the United States.²⁵ As discussed in the July 10, 2023 notices announcing four new family reunification processes,²⁶ the United States continues to engage hemispheric partners to increase their efforts to collaboratively manage irregular migration.²⁷ Improving the

efficiency and accessibility of HFRP is necessary to ensure our foreign partners’ continued collaboration on migration issues, including the ability of the United States to meet other immigration-management priorities such as the implementation of the initial phases of Safe Mobility Offices (SMOs) in Guatemala, Costa Rica, and Colombia.²⁸ Also, as with the four new processes, delays in implementing these procedural changes would complicate broader ongoing and future discussions and negotiations with key foreign partners about migration management. As such, foreign partners have requested that the United States ensure that functional, efficient lawful pathways exist for Haitian nationals.

B. Paperwork Reduction Act (PRA)

Under the Paperwork Reduction Act (PRA), 44 U.S.C. chapter 35, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any new reporting requirements they impose. The updates to the HFRP process announced by this notice require changes to the collection of information on Form I-134A, Online Request to be a Supporter and Declaration of Financial Support (OMB control number 1615-0157), and the collection of information on Form I-131, Application for Travel Document (OMB control number 1615-0013), which will be used for this HFRP process and are being revised in connection with this notice by adjusting the burden estimate. The updates to this process also require changes to the collection of information for Advance Travel Authorization (ATA) (OMB

Commitment to Address the Hemispheric Challenge of Irregular Migration (June 4, 2023), <https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>; see The White House, Readout of Principal Deputy National Security Advisor Jon Finer’s Meeting with Colombian Foreign Minister Alvaro Leyva (June 11, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/11/readout-of-principal-deputy-national-security-advisor-jon-finers-meeting-with-colombian-foreign-minister-alvaro-leyva/>; see United States Department of State, U.S.-Costa Rica Joint Commitment to Address the Hemispheric Challenge of Irregular Migration (June 12, 2023), <https://www.state.gov/u-s-costa-rica-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>.

²⁸ See DHS, Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration (April 27, 2023), <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration>. DHS has previously announced the intention to establish Regional Processing Centers (RPCs) but will now refer to them as Safe Mobility Offices (SMOs) following the launch of the *MovilidadSegura.org* website and the announcements with hosting countries.

Control Number 1651-0143). USCIS and CBP have submitted, and OMB has approved, requests for emergency authorization of the required changes (under 5 CFR 1320.13) to Form I-134A, Form I-131, and ATA for a period of six (6) months. USCIS and CBP will issue respective 60-day **Federal Register** notices seeking comment on these changes on or before August 25, 2023.²⁹

Alejandro N. Mayorkas,
Secretary, U.S. Department of Homeland Security.

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BILLING CODE 9111-97-P ; 9111-14-P

DEPARTMENT OF HOMELAND SECURITY

[CIS No. 2753-23; DHS Docket No. USCIS-2007-0043]

RIN 1615-ZC04

Implementation of Changes to the Cuban Family Reunification Parole Process

AGENCY: Department of Homeland Security (DHS).

ACTION: Notice of changes to Cuban Family Reunification Parole.

SUMMARY: This notice announces that the Secretary of Homeland Security (Secretary) has authorized updates to modernize Cuban Family Reunification Parole (CFRP). CFRP provides a lawful, safe, and orderly pathway for certain Cubans to seek parole into the United States, allowing them to reunite with family as they wait for their immigrant visas to become available so they may apply to adjust status to lawful permanent resident (LPR). The Secretary has authorized these updates to CFRP in light of technological advancements and process efficiencies created since the CFRP’s inception in 2007. Every step of the updated process will be completed online with the exception of a medical exam by a panel physician and the parole determination made upon arrival at an interior U.S. port of entry (POE). **DATES:** DHS will begin using the Form I-134A, Online Request to be a Supporter and Declaration of Financial Support, for this process on August 11, 2023.

FOR FURTHER INFORMATION CONTACT: Rená Cutlip-Mason, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Drive, Camp Springs,

²⁹ Per the normal clearance procedures at 5 CFR 1320.10(e).

²² 5 U.S.C. 553(b)(A).

²³ See *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)).

²⁴ 5 U.S.C. 553(b)(A).

²⁵ 5 U.S.C. 553(a)(1).

²⁶ See footnotes 8, 9, 10, and 11; see also DHS press release “DHS Announces Family Reunification Parole Processes for Colombia, El Salvador, Guatemala, and Honduras” (July 7, 2023), <https://www.dhs.gov/news/2023/07/07/dhs-announces-family-reunification-parole-processes-colombia-el-salvador-guatemala>.

²⁷ See The White House, Joint Statement from the United States and Guatemala on Migration (Jun 1, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/01/joint-statement-from-the-united-states-and-guatemala-on-migration/> and <https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>; see United States Department of State, U.S.-Colombia Joint

MD 20746, or by phone at 800–375–5283.

SUPPLEMENTARY INFORMATION:

I. Background

In 2007, U.S. Citizenship and Immigration Services (USCIS) launched CFRP in furtherance of the United States' commitment under the U.S.-Cuba Migration Accords¹ to direct Cuban migration into lawful, safe, and orderly channels and to continue regular review of the migration situation and proper implementation of the Accords.² Under CFRP, the U.S. Government (USG) invites certain eligible United States citizen (U.S.C.) and LPR petitioners to file a request and initiate consideration for parole for certain family members in Cuba who are the beneficiaries of an approved Form I–130, Petition for Alien Relative.³

If travel is authorized for the beneficiaries, these family members are allowed to travel to the United States before their immigrant visas become available and seek parole on a case-by-case basis upon arrival at a port of entry (POE) in the United States.⁴ If granted parole into the United States, CFRP parolees may apply for employment authorization while they wait to apply to adjust to LPR status.⁵ Unlike parolees under similar family reunification parole (FRP) processes, CFRP beneficiaries may apply for adjustment one year after their parole into the United States under the Cuban Adjustment Act.⁶ They do not need to wait for their immigrant visas to become available to apply for adjustment.⁷

Beneficiaries must have a petitioner who filed a Form I–130 on behalf of a principal beneficiary and has been invited to participate in the CFRP

process after the Form I–130 was approved. The principal beneficiary of that petitioner's Form I–130 must be a Cuban national. Consistent with a **Federal Register** notice updating the CFRP process in 2014, beginning February 17, 2015, USCIS required invited petitioners to file a completed Form I–131, Application for Travel Document, and submit the required fee(s) or fee waiver request for consideration of parole for each beneficiary.⁸ Also consistent with that notice, USCIS required that USCIS officers or U.S. Department of State (State) consular officers interview beneficiaries in Havana, Cuba, to verify their eligibility for the program.⁹ If USCIS issued a travel document to a given beneficiary, that individual could then travel to the United States to seek parole.

In May 2022, the United States announced the resumption of CFRP operations following suspension of CFRP interviews in September 2017¹⁰ and closure of the USCIS Havana Field Office on December 10, 2018.¹¹ In August 2022, USCIS began mailing CFRP interview notices to petitioners with instructions for the beneficiary interview. On August 18, 2022, USCIS restarted interviews at the U.S. Embassy in Cuba. However, USCIS has had limited capacity to conduct interviews due to operational constraints in Cuba. Specifically, while both State and USCIS are working to fully resume operations in Havana, these efforts are taking time to fully realize, which is one reason DHS is implementing these operational changes. Furthermore, the economic and political crisis in Cuba, which has been marked by food shortages, rolling blackouts, and countrywide internet outages,¹² impacts

the USG capacity to process parole requests in Cuba for Cuban nationals and their immediate family members¹³ under CFRP.

In short, interview capacity limitations in Cuba, resource constraints within DHS and State, and the pending application caseload have made the process inefficient and inaccessible to many beneficiaries in Cuba. Many applications are pending, and no new invitations to access CFRP have been sent since August 23, 2016.

In the meantime, technology has evolved since the launch of the CFRP process in 2007. DHS is now able to electronically collect biographic information and evidentiary documents to facilitate identity verification, national security checks, and public safety vetting. DHS has expanded capacity to intake forms through online processes and allow individuals to upload supporting documentation directly online as part of the application process. The updated process for CFRP utilizes these technological developments to make the advance travel authorization and parole process more efficient and accessible while maintaining national security and public safety vetting measures as well as other measures for case-by-case adjudication.

In addition, DHS has recently implemented parole processes that are similar to CFRP but that follow different procedures that utilize these recent technological developments. These include the filing of a Form I–134A, Online Request to be a Supporter and Declaration of Financial Support, the use of a fully electronic request for advance travel authorization (as opposed to the petitioner's use of the Form I–131 under the 2014 CFRP procedures), and processing without a requirement for an in-person interview abroad. Most recently, on July 10, 2023, DHS implemented FRP processes for certain Colombians,¹⁴ Guatemalans,¹⁵

blackouts. <https://www.reuters.com/world/americas/cubans-havana-bang-pots-protest-days-long-blackout-after-ian-2022-09-30/>; The Economist, Cuba is Facing Its Worst Shortage of Food Since the 1990s (July 1, 2021), <https://www.economist.com/the-americas/2021/07/01/cuba-is-facing-its-worst-shortage-of-food-since-the-1990s>.

¹³ Within this notice, "immediate family members" is used as a shorthand for the derivative beneficiary spouse and children of a principal beneficiary. See INA sec. 203(d), 8 U.S.C. 1153(d); see also INA sec. 101(b)(1), 8 U.S.C. 1101(b)(1) (defining "child", in general, as meaning "an unmarried person under twenty-one years of age").

¹⁴ See *Implementation of a Family Reunification Parole Process for Colombians*, 88 FR 43591 (July 10, 2023).

¹⁵ See *Implementation of a Family Reunification Parole Process for Guatemalans*, 88 FR 43581 (July 10, 2023).

¹ See generally U.S. Department of State archived website on Cuban migration, <https://1997-2001.state.gov/regions/wha/cuba/migration.html>. Under the Accords, the United States committed itself to total legal migration to the United States from Cuba of a minimum of 20,000 Cubans each year, not including immediate relatives of U.S. citizens (USCs). See Joint Communiqué on Migration, U.S.-Cuba (Sept. 9, 1994) (known together with the Joint Statement With the Republic of Cuba on Normalization of Migration (May 2, 1995) as the U.S.-Cuba Migration Accords).

² Cuban Family Reunification Parole Program, 72 FR 65588 (Nov. 15, 2007). Note that, consistent with other processes described in this notice, DHS now refers to CFRP as a process rather than a program.

³ *Id.*; see also USCIS, The Cuban Family Reunification Parole Program (Sept. 1, 2022), <https://www.uscis.gov/humanitarian/humanitarian-parole/the-cuban-family-reunification-parole-program>.

⁴ *Id.*

⁵ See 8 CFR 274a.12(c)(11).

⁶ See Public Law 89–732, 80 Stat. 1161 (Nov. 2, 1966), as amended (Immigration and Nationality Act (INA), sec. 245, Note 1, 8 U.S.C. 1255, Note 1).

⁷ *Id.*

⁸ Notice of Changes to Application Procedures for the Cuban Family Reunification Parole Program, 79 FR 75579 (Dec. 18, 2014).

⁹ 79 FR 75581.

¹⁰ See U.S. Department of State, Biden Administration Measures to Support the Cuban People (May 16, 2022), <https://www.state.gov/biden-administration-measures-to-support-the-cuban-people/>. See also U.S. Embassy in Cuba, USCIS Resumes Cuban Family Reunification Parole Program Operations (September 1, 2022), <https://cu.usembassy.gov/uscis-resumes-cuban-family-reunification-parole-program-operations/#:~:text=CFRP%20processing%20was%20suspended%20due,office%20in%20Havana%20in%202018>.

¹¹ See USCIS, USCIS Closes Havana Field Office on December 10, 2018 (December 10, 2018), <https://www.uscis.gov/archive/uscis-closes-havana-field-office-on-dec-10-2018>.

¹² New York Times, 'Cuba Is Depopulating': Largest Exodus Yet Threatens Country's Future, Dec. 10, 2022, <https://www.nytimes.com/2022/12/10/world/americas/cuba-us-migration.html>; Dave Sherwood, Reuters, Oct. 1, 2022, Banging pots, Cubans stage rare protests over Hurricane Ian

Hondurans,¹⁶ and Salvadorans¹⁷ along these lines. DHS is now conforming the CFRP process to these recently announced processes.

II. Modernized Process

A. Petitioners

As done under the 2007 process and the revised process in 2014, invitations to participate in the CFRP process will issue to certain petitioners who have an approved Form I-130 filed on behalf of a Cuban principal beneficiary.

Invitations will continue to issue at the USC's discretion, based on operational capacity, the expected period of time until the principal beneficiary's immigrant visa becomes available, and in a manner calibrated to best achieve the foreign policy aims of this process.

Petitioners who have an approved¹⁸ Form I-130 filed on behalf of a Cuban principal beneficiary outside the United States should ensure that their mailing address and other contact information are up to date with State's National Visa Center (NVC), as this is the information that will be used to issue invitations. The invitations will provide information about how the petitioner may file a request to be a supporter with USCIS to initiate this process on behalf of a Cuban principal beneficiary of an approved Form I-130, and how to file separate requests for any immediate family members of the principal beneficiary.

As part of the request process, the petitioner will be required to provide evidence of their income and assets and commit to provide financial support to the beneficiary named in the request for the period of parole. Petitioners will also be required to provide evidence to verify the familial relationship between the principal beneficiary of the Form I-130 and all immediate family members of the principal beneficiary for whom the petitioner will be filing a request to be a supporter under this process. As part of the review process, the petitioner must also pass security and background vetting, including for public safety,

national security, human trafficking, and exploitation concerns.

B. Beneficiaries

The threshold eligibility criteria for participation in the CFRP continue to apply. Principal beneficiaries must be Cuban nationals who have a petitioner who has been invited to participate. However, DHS is implementing an update for the petitioner to initiate this process so the beneficiary can be considered for issuance of advance authorization to travel to the United States where the beneficiary can seek a discretionary grant of parole at an interior POE.

To be eligible to be considered under this process, a beneficiary must not have been issued an immigrant visa at the time the invitation issues to the petitioner and, if authorized to travel, must now travel by commercial air with sufficient documentation (e.g., international passport) to an interior POE.

In addition, as with the 2007 process and the revised 2014 process, each beneficiary must undergo and pass national security and public safety vetting and must demonstrate that they otherwise merit a favorable exercise of discretion by DHS. Under this updated process, U.S. Customs and Border Protection (CBP) will consider a beneficiary's previous immigration history, encounters with USG entities, and the results of national security and public safety vetting when determining a beneficiary's eligibility to be issued advance authorization to travel to the United States. CBP will determine, on a case-by-case basis, whether to exercise discretion to grant parole to the beneficiary at an interior POE upon their arrival. CBP also will consider other factors in making discretionary determinations consistent with longstanding policy and practice.

Upon arrival at an interior POE, each beneficiary must demonstrate to CBP that a grant of parole is warranted based on a significant public benefit or for urgent humanitarian reasons and that the beneficiary merits a favorable exercise of discretion. Each beneficiary must also comply with all additional requirements, including vaccination requirements and other public health guidelines, prior to traveling to the United States. For consistency with other FRP processes, parole will generally be granted for a period of up to three years, rather than the two years under the previous CFRP process.

Participation in this process is not limited to beneficiaries currently living

in Cuba.¹⁹ However, as noted above, beneficiaries must be outside the United States to participate in the process, and the principal beneficiaries must be Cuban nationals.

A beneficiary of this process who enters the United States between POEs rather than being considered for parole under this process will be processed under Title 8 of the U.S. Code and face appropriate consequences. For example, they may be subject to potential criminal prosecution,²⁰ expedited removal proceedings,²¹ or removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. In addition, beneficiaries who enter the United States between POEs rather than being considered for parole under this process may already be or may become ineligible for adjustment of status²² or for an immigrant visa²³ as a result of entering without inspection and not having been admitted or paroled.²⁴

¹⁹ DHS recognizes that permitting Cubans to be processed under the CFRP process when not physically present in Cuba means that not all Cubans who are paroled under the CFRP process would count towards the U.S. Government's annual obligation under the U.S.-Cuba Migration Accords.

²⁰ 8 U.S.C. 1325, 1326 (for illegal entry and reentry, respectively).

²¹ INA sec. 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i).

²² INA sec. 245(a), 8 U.S.C. 1255(a) (requiring adjustment of status applicants to be inspected and admitted or inspected and paroled, as well as be admissible); INA sec. 245(c), 8 U.S.C. 1255(c)(2) (adjustment of status applicants are ineligible if they are in unlawful immigration status on the date of filing the application for adjustment of status or fail to maintain continuously a lawful status since entry into the United States); INA sec. 212(a), 8 U.S.C. 1182(a) (grounds of inadmissibility that render applicants for adjustment of status ineligible).

²³ INA sec. 221(g), 8 U.S.C. 1201(g) (immigrant visa applicants are ineligible for immigrant visas if inadmissible under INA sec. 212(a), 8 U.S.C. 1182(a)); INA sec. 212(a), 8 U.S.C. 1182(a) (grounds of inadmissibility that render applicants for immigrant visas ineligible).

²⁴ For example, an applicant for adjustment of status who previously accrued more than one year of unlawful presence, departed, and thereafter reentered the United States without admission or parole is inadmissible and ineligible for adjustment unless they apply for and obtain consent to reapply for admission from outside the United States after waiting ten years after their last departure from the United States. See INA sec. 212(a)(9)(C)(i)(I), 8 U.S.C. 1182(a)(9)(C)(i)(I). In addition, an applicant for an immigrant visa who accrued more than 180 days of unlawful presence in the United States, departed (or is removed, as applicable), and again seeks admission (by filing an immigrant visa application) within 3 or 10 years of departure (or removal) is inadmissible and ineligible for an immigrant visa unless they apply for and obtain a waiver of inadmissibility. See INA sec. 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). Additionally, an applicant for an immigrant visa who was ordered removed, departed, and again seeks admission within certain periods of time thereafter is inadmissible and therefore ineligible for an immigrant visa unless they apply for and obtain consent to reapply for admission. See INA sec. 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A).

¹⁶ See *Implementation of a Family Reunification Parole Process for Hondurans*, 88 FR 43601 (July 10, 2023).

¹⁷ See *Implementation of a Family Reunification Parole Process for Salvadorans*, 88 FR 43611 (July 10, 2023).

¹⁸ In certain circumstances, such as if the beneficiary is no longer eligible for the Form I-130 (e.g., the petitioner is no longer an LPR or U.S.C.), parole would be denied, and the Form I-130 approval would be revoked. If DHS revokes Form I-130 approval, the beneficiary will no longer be eligible for an immigrant visa. DHS will make these determinations on a case-by-case basis and will provide a written notice of the revocation of the approved Form I-130.

C. Description of Updated Process for CFRP

DHS announces these updates to the CFRP process in light of lessons learned, technological advancements made, and efficiencies created in parole processes developed and implemented since CFRP's inception in 2007. Except for the medical exam by a panel physician and the ultimate parole determination made in person, on a case-by-case basis, by CBP at an interior POE, all steps of the updated CFRP process will generally be completed online. As a result, the process will no longer require an in-country interview for each beneficiary.

Step 1: Invitation Sent to Petitioner

An invitation may be sent to a petitioner who has filed an approved Form I-130 on behalf of the principal beneficiary and any derivative beneficiaries listed on the Form I-130. The decision whether to send the invitation is based on multiple discretionary factors. Such factors may include operational capacity considerations, the expected period of time until the beneficiary's immigrant visa becomes available, as well as other measures calibrated to best achieve the policy aims of this process as described in this Notice.

Only after receiving an invitation may the petitioner file a Form I-134A request to initiate consideration under this CFRP process. Participation in the process will continue to be voluntary. The invitation will instruct the petitioner on next steps to initiate this process on behalf of the beneficiaries, including instructions on documentation to include in their Form I-134A filing. Each invitation will include an identifying number that the petitioner must include in the Form I-134A for each beneficiary on whose behalf they wish to request to be a supporter.

Step 2: Petitioner Files Form I-134A Online

After receiving an invitation to initiate this process, the U.S.C. or LPR petitioner who filed the approved Form I-130 on behalf of the beneficiaries will submit a Form I-134A for each beneficiary with USCIS through the USCIS online web portal. The petitioner must submit a separate Form I-134A for each beneficiary, including derivatives of the principal beneficiary. The petitioner will not be required to pay a fee to file Form I-134A. The Form I-134A identifies and collects information on both the petitioner and the beneficiary.

The petitioner must submit evidence establishing their income and assets and

commit to provide financial support to the beneficiary for the duration of parole. The petitioner must also submit evidence establishing the family relationships between the principal beneficiary and all derivative beneficiaries.

USCIS will perform background checks on the petitioner and verify their financial information to ensure that the petitioner is able to financially support the beneficiary. If the petitioner's Form I-134A is confirmed, the request proceeds to the next step.

Step 3: Beneficiary Electronically Provides Information To Support the Request

If a petitioner's Form I-134A is confirmed by USCIS, the beneficiary named in the Form I-134A will receive an email from USCIS with instructions to create a USCIS online account and next steps for completing the request. The beneficiary will be required to confirm their biographic information in their online account and attest to meeting eligibility requirements.

As part of confirming eligibility in their USCIS online account, a beneficiary who seeks advance authorization to travel to the United States will need to confirm that they meet public health requirements, including certain vaccination requirements.

Step 4: Beneficiary Submits Request in CBP One Mobile Application

After confirming biographic information in their USCIS online account and completing required eligibility attestations, the beneficiary will receive instructions through their USCIS online account for accessing the CBP One mobile application. The beneficiary must enter certain biographic and biometric information—including a “live” facial photograph—into CBP One.

Step 5: Approval To Travel to the United States

A beneficiary who establishes eligibility for this process, passes all the requisite vetting, and demonstrates that they otherwise warrant a favorable exercise of discretion, may receive an electronic advance authorization from CBP to travel to the United States. This will facilitate their ability to travel to the United States to seek a discretionary grant of parole, on a case-by-case basis, at an interior POE.

The beneficiary will receive a notice in their USCIS online account confirming whether CBP has, in its discretion, provided the beneficiary with advance authorization to travel to

the United States. If approved, the beneficiary is responsible for securing their own travel via commercial air to an interior POE inside a U.S. airport.²⁵

Approval of advance authorization to travel does not guarantee a beneficiary will be paroled into the United States upon inspection at the POE. Whether to parole the beneficiary is a discretionary, case-by-case determination made by CBP at the time the beneficiary arrives at the interior POE.

Step 6: Beneficiary Seeks Parole at the POE

To use the advance authorization to travel to the United States, the beneficiary must have sufficient documentation (*e.g.*, international passport) to travel on a commercial airline. Beneficiaries under the age of 18 to whom CBP issues advance authorization to travel under this process may be subject to additional screening and/or travel parameters in coordination with U.S. authorities to ensure appropriate travel arrangements and coordination with their parent(s) or legal guardian(s). This FRP process does not affect CBP's legal obligations regarding the identification and processing of unaccompanied children.²⁶

CBP will inspect each beneficiary arriving at an interior POE under this process and consider each individual, on a case-by-case basis, for a grant of discretionary parole for a period of up to three years. Upon arrival at an interior POE, the beneficiary will be required to submit additional biometrics to DHS, including another photograph and fingerprints. This biometric information will support additional vetting against available databases to inform an independent determination by CBP officers as to whether parole is warranted on a case-by-case basis and whether the beneficiary merits a favorable exercise of discretion.

A beneficiary who is determined to pose a national security or public safety threat will be denied parole. A beneficiary who otherwise does not warrant parole pursuant to section 212(d)(5)(A) of the INA, 8 U.S.C. 1182(d)(5)(A), as a matter of discretion upon inspection, will be processed under an appropriate disposition and may be referred to U.S. Immigration and

²⁵ Air carriers can validate an approved and valid travel authorization submission using the same mechanisms that are currently in place to validate that a traveler has a valid visa or other documentation to facilitate issuance of a boarding pass for air travel.

²⁶ See 6 U.S.C. 279(g)(2) (defining “unaccompanied alien child”).

Customs Enforcement (ICE) for detention.

Step 7: Parole

If granted parole at the POE, on a case-by-case basis, parole will generally be granted for a period of up to three years, subject to satisfying applicable health and vetting requirements, and the parolee will be eligible to apply for employment authorization for the duration of the parole period.²⁷

Parole may be terminated upon notice at DHS's discretion, and the noncitizen may be placed into removal proceedings and/or detained if, for example, the parolee fails to maintain the conditions for the parole or other derogatory information emerges during the parole period. A noncitizen paroled into the United States under this process may request additional periods of parole. DHS will determine whether an additional period is warranted, on a case-by-case basis, for urgent humanitarian reasons or significant public benefit. All of the steps in this process, including the decision to confirm or non-confirm the Form I-134A, as well as the decision whether to issue advance authorization to travel and the parole decision at the interior POE, are entirely discretionary and not subject to appeal on any grounds.

D. Termination, No Private Rights, and Severability

The Secretary retains the sole discretion to terminate this CFRP process at any point. This process is being implemented as a matter of the Secretary's discretion. It is not intended to and does not create any rights, substantive or procedural, enforceable by any party in any matter, civil or criminal. The 2007 decision to implement this process remains unchanged and is severable from the procedural updates announced in this notice.

III. Regulatory Requirements

A. Administrative Procedure Act

The changes to the CFRP process announced in this notice are exempt from notice-and-comment rulemaking and delayed effective date requirements on multiple grounds and are therefore amenable to immediate issuance and implementation.

First, the CFRP process, and these updates to that process, constitute a general statement of policy,²⁸ i.e., a "statement issued by an agency to advise the public prospectively of the manner in which the agency proposes to

exercise a discretionary power."²⁹ As section 212(d)(5)(A) of the INA, 8 U.S.C. 1182(d)(5)(A), provides, parole decisions are made by the Secretary "in his discretion." This policy creates a process for making discretionary, case-by-case parole decisions. The updates to the process do not change the nature of the policy and fall under the exception for general statements of policy. Additionally, this falls under the separate exception for rules of agency organization, procedure, or practice³⁰ because it sets forth updates to how agencies will implement the CFRP process.

Second, even if the updates to this process were considered to be a legislative rule that will normally be subject to requirements for notice-and-comment rulemaking and a delayed effective date, the updates are exempt from such requirements because they involve a foreign affairs function of the United States.³¹ As discussed in the July 10, 2023 notices announcing four new family reunification processes,³² the United States continues to engage hemispheric partners to increase their efforts to collaboratively manage irregular migration.³³ Improving the efficiency and accessibility of CFRP is necessary to ensure our foreign partners' continued collaboration on migration issues, including the ability of the United States to meet other

²⁹ See *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)).

³⁰ 5 U.S.C. 553(b)(A).

³¹ 5 U.S.C. 553(a)(1).

³² See footnotes 14, 15, 16, and 17; see also DHS press release "DHS Announces Family Reunification Parole Processes for Colombia, El Salvador, Guatemala, and Honduras" (July 7, 2023), <https://www.dhs.gov/news/2023/07/07/dhs-announces-family-reunification-parole-processes-colombia-el-salvador-guatemala>.

³³ See The White House, Joint Statement from the United States and Guatemala on Migration (Jun 1, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/01/joint-statement-from-the-united-states-and-guatemala-on-migration/> and <https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>; see United States Department of State, U.S.-Colombia Joint Commitment to Address the Hemispheric Challenge of Irregular Migration (June 4, 2023), <https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>; see The White House, Readout of Principal Deputy National Security Advisor Jon Finer's Meeting with Colombian Foreign Minister Alvaro Leyva (June 11, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/11/readout-of-principal-deputy-national-security-advisor-jon-finers-meeting-with-colombian-foreign-minister-alvaro-leyva/>; see United States Department of State, U.S.-Costa Rica Joint Commitment to Address the Hemispheric Challenge of Irregular Migration (June 12, 2023), <https://www.state.gov/u-s-costa-rica-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>.

immigration-management priorities such as the implementation of the initial phases of Safe Mobility Offices (SMOs) in Guatemala, Costa Rica, and Colombia.³⁴ Also, as with the four new processes, delays in implementing these procedural changes would complicate broader ongoing and future discussions and negotiations with key foreign partners about migration management. As such, foreign partners have requested that the United States ensure that functional, efficient lawful pathways exist for Cuban nationals.

B. Paperwork Reduction Act (PRA)

Under the Paperwork Reduction Act (PRA), 44 U.S.C. chapter 35, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any new reporting requirements they impose. The updates to the CFRP process announced by this notice require changes to the collection of information on Form I-134A, Online Request to be a Supporter and Declaration of Financial Support (OMB control number 1615-0157), and the collection of information on Form I-131, Application for Travel Document (OMB control number 1615-0013), which will be used for this CFRP process and are being revised in connection with this notice by adjusting the burden estimate. The updates to this process also require changes to the collection of information for Advance Travel Authorization (ATA) (OMB Control Number 1651-0143). USCIS and CBP have submitted, and OMB has approved, requests for emergency authorization of the required changes (under 5 CFR 1320.13) to Form I-134A, Form I-131, and ATA for a period of six (6) months. USCIS and CBP will issue respective 60-day **Federal Register** notices seeking comment on these changes on or before August 25, 2023.³⁵

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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BILLING CODE 9111-97-P; 9111-14-P

³⁴ See DHS, Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration (April 27, 2023), <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration>. DHS has previously announced the intention to establish Regional Processing Centers (RPCs) but will now refer to them as Safe Mobility Offices (SMOs) following the launch of the MovilidadSegura.org website and the announcements with hosting countries.

³⁵ Per the normal clearance procedures at 5 CFR 1320.10(e).

²⁷ 8 CFR 274a.12(c)(11).

²⁸ 5 U.S.C. 553(b)(A).

INTER-AMERICAN FOUNDATION**Submission for OMB Review;
Comments Request****AGENCY:** Inter-American Foundation.**ACTION:** Notice of information collections; request for comment.

SUMMARY: Under the provisions of the Paperwork Reduction Act, agencies are required to publish a Notice in the **Federal Register** notifying the public that the agency is creating three new information collections for OMB review and approval and requests public review and comment on the submissions. Comments are being solicited on the need for the information; the accuracy of the burden estimate; the quality, practical utility, and clarity of the information to be collected; and ways to minimize reporting the burden, including automated collected techniques and uses of other forms of technology.

DATES: Comments must be received by October 10, 2023.**ADDRESSES:** Comments and requests for copies of the subject information collection may be sent by any of the following methods:

- *Mail:* Nicole Stinson, Associate General Counsel, Inter-American Foundation, 1331 Pennsylvania Ave. NW, Suite 1200 North, Washington, DC 20004.

- *Email:* nstinson@iaf.gov.

Instructions: All submissions received must include the agency name and agency form name or OMB control number for this information collection. Electronic submissions must include the agency form name in the subject line to ensure proper routing. Please note that all written comments received in response to this notice will be considered public records.

FOR FURTHER INFORMATION CONTACT: Associate General Counsel: Nicole Stinson, (202) 683-7117.**SUPPLEMENTARY INFORMATION:** This notice informs the public that IAF will submit to OMB a request for approval of the following information collections.**Summary Form Under Review**

Title of Collection: Grant Management System Registration, IAF-01.

Type of Review: New information collection.

OMB Control Number: Not assigned, new information collection.

Type of Respondent/Affected Public: Private Sector, Businesses or other for profits, Not-for-profit institutions.

Frequency: Once.

Estimated Number of Respondents per Year: 1,400.

Estimated Time per Respondent: 0.1 hours.

Estimated Total Annual Burden Hours: 140 hours.

Abstract: The IAF works to promote sustainable development in Latin America and the Caribbean by directly supporting qualified civil society organizations through funding actions, such as grants and cooperative agreements. This collection will allow grant seekers to register for a new online IAF grant portal if they meet basic eligibility requirements. Transition to an online portal will allow electronic grant application and reporting which will increase the efficiency of IAF's grant management program.

Summary Form Under Review

Title of Collection: Grant Application, IAF-02.

Type of Review: New information collection.

OMB Control Number: Not assigned, new information collection.

Type of Respondent/Affected Public: Private Sector, Businesses or other for profits, Not-for-profit institutions.

Frequency: Once.

Estimated Number of Respondents per Year: 1,400.

Estimated Time Per Respondent: 14 hours.

Estimated Total Annual Burden Hours: 19,600 hours.

Abstract: The IAF works to promote sustainable development in Latin America and the Caribbean by directly supporting qualified civil society organizations through funding actions, such as grants and cooperative agreements. This collection will gather application information directly from grant seekers including details about the applicant's organization, the development opportunity, and proposed project activities. Using this information, IAF is able to perform an initial assessment of the proposed project and determine which applicants are qualified as well as which projects are best positioned to advance grassroots development in the region. The IAF has made an effort to standardize the basic level of information required for this review in order to reduce the burden on both applicants and IAF staff reviewing the applications.

Summary Form Under Review

Title of Collection: Grant Programmatic and Financial Reporting, IAF-03.

Type of Review: New information collection.

OMB Control Number: Not assigned, new information collection.

Type of Respondent/Affected Public: Private Sector, Businesses or other for profits, Not-for-profit institutions.

Frequency: Twice a year.

Estimated Number of Respondents per Year: 450.

Estimated Time Per Respondent: 18 hours.

Estimated Total Annual Burden Hours: 16,200 hours.

Abstract: The IAF works to promote sustainable development in Latin America and the Caribbean by directly supporting civil society organizations through funding actions, such as grants and cooperative agreements. In order to track grant progress toward desired results and ensure compliance with the terms and conditions of the agreement, the IAF seeks to establish a requirement that grantees provide programmatic and financial information every six months during the grant period, including reporting on project indicators, narrative data on grant achievements and challenges, and a record of spent funds. This information is necessary as it allows IAF to ensure that the grantee is using project funds responsibly and making the necessary strides toward achieving the results laid out in the grant agreement.

Dated: August 8, 2023.

Nicole Stinson,

Associate General Counsel, Office of the General Counsel.

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BILLING CODE 7025-01-P

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs**

[234A2100DD/AAK001030/
A0A501010.999900]

Indian Child Welfare Act (ICWA) Grants to Indian Organizations for Off-Reservation Indian Child and Family Service Programs

AGENCY: Office of Indian Services, Bureau of Indian Affairs.

ACTION: Solicitation of proposals.

SUMMARY: The Secretary of the Interior (Secretary), through the Bureau of Indian Affairs (BIA), is soliciting grants from Off-Reservation Indian Organizations to establish and operate off-reservation Indian child and family service programs, which provide services intended to stabilize Indian families and Tribes, prevent the breakup of Indian families, and ensure that the permanent removal of an Indian child from the custody of his/her Indian parent or Indian custodian is a last resort.

DATES: Grant application packages must be submitted no later than 5 p.m. Eastern Daylight Time, September 15, 2023. The BIA will not consider proposals received after this time and date.

ADDRESSES: Grant application packages must be submitted through *Grants.gov*. For information on how to apply for grants in *Grants.gov*, see the instructions available at: <https://www.grants.gov/help/html/help/Applicants/HowToApplyForGrants.htm>.

FOR FURTHER INFORMATION CONTACT: If you have questions regarding the application process, please contact Jo Ann Metcalfe, Grant Officer, via email at jo.metcalfe@bia.gov or phone at (703) 390-6410.

SUPPLEMENTARY INFORMATION: The BIA is the Federal agency charged with administering ICWA funding to federally recognized Tribes. In FY 2023, the Congress appropriated \$2.0 million to fund off-reservation programs authorized by section 202 of the ICWA (25 U.S.C. 1932). The BIA will distribute the FY 2023 funding through the competitive grant process outlined in 25 CFR 23.31 through 23.35, subpart D, Grants to Off-Reservation Indian Organizations for title II Indian Child and Family Services Programs (subject to fund availability), to assist Indian Organizations in establishing and operating off-reservation Indian child and family service programs, which may include, but are not limited to:

- (1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;
- (2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;
- (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and
- (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings, 25 U.S.C. 1932.

- I. Authority
- II. Eligibility
- III. Categories of Available Funding
- IV. Funding Limitations
- V. Proposal Application Guidelines
 - A. Background

- B. Items To Consider Before Preparing an Application, Funding Limitations, 2-Year Timeframes,
- C. Mandatory Components and Requirements for Applications
- D. Submission of Application in Digital Format
- E. Categories of Funding, Review Criteria and Evaluation
- F. Transfer of Funding and Transfer of Funds
- G. Reporting Requirements for Award Recipients
- H. Additional Information

I. Authority

This ICWA grant is funding that is provided through non-recurring appropriations made by the Congress in its annual appropriations to the BIA. These funds are provided on a year-to-year basis and may or may not be provided in future years. In FY 2023, Congress appropriated a total of \$2.0 million for off-reservation programs authorized by section 202 of ICWA (25 U.S.C. 1932), which reflects an increase of \$500,000.00 above the FY 2022 funding level. The BIA will be distributing a total of \$2.0 million to eligible Indian Organizations under this grant solicitation. Additional authorizing statutes for the program include:

- Section 202 of ICWA (25 U.S.C. 1932)
- Public Law 93-638, ISDEAA of 1975, as amended
- Public Law 101-630, The Indian Child Protection and Family Violence Prevention Act
- Public Law 114-165, Native American Children's Safety Act (NACSA) of 2016
- 25 CFR part 23, ICWA
- 25 U.S.C. 1901 *et seq.*, ICWA of 1978
- 2 CFR, Grants and Agreements, Volume 1, 1-299
- 43 CFR part 18 (31 U.S.C. 1352) New Restrictions on Lobbying
- Indian Child Welfare Act Title II Authorities

II. Eligibility

This solicitation contains guidelines and instructions for writing and submitting a proposal. The BIA will use a competitive evaluation process. Eligibility for funding will be limited to activities that support and are consistent with the intent and activities outlined in the Indian Child Welfare Act (ICWA) section 202 (25 U.S.C. 1932).

Authorized Tribal organizations, as defined at 25 U.S.C. 5304(l) may apply individually or as a consortium for a grant under this notice. Indian Organization, solely for purpose of eligibility for grants, means any legally established group, association, partnership, corporation, or other legal

entity which is owned or controlled by Indians, or a majority (51 percent or more) of whose members are Indians. A consortium is created by an agreement or association between two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area when its administratively feasible to provide an adequate level of service within the area. An applicant may not submit more than one application nor be the beneficiary of more than one grant under this notice.

III. Categories of Available Funding

Category of funding will be under ICWA.

IV. Funding Limitations

Matching requirement(s) are voluntary. Title II of ICWA, at section 201(b), clearly encourages Tribes to seek funds from other sources to enhance the quality and scope of ICWA child and family services programs.

Award Type: Grant

Estimated Total Funding: \$2,000,000

Expected Number of Grant Awards: 0-15

Award Ceiling: \$200,000 per Budget period

Award Floor: \$80,000 per Budget period
Anticipated Project Start Date: October 17, 2023

Anticipated Project End Date: October 16, 2025

Length of Project Period: Two Fiscal Years

Category: ICWA

Cost Sharing or Matching: No (volunteer)

V. Proposal Application Guidelines

A. Background

On January 13, 1994, Indian Affairs (IA) published in the **Federal Register** (59 FR 2248) regulations revising 25 CFR part 23, the rules that govern the title II ICWA grant program. The announcement converted the previous competitive ICWA grant award process to initiate a noncompetitive award system for eligible federally recognized Tribes.

In FY 1995, the eligible Tribes began to continuously access their recurring ICWA funds in the Tribal Priority Allocation (TPA) budget Sub activity section of the Tribe's budget system. The funding process managed centrally by IA for off-reservation Indian Organizations was discontinued after the conversion to the noncompetitive process for eligible federally recognized Tribes. The BIA last awarded the ICWA

off-reservation grants to Indian Organizations in FY 1994. Rather, some federally recognized Tribes have contracted with off-reservation Indian Organizations, if and where needed.

In FY 2020, the Congress appropriated \$1.0 million specifically to fund off-reservation programs authorized by section 202 of the ICWA (25 U.S.C. 1932). In FY 2021, the Congress allocated again \$1.0 million for the ICWA, to fund off-reservation programs authorized by section 202 of the ICWA (25 U.S.C. 1932) for the second consecutive fiscal year. In FY 2022, Congress allocated \$1.5 million for the ICWA, to fund off-reservation programs authorized by section 202 of the ICWA (25 U.S.C. 1932) for the third consecutive fiscal year. In FY 2023, Congress allocated 2 million, additional \$500,000 for the ICWA, to fund off-reservation programs authorized by section 202 of the ICWA (25 U.S.C. 1932) for the fourth consecutive fiscal year. These are considered one-time funding for the earmark as included in the four consecutive fiscal year appropriations act.

B. Items To Consider Before Preparing an Application, Funding Limitations, 2-Year Timeframes and No-Cost Extensions

Awards are subject to available funding. The BIA's obligation under this solicitation notice is contingent on receipt of available appropriated funds. No liability on part of the U.S. Government for any payment may arise until funds are made available to the awarding officer for this grant. No liability may arise until the recipient receives notice of such availability and is confirmed in writing by the grants officer.

C. Mandatory Components and Requirements for Applications

The mandatory components, and requirements for applications identified below, must be included in the application. The required forms may be downloaded from this solicitation on [grants.gov](https://www.grants.gov), under the "PACKAGE" tab. If the forms are unable to be downloaded from the PACKAGE tab, select the "FORMS" tab. From the FORMS dropdown menu, select the second item "SF-424 Family". This will open the page with a table titled "SF-424 FAMILY FORMS." From this table, download the following required forms:

- Application for Federal Assistance (SF-424)
- Budget Information for Non-Construction Programs (SF-424A)
- Key Contacts
- Project Abstract Summary

Click on the PDF letters to download each document.

The following are the required documents:

- *Project Narrative*
- *Executive Summary*
- *Technical Summary*
- *Documentation of Authority to Apply*
- *Resume(s)*
- *Budget Narrative (Excel Spreadsheet with line items)*

Project Narrative

The Project Narrative includes an Executive Summary and a Technical Summary. The Project Narrative must not exceed 20 pages.

Executive Summary

An Executive Summary includes an overview or an initial assessment of the project and includes a description of the specific ICWA services and activities the Indian Organization provides to Indian communities. The Executive Summary must outline the Organization's understanding of the ICWA and explain the existing working relationship with Indian child and family service programs, specifically in reference to family reunification and the prevention of Indian family breakups. This section will describe the challenges or needs faced by the communities served and how the goal/vision for this proposal will meet those needs. At a minimum, the proposal should include a description of:

- The proposed project and Tribal communities served, including geographic location, the population in the service area, and available information relevant to ICWA.
- The existing ICWA services provided to Tribes in context to readiness to exercise the project's objectives and goals. The description must identify strengths and gaps in ICWA services where relevant. Provide examples of other Tribal or Federal project and/or similar projects for which funding is being requested.
- The deliverable services that the project is expected to develop and the resources available to implement proposed project(s) to Tribes in service deliverable area.

Technical Summary

The Technical Summary is a narrative description of the program's skills and abilities, which includes the Scope of Work (SOW) outlining what will be done. This section must provide a clear link between the proposed activities provided to Tribes and need identified in the Executive Summary. It must clearly state the project's measurable goals, objectives, activities,

methodology used, including culturally defined approaches, which the applicant will incorporate to achieve the identified goals and objectives. Indicate the project purpose (*i.e.*, start up, expansion, or replacement), describe the proposed project and what it will accomplish (*e.g.*, number of children and families it will service, service area, type of services).

- *SOW*: The SOW must include a detailed outline of the project(s) deliverables, timeline, and milestones that will enhance ICWA services provided to children and families. The SOW explains how the applicant will measure and/or track its objectives and outcomes of the proposed project (performance measures), and why the methods utilized will achieve the stated goals. Tools may include quarterly performance reports and other data collected during reporting period.

- *Deliverables*: Is the result that clearly defines each item(s) that the project will deliver. Whether it is a *product* or a service, state the reason why the task/item is being executed in the project for the customer—Tribe.

- *Timeline*: Is the road map that outlines the project from start to finish. The document delineates the *major* phases across the schedule of the project's duration. *Milestones*: Breaks down the timeline into manageable parts or tasks. This document should help to monitor the *project's* progress and assist the planned schedule. Key milestones, such as, project kickoffs, meetings, hand offs, and how proposed project activities and services will reach the population identified.

- *Performance Measures and Outcomes*: Is the process that the applicant will use to collect data *and* analyze the services provided to the organization, individual, group, or system (*e.g.*, number of Indian children and families supported in family reunification foster and adoptive homes).

Documentation of Authority To Apply

Applicants applying as an Indian Organizations must submit documentation of authority that demonstrates Tribal support (*e.g.*, a Tribal resolution, letters of support, cooperative service agreements). The documentation must give the Tribal Organization authority to apply for the grant and contain authorized signature(s) by the application due date. Applicants applying as a Tribal consortium must submit documentation of authority to apply from each Tribe and include a copy of the bylaws or other governance documents that allow the consortium's action with the

application. This documentation must give the consortium authority to apply for the grant, contain authorized signature(s), and be submitted by the application due date.

Resume(s)

Provide the resumes (with areas of expertise) of key consultants and personnel, and the nature of their involvement, including their relationship to the applicant as Tribal staff, consultant, subcontractor, etc. This information may be included as an attachment to the application and will not be counted towards the 20-page limitation.

Budget Narrative

Provide a budget narrative that describes separately all major line-item grant expenditures such as personnel, fringe benefits, travel, equipment, supplies, direct client services, contractual, indirect costs, or other major expenditures. Budget narrative must correlate to the project scope of work and clearly break the project down into defined tasks with an associated budget line item for each task. Include justification for each task and identify cost.

Critical Information Page

Applicants must provide proof of its Indian Organization or consortium status as defined in Section II of this notice. Applicants must include a list and the contact information of the Indian Organization Project Lead(s) and personnel. The list must include those individuals that will oversee the project work, make authorized decisions, and is responsible for submitting the quarterly, annual, and the final reports, plus quarterly financial status reports. The designated lead personnel may not be a consultant. The designated Indian Organization Project Lead(s) is authorized to make decisions on the grant activities.

a. Federal Unique Entity Identifier (UEI) Number

Each Indian Organization must verify that it is actively registered in *SAM.gov* (<https://sam.gov/SAM>), and has a Federal UEI number.

b. Active ASAP Enrollment with the BIA

Each Indian Organization must be actively enrolled with the BIA in the Automated Standard Application for Payment (ASAP) system to receive the grant. This information must be provided in the critical information page.

D. Submission of Application in Digital Format

Submission of a complete application in digital form to *grants.gov* is required. For instructions, see <https://www.grants.gov/help/html/help/Applicants/HowToApplyForGrants.htm>. In very limited circumstances, the BIA may accept a non-digital application. Please contact the BIA at least a week prior to the submission deadline for approval. The BIA will not accept or review any incomplete applications. Please use descriptive file names to ensure the BIA quickly locates specific components of the application.

E. Categories of Funding, Review Criteria and Evaluation

Applications will be evaluated for responsiveness to ICWA components under each Funding Category. Review criteria and the scoring system for each Category are identified below.

Project Description and Scoring System

Executive Summary (30 points): The Committee will evaluate the applications based on the clarity and content outlined in the Project Narrative [Executive and Technical Summaries, section VIII, B (1)]. The Committee will assess if the application:

- Demonstrates an understanding of the ICWA.
- Describes examples of other Federal project and/or similar projects for which funding is being requested.
- Describes the current Indian population served and if it operates existing child and family service programs, application contents emphasize the prevention of Indian family breakups and how project(s) will complement these existing services.
- Describes how the applicant understands the challenges faced by the community and how the proposed project clearly defines how it will address these challenges.
- Offers a clearly defined description of the project for the service area that describes service population and geographic area.
- Describes specific services and/or activities with recent baseline data with plans that address gaps in services identified.

Project Objective, Technical Description, and Scope of Work (25 Points)

This criterion will evaluate the project objective, technical description, and scope of work as described in section VIII, B (2). The clarity of the described work and the appropriateness of the project in terms of meeting the intent

and goals of the grant. The Committee will assess if the application:

- Includes activities, in the proposed project, that directly relates to the intent and provisions of the grant.
- Offers examples that reflect an understanding of the social problems or issues affecting the resident Indian client population (including cultural issues) that the applicant proposes to serve and provides a clear link between the proposed activities and the needs identified of the population to be served.
- Includes the technical barriers created by existing public and private programs, for example, availability of transportation, distance between community to be served, specific needs of the Indian clientele and how the proposed project will reach population in the service area identified.
- Presents measurable goals, objectives, and a timeline for implementation of proposed projects that are clearly defined and describes how it will measure its progress in achieving projects goals and objectives.
- Includes documentation that the Indian Organization or consortium has authority to apply for the grant, is legally established, and submits letters of support from the Tribe(s).

Deliverable Products (25 Points)

The Committee will evaluate the extent to which the expected outcome and budget proposal meets the applicant's stated goals, based on the deliverables described below. The Committee will assess if the application:

- Presents a narrative that includes a needs assessment, quantitative data, and demographics of the Indian population to be served.
- Estimates the number of Indian people or families served based on available data.
- Offers a narrative description of the program; the program goals and objectives are stated in measurable terms.
- Includes culturally defined approaches and/or procedures by which the applicant will accomplish the identified goals and objectives.
- Explains the internal monitoring process or describes how it will measure the project's progress and accomplishments.
- Provides a budget narrative that separately describes all major line-item grant expenditures, and it correlates to the project scope of work.
- Clearly breaks the project down into defined tasks with an associated budget line item for each task; includes justification for each task and costs identified.

- Has a budget that includes how the cost of goods and services are determined and how they will fulfill the objectives of the project.

- Has a reasonable budget, based on the resources needed to implement the project(s) in the identified specific geographic location.

Key Personnel and Administration (20 Points)

The BIA, Director will approve all final award selections. The BIA will notify all award applicants in writing.

The Committee will evaluate key personnel experience working with Tribal communities on ICWA related matters. The Committee will assess how the Indian Organizations performs administrative functions and produces quality project deliverables. The Committee will assess if the application:

- Provides proof of its Indian Organization or consortium status.
- Includes resumes that demonstrate key personnel have ICWA experience, and position descriptions.
- Submitted the Federal Assistance form (SF-424).
- Includes a UEI Number.
- Includes certification that the bookkeeping and accounting procedures used meet existing Federal standards for grant administration and management.
- Includes verification, in accordance with 25 U.S.C. 3201 *et seq.* (Pub. L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, that character and background investigations of key personnel is or will be conducted.
- Demonstrates compliance with a Drug-Free Workplace.
- Demonstrates financial management capability by providing its most recent audit report.

F. Transfer of Funding and Transfer of Funds

The BIA's obligation under this solicitation is contingent upon receipt of Congressionally appropriated funds. No liability on the part of the U.S. Government for any payment may arise until funds are made available to the Grants Officer for this award until recipient receives notice of such availability, to be confirmed in writing by the Grant Officer. All payment under this agreement will be made by the U.S. Government by electronic funds transfer (through ASAP). All payments will be deposited in accordance with the banking information designated for the applicant in the System for Award Management (SAM).

G. Reporting Requirements for Award Recipients

During the life of a grant project, deliverables will include a semi-annual project/technical progress updates, and a final written report addressing components outlined in the Scope of Work. Semiannual written progress and financial status reports are to be submitted to the BIA using the *GrantSolutions.gov* portal 30 days following the end of each six month period of performance. Reporting dates will be established by the BIA's Grants Officer in *GrantSolutions.gov* during the awarding process and will coincide with the Federal fiscal year calendar.

The semiannual reports consist of two parts: (1) a narrative report: a summary of events, accomplishments, problems and results during the year, and (2) a financial report SF-425: a list in of expenditures during the quarter, how the funds were spent, and the amount remaining. The project monitor will access the reports in the Grant Solutions system.

Delivery Schedules

The Tribal awardees will deliver all products and data generated under the project to the BIA via the *GrantSolutions.gov* portal within 120 days after project completion, as required by the signed agreement, and may withhold sensitive information (e.g., proprietary Tribal data or Traditional Knowledge). Such information may be redacted at the Tribal government's discretion because information in the possession of the BIA or submitted to the BIA throughout the process, including final work product, constitutes Government records and may be subject to the disclosure to third parties under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Department of the Interior's FOIA regulations at 43 CFR part 2, unless a FOIA exemption or exception applies or other provisions of law protect the information.

Digital Format Requirements for Reports and Data

The BIA requires that all deliverable products and reports be uploaded to *GrantSolutions.gov*. Reports can be provided in Microsoft Word or Adobe Acrobat PDF formats. Spreadsheet data can be provided in Microsoft Excel, Microsoft Access, or Adobe PDF formats. All vector figures should be converted to PDF format. Raster images can be provided in PDF, JPEG, TIFF, or any of the Windows metafile formats.

Number of Copies

The submitted proposal should account for the requirement that all final products be delivered in the format described above, one digital copy.

H. Additional Information

DUNS Registration

Request a DUNS number online at <http://fedgov.dnb.com/webform>. U.S.-based entities may also request a DUNS number by telephone by calling the Dun & Bradstreet Government Customer Response Center, Monday-Friday, 7 a.m. to 8 p.m. CST at the following numbers:

U.S. and U.S Virgin Islands: 1-866-705-5711
Alaska and Puerto Rico: 1-800-234-3867 (Select Option 2, then Option 1)
For Hearing Impaired Customers Only call: 1-877-807-1679 (TTY Line)

Once assigned a DUNS number and UEI, entities are responsible for maintaining up-to date information with Dun & Bradstreet.

Entity Registration in SAM and Printing Confirmation

Registration in System for Award Management (SAM) is required and online at <http://www.sam.gov>. Once registered in SAM with BIA, entities must renew and revalidate their SAM registration at least every 12 months from the date previously registered. Entities are strongly urged to revalidate their registration as often as needed to ensure that their information is up to date and in sync with changes that may have been made to their UEI and IRS information. For SAM assistance, call: 1-866-606-8220. If the tribe's SAM registration name is not exactly the same as the legal name on BIA's list, the tribal organization should contact their local Procurement Technical Assistance Center (PTAC) as soon as possible.

Changing a name can take several weeks. Find your local PTAC at <http://www.dla.mil/HQ/SmallBusiness/PTAC.aspx>. Alaska tribes may also call 1-800-478-7232.

To Print Confirmation Page

- Go to www.sam.gov.
- Click on "Search Records".
- Click on "Quick Search" or "DUNS Number Search" or "CAGE Code Search" query boxes to enter tribe's information (any of these should work).
- Click "Search".
- If correct Entity Name and information are displayed, click "Save PDF" on right side of screen and add that to the application as the attachment for Requirement 2.

Excluded Entities

Applicant entities identified in the SAM.gov Exclusions database as ineligible, prohibited/restricted or excluded from receiving Federal awards, certain subawards, and certain Federal assistance and benefits, will not be considered for Federal funding, as applicable to the funding being requested under this Federal program.

Registration in ASAP With BIA

Although a Tribe or Indian Organization may be registered in the ASAP already with another agency, it must be specifically enrolled with the BIA. To register in ASAP, an enrollment form must be completed and emailed to Jo Ann Metcalfe at jo.metcalfe@bia.gov. As soon as the Tribe or Indian Organization is enrolled, a user ID will be emailed to the point of contact listed on the enrollment form. Next, a password will automatically be mailed by USPS to the Tribe or Indian Organization, but you can call the ASAP Help Desk at 855-868-0151 and press 2 then 3 to reach an agent who can help to request a password via email to expedite the process. Upon receiving a password, you will then have access to your online ASAP account for setup. To complete the enrollment, call the ASAP Help Desk again and remain on the line with them while they assist you in setting up and linking the Tribe's banking information to BIA's Agency Locator Code (ALC/Region). BIA's ALC is 14200699. Once this is completed, you will receive a confirmation email and it will take the Treasury 5-10 business days to approve your ASAP enrollment with BIA. This process only needs to be done once and does not need to be regularly updated unless the individual who had the primary role for the Tribe or Tribal organization in ASAP set-up changes.

Bryan Newland,

Assistant Secretary—Indian Affairs.

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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/
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Fiscal Year 2023 List of Programs Eligible for Inclusion in Funding Agreements Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs; Fiscal Year 2024 Programmatic Targets

AGENCY: Office of the Secretary, Interior.
ACTION: Notice.

SUMMARY: This notice lists: fiscal year 2024 programmatic targets for each of the non-Bureau of Indian Affairs (BIA) bureaus in the Department of the Interior (Department), pursuant to title IV of the Act, as amended, and list of fiscal year 2023 programs or portions of programs eligible for inclusion in self-governance funding agreements with Indian Tribes. Revisions to this list are based upon feedback received during Tribal Consultations held in January 2023 on what information would be most helpful to Indian Tribes seeking ways to develop collaborative arrangements in the co-stewardship of Federal lands and waters.

DATES: Programs on this list are eligible for inclusion in self-governance funding agreements until September 30, 2024.

ADDRESSES: Inquiries or comments regarding this notice may be directed to the bureau-specific points of contact listed below.

FOR FURTHER INFORMATION CONTACT: Contacts from the following bureaus and offices are available to answer questions:

- *Office of Self Governance:* Vickie Hanvey, Program Policy Analyst, Office of Self Governance; telephone: (918) 931-0745; email: vickie.hanvey@bia.gov.
- *Bureau of Land Management:* Byron Loosle, Division Chief for National Conservation Lands; telephone: (202) 302-1442; email: bloosle@blm.gov.
- *Bureau of Reclamation:* Mr. Kelly Titensor, Native American Affairs Advisor; telephone: (202) 513-0558; email: ktitensor@usbr.gov.
- *Office of Natural Resources Revenue:* Bethany Hagen-Templin, Tribal Liaison Officer; telephone: 303-231-3667; email: onrrtriballiaisonofficer@onrr.gov.
- *National Park Service:* Dorothy FireCloud, Native American Affairs Liaison; telephone: (202) 354-2090; email: dorothy_firecloud@nps.gov.
- *U.S. Fish and Wildlife Service:* Scott Aikin, National Native American

Programs Coordinator; telephone: (202) 285-3411; email: scott_aikin@fws.gov.

- *U.S. Geological Survey:* Chris Hammond, Head, Office of Tribal Relations; telephone: (703) 648-6621; email: chammond@usgs.gov.

- *Bureau of Trust Funds Administration:* Lee Frazier, Program Analyst; telephone: (202) 208-7587; email: lee_frazier@btfa.gov.

- *Appraisal and Valuation Services Office (AVSO):* Eldred F. Lesansee, Associate Deputy Director, Office of Tribal Sovereignty; telephone: (505) 414-3805; email: eldred_lesansee@ios.doi.gov.

Alternatively, inquiries may also be submitted by mail to: Director, Office of Self Governance, 1849 C Street NW—3624 MIB. U.S. Department of the Interior, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: Title IV of the Indian Self-Determination and Education Assistance Act (Act), Public Law 93-638, instituted a permanent self-governance program for each of the Department bureaus other than the BIA. Under the self-governance program, certain programs, services, functions, and activities, or portions thereof, in Department bureaus other than the BIA are eligible to be planned, conducted, consolidated, and administered by a self-governance Tribe.

Section 412(c) of the Act requires the Secretary of the Interior (Secretary) to annually publish a list of, and programmatic targets for, non-BIA programs, services, functions, and activities, or portions thereof, that are eligible for inclusion in agreements negotiated under the self-governance program.

I. Background

Two kinds of non-BIA programs are eligible for self-governance funding agreements. section 403(b)(2) of the Act provides that any non-BIA program, service, function, or activity that is administered by the Department that is “otherwise available to Indian tribes or Indians” can be administered by a Tribe through a self-governance funding agreement. The Department interprets this provision to authorize the inclusion of programs eligible for self-determination contracts under title I of the Act. Section 403(b)(2) also specifies, “nothing in this subsection may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided for by law.” Section 403(c) of the Act adds that the Secretary may include other programs, services, functions, and

activities or portions thereof that are of “special geographic, historical, or cultural significance” to a participating self-governance Tribe. Subpart G of the self-governance regulations (25 CFR 1000) provides the process and timelines for negotiating self-governance funding agreements with non-BIA bureaus.

Section 403(k) of the Act provides that funding agreements may not include programs, services, functions, or activities that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the Tribe. However, an Indian Tribe (or Tribes) need not be identified in the authorizing statutes in order for a program or element of a program to be included in a self-governance funding agreement. While general legal and policy guidance regarding what constitutes an inherently Federal function exists, the non-BIA bureaus will determine whether a specific function is inherently Federal on a case-by-case basis considering the totality of circumstances.

II. Principles Governing Non-BIA Self-Governance Programs Eligible for Inclusion in Self-Governance Funding Agreements

In January 2023, the Assistant Secretary—Indian Affairs held three Tribal Consultations on what information would be most helpful to Indian Tribes seeking ways to develop collaborative arrangements in the co-stewardship of Federal lands and waters. The Department received three oral comments and two written comments:

- Two of the oral comments asked for the location of the list of non-BIA programs. This **Federal Register** constitutes the Department’s listing of eligible programs. The Department welcomes feedback on ways in which the list may be further improved. The final oral comment asked that any future list identify all non-BIA programs which may be eligible for integration into a Tribal plan under Public Law 102–477. The Department is unable to determine whether implementation of a non-BIA program in a specific instance would meet the purposes set forth in 25 U.S.C. 3404(a)(1)(A), before a Tribe proposes integration. Nevertheless, the Department is firmly committed to promoting Tribal sovereignty through the integration of programs and funds from the Department of the Interior in a Tribal plan under Public Law 102–477, including from non-BIA programs.
- The first written comment was from the Department’s Appraisal and

Valuation Services Office (AVSO). That comment shared that one Tribe has assumed AVSO’s operations, that AVSO has not experienced significant growth of Tribes contracting, and that AVSO believes additional guidance on the principles governing contracting, self-governance agreements, and compacting under the Act should be included in the List.

- The second written comment was from a Tribe and asked that agencies strive for consensus with Tribes and a mutually desired outcome. The Tribal comment also asks that the List include all current and expired contracts and compacts, establish a searchable database of all funding agreements and compacts, designate self-governance contacts in all Department bureaus, and create a guidance document for non-BIA self-governance programs.

Based on feedback from Consultation, the Department includes in this year’s **Federal Register** Notice general guidance on principles governing non-BIA self-governance programs eligible for inclusion in self-governance funding agreements. As a foundational matter, self-governance compacts may include federal programs, services, functions, or activities administered by the Department other than through the Bureau of Indian Affairs that are otherwise available to Indian tribes or Indians. Self-governance compacts may also include other programs, services, functions, and activities, or portions thereof which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact. The Department has interpreted this language as granting the government discretion to fund programs that may coincidentally benefit Indians but that are national in scope and are not by definition programs for the benefit of Indians because of their status as Indians.

Pursuant to S.O. 3403, the Departments’ agencies have a directive to facilitate agreements with Tribes to collaborate in the co-stewardship of Federal lands and waters and to strengthen Tribal homelands. Pursuant to Executive Order 13175, the Department supports Tribal sovereignty and self-determination, and encourages Indian Tribes to develop their own policies to achieve the objectives of the Act for non-BIA Programs. Where possible, the Department will defer to Indian Tribes to establish standards for non-BIA Programs. Together, these policy documents demonstrate, and the Department reiterates, a desire to further inclusion of non-BIA programs in self-governance funding agreements.

III. Programmatic Target for Fiscal Year 2024

The programmatic target for fiscal year 2024 provides that, upon request of a self-governance Tribe, each non-BIA bureau will negotiate funding agreements for its eligible programs beyond those already negotiated.

Self-governance compacts may include programs, services, functions, or activities administered by the Department other than through the BIA that are otherwise available to Indian tribes or Indians and may also include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact. This grants the Department the discretion to fund programs that may coincidentally benefit Indians but that are national in scope and are not by definition programs for the benefit of Indians because of their status as Indians.

This section lists by bureau examples of the types of non-BIA programs, or portions thereof, that may be eligible for self-governance funding agreements because they are either “otherwise available to Indians” under title I of the Act and not precluded by any other law, or that may have “special geographic, historical, or cultural significance” to a participating Tribe. The list represents examples of the programs that may be available to Tribes under a self-governance funding agreement, and is neither complete, exhaustive, nor indicative of a final determination on any program.

The Department may include in funding agreements other programs or activities not listed below which, upon request of a self-governance Tribe, the Department determines to be eligible under either sections 403(b)(2) or 403(c) of the Act. Tribes interested in doing so are encouraged to begin discussions with the appropriate non-BIA bureau.

The Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce have issued Joint Secretarial Order No. 3403 on fulfilling the trust responsibility to Tribes in the stewardship of Federal lands and waters. Pursuant to S.O. 3403, the Department is committed to facilitating agreements with Tribes for the collaborative and cooperative stewardship of Federal lands and waters.

A. Eligible Bureau of Land Management Programs

Congress tasked the Bureau of Land Management (BLM) with a mandate of

managing public lands for a variety of uses such as energy development, livestock grazing, recreation, and timber harvesting while ensuring natural, cultural, and historic resources are maintained for present and future use. BLM carries out some of its public land management activities through contracts and cooperative agreements. These and other activities may be available for inclusion in self-governance funding agreements depending upon availability of funds, the need for specific services, and the self-governance Tribe's demonstration of a special geographic, cultural, or historical significance. Tribes may obtain further information on specific activities that may be available for inclusion in a self-governance funding agreement from the relevant BLM State office.

Some elements of the following non-exclusive list of BLM programs may be eligible for inclusion in a self-governance funding agreement:

- *Minerals Management Inspection, Enforcement, and Production.*

Verification of Indian coal and sand and gravel operations is already available for contracting under title I of the Act and, therefore, may be available for inclusion in a funding agreement. In addition, in a study conducted pursuant to Secretarial Order 3377, the Department of the Interior Office of the Solicitor determined that the following functions are available for inclusion in a funding agreement: inspection and enforcement of Indian oil and gas operations; determining trust land locations; approving applications for permits to drill; securing and enforcing bonds (for surface of spill estate); and providing mineral assessments and valuation;

- *Cadastral Survey.* Tribal and allottee cadastral survey services are already available for contracting under title I of the Act and, therefore, may be available for inclusion in a funding agreement;

- *Cultural Heritage.* Cultural heritage activities such as research and inventory may be available in specific States;

- *Natural Resources Management.*

Activities such as silvicultural treatments, timber management, cultural resource management, watershed restoration, environmental studies, tree planting, and tree thinning may be available in specific States;

- *Range Management.* Activities such as revegetation, noxious weed control, fencing, construction and management of range improvements, grazing management experiments, and range monitoring may be available in specific States;

- *Riparian Management.* Activities such as facilities construction, erosion

control, and rehabilitation may be available in specific States;

- *Recreation Management.* Activities such as facilities construction and maintenance, and interpretive design and interpretive construction, and similar activities may be available in specific States;

- *Wildlife and Fisheries Habitat Management.* Activities such as construction and maintenance; implementation of statutory, regulatory, and policy or administrative plan-based species protection; and interpretive design and construction and similar activities may be available in specific States; and

- *Wild Horse Management.* Activities such as wild horse roundups, adoption, and disposition, including operation and maintenance of wild horse facilities, may be available in specific States.

B. Eligible Bureau of Reclamation Programs

The mission of the Bureau of Reclamation (Reclamation) is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public. Reclamation water resources projects provide water for agricultural, municipal, and industrial water supplies use; hydroelectric power generation; flood control; enhancement of fish and wildlife habitats; and outdoor recreation. To this end, most of Reclamation's activities involve the construction, operation, maintenance, and management of water resources projects and associated facilities, as well as research and development related to Reclamation's responsibilities. Upon the request of a self-governance Tribe, Reclamation will consider including programs or activities which Reclamation determines to be eligible under section 403(b)(2) or 403(c) of the Act in self-governance funding agreements.

Some elements of the following non-exclusive list of Reclamation water resource projects, which was developed with consideration of their proximity to identified self-governance Tribes, may be eligible for inclusion in a self-governance funding agreement:

- Klamath Project, California and Oregon;
- Trinity River Fishery, California;
- Central Arizona Project, Arizona; and
- Indian Water Rights Settlement Projects, as authorized by Congress.

C. Eligible Office of Natural Resources Revenue Programs

The Office of Natural Resources Revenue (ONRR) collects, accounts for, verifies, and distributes mineral revenues from both Federal and Indian mineral leases. ONRR also evaluates industry compliance with laws, regulations, and lease terms, and offers mineral-owning Tribes opportunities to become involved in ONRR programs that address the intent of Tribal self-governance, providing self-governance Tribes with good preparation for assuming other technical functions. ONRR program functions are generally available to Tribes pursuant to the Federal Oil and Gas Royalty Management Act of 1983 (FOGRMA; 30 U.S.C. 1701 *et seq.*).

The following ONRR program functions may be eligible for inclusion in a self-governance funding agreement:

- *Audit of Tribal Royalty Payments.* Audit activities for Tribal leases, except for the issuance of orders, final valuation decisions, and other enforcement activities. (This program is offered as an option for Tribes already participating in ONRR cooperative audits);

- *Verification of Tribal Royalty Payments.* Financial compliance verification, monitoring activities, and production verification;

- *Tribal Royalty Reporting, Accounting, and Data Management.* Establishment and management of royalty reporting and accounting systems, including document processing, production reporting, reference data (lease, payor, agreement) management, billing, and general ledger;

- *Tribal Royalty Valuation.* Preliminary analysis and recommendations for valuation, and allowance determinations and approvals; and

- *Royalty Internship Program.* An orientation and training program for auditors and accountants from mineral-producing Tribes to acquaint Tribal staff with royalty laws, procedures, and techniques. This program is recommended for Tribes that are considering a self-governance funding agreement but have not yet acquired mineral revenue expertise via a 30 U.S.C. 1732 cooperative agreement (FOGRMA; Pub. L. 97-451, section 202), as this term is defined in FOGRMA and implementing regulations at 30 CFR 228.4.

D. Eligible National Park Service Projects

The mission of the National Park Service (NPS) is to preserve the

unimpaired natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations.

The NPS administers the National Park System, which provides resource park management technical, operational, and training assistance to Tribal Governments. NPS consists of 420+ national parks, monuments, historic sites, battlefields, seashores, lake shores and recreation areas. NPS units protect natural and cultural resources on these Federal lands and conduct a range of visitor services such as law enforcement, park maintenance, and interpretation of geology, history, and natural and cultural resource management.

NPS projects listed below may be eligible for inclusion in a self-governance funding agreement. Proximity to an NPS unit is not a barrier for entering into such an agreement and should be based on shared stewardship goals where associated Tribal interests are shared with unit operations. All NPS units sit on Indigenous homelands and bear Indigenous interests and unique oral histories.

The list below is not all inclusive, but is representative of the types of elements of projects which may be eligible for Tribal participation through self-governance funding agreements:

- *Archaeological Surveys*
- *Climate Change Planning, Mitigation, and Adaptation Projects*
- *Comprehensive Management Planning*
- *Cultural Landscape Study and Maintenance*
- *Cultural Resource Management Projects*
- *Ethnographic Studies*
- *Erosion Control*
- *Fire Protection and Training*
- *Post-Fire Stabilization and Rehabilitation Projects*
- *Gathering Baseline Subsistence Data—Alaska*
- *Hazardous Fuel Reduction*
- *Housing Construction and Rehabilitation*
- *Interpretation and Education—to Include Programs, Signage, Vendors, Demonstrations, Multi-Media*
- *Interpreting Tribal History*
- *Janitorial Services*
- *Preservation and Perpetuation of Language & Tribal Lifeways*
- *Maintenance*

- *Management and Care of Museum Collections*
- *Natural Resource Management Projects*
- *Operation and Maintenance of Campgrounds, Serpentine, Marinas, and Other Administrative Facilities*
- *Preservation and Sharing of Cultural and Indigenous Knowledge*
- *Range Assessment—Alaska*
- *Reindeer Grazing—Alaska*
- *Road and Trail Maintenance, Repairs, and Upgrades*
- *Shelter Cabin Maintenance and Upgrades*
- *Solid Waste Collection and Disposal*
- *Trail Construction and Rehabilitation*
- *Visitor Center services*
- *Youth Projects*
- *Watershed Assessments, Restoration and Maintenance*
- *Beringia Research*
- *Elwha and Other River Restoration Projects*
- *Recycling Projects*
- *Visitor Center Services*
- *Historic Preservation Activities*

Self-governance Tribes associated to the various NPS system units can begin the process by writing a letter of interest to the respective Park Superintendent.

E. Eligible U.S. Fish and Wildlife Service Programs

The mission of the U.S. Fish and Wildlife Service (Service) is to conserve, protect, and enhance fish, wildlife, and their habitats for the continuing benefit of the American people. The Service's primary responsibilities involve migratory birds, endangered species, freshwater and anadromous fisheries, and certain marine mammals. The Service has continuing cooperative relationships with several Indian Tribes regarding the National Wildlife Refuge System and the Service's fish hatcheries. Any self-governance Tribe may contact a national wildlife refuge or national fish hatchery directly concerning participation in Service programs under the Tribal Self-Governance Act.

The following non-exclusive list of Service programs is representative of the types of programs that may be eligible for inclusion in a self-governance funding agreement:

- *Subsistence programs within the State of Alaska.* Evaluate and analyze data for annual subsistence regulatory cycles and other data trends related to subsistence harvest needs and facilitate

Tribal Consultation to ensure that title VII terms of the Alaska National Interest Lands Conservation Act (ANILCA; Pub. L. 96-487) are being met, as well as activities fulfilling the terms of title VIII of ANILCA;

- *Technical Assistance, Restoration, and Conservation.* Conduct planning and implementation of population surveys, habitat surveys, restoration of sport fish, capture of depredating migratory birds, and habitat restoration activities;

- *Endangered Species Programs.* Conduct activities associated with the conservation and recovery of threatened or endangered species protected under the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*) or candidate species under the ESA. These activities may include, but are not limited to, cooperative conservation programs, development of recovery plans and implementation of recovery actions for threatened and endangered species, and implementation of status surveys for high-priority candidate species;

- *Education Programs.* Provide services in interpretation, outdoor classroom instruction, visitor center operations, and volunteer coordination both on and off national wildlife refuge lands in a variety of communities and assist with environmental education and outreach efforts in local villages;

- *Environmental Contaminants Program.* Conduct activities associated with identifying and removing toxic chemicals, to help prevent harm to fish, wildlife, and their habitats. The activities required for environmental contaminant management may include, but are not limited to, analysis of pollution data, removal of underground storage tanks, specific cleanup activities, and field data gathering efforts;

- *Wetland and Habitat Conservation Restoration.* Provide services for construction, planning, and habitat monitoring and activities associated with conservation and restoration of wetland habitat;

- *Fish Hatchery Operations.* Conduct activities to recover aquatic species listed under the ESA, restore native aquatic populations, and provide fish to benefit national wildlife refuges and Tribes. Such activities may include, but are not limited to tagging, rearing, and feeding of fish; disease treatment; and clerical or facility maintenance at a fish hatchery; and

- *National Wildlife Refuge Operations and Maintenance.* Conduct activities to assist the National Wildlife Refuge System, a national network of lands and waters for conservation, management, and restoration of fish, wildlife and plant resources and their habitats within the United States. Activities that may be eligible for a self-governance funding agreement may include, but are not limited to construction, farming, concessions, maintenance, biological program efforts, habitat management, fire management, and implementation of comprehensive conservation planning.

F. Eligible U.S. Geological Survey Programs

The U.S. Geological Survey (USGS) is a scientific research bureau whose mission is to monitor, analyze, and predict current and evolving Earth-system interactions and deliver actionable information at scales and timeframes relevant to decision makers. This information is usually publicly available and includes reports, maps, databases, and descriptions and analyses of the water, plants, animals, energy, and mineral resources, land surface, underlying geologic structure, and dynamic processes of the earth. The USGS does not manage lands or resources. Self-governance Tribes may potentially assist the USGS in the data acquisition and analysis components of USGS's activities.

G. Eligible Bureau of Trust Funds Administration Programs

Secretarial Order 3384, authorized the establishment of the Bureau of Trust Funds Administration (BTFA) which reports to the Office of the Assistant Secretary—Indian Affairs. BTFA is responsible for the management (receipting, investing, disbursing, reconciling and reporting) of the monetary assets of American Indians held in trust by the Department of the Interior. BTFA also maintains the official archive of American Indian Records. This program safeguards millions of original historic documents that detail the Federal Government's treaty obligation to Native Americans.

A Tribe operating under self-governance may include the following programs, services, functions, and activities or portions thereof, in a funding agreement:

- *Beneficiary Processes Program (Individual Indian Money Accounting Technical Functions).* The memorandum of understanding (MOU) between the Tribe/Consortium and BTFA outlines the roles and responsibilities for the performance of

the BTFA program by the Tribe/Consortium. If those roles and responsibilities are already fully specified in the existing funding agreement with the Office of Self-Governance (OSG), an MOU is not necessary. To the extent that the parties desire specific program standards, an MOU will be negotiated between the Tribe/Consortium and BTFA, which will be binding on both parties and attached and incorporated into the OSG funding agreement. If a Tribe/Consortium decides to assume the operation of a BTFA program, the new funding for performing that program will come from BTFA program dollars. A Tribe's newly assumed operation of the BTFA program(s) will be reflected in the Tribe's OSG funding agreement.

H. Eligible Appraisal and Valuation Services Office Programs

The mission of the Appraisal and Valuation Services Office (AVSO) is to provide credible, timely, and efficient valuation services to ensure the Department's fiduciary responsibilities are met for Tribes and beneficiaries in trust and restricted-fee real property transactions, and to uphold public trust in Federal real property transactions. AVSO provides appraisal, valuation, mineral evaluation, and real property consulting expertise to Indian beneficiaries, Federal clients, and other stakeholders in accordance with the highest professional and ethical standards and is responsible for all real property appraisal and valuation services within the Department of the Interior. AVSO is comprised of three regions (Western, Central and Eastern) serving all of Indian Country as well as all DOI bureaus, agencies and offices. AVSO's Mineral Evaluations Division is tasked with providing mineral assessments and evaluations for DOI.

These and other activities may be available for inclusion in self-governance funding agreements depending upon availability of funds, the need for specific services, and the self-governance Tribe's demonstration of a special geographic, cultural, or historical significance. Tribes may obtain further information on specific activities that may be available for inclusion in a self-governance funding agreement.

Some elements of the following non-exclusive list of AVSO programs, functions, services and activities may be eligible for inclusion in a self-governance funding agreement:

- Appraisal and valuation functions for Indian trust and restricted fee real property

- Appraisal review function for appraisals prepared for Departmental use
- Appraisal and valuation functions for Federal real property
- Appraisals and evaluation functions for Indian and Federal minerals
- Real property consultation services

The MOU between the Tribe/Consortium and AVSO outlines the roles and responsibilities for the performance of the AVSO program by the Tribe/Consortium. An MOU will be negotiated between the Tribe/Consortium and AVSO, which will be binding on both parties and attached and incorporated into the OSG funding agreement. If a Tribe/Consortium decides to assume the operation of an AVSO program, the new funding for performing that program will come from AVSO program dollars. A Tribe's newly-assumed operation of an AVSO program will be reflected in the Tribe's OSG funding agreement.

IV. Funding Agreements Between Self-Governance Tribes and Non-BIA Bureaus of the Department of the Interior for Fiscal Year 2023

This section provides information on the Tribes with which the Department of the Interior's non-BIA Bureaus have entered self-governance funding agreements for fiscal year 2023. The Department is exploring ways to make available a historic list of agreements in prior fiscal years.

A. Bureau of Land Management

The Bureau of Land Management has entered funding agreements with the following Tribes for fiscal year 2023:

- Council of Athabascan Tribal Governments; and
- Duckwater Shoshone Tribe of the Duckwater Reservation.

B. Bureau of Reclamation

The Bureau of Reclamation has entered funding agreements with the following Tribes for fiscal year 2023:

- Gila River Indian Community of the Gila River Indian Reservation;
- Hoopa Valley Tribe;
- Karuk Tribe; and
- Yurok Tribe of the Yurok Reservation.

C. Office of Natural Resources Revenue

The Office of Natural Resources Revenue has entered no funding agreements with any Tribes for fiscal year 2023.

D. National Park Service

The National Park Service has entered into funding agreements with the following Tribes for fiscal year 2023:

- Grand Portage Band of Lake Superior Chippewa Indians—Minnesota Chippewa Tribe and Grand Portage National Monument;
- Wyandotte Nation and River Raisin National Battlefield;
- Kawerak, Inc. and Bering Land Bridge National Preserve;
- Pueblo of Santa Clara and Valles Caldera National Preserve; and
- Yurok Tribe of the Yurok *COM007* Reservation and Redwood National Park

E. Fish and Wildlife Service

The Fish and Wildlife Service has entered a funding agreement with the following Tribe for fiscal year 2023:

- Council of Athabascan Tribal Governments.

F. U.S. Geological Survey

The U.S. Geological Survey has entered no self-governance funding agreements with any Tribes for fiscal year 2023.

G. Bureau of Trust Fund Administration

The Bureau of Trust Fund Administration has entered a funding agreement with the following Tribe for fiscal year 2023:

- Confederated Salish and Kootenai Tribes of the Flathead Reservation.

H. Appraisal and Valuation Services Office

The Appraisal and Valuation Services Office has entered funding agreements with the following Tribes for fiscal year 2023:

- Quapaw Nation;
- Morongo Band of Mission Indians;
- Muckleshoot Indian Tribe;
- Pueblo of Taos;
- Confederated Tribes of the Umatilla Indian Reservation;
- Association of Village Council Presidents;
- Kawerak, Inc.;
- Native Village of Tanana;
- Tanana Chiefs Conference (includes Gwichyaa Gwich'in, aka Fort Yukon);
- Central Council of the Tlingit and Haida Indian Tribes;
- Cherokee Nation;
- The Choctaw Nation of Oklahoma;
- Eastern Shawnee Tribe of Oklahoma;
- The Muscogee (Creek) Nation;
- Wyandotte Nation;
- Oneida Nation;
- Confederated Salish and Kootenai Tribes of the Flathead Reservation;
- Lummi Tribe of the Lummi Reservation;
- Port Gamble S'Klallam Tribes;
- Confederated Tribes of Siletz Indians of Oregon;

- Hoopa Valley Tribe;
- Redding Rancheria;
- Chippewa Cree Indians of the Rocky Boy's Reservation;
- Absentee-Shawnee Tribe of Indians of Oklahoma;
- Citizen Potawatomi Nation, Oklahoma;
- Kaw Nation, Oklahoma;
- Sac and Fox Nation, Oklahoma;
- Salt River Pima-Maricopa Indian Community of the Salt River Reservation;
- Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada; and
- The Osage Nation.

V. Authority

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1.

Bryan Newland,

Assistant Secretary—Indian Affairs.

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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

**[234A2100DD/AAKC001030/
A0A501010.999900]**

Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the current list of 574 Tribal entities recognized by and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes.

DATES: The list is updated from the notice published on January 12, 2023 (88 FR 2112).

FOR FURTHER INFORMATION CONTACT: Ms. Johnna Blackhair, Bureau of Indian Affairs, Acting Deputy Director, Office of Indian Services, Mail Stop 3645–MIB, 1849 C Street NW, Washington, DC 20240. Telephone number: (202) 513–7641.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to section 104 of the Act of November 2, 1994 (Pub. L. 103–454; 108 Stat. 4791, 4792), in accordance with section 83.6(a) of part 83 of Title 25 of the Code of Federal Regulations, and in exercise of authority delegated to the Assistant Secretary—Indian Affairs under 25 U.S.C. 2 and 9

and 209 DM 8. Published below is an updated list of federally recognized Indian Tribes within the contiguous 48 states and Alaska. Amendments to the list include formatting edits and name changes.

This update returns to the List: (1) the Native Village of Venetie Tribal Government; and (2) Pribilof Islands Aleut Communities of St. Paul & St. George Islands. On January 28, 2022, the BIA published its list of Tribal entities recognized by and eligible for BIA funding and services by virtue of their status as Indian tribes (“2022 List”). The 2022 List, as well as the subsequent List published on January 12, 2023, included a clarification on the listing of the Native Village of Venetie Tribal Government and Pribilof Islands Aleut Communities of St. Paul & St. George Islands, and removed those groups from the List of tribes. Upon further review, the BIA has withdrawn that clarification and returns these Alaska Native entities to the List as set forth in 1993 and every year thereafter until the 2022 list.

The listed Indian entities are recognized to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their Government-to-Government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Indian Tribes. The BIA has continued the practice of listing the Alaska Native entities separately for the purpose of facilitating identification of them.

There is a total of 347 federally recognized Indian Tribes within the contiguous 48 states and 227 federally recognized Tribal entities within the state of Alaska that comprise the 574 federally recognized Indian Tribes of the United States.

Bryan Newland,

Assistant Secretary—Indian Affairs.

Indian Tribal Entities Within the Contiguous 48 States Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs (347 Federally Recognized Indian Tribes Within the Contiguous 48 States)

Absentee-Shawnee Tribe of Indians of Oklahoma
 Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California
 Ak-Chin Indian Community
 Alabama-Coushatta Tribe of Texas
 Alabama-Quassarte Tribal Town
 Alturas Indian Rancheria, California
 Apache Tribe of Oklahoma
 Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana

Augustine Band of Cahuilla Indians, California
 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin
 Bay Mills Indian Community, Michigan
 Bear River Band of the Rohnerville Rancheria, California
 Berry Creek Rancheria of Maidu Indians of California
 Big Lagoon Rancheria, California
 Big Pine Paiute Tribe of the Owens Valley
 Big Sandy Rancheria of Western Mono Indians of California
 Big Valley Band of Pomo Indians of the Big Valley Rancheria, California
 Bishop Paiute Tribe
 Blackfeet Tribe of the Blackfeet Indian Reservation of Montana
 Blue Lake Rancheria, California
 Bridgeport Indian Colony
 Buena Vista Rancheria of Me-Wuk Indians of California
 Burns Paiute Tribe
 Cabazon Band of Cahuilla Indians (Previously listed as Cabazon Band of Mission Indians, California)
 Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California
 Caddo Nation of Oklahoma
 Cahto Tribe of the Laytonville Rancheria
 Cahuilla Band of Indians
 California Valley Miwok Tribe, California
 Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California
 Capitan Grande Band of Diegueno Mission Indians of California (Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California)
 Catawba Indian Nation
 Cayuga Nation
 Cedarville Rancheria, California
 Chemehuevi Indian Tribe of the Chemehuevi Reservation, California
 Cher-Ae Heights Indian Community of the Trinidad Rancheria, California
 Cherokee Nation
 Cheyenne and Arapaho Tribes, Oklahoma
 Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota
 Chickahominy Indian Tribe
 Chickahominy Indian Tribe—Eastern Division
 Chicken Ranch Rancheria of Me-Wuk Indians of California
 Chippewa Cree Indians of the Rocky Boy's Reservation, Montana
 Chitimacha Tribe of Louisiana
 Citizen Potawatomi Nation, Oklahoma
 Cloverdale Rancheria of Pomo Indians of California
 Cocopah Tribe of Arizona
 Coeur D'Alene Tribe
 Cold Springs Rancheria of Mono Indians of California
 Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California
 Comanche Nation, Oklahoma
 Confederated Salish and Kootenai Tribes of the Flathead Reservation
 Confederated Tribes and Bands of the Yakama Nation
 Confederated Tribes of Siletz Indians of Oregon
 Confederated Tribes of the Chehalis Reservation
 Confederated Tribes of the Colville Reservation
 Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians
 Confederated Tribes of the Goshute Reservation, Nevada and Utah
 Confederated Tribes of the Grand Ronde Community of Oregon
 Confederated Tribes of the Umatilla Indian Reservation
 Confederated Tribes of the Warm Springs Reservation of Oregon
 Coquille Indian Tribe
 Coushatta Tribe of Louisiana
 Cow Creek Band of Umpqua Tribe of Indians
 Cowlitz Indian Tribe
 Coyote Valley Band of Pomo Indians of California
 Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota
 Crow Tribe of Montana
 Delaware Nation, Oklahoma
 Delaware Tribe of Indians
 Dry Creek Rancheria Band of Pomo Indians, California
 Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada
 Eastern Band of Cherokee Indians
 Eastern Shawnee Tribe of Oklahoma
 Eastern Shoshone Tribe of the Wind River Reservation, Wyoming
 Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California
 Elk Valley Rancheria, California
 Ely Shoshone Tribe of Nevada
 Enterprise Rancheria of Maidu Indians of California
 Ewiiapaayp Band of Kumeyaay Indians, California
 Federated Indians of Graton Rancheria, California
 Flandreau Santee Sioux Tribe of South Dakota
 Forest County Potawatomi Community, Wisconsin
 Fort Belknap Indian Community of the Fort Belknap Reservation of Montana
 Fort Bidwell Indian Community of the Fort Bidwell Reservation of California
 Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California
 Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada and Oregon
 Fort McDowell Yavapai Nation, Arizona
 Fort Mojave Indian Tribe of Arizona, California & Nevada
 Fort Sill Apache Tribe of Oklahoma
 Gila River Indian Community of the Gila River Indian Reservation, Arizona
 Grand Traverse Band of Ottawa and Chippewa Indians, Michigan
 Greenville Rancheria
 Grindstone Indian Rancheria of Wintun-Wailaki Indians of California
 Guidiville Rancheria of California
 Habematolel Pomo of Upper Lake, California
 Hannahville Indian Community, Michigan
 Havasupai Tribe of the Havasupai Reservation, Arizona
 Ho-Chunk Nation of Wisconsin
 Hoh Indian Tribe
 Hoopa Valley Tribe, California
 Hopi Tribe of Arizona
 Hopland Band of Pomo Indians, California
 Houlton Band of Maliseet Indians
 Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona
 Iipay Nation of Santa Ysabel, California
 Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California
 Ione Band of Miwok Indians of California
 Iowa Tribe of Kansas and Nebraska
 Iowa Tribe of Oklahoma
 Jackson Band of Miwok Indians
 Jamestown S'Klallam Tribe
 Jamul Indian Village of California
 Jena Band of Choctaw Indians
 Jicarilla Apache Nation, New Mexico
 Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona
 Kalispel Indian Community of the Kalispel Reservation
 Karuk Tribe
 Kashia Band of Pomo Indians of the Stewarts Point Rancheria, California
 Kaw Nation, Oklahoma
 Keweenaw Bay Indian Community, Michigan
 Kialegee Tribal Town
 Kickapoo Traditional Tribe of Texas
 Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas
 Kickapoo Tribe of Oklahoma
 Kiowa Indian Tribe of Oklahoma
 Klamath Tribes
 Kletsel Dehe Wintun Nation of the Cortina Rancheria (Previously listed as Kletsel Dehe Band of Wintun Indians)
 Koi Nation of Northern California
 Kootenai Tribe of Idaho

La Jolla Band of Luiseno Indians, California	Mohegan Tribe of Indians of Connecticut	Ponca Tribe of Nebraska
La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California	Monacan Indian Nation	Port Gamble S'Klallam Tribe
Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin	Mooretown Rancheria of Maidu Indians of California	Potter Valley Tribe, California
Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin	Morongo Band of Mission Indians, California	Prairie Band Potawatomi Nation
Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan	Muckleshoot Indian Tribe	Prairie Island Indian Community in the State of Minnesota
Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada	Nansemond Indian Nation	Pueblo of Acoma, New Mexico
Little River Band of Ottawa Indians, Michigan	Narragansett Indian Tribe	Pueblo of Cochiti, New Mexico
Little Shell Tribe of Chippewa Indians of Montana	Navajo Nation, Arizona, New Mexico, & Utah	Pueblo of Isleta, New Mexico
Little Traverse Bay Bands of Odawa Indians, Michigan	Nez Perce Tribe	Pueblo of Jemez, New Mexico
Lone Pine Paiute-Shoshone Tribe	Nisqually Indian Tribe	Pueblo of Laguna, New Mexico
Los Coyotes Band of Cahuilla and Cupeno Indians, California	Nooksack Indian Tribe	Pueblo of Nambe, New Mexico
Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada	Northern Arapaho Tribe of the Wind River Reservation, Wyoming	Pueblo of Picuris, New Mexico
Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota	Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana	Pueblo of Pojoaque, New Mexico
Lower Elwha Tribal Community	Northfork Rancheria of Mono Indians of California	Pueblo of San Felipe, New Mexico
Lower Sioux Indian Community in the State of Minnesota	Northwestern Band of the Shoshone Nation	Pueblo of San Ildefonso, New Mexico
Lummi Tribe of the Lummi Reservation	Nottawaseppi Huron Band of the Potawatomi, Michigan	Pueblo of Sandia, New Mexico
Lytton Rancheria of California	Oglala Sioux Tribe	Pueblo of Santa Ana, New Mexico
Makah Indian Tribe of the Makah Indian Reservation	Ohkay Owingeh, New Mexico	Pueblo of Santa Clara, New Mexico
Manchester Band of Pomo Indians of the Manchester Rancheria, California	Omaha Tribe of Nebraska	Pueblo of Taos, New Mexico
Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California	Oneida Indian Nation	Pueblo of Tesuque, New Mexico
Mashantucket Pequot Indian Tribe	Oneida Nation	Pueblo of Zia, New Mexico
Mashpee Wampanoag Tribe	Onondaga Nation	Puyallup Tribe of the Puyallup Reservation
Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan	Otoe-Missouria Tribe of Indians, Oklahoma	Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada
Mechoopda Indian Tribe of Chico Rancheria, California	Ottawa Tribe of Oklahoma	Quapaw Nation
Menominee Indian Tribe of Wisconsin	Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes)	Quartz Valley Indian Community of the Quartz Valley Reservation of California
Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California	Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada	Quechan Tribe of the Fort Yuma Indian Reservation, California & Arizona
Mescalero Apache Tribe of the Mescalero Reservation, New Mexico	Pala Band of Mission Indians	Quileute Tribe of the Quileute Reservation
Miami Tribe of Oklahoma	Pamunkey Indian Tribe	Quinault Indian Nation
Miccosukee Tribe of Indians	Pascua Yaqui Tribe of Arizona	Ramona Band of Cahuilla, California
Middletown Rancheria of Pomo Indians of California	Paskenta Band of Nomlaki Indians of California	Rappahannock Tribe, Inc.
Mi'kmaq Nation (Previously listed as Aroostook Band of Micmacs)	Passamaquoddy Tribe	Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin
Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band)	Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California	Red Lake Band of Chippewa Indians, Minnesota
Mississippi Band of Choctaw Indians	Pawnee Nation of Oklahoma	Redding Rancheria, California
Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada	Pechanga Band of Indians (Previously listed as Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California)	Redwood Valley or Little River Band of Pomo Indians of the Redwood Valley Rancheria California
Modoc Nation	Penobscot Nation	Reno-Sparks Indian Colony, Nevada
	Peoria Tribe of Indians of Oklahoma	Resighini Rancheria, California
	Picayune Rancheria of Chukchansi Indians of California	Rincon Band of Luiseno Mission Indians of Rincon Reservation, California
	Pinoleville Pomo Nation, California	Robinson Rancheria
	Pit River Tribe, California (includes XL Ranch, Big Bend, Likely, Lookout, Montgomery Creek, and Roaring Creek Rancherias)	Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota
	Poarch Band of Creek Indians	Round Valley Indian Tribes, Round Valley Reservation, California
	Pokagon Band of Potawatomi Indians, Michigan and Indiana	Sac & Fox Nation of Missouri in Kansas and Nebraska
	Ponca Tribe of Indians of Oklahoma	Sac & Fox Nation, Oklahoma
		Sac & Fox Tribe of the Mississippi in Iowa
		Saginaw Chippewa Indian Tribe of Michigan
		Saint Regis Mohawk Tribe
		Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona
		Samish Indian Nation
		San Carlos Apache Tribe of the San Carlos Reservation, Arizona

San Juan Southern Paiute Tribe of Arizona	Te-Moak Tribe of Western Shoshone Indians of Nevada (Four constituent bands: Battle Mountain Band; Elko Band; South Fork Band; and Wells Band)	Yomba Shoshone Tribe of the Yomba Reservation, Nevada
San Pasqual Band of Diegueno Mission Indians of California	The Chickasaw Nation	Ysleta del Sur Pueblo
Santa Rosa Band of Cahuilla Indians, California	The Choctaw Nation of Oklahoma	Yuhaaviatam of San Manuel Nation (Previously listed as San Manuel Band of Mission Indians, California)
Santa Rosa Indian Community of the Santa Rosa Rancheria, California	The Muscogee (Creek) Nation	Yurok Tribe of the Yurok Reservation, California
Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California	The Osage Nation	Zuni Tribe of the Zuni Reservation, New Mexico
Santee Sioux Nation, Nebraska	The Seminole Nation of Oklahoma	
Santo Domingo Pueblo	Thlopthlocco Tribal Town	Native Entities Within the State of Alaska Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs (227 Federally Recognized Alaska Native Villages/Tribes Within the State of Alaska)
Sauk-Suiattle Indian Tribe	Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota	Agdaagux Tribe of King Cove
Sault Ste. Marie Tribe of Chippewa Indians, Michigan	Timbisha Shoshone Tribe	Akiachak Native Community
Scotts Valley Band of Pomo Indians of California	Tohono O'odham Nation of Arizona	Akiak Native Community
Seminole Tribe of Florida	Tolowa Dee-ni' Nation	Alatna Village
Seneca Nation of Indians	Tonawanda Band of Seneca	Algaaciq Native Village (St. Mary's)
Seneca-Cayuga Nation	Tonkawa Tribe of Indians of Oklahoma	Allakaket Village
Shakopee Mdewakanton Sioux Community of Minnesota	Tonto Apache Tribe of Arizona	Alutiiq Tribe of Old Harbor
Shawnee Tribe	Torres Martinez Desert Cahuilla Indians, California	Angoon Community Association
Sherwood Valley Rancheria of Pomo Indians of California	Tulalip Tribes of Washington	Anvik Village
Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California	Tule River Indian Tribe of the Tule River Reservation, California	Arctic Village (See Native Village of Venetie Tribal Government)
Shinnecock Indian Nation	Tunica-Biloxi Indian Tribe	Asa'carsarmiut Tribe
Shoalwater Bay Indian Tribe of the Shoalwater Bay Indian Reservation	Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California	Beaver Village
Shoshone-Bannock Tribes of the Fort Hall Reservation	Turtle Mountain Band of Chippewa Indians of North Dakota	Birch Creek Tribe
Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada	Tuscarora Nation	Central Council of the Tlingit & Haida Indian Tribes
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota	Twenty-Nine Palms Band of Mission Indians of California	Chalkyitsik Village
Skokomish Indian Tribe	United Auburn Indian Community of the Auburn Rancheria of California	Cheesh-Na Tribe
Skull Valley Band of Goshute Indians of Utah	United Keetoowah Band of Cherokee Indians in Oklahoma	Chevak Native Village
Snoqualmie Indian Tribe	Upper Mattaponi Tribe	Chickaloon Native Village
Soboba Band of Luiseno Indians, California	Upper Sioux Community, Minnesota	Chignik Bay Tribal Council
Sokaogon Chippewa Community, Wisconsin	Upper Skagit Indian Tribe	Chignik Lake Village
Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado	Ute Indian Tribe of the Uintah & Ouray Reservation, Utah	Chilkat Indian Village (Klukwan)
Spirit Lake Tribe, North Dakota	Ute Mountain Ute Tribe	Chilkoot Indian Association (Haines)
Spokane Tribe of the Spokane Reservation	Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California	Chinik Eskimo Community (Golovin)
Squaxin Island Tribe of the Squaxin Island Reservation	Walker River Paiute Tribe of the Walker River Reservation, Nevada	Chuloonawick Native Village
St. Croix Chippewa Indians of Wisconsin	Wampanoag Tribe of Gay Head (Aquinnah)	Circle Native Community
Standing Rock Sioux Tribe of North & South Dakota	Washoe Tribe of Nevada & California (Carson Colony, Dresslerville Colony, Woodfords Community, Stewart Community, & Washoe Ranches)	Craig Tribal Association
Stillaguamish Tribe of Indians of Washington	White Mountain Apache Tribe of the Fort Apache Reservation, Arizona	Curyung Tribal Council
Stockbridge Munsee Community, Wisconsin	Wichita and Affiliated Tribes (Wichita, Keechi, Waco, & Tawakonie), Oklahoma	Douglas Indian Association
Summit Lake Paiute Tribe of Nevada	Wilton Rancheria, California	Egegik Village
Suquamish Indian Tribe of the Port Madison Reservation	Winnebago Tribe of Nebraska	Eklutna Native Village
Susanville Indian Rancheria, California	Winnemucca Indian Colony of Nevada	Emmonak Village
Swinomish Indian Tribal Community	Wiyot Tribe, California	Evansville Village (aka Bettles Field)
Sycuan Band of the Kumeyaay Nation	Wyandotte Nation	Galena Village (aka Loudon Village)
Table Mountain Rancheria	Yankton Sioux Tribe of South Dakota	Gulkana Village Council
Tejon Indian Tribe	Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona	Healy Lake Village
	Yavapai-Prescott Indian Tribe	Holy Cross Tribe
	Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada	Hoonah Indian Association
	Yocha Dehe Wintun Nation, California	Hughes Village
		Huslia Village
		Hydaburg Cooperative Association
		Igiugig Village
		Inupiat Community of the Arctic Slope
		Iqummiut Traditional Council
		Ivanof Bay Tribe
		Kaguyak Village
		Kaktovik Village (aka Barter Island)
		Kasigluk Traditional Elders Council
		Kenaitze Indian Tribe
		Ketchikan Indian Community

King Island Native Community	Native Village of Minto	Pauloff Harbor Village
King Salmon Tribe	Native Village of Nanwalek (aka English Bay)	Pedro Bay Village
Klawock Cooperative Association	Native Village of Napaimute	Petersburg Indian Association
Knik Tribe	Native Village of Napakiak	Pilot Station Traditional Village
Kokhanok Village	Native Village of Napaskiak	Pitka's Point Traditional Council
Koyukuk Native Village	Native Village of Nelson Lagoon	Platinum Traditional Village
Levelock Village	Native Village of Nightmute	Portage Creek Village (aka Ohgsenakale)
Lime Village	Native Village of Nikolski	Pribilof Islands Aleut Communities of St. Paul & St. George Islands (Saint George Island and Saint Paul Island)
Manley Hot Springs Village	Native Village of Noatak	Qagan Tayagungin Tribe of Sand Point
Manokotak Village	Native Village of Nuiqsut (aka Nooiksut)	Qawalangin Tribe of Unalaska
McGrath Native Village	Native Village of Nunam Iqua	Rampart Village
Mentasta Traditional Council	Native Village of Nunapitchuk	Saint George Island (<i>See</i> Pribilof Islands Aleut Communities of St. Paul & St. George Islands)
Metlakatla Indian Community, Annette Island Reserve	Native Village of Ouzinkie	Saint Paul Island (<i>See</i> Pribilof Islands Aleut Communities of St. Paul & St. George Islands)
Naknek Native Village	Native Village of Paimiut	Salamatof Tribe
Native Village of Afognak	Native Village of Perryville	Seldovia Village Tribe
Native Village of Akhiok	Native Village of Pilot Point	Shageluk Native Village
Native Village of Akutan	Native Village of Point Hope	Sitka Tribe of Alaska
Native Village of Aleknagik	Native Village of Point Lay	Skagway Village
Native Village of Ambler	Native Village of Port Graham	South Naknek Village
Native Village of Atka	Native Village of Port Heiden	Stebbins Community Association
Native Village of Atkasuk	Native Village of Port Lions	Sun'aq Tribe of Kodiak
Native Village of Barrow Inupiat Traditional Government	Native Village of Ruby	Takotna Village
Native Village of Belkofski	Native Village of Saint Michael	Tangirnaq Native Village
Native Village of Brevig Mission	Native Village of Savoonga	Telida Village
Native Village of Buckland	Native Village of Scammon Bay	Traditional Village of Togiak
Native Village of Cantwell	Native Village of Selawik	Tuluksak Native Community
Native Village of Chenega (aka Chanega)	Native Village of Shaktoolik	Twin Hills Village
Native Village of Chignik Lagoon	Native Village of Shishmaref	Ugashik Village
Native Village of Chitina	Native Village of Shungnak	Umkumiut Native Village
Native Village of Chuathbaluk (Russian Mission, Kuskokwim)	Native Village of Stevens	Village of Alakanuk
Native Village of Council	Native Village of Tanacross	Village of Anaktuvuk Pass
Native Village of Deering	Native Village of Tanana	Village of Aniak
Native Village of Diomedea (aka Inalik)	Native Village of Tatitlek	Village of Atmautluak
Native Village of Eagle	Native Village of Tazlina	Village of Bill Moore's Slough
Native Village of Eek	Native Village of Teller	Village of Chefornak
Native Village of Ekuk	Native Village of Tetlin	Village of Clarks Point
Native Village of Ekwok	Native Village of Tuntutuliak	Village of Crooked Creek
Native Village of Elim	Native Village of Tununak	Village of Dot Lake
Native Village of Eyak (Cordova)	Native Village of Tyonek	Village of Iliamna
Native Village of False Pass	Native Village of Unalakleet	Village of Kalskag
Native Village of Fort Yukon	Native Village of Unga	Village of Kaltag
Native Village of Gakona	Native Village of Venetie Tribal Government (Arctic Village and Village of Venetie)	Village of Kotlik
Native Village of Gambell	Native Village of Wales	Village of Lower Kalskag
Native Village of Georgetown	Native Village of White Mountain	Village of Ohogamiut
Native Village of Goodnews Bay	Nenana Native Association	Village of Red Devil
Native Village of Hamilton	New Koliganek Village Council	Village of Sleetmute
Native Village of Hooper Bay	New Stuyahok Village	Village of Solomon
Native Village of Kanatak	Newhalen Village	Village of Stony River
Native Village of Karluk	Newtok Village	Village of Venetie (<i>See</i> Native Village of Venetie Tribal Government)
Native Village of Kiana	Nikolai Village	Village of Wainwright
Native Village of Kipnuk	Ninilchik Village	Wrangell Cooperative Association
Native Village of Kivalina	Nome Eskimo Community	Yakutat Tlingit Tribe
Native Village of Kluti Kaah (aka Copper Center)	Nondalton Village	Yup'it of Andreafski
Native Village of Kobuk	Noorvik Native Community	
Native Village of Kongiganak	Northway Village	
Native Village of Kotzebue	Nulato Village	
Native Village of Koyuk	Nunakauyarmiut Tribe	
Native Village of Kwigillingok	Organized Village of Grayling (aka Holikachuk)	
Native Village of Kwinhagak (aka Quinhagak)	Organized Village of Kake	
Native Village of Larsen Bay	Organized Village of Kasaan	
Native Village of Marshall (aka Fortuna Ledge)	Organized Village of Kwethluk	
Native Village of Mary's Igloo	Organized Village of Saxman	
Native Village of Mekoryuk	Orutsararmiut Traditional Native Council	
	Oscarville Traditional Village	

DEPARTMENT OF THE INTERIOR

[NPS-WASO-BSD-FEES-NPS0036034;
PX.XBSAD0113.00.1 (222); OMB Control
Number 1024-0252]

**Agency Information Collection
Activities; Submission to the Office of
Management and Budget for Review
and Approval; the Interagency Access
Pass and Senior Pass Application
Processes**

AGENCY: National Park Service, Interior.
ACTION: Notice of information collection;
request for comment.

SUMMARY: In accordance with the
Paperwork Reduction Act of 1995 we,
the National Park Service (NPS) are
proposing to renew an information
collection.

DATES: Interested persons are invited to
submit comments on or before
September 11, 2023.

ADDRESSES: Written comments and
suggestions on the information
collection requirements should be
submitted by the date specified above in
DATES to [http://www.reginfo.gov/
public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this
particular information collection by
selecting “Currently under Review—
Open for Public Comments” or by using
the search function. Please provide a
copy of your comments to the NPS
Information Collection Clearance Officer
(ADIR-ICCO), 13461 Sunrise Valley
Drive, (MS-244), Reston, VA 20191
(mail); or phadrea_ponds@nps.gov
(email). Please include OMB Control
Number 1024-0252 in the subject line of
your comments.

FOR FURTHER INFORMATION CONTACT: To
request additional information about
this ICR, contact Linda Thurn,
Interagency Pass Program Manager,
National Park Service at linda_thurn@nps.gov
(email); or at 202 513-7095
(telephone). Please reference OMB
Control Number 1024-0252 in the
subject line of your comments.
Individuals in the United States who are
deaf, deafblind, hard of hearing, or have
a speech disability may dial 711 (TTY,
TDD, or TeleBraille) to access
telecommunications relay services.
Individuals outside the United States
should use the relay services offered
within their country to make
international calls to the point of
contact in the United States. You may
also view the ICR at [http://
www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain).
SUPPLEMENTARY INFORMATION: In
accordance with the Paperwork
Reduction Act of 1995 (PRA, 44 U.S.C.
3501 *et seq.*) and 5 CFR 1320.8(d)(1), we
provide the general public and other

Federal agencies with an opportunity to
comment on new, proposed, revised,
and continuing collections of
information. This helps us assess the
impact of our information collection
requirements and minimize the public's
reporting burden. It also helps the
public understand our information
collection requirements and provide the
requested data in the desired format.

A **Federal Register** notice with a 60-
day public comment period soliciting
comments on this collection of
information was published on October
28, 2022 (87 FR 65244). No comments
were received.

As part of our continuing effort to
reduce paperwork and respondent
burdens, we are again soliciting
comments from the public and other
Federal agencies on the proposed ICR
that is described below. We are
especially interested in public comment
addressing the following:

(1) Whether or not the collection of
information is necessary for the proper
performance of the functions of the
agency, including whether or not the
information will have practical utility.

(2) The accuracy of our estimate of the
burden for this collection of
information, including the validity of
the methodology and assumptions used.

(3) Ways to enhance the quality,
utility, and clarity of the information to
be collected.

(4) How might the agency minimize
the burden of the collection of
information on those who are to
respond, including through the use of
appropriate automated, electronic,
mechanical, or other technological
collection techniques or other forms of
information technology, *e.g.*, permitting
electronic submission of response.

Comments that you submit in
response to this notice are a matter of
public record. Before including your
address, phone number, email address,
or other personal identifying
information in your comment, you
should be aware that your entire
comment—including your personal
identifying information—may be made
publicly available at any time. While
you can ask us in your comment to
withhold your personal identifying
information from public review, we
cannot guarantee that we will be able to
do so.

Abstract: Authorized by the Federal
Lands Recreation Enhancement Act
(FLREA; 16 U.S.C. 6801-6814), the
“America the Beautiful—National Parks
and Federal Recreation Lands Pass”
Program provides recreation
opportunities on public lands managed
by four Department of the Interior
agencies: the National Park Service, U.S.

Fish and Wildlife Service, Bureau of
Land Management, and the Bureau of
Reclamation in addition to the
Department of Agriculture's U.S. Forest
Service and the U.S. Army Corps of
Engineers. This program manages the
application process and distribution of
passes to provide visitors with an
affordable and convenient way to access
Federal recreation lands. The pass
program's proceeds are used to improve
and enhance visitor recreation services.

NPS Form 10-596, “Interagency
Access Pass” is a free, lifetime pass
issued to citizens or residents who are
domiciled in the United States,
regardless of age, who have a medical
determination and documentation of
permanent disability. Ordering an
Access Pass requires a complete
application, proof of residency,
documentation that proves permanent
disability, and payment of the \$5
processing fee, plus actual shipping
costs. Passes can be obtained in person
from a participating Federal recreation
site or office, through the mail, or online
via the U.S. Geological Survey (USGS)
store at [https://store.usgs.gov/access-
pass](https://store.usgs.gov/access-pass).

If a person arrives at a recreation site
and claims eligibility for the Interagency
Access Pass, but cannot produce any
documentation, that person must read,
sign, and date NPS Form 10-597,
“Statement of Disability” in the
presence of the agency officer issuing
the Interagency Access Pass. If the
applicant cannot read and/or sign the
form, someone else may read, date, and
sign the statement on his/her behalf in
the applicant's presence and in the
presence of the agency officer issuing
the Interagency Access Pass.

NPS Form 10-595, “Interagency
Senior Pass” is a pass issued to U.S.
citizens or permanent residents who are
62 years or older. Senior Passes may be
issued on a lifetime or annual basis.
Both types of the Senior Pass can be
purchased at any federal recreation site,
including national parks, that charges
an entrance or standard amenity (day-
use) fee; online or through the mail from
USGS. Ordering a Senior Pass requires
a complete application, proof of
residency, payment (\$20 for Annual
Senior or \$80 for Lifetime Senior Pass,
plus \$5 processing fee, and shipping
costs. Passes can be obtained in person
from a participating Federal recreation
site or office, through the mail, or via
the U.S. Geological Survey (USGS) store
at <https://store.usgs.gov/senior-pass>.

Agency websites provide information
on the passes and acceptable
documentation. All documentation
submitted in person or through the mail

is returned to the applicant or destroyed after the form is processed.

Title of Collection: The Interagency Access Pass and Senior Pass Application Processes.

OMB Control Number: 1024–0252.

Form Number: NPS Forms 10–595, 10–596, and 10–597.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals, organizations, businesses, and State, local, or tribal governments.

Total Estimated Number of Annual Respondents: 212,000.

Total Estimated Number of Annual Responses: 212,000.

Estimated Completion Time per Response: Varies from 5 minutes to 10 minutes, depending on activity.

Total Estimated Number of Annual Burden Hours: 22,667.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Non-hour Burden Cost: \$686,000 (mail-in applicants—application fee, mailing, and processing).

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

*Information Collection Clearance Officer,
National Park Service.*

[FR Doc. 2023–17272 Filed 8–10–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_NM_FRN_MO#4500172602]

Notice of Intent To Amend the Taos Resource Management Plan for the Río Grande del Norte National Monument Management Plan and Prepare an Associated Environmental Assessment

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA) and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) New Mexico State Director intends to prepare a resource management plan

(RMP) amendment with an associated environmental assessment (EA) for the Río Grande del Norte National Monument and by this notice is announcing the beginning of the scoping period to solicit public comments and identify issues. We are also providing the planning criteria for public review.

DATES: The BLM requests that the public submit comments concerning the scope of the analysis, potential alternatives, and identification of relevant information and studies by September 11, 2023. To afford the BLM the opportunity to consider issues raised by commenters in the draft RMP amendment/EA, please ensure your comments are received prior to the close of the 30-day scoping period or 15 days after the last public meeting, whichever is later.

ADDRESSES: You may submit comments on issues and planning criteria related to the management plan for Río Grande del Norte National Monument by any of the following methods:

- **Website:** <https://eplanning.blm.gov/eplanning-ui/project/2024165/510>

- **Mail:** Brad Higdon, Project Manager, BLM Taos Field Office, 1024 Paseo del Pueblo Sur, Taos, NM 87571.

Documents pertinent to this proposal may be examined online at <https://eplanning.blm.gov/eplanning-ui/project/2024165/510> and at the BLM Taos Field Office, New Mexico.

FOR FURTHER INFORMATION CONTACT: Brad Higdon, Planning and Environmental Specialist, telephone: (575) 751–4725; address: 1024 Paseo del Pueblo Sur, Taos, NM 87571; or email: bhigdon@blm.gov. Contact Mr. Higdon to have your name added to our mailing list. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services for contacting Mr. Higdon. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: This document provides notice that the BLM New Mexico State Director intends to prepare a RMP amendment with an associated EA for the Río Grande del Norte National Monument, announces the beginning of the scoping process, and seeks public input on issues and planning criteria. The RMP amendment would change the existing Taos RMP.

The planning area is located in Taos and Rio Arriba counties, New Mexico,

and encompasses approximately 247,852 acres of public land.

Purpose and Need

Need: The need for the RMP amendment was established by the Presidential Proclamation that designated the Monument. The Proclamation states, “For purposes of protecting and restoring the objects. . . the Secretary, through the BLM, would prepare and maintain a management plan. . . .” An RMP amendment is necessary—as mandated by the Proclamation—for providing the management guidance critical for ensuring the Monument objects are preserved.

FLPMA, which established public land policy, also requires the BLM to “develop, maintain, and, when appropriate, revise land use plans” for the management of public lands. Furthermore, it is BLM policy that each Monument has an independent decision document that specifies the management guidance for that Monument.

In addition to these mandates, an amendment to the Taos RMP is necessary to address the new information that has been accrued and the changed circumstances the Monument has experienced since its designation in 2013. New surveys of seeps and springs, cultural resources, sagebrush distribution, sensitive species, wildlife corridors, among other resources, have been conducted in recent years that add to the BLM’s catalogue of the best-available information. This new information will enable the BLM to reevaluate and adjust its current management of the Monument under an amended Taos RMP. Changed circumstances include increased demand for recreational opportunities and increased pressure on recreation facilities and infrastructure within the Monument. The public is seeking a wider array of trail use opportunities, particularly around the communities of Taos and Questa, and increased pressure on existing trails and recreational facilities has been especially evident since the onset of the COVID–19 pandemic. Trailhead parking is regularly at or exceeds capacity throughout much of the Monument. New types of recreation, such as e-bikes, also need to be addressed.

Opportunities for new rights-of-way for electrical transmission in support of renewable energy development is an evolving circumstance that may require new authorizations consistent with the parameters specified in the Proclamation. Changed circumstances regarding climatic conditions also

requires careful management considerations for a broad spectrum of resources in an updated plan, including those contributing to the objects for which the Monument was established to protect.

A RMP amendment is also necessary for providing protective management of Cerro del Yuta Wilderness and Rio San Antonio Wilderness, designated by Congress in 2019. Wilderness areas are required to be managed according to the provisions of the Wilderness Act of 1964, and this management plan would provide the framework for the implementation-level wilderness plans that would be completed once a management plan is approved.

Purpose: As specified in the Presidential Proclamation, the overarching purpose of this action—the RMP amendment—is to provide for the protection and restoration of the Monument objects presented below, as well as allowing for the enjoyment and use of the Monument lands and resources through recreation, traditional uses, and other means. The management plan would establish goals and objectives and identify allocations and allowable uses to achieve a balance of protection and use for the Monument. More specifically, the BLM seeks to achieve the objectives outlined below under the guidance of an approved management plan.

To Protect Monument Objects Listed Under the Proclamation

- To provide protection and preservation for cultural resources and the integrity of cultural landscapes from conflicts that have emerged from resource uses. The BLM also has an opportunity to promote stewardship, interpretation, and an understanding of the area's ethnography, as well as to provide opportunities for Tribal co-stewardship.

- To provide for the protection and restoration of the Monument's ecological diversity. The BLM would foster resistance and resilience of diverse, native vegetative communities in the face of changing climate and water conditions, and public use. The BLM would identify opportunities for sustaining the health of a broad range of species, their habitats, and conditions that contribute to the ecological diversity of the Monument, including, for example, various special status biological species, pollinators, and soils in the face of the same challenges. The BLM will also update strategies and practices for wildlife corridors and restoring vegetative communities through treatments and management of fuels.

- To provide for the protection and restoration of diverse terrestrial and aquatic wildlife populations and their habitats, including threatened and endangered species and other special status species and their habitats. The BLM would minimize fragmentation of seasonal habitats, habitat connectivity, and the displacement of wildlife from those habitats, while allowing for recreational and traditional uses of the Monument.

- To protect the geologic features, functions, and visual integrity of the Monument, while balancing the increased recreational use, demand for rights-of-way, and other uses that could impact Monument lands.

Resolve Conflicts Between Recreational and Other Uses and Protect Monument Objects

- To provide for a variety of recreational opportunities in diverse settings in a manner that meets the demand of the public and resolves conflicts between recreational use and the protection of Monument objects.
- To provide for traditional uses of the public lands in a manner consistent with the protection, preservation, and restoration of Monument objects. Traditional uses are very important to sustaining cultural customs and traditions of local populations, such as those associated with food, shelter, and other basic human needs. Traditional uses include livestock grazing, fuelwood collection, piñon nut collection, herb collection, hunting, fishing, and other similar uses.

- To allow for motorized and non-motorized access to the Monument, consistent with the Proclamation (which states “[e]xcept for emergency or authorized administrative purposes, motorized vehicle use in the monument shall be permitted only on designated roads and non-motorized mechanized vehicle use shall be permitted only on designated roads and trails.”), for traditional uses, livestock grazing, fuelwood collection, and recreational opportunities, while protecting Monument objects. A long-term, sustainable travel and transportation network must be defined by allocations necessary to provide for access while preventing any degradation to Monument objects, wild and scenic river corridors, and the two new wilderness areas. FLPMA requires that, among other uses, “the public lands be managed in a manner that will . . . provide for outdoor recreation” (43 CFR 1701).

- To update the use of existing designated corridors, allowing for new, expanded, and upgraded utility rights-

of-way that serve local communities in a manner consistent with the protection, preservation, and restoration of Monument objects. The Presidential Proclamation that established the Monument allows for limited opportunities to upgrade or modify utility rights-of-way. The linear layout of the Monument makes it difficult to avoid crossing the Monument with transmission lines and other utilities.

To Protect Newly Designated Wilderness Areas Within the Monument

To preserve the wilderness character of the newly designated Cerro del Yuta Wilderness and Rio San Antonio Wilderness areas.

Preliminary Alternatives

No Action Alternative

Under the No Action Alternative, management of the Monument would continue to follow the decisions of the existing Taos Field Office RMP. Two areas of critical environmental concern, the Taos Plateau Area of Critical Environmental Concern (222,500 acres) and the Lower Gorge Area of Critical Environmental Concern (21,190 acres), overlap the Monument nearly in its entirety. The Taos Plateau Area of Critical Environmental Concern contains relevant and important values associated with wildlife habitat, special status species, water quality and quantity, wetlands, and scenic quality. The Lower Gorge Area of Critical Environmental Concern was established to provide direct management of relevant and important riparian vegetation, special status species and wildlife habitat, and cultural values. Management of the Lower Gorge Area of Critical Environmental Concern also includes emphasis on recreation and contains the Orilla Verde Recreation Area. The remainder of the Monument not managed as an area of critical environmental concern is included with the Rio Grande Wild and Scenic River, which includes a segment of the Red River, and is managed pursuant to the National Wild and Scenic Rivers Act, as amended. Under the No Action Alternative, existing management for BLM-administered lands within the Monument would be largely consistent with the purposes of the Monument's designation.

To meet the mandates of Presidential Proclamation 8946, the BLM proposes to manage the Río Grande del Norte National Monument consistent with existing management direction contained in the 2012 Taos RMP except for the following Monument objects,

resources, or uses for which goals and objectives, administrative designations, allocations for allowable uses, and/or management direction may be updated:

- Cultural and historic resources
- Ecological resources
- Geologic resources
- Fish and wildlife and their habitat
- Recreation
- Motorized and mechanized vehicle use
- Lands and realty
- Livestock grazing
- Wilderness

Other existing goals, objectives, and other land use planning-level decisions from the 2012 Taos RMP will be modified under the Proposed Action if necessary to ensure that the protection, restoration, and/or increased resiliency of Monument objects. The BLM welcomes comments on the preliminary proposed action as well as suggestions for additional alternatives.

Planning Criteria

The planning criteria guide the planning effort and lay the groundwork for effects analysis by identifying the preliminary issues and their analytical frameworks. Preliminary issues for the planning area have been identified by BLM personnel and from early engagement conducted for this planning effort with Federal, State, and local agencies; Tribes; and other stakeholders. The BLM has identified multiple preliminary issues regarding various resources and uses for this planning effort's analysis. The planning criteria are available for public review and comment at the ePlanning website (see **ADDRESSES**).

Public Scoping Process

This notice of intent initiates the scoping period and public review of the planning criteria, which guide the development and analysis of the RMP Amendment and Environmental Analysis.

The BLM will be holding two public scoping meetings in the following locations: Taos and Santa Fe, New Mexico. One virtual meeting will also be held. The specific date and location of these scoping meetings will be announced at least 15 days in advance through media outlets, social media, and the project ePlanning website (see **ADDRESSES**).

Comments submitted during public scoping that provide pertinent information, express relevant concerns and issues, and identify reasonable management options, especially when submitted with sufficient detail, are most substantive and useful for

evaluating alternatives and conducting impact analysis.

Interdisciplinary Team

The BLM will use an interdisciplinary approach to develop the plan in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in this planning effort: aquatic resources, archaeology, botany, ecology, environmental justice, forestry, geology, lands and realty, paleontology, outdoor recreation, rangeland management, soils, socioeconomics, visual resources, wild and scenic rivers, wilderness, wildlife and fisheries.

Additional Information

The BLM will identify, analyze, and consider mitigation to address the reasonably foreseeable impacts to resources from the proposed plan amendment and any analyzed reasonable alternatives and, in accordance with 40 CFR 1502.14(e), include appropriate mitigation measures not already included in the proposed plan amendment or alternatives. Mitigation may include avoidance, minimization, rectification, reduction or elimination over time, and compensation; and may be considered at multiple scales, including the landscape scale.

The BLM will utilize and coordinate the NEPA and land use planning processes for this planning effort to help support compliance with applicable procedural requirements under the Endangered Species Act (16 U.S.C. 1536) and Section 106 of the National Historic Preservation Act (54 U.S.C. 306108) as provided in 36 CFR 800.2(d)(3), including public involvement requirements of Section 106. The information about historic and cultural resources and threatened and endangered species within the area potentially affected by the proposed plan will assist the BLM in identifying and evaluating impacts to such resources.

The BLM will consult with Tribal Nations on a government-to-government basis in accordance with Executive Order 13175, BLM MS 1780, and other Departmental policies. Tribal concerns, including impacts on Tribal trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with Tribal Nations and other stakeholders that may be interested in or affected by the proposed approval that the BLM is evaluating, are invited to participate in the scoping process and, if eligible, may request or

be requested by the BLM to participate in the development of the environmental analysis as a cooperating agency.

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.

(Authority: 40 CFR 1501.9 and 43 CFR 1610.2.)

Melanie G. Barnes,
State Director.

[FR Doc. 2023-17224 Filed 8-10-23; 8:45 am]

BILLING CODE 4331-23-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY920000.19200000.ET0000.
LRORK1405800.XXX; WYW-172386]

Public Land Order 7928; Permanent Withdrawal and Transfer of Jurisdiction, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order permanently withdraws and transfers administrative jurisdiction of 869.08 acres of public lands and 3,454.39 acres of Federal mineral estate to the Department of Energy, Office of Legacy Management (DOE-LM) for its Split Rock Site in Wyoming pursuant to the authority under Title II of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA).

DATES: This Public Land Order takes effect on August 11, 2023.

FOR FURTHER INFORMATION CONTACT: Keesha Clay, Realty Specialist, BLM Wyoming State Office, (307) 775-6189, during regular business hours 8:00 a.m. to 4:30 p.m., Monday through Friday, except holidays. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services for contacting Ms. Clay. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The Secretary of the Interior is permanently withdrawing and transferring the subject Federal lands and minerals under UMTRCA, as amended by the Uranium Mill Tailings Remedial Action Amendments Act of 1988 (42 U.S.C. 7916), for the purpose of facilitating long term maintenance and monitoring of the Split Rock Uranium Tailing Cell Site by DOE-LM under applicable provisions of UMTRCA.

Order

By virtue of the authority vested in the Secretary of the Interior by the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. 7916 (2000)), as amended, it is ordered as follows:

1. Subject to valid existing rights, the following described public lands and reserved public minerals are hereby permanently withdrawn from settlement, sale, location, and entry under the general land laws, including the United States mining laws, mineral and geothermal leasing laws, and disposal under the mineral materials laws, and jurisdiction over such lands and minerals is hereby permanently transferred to the United States DOE-LM to administer them in perpetuity as a hazardous material site under the authority of the UMTRCA of 1978, Public Law 95-604, 92 Stat. 3021, as amended, as the Split Rock Uranium Tailing Cell Site:

Public Lands

Sixth Principal Meridian, Wyoming

- T. 29 N., R. 91 W.,
 sec. 6, lots 8 thru 13 and E $\frac{1}{2}$ SE $\frac{1}{4}$;
 sec. 7, N $\frac{1}{2}$ NE $\frac{1}{4}$;
 sec. 8, NW $\frac{1}{4}$ NW $\frac{1}{4}$.
 T. 29 N., R. 92 W.,
 sec. 1, lots 1 and 2, S $\frac{1}{2}$ NE $\frac{1}{4}$, and
 SE $\frac{1}{4}$ SE $\frac{1}{4}$;
 sec. 2, SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$;
 sec. 11, NW $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$;
 sec. 12, W $\frac{1}{2}$ NE $\frac{1}{4}$.

The areas described aggregate 869.08 acres of surface and Federal minerals.

Federal Mineral Interests Underlying Non-Federal Surface

- T. 29 N., R. 91 W.
 sec. 5, S $\frac{1}{2}$;
 sec. 6, lot 5, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and SW $\frac{1}{4}$ SE $\frac{1}{4}$;
 sec. 7, lots 1 thru 4, S $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$,
 E $\frac{1}{2}$ SW $\frac{1}{4}$, and SE $\frac{1}{4}$;
 sec. 8, E $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, and
 W $\frac{1}{2}$ SW $\frac{1}{4}$;
 sec. 18, lots 1 and 2 and E $\frac{1}{2}$ NW $\frac{1}{4}$, those
 portions lying northerly of the northerly
 right-of-way boundary of U.S. Highway
 287, as described on Document No.
 2009-1328633, filed October 19, 2009, in
 the Fremont County Clerk's Office.
 T. 29 N., R. 92 W.,
 sec. 1, lot 4, SW $\frac{1}{4}$, and W $\frac{1}{2}$ SE $\frac{1}{4}$;

- sec. 2, SW $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$,
 and SE $\frac{1}{4}$ SE $\frac{1}{4}$;
 sec. 3, E $\frac{1}{2}$ SE $\frac{1}{4}$;
 sec. 10, E $\frac{1}{2}$ SE $\frac{1}{4}$, that portion lying
 northerly of the northerly boundary of
 the Home on the Range Estates
 Subdivision, Document No. 970395, filed
 March 8, 1978, in the Fremont County
 Clerk's Office;
 sec. 11, NE $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$,
 and S $\frac{1}{2}$, except that portion of
 SW $\frac{1}{4}$ SW $\frac{1}{4}$ within said Home on the
 Range Subdivision;
 sec. 12, E $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, and S $\frac{1}{2}$;
 sec. 13, N $\frac{1}{2}$;
 sec. 14, NE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$.

The areas described aggregate
 approximately 3,454.39 acres of Federal
 minerals underlying non-Federal surface.

2. DOE-LM has acknowledged that segments of four National Historic Trails are present within the project area. The transfer of administrative jurisdiction does not invalidate or revoke the congressionally designated alignments of the National Historic Trails across the property; the National Park Service continues to coordinate trail-wide administration.

(Authority: 42 U.S.C. 7916.)

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2023-17230 Filed 8-10-23; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_UT_FRN_MO45172464]

Notice of Availability of the Draft Resource Management Plan and Environmental Impact Statement for the Grand Staircase-Escalante National Monument in Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) has prepared a Draft Resource Management Plan (RMP) and Draft Environmental Impact Statement (EIS) for the Grand Staircase-Escalante National Monument (GSENM or Monument), and by this notice is providing information announcing the opening of the comment period on the Draft RMP/EIS and the comment period on the BLM's proposed areas of critical environmental concern (ACECs) and proposed recreational target shooting closures.

DATES: This notice announces the opening of a 90-day comment period for the Draft RMP/EIS beginning with the date following the Environmental Protection Agency's (EPA's) publication of its Notice of Availability (NOA) of the Draft RMP/EIS in the **Federal Register**. The EPA usually publishes its NOAs on Fridays.

To afford the BLM the opportunity to consider comments in the Proposed RMP/Final EIS, please ensure that the BLM receives your comments prior to the close of the 90-day public comment period or 15 days after the last public meeting, whichever is later.

In addition, this notice also announces the opening of a 90-day comment period for proposed target shooting closures and a 90-day comment period for proposed ACECs. The BLM must receive your comments by November 9, 2023.

ADDRESSES: The Draft RMP/EIS is available for review on the BLM ePlanning project website at <https://eplanning.blm.gov/eplanning-ui/project/2020343/510>.

Written comments related to the GSENM Draft RMP/EIS may be submitted by any of the following methods:

- **Website:** <https://eplanning.blm.gov/eplanning-ui/project/2020343/510>.

- **Mail:** ATTN: GSENM RMP Project Manager, BLM Paria River District, 669 S Highway 89A, Kanab, UT 84741.

Documents pertinent to this proposal may be examined online at <https://eplanning.blm.gov/eplanning-ui/project/2020343/570> and at the BLM Paria River District Office, 669 US-89A, Kanab, Utah 84741.

FOR FURTHER INFORMATION CONTACT:

Scott M. Whitesides, Project Manager, telephone (801) 539-4054; address Bureau of Land Management Utah, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101; email swhitesides@blm.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services for contacting Mr. Whitesides. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: This document provides notice that the BLM Utah State Director has prepared a Draft RMP/EIS, provides information announcing the opening of the comment period on the Draft RMP/EIS, and announces the comment period on the BLM's proposed ACEC and proposed

recreational target shooting closures. The planning area is located in Kane and Garfield Counties, Utah, and encompasses approximately 1.87 million acres of public land.

Management of GSENM is currently guided by the 2020 GSENM Approved RMPs and 2020 Kanab Escalante Planning Area (KEPA) Approved RMP to the extent the management actions in the RMPs are consistent with Presidential Proclamation 10286 (Oct. 8, 2021).

Purpose and Need for the Planning Effort

The purpose and need serve to frame the identification of issues, alternatives development, and effects analyses. Proclamation 10286 directs the BLM to “prepare and maintain a new management plan for the entire monument” for the specific purposes of “protecting and restoring the objects identified [in Proclamation 10286] and in Proclamation 6920.”

The RMP’s underlying purpose (40 CFR 1502.13) is to provide a management framework, including goals, objectives, and management direction, to guide GSENM management consistent with the protection and/or restoration of GSENM objects and the management direction provided in Proclamation 10286.

Alternatives Including the Preferred Alternative

The BLM has analyzed four alternatives in detail, including the no action alternative.

Alternative A, the no action alternative, represents current management from the 2020 GSENM Approved RMPs, which apply to the lands in GSENM as it existed under Proclamation 9682, and the 2020 KEPA Approved RMP, which applies to the lands that were excluded from GSENM by Proclamation 9682, to the extent that those management actions are consistent with Proclamation 10286. In some cases, decisions in the 2020 Approved RMPs are inconsistent with Proclamation 10286; in those instances, Alternative A has been modified to be consistent with Proclamation 10286.

Alternative B emphasizes flexibility in planning-level direction to maximize the potential for an array of discretionary actions that are compatible with the protection of GSENM objects.

Alternative C emphasizes the protection and maintenance of intact and resilient landscapes using a zonal management approach to selectively allow for discretionary uses in appropriate settings. Four management

zones similar to those used in the 2000 GSENM Management Plan would be established: the front country zone, passage zone, outback zone, and primitive zone. Each of these management zones would provide certain management direction to guide resource protection and allowable uses; the intensity of resource protection and use would vary depending on the zone. Under Alternative C, the designation of management zones would serve primarily as a tool for managing visitation and allowable uses while also protecting GSENM objects.

Alternative D strives to maximize natural processes by minimizing active management and limiting discretionary uses. Land use allocations would minimize discretionary uses, including recreation, livestock grazing, rights-of-way (ROWs), and activities under special recreation permits. This alternative would also constrain management actions to emphasize natural conditions, such as passive vegetation management.

The BLM further considered two additional alternatives but dismissed these alternatives from detailed analysis as explained in the Draft RMP/EIS.

The State Director has identified Alternative C as the preferred alternative. Alternative C was found to best meet the State Director’s planning guidance and, therefore, was selected as the preferred alternative because it provides goals, objectives, and management direction determined to be most effective at resolving planning issues, protecting monument objects, balancing resource uses, and meeting the purpose and need.

Mitigation

The BLM will identify, analyze, and consider best management practices to mitigate the reasonably foreseeable impacts to resources and monument objects. The Draft EIS analyzes all alternatives and, in accordance with 40 CFR 1502.14(e), will include appropriate mitigation measures (best management practices) not already included in the proposed plan or alternatives. Best management practices may include measures to avoid, minimize, rectify, reduce, or eliminate reasonably foreseeable impacts over time, and may be considered at multiple scales, including the landscape scale.

ACECs

Consistent with land use planning regulations at 43 CFR 1610.7–2(b), the BLM is announcing a comment period on the ACECs proposed for designation, which will be open for 90 days. Comments may be submitted using any

of the methods listed in the **ADDRESSES** section.

The proposed ACECs included in the preferred alternative are:

- Little No Man’s Mesa Research Natural Area (RNA)—approximately 50 acres. Designation proposed to protect vegetation and provide opportunities for scientific research. Identified special management would include prohibiting campfires, camping, ROWs, and recreational target shooting and making the area unavailable for livestock grazing.

- No Man’s Mesa RNA—approximately 2,800 acres. Designation proposed to protect vegetation resources and provide opportunities for scientific research. Identified special management would include prohibiting campfires and recreational target shooting, making the area unavailable for livestock grazing, and closing the area to off-highway vehicles.

- Little Spring Point RNA—approximately 300 acres. Designation proposed to protect vegetation resources and provide opportunities for scientific research. Special management would include prohibiting campfires, camping, ROWs, and recreational target shooting and making the area unavailable for livestock grazing.

- Fiftymile Mountain RNA—approximately 56,800 acres. Designation proposed to protect cultural resources and provide opportunities for scientific research. Special management would include camping by permit only, prohibiting ROWs and recreational target shooting, and requiring monitoring to ensure the appropriate level of grazing, including, if necessary, no grazing for the protection of cultural resources.

The preferred alternative does not propose to designate the following potential ACECs:

- Warm Creek ACEC.
- Willis Creek ACEC.

Dingell Act Proposed Target Shooting Closures

In accordance with the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019 (Dingell Act, Pub. L. 116–9, Section 4103), the BLM is announcing the opening of a public comment period on the proposed recreational target shooting closures within the Monument, which will be open for 90 days. The preferred alternative would close approximately 1,215,100 acres to recreational target shooting to protect GSENM objects. Comments may be submitted using any of the methods listed in the **ADDRESSES** section.

Schedule for the Decision-Making Process

The BLM will provide additional opportunities for public participation consistent with the NEPA and land use planning processes, including a 30-day public protest period and a 60-day Governor's consistency review on the Proposed RMP. The Proposed RMP/ Final EIS is anticipated to be available for public protest in April 2024 with a Record of Decision and Approved RMP in July 2024.

The BLM will hold a total of five public meetings. Two meetings will be held virtually, and three meetings will be conducted in-person: in Kanab, Panguitch, and Escalante, Utah. The dates and locations of these meetings will be announced at least 15 days in advance through local media, social media, newspapers, and the ePlanning website (see **ADDRESSES**).

The BLM will continue to consult with Indian Tribal Nations on a government-to-government basis in accordance with Executive Order 13175, BLM Manual Section 1780, and other Departmental policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration.

You may submit comments on the Draft RMP/EIS in writing to the BLM at any public meetings or to the BLM using one of the methods listed in the **ADDRESSES** section. To be considered, comments must be received by the end of the 90-day comment period. The ePlanning website (see **ADDRESSES**) includes background information on GSENM and the planning process.

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.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2, 43 CFR 1610.7–2)

Gregory Sheehan,
State Director.

[FR Doc. 2023–17203 Filed 8–10–23; 8:45 am]

BILLING CODE 4331–25–P

DEPARTMENT OF THE INTERIOR**National Park Service**

**[NPS–WASO–NRNHL–DTS#–36317;
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 29, 2023, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by August 28, 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 29, 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.

ALASKA**Kenai Peninsula Borough**

Snug Harbor Packing Company, Chisik Island, Chisik Island vicinity, SG100009319

Prince of Wales-Outer K. Borough

Hansen, Karl, House, 603a Main St., Port Alexander, SG100009304

MASSACHUSETTS**Suffolk County**

Homestead Street Apartments Historic District, 119–167 Homestead St., Boston, SG100009306
Repertory Theatre of Boston, 264 Huntington Ave., Boston, SG100009307

SOUTH DAKOTA**Clay County**

Brookman House, 404 Cottage Ave., Vermillion, SG100009320

Hand County

Archaeological Site 39HD115 (Bison Kill Sites in South Dakota, 9000 B.C. to 1875 A.D. MPS), Address Restricted, Ree Heights vicinity, MP100009315

UTAH**Davis County**

Leonard–Taylor House (Settlement Era Buildings of Farmington, 1847 to 1896), 94 East 500 North, Farmington, MP100009316

VIRGINIA**King William County**

Cherry Grove, 4381 Mansfield Rd., Avlett vicinity, SG100009312

WISCONSIN**Ashland County**

Fifield Place Historic District, 110 North Ellis Ave., 2–5 and 7 Fifield Row, Ashland, SG100009305

A request for removal has been made for the following resource:

WISCONSIN**Brown County**

Krause, Julius, Store Building, 106 South Broadway, De Pere, OT14000502

Additional documentation has been received for the following resource):

ARIZONA**Maricopa County**

Coronado Neighborhood Historic District (Additional Documentation), 942 and 946 East Coronado Rd. and 1650 North 10th St., Phoenix, AD86000206

Nomination submitted by Federal Preservation Officer:

The State Historic Preservation Officer reviewed the following nomination and responded to the Federal Preservation Officer within 45 days of receipt of the nomination and supports listing the property in the National Register of Historic Places.

COLORADO

San Miguel County

Bachelor Mine (Historic Radium, Uranium, and Vanadium Mining Resources in the Uravan Mineral Belt, Colorado MPS), Cty. Rd. Z13 southwest of Naturita, Naturita vicinity, MP100009310

Authority: Section 60.13 of 36 CFR part 60.

Dated: August 2, 2023.

Sherry A. Frear,

Chief, National Register of Historic Places/
National Historic Landmarks Program.

[FR Doc. 2023–17191 Filed 8–10–23; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE
COMMISSION

[USITC SE–23–038]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: August 16, 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. 731–TA–1104 (Third Review) (Polyester Staple Fiber (PSF) from China). The Commission currently is scheduled to complete and file its determinations and views of the Commission on August 24, 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 this meeting was not possible.

By order of the Commission.

Issued: August 9, 2023.

Sharon Bellamy,

Acting Supervisory Hearings and Information Officer.

[FR Doc. 2023–17371 Filed 8–9–23; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; 2023 Law Enforcement Administrative and Management Statistics (LEMAS) Supplement Survey—Post-Academy Training and Officer Wellness (PATOW)

AGENCY: Bureau of Justice Statistics, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Justice Statistics, Office of Justice Programs, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on May 16, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until September 11, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Sean E. Goodison (email: Sean.Goodison@usdoj.gov; telephone: 202–307–0765), Bureau of Justice Statistics, 810 Seventh Street NW, Washington, DC 20531.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and/or
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic,

mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function and entering either the title of the information collection. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. Type of Information Collection: New collection.
2. Title of the Form/Collection: 2023 Law Enforcement Administrative and Management Statistics (LEMAS) supplement survey—Post-Academy Training and Officer Wellness (PATOW).
3. Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: No agency form number at this time. The applicable component within the Department of Justice is the Bureau of Justice Statistics (BJS), in the Office of Justice Programs.
4. Affected public who will be asked or required to respond, as well as a brief abstract: Affected Public: State, local and tribal governments (Respondents will be general purpose state, county, and local law enforcement agencies (LEAs), including local and county police departments, sheriff's offices, and primary state law enforcement agencies. BJS plans to publish this information in reports and reference it when responding to queries from the U.S. Congress, Executive Office of the President, the U.S. Supreme Court, state officials, international organizations, researchers, students, the media, and others interested in criminal justice statistics.)

Abstract: The LEMAS core survey, conducted every 3 to 4 years since 1987, is based on a nationally representative sample of approximately 3,500 general-purpose LEAs and provides national estimates of law enforcement salaries, expenditures, operations, equipment, information systems and policies and procedures. In addition to these regular surveys, BJS also fields LEMAS supplement surveys to capture detailed information on specific topics pertaining to specific issues in law enforcement. BJS implemented this model of regular LEMAS core surveys and thematic supplement surveys following recommendations from the National Research Council. The first LEMAS supplement survey was fielded in 2017 (OMB Control Number 1121-0354, expired 2/28/2019), with a focus on body-worn camera use among law enforcement agencies.

The 2023 LEMAS supplement focuses on two topics, post-academy law enforcement training and officer wellness programs associated with agency responses to suicide. Post-academy training is defined as law enforcement training provided to full-time sworn personnel with general arrest powers at any point in their law enforcement career following any recruit or field training. Applicable topics include the number and types of training instructors used; training budgets; the resources that are accessible to officers through the agency's training program; the number of instruction hours provided for each training topic; and the types of special training programs offered to active full-time sworn personnel. The 2023 LEMAS supplement will also address law enforcement agency wellness programs associated with responses to suicide. The Federal Bureau of Investigation (FBI) launched the Law Enforcement Suicide Data Collection (LESDC) in January 2022 (OMB Control Number 1110-0082). The 2023 LEMAS supplement survey is intended to be a supporting effort to LESDC by collecting agency-level information on formal wellness programs currently available to full-time sworn personnel and related policies and training.

5. Obligation to Respond: Voluntary.
6. Total Estimated Number of Respondents: 3,500.
7. Estimated Time per Respondent: 1.75 hours.
8. Frequency: Annually.
9. Total Estimated Annual Time Burden: 6,125 hours.
10. Total Estimated Annual Other Costs Burden: \$210,210.

If additional information is required, contact: Darwin Arceo, Department

Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W-218 Washington, DC 20530.

Dated: August 8, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023-17238 Filed 8-10-23; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Defined Benefit Plan Annual Funding Notice

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before September 11, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202-693-0213, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: As required by Section 101(f) of the Employee Retirement Income Security Act of 1974, an annual notice of the plan's funded status to the plan's participants and beneficiaries and other specified interested parties (each labor organization representing such participants or beneficiaries, each employer that has an obligation to contribute under the plan, and the Pension Benefit Guaranty Corporation) is required to be disclosed. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 8, 2023 (88 FR 8317).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL-EBSA.

Title of Collection: Defined Benefit Plan Annual Funding Notice.

OMB Control Number: 1210-0126.

Affected Public: Private Sector—Businesses or other for-profits; Not-for-profit Institutions.

Total Estimated Number of Respondents: 32,209.

Total Estimated Number of Responses: 58,201,069.

Total Estimated Annual Time Burden: 166,067 hours.

Total Estimated Annual Other Costs Burden: \$5,758,314.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Acting Departmental Clearance Officer.

[FR Doc. 2023-17200 Filed 8-10-23; 8:45 am]

BILLING CODE 4510-29-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 23–088]

Name of Information Collection: Generic Clearance for NASA Citizen Science and Crowdsourcing Projects

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

DATES: Comments are due by October 10, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 60 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 60-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Bill Edwards-Bodmer, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, 757–864–7998, or b.edwards-bodmer@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

Citizen science and crowdsourcing are tools that engage, educate and empower the public to apply their curiosity and contribute their talents to a wide range of scientific and societal issues. NASA’s mission to *reach for new heights and reveal the unknown so that what we do and learn will benefit all humankind*. NASA uses the vantage point of space to achieve with the science community and our partners a deep scientific understanding of our planet, other planets and solar system bodies, the interplanetary environment, the Sun and its effects on the solar system, and the universe beyond. Citizen science and crowdsourcing can support NASA’s mission and purpose by providing new opportunities to explore our solar system and our own home planet like never before, producing critical data that expands our knowledge of the universe, and advancing our ability to provide societal

benefit through the synergy of satellite and ground-based observations.

II. Methods of Collection

Citizen science and crowdsourcing collections submitted under this generic clearance can be stand-alone projects or the methods may be incorporated into an existing or new project, including, but not limited to, projects in the following typology:

- Data gathering projects. These projects may include: (1) Observation, characterization and documentation of natural phenomena or general environmental health observations, opinions, or preferences or (2) surveying participants or screening environmental conditions, including using specialized equipment provided by project leaders to record and submit data, or submitting samples plus descriptors (*e.g.*, of air or water) for testing. Data may be collected using technologies mentioned above, through structured data forms, surveys, focus groups or interviews, submitting photographs or other media, surveys or questionnaires, or providing written observations.

- Classification/problem solving projects. Participants’ tasks may include: (1) Observation of recorded materials provided by project organizers (images, video, etc.) through structured data submission forms, surveys or questionnaires in an online or computer program, clicking boxes, highlighting parts of text or image, and providing comments and/or annotations; (2) Classification of images or sounds using structured data submission forms or clicking boxes in an online or computer program; (3) Transcribing information, by typing handwritten logs or notes; (4) Performing a function meant to generate human behavior data; or (5) Problem-solving or manipulation of data. Tasks 1–5 may be conducted via structured actions or instructions or through the use of “human-based computational game” or “game with a purpose”, a human-based computational technique in which a computational process performs its function by presenting certain steps to humans in an entertaining way.

III. Data

Title: Generic Clearance for NASA Citizen Science and Crowdsourcing Projects.

OMB Number: 2700–0168.

Type of review: Extension of approval for a collection of information.

Affected Public: Individuals.

Annual Responses: 50,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 8,333 hours.

Estimated Total Annual Cost: \$100,000.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA’s estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

William Edwards-Bodmer,

NASA PRA Clearance Officer.

[FR Doc. 2023–17214 Filed 8–10–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

The National Science Board (NSB) and the NSB Committee on Strategy (CS) hereby give notice of the scheduling of meetings for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

TIME AND DATE: Tuesday, August 15, 2023, from 9:00 a.m.–5:20 p.m. and Wednesday, August 16, 2023, from 8:30 a.m.–2:25 p.m. EDT.

PLACE: These meetings will be held at NSF headquarters, 2415 Eisenhower Avenue, Alexandria, VA 22314, and by videoconference. If the COVID status for Alexandria, Virginia goes to “high,” please fill out and bring OMB’s certification of vaccination form with you. All open sessions of the meeting will be webcast live on the NSB YouTube channel.

August 15, 2023—<https://youtube.com/watch?v=N8-Lf3lY4E>

August 16, 2023—<https://youtube.com/watch?v=E7OTUOCV5HE>

STATUS: Parts of these meetings will be open to the public. The rest of the meetings will be closed to the public. See full description below.

MATTERS TO BE CONSIDERED:**Tuesday, August 15, 2023***Plenary Board Meeting*

Open Session: 9:00–11:55 a.m.

- NSB Chair's Opening Remarks
- NSF Director's Remarks
- NSB Presentation, *Vision 2030—Developing STEM Talent*
- NSB Panel, *STEM Workforce Shortages Across the Federal Government*

Open Session: 12:55–2:45 p.m.

- NSF Office of International Science and Engineering briefing
- NSB Committee Reports
 - Committee on External Engagement
 - update on engagement initiatives
 - Committee on Science and Engineering Policy
 - *Indicators 2024*
 - Talent Development Team
 - National Security Team
- Approval of May 2023 open meeting minutes
- 2024 NSB meeting dates vote

Closed Session: 3:00–3:55 p.m.

- NSB Chair's Remarks
- Approval of May 2023 Closed Meeting Minutes
- NSF Director's Remarks
 - Agency Operating Status
- NSB Committee Reports
 - Subcommittee on Technology, Innovation, and Partnerships
 - update on Status of NSF Engines Type 2 Competition
 - NSF Engines Progress Monitoring and Interim Goals and Metrics
 - Quadrennial Review
- Committee on Strategy
 - NSF Budget

Committee on Strategy

Closed Meeting: 4:05–5:05 p.m.

- Committee Chair's Opening Remarks on the Agenda
- Approval of minutes for the July 28, 2023 meeting
- NSF FY 2025 Budget Development Update
- Consensus Statement on NSF's FY25 Budget Submission to the Office of Management and Budget

Plenary NSB

Closed Session: 5:05–5:20 p.m.

- NSB FY25 Budget Presentation
- Resolution related to NSF's FY25 Budget Submission to the Office of Management and Budget

Wednesday, August 16, 2023*Plenary Board Meeting*

Open Session: 8:30–10:50 a.m.

- NSB Chair's Opening Remarks

- NSB Committee Reports
 - Subcommittee on Technology, Innovation, and Partnerships
 - NSF Engines Type 2 Finalists Update
 - NSB–NSF Commission on Merit Review
 - Workplan and Timeline Update
 - Commission Activities
- NSF Research Security and Integrity Information Sharing and Analysis Organization—SECURE, Update
- NSF Sexual Assault/Harassment Prevention Report Update
- Office of the Inspector General (OIG)
 - Briefing on the OIG's Engagement in Antarctica

Plenary Board Meeting

Closed Session: 10:50–11:10 a.m.

- NSF Sexual Assault/Harassment Prevention Report Update

Plenary Board Meeting

Closed Session: 11:55 a.m.–1:10 p.m.

- NSB Committee Reports
 - Committee on National Science and Engineering Policy
 - Quadrennial Review Update
 - Committee on Awards and Facilities Report

Discussion and vote on advice related to:

- Renewal of Laser Interferometer Gravitational-Wave Observatory (LIGO) Operations and Management Award
- Arecibo Record of Decision
- NSB–NSF Commission on Merit Review
- Vote to move into Executive Plenary Closed

Plenary Board

Closed (Executive) Session: 1:20 p.m.–2:25 p.m.

- NSB Chair's Opening Remarks
- Approval of May 2023 Executive Plenary closed meeting minutes
- Committee on Nominations, Class of 2024–2030
- NSF Director's Remarks
 - Personnel topics
- NSB Chair's Closing Remarks

Meeting Adjourns: 2:25 p.m.

Portions Open to the Public*Tuesday, August 15, 2023*9:00 a.m.–11:55 a.m. Plenary NSB
12:55 p.m.–2:45 p.m. Plenary NSB*Wednesday, August 16, 2023*

8:30 a.m.–10:50 a.m. Plenary NSB

Portions Closed to the Public*Tuesday, August 15, 2023*

3:00 p.m.–3:55 p.m. Plenary NSB

4:05 p.m.–5:05 p.m. Committee on Strategy

5:05 p.m.–5:20 p.m. Plenary NSB

Wednesday, August 16, 2023

10:50 a.m.–11:10 a.m. Plenary NSB

11:55 a.m.–1:10 p.m. Plenary NSB

1:20 p.m.–2:25 p.m. Plenary NSB
(executive session)

Members of the public are advised that the NSB provides some flexibility around start and end times. A session may be allowed to run over by as much as 15 minutes if the Chair decides the extra time is warranted. The next session will start no later than 15 minutes after the noticed start time. If a session ends early, the next meeting may start up to 15 minutes earlier than the noticed start time. Sessions will not vary from noticed times by more than 15 minutes.

CONTACT PERSON FOR MORE INFORMATION:

The NSB Office contact is Christopher Blair, cblair@nsf.gov, 703–292–7000. The NSB Public Affairs contact is Nadine Lynn, nlynn@nsf.gov, 703–292–2490. Please refer to the NSB website for additional information: <https://www.nsf.gov/nsb>.

Christopher Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2023–17356 Filed 8–9–23; 11:15 am]

BILLING CODE 7555–01–P**NATIONAL SCIENCE FOUNDATION****Advisory Committee for Geosciences; Notice of Meeting**

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Advisory Committee for Geosciences (1755) (Hybrid Meeting).

Date and Time: September 20, 2023, 12:30 p.m.–5:00 p.m. MT, September 21, 2023, 9:00 a.m.–5:00 p.m. MT, September 22, 2023, 9:00 a.m.–12:30 p.m. MT.

Place: National Center for Atmospheric Research, 1850 Table Mesa Drive, Boulder, CO 80305; In-person and Virtual via Zoom.

Registration for the meeting will be available prior to the meeting date. Both the agenda and the registration link will be located on the GEO AC website at: <https://www.nsf.gov/geo/advisory.jsp>.

Type of Meeting: Open.

Contact Person: Melissa Lane, National Science Foundation, Room C 8000, 2415 Eisenhower Avenue,

Alexandria, Virginia 22314; Phone 703–292–8500.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To provide advice, recommendations, and oversight on support for geoscience research and education including atmospheric, geospace, earth, ocean, and polar sciences.

Agenda:

September 20, 2023

- Meeting with the Chief Operating Officer, NSF
- Panel: Report on Sexual Assault/Harassment Prevention and Response (SAHPR)
- Presentation on Research Security Issues

September 21, 2023

- NSF Facilities Overview
- GEO Facilities Discussion and Breakout Groups
- Review of OCE Science Programs COV Report and Response
- Science Advisory Subcommittee Report on Antarctic Research Vessel

September 22, 2023

- Tour of NCAR Research Aviation Facility
- GEO Division Discussions

Dated: August 8, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023–17275 Filed 8–10–23; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

The National Science Board's (NSB) NSB–NSF Commission on Merit Review hereby gives notice of the scheduling of a videoconference meeting for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

TIME AND DATE: Monday, August 14, 2023, from 9:00 a.m.–12:00 p.m. EDT.

PLACE: This meeting will be held in person and by videoconference through the National Science Foundation headquarters at 2415 Eisenhower Ave., Alexandria, VA 22314.

STATUS: One portion open and one portion closed.

MATTERS TO BE CONSIDERED:

Open: 9:00–10:30 a.m. Matter to be considered—Panel presentation and discussion, “Federal Agency Perspectives on Grant Review Processes”.

Closed: 10:30 a.m.–12:00 p.m. Matters to be considered—Chairman's opening remarks regarding the agenda; and discussion of topical areas of inquiry.

CONTACT PERSON FOR MORE INFORMATION:

Point of contact for this meeting is: (Chris Blair, cblair@nsf.gov), 703/292–7000. Members of the public can observe the public portion of this meeting through a YouTube livestream. The YouTube link will be available from the NSB web page.

Christopher Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2023–17351 Filed 8–9–23; 11:15 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meeting

The National Science Board's Awards and Facilities Committee (A&F) hereby gives notice of the scheduling of a meeting for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

TIME AND DATE: Monday, August 14, 2023, from 2:30–4:30 p.m. EDT.

PLACE: This meeting will be held virtually and in person at NSF headquarters, 2145 Eisenhower Ave., Alexandria, VA 22314, and by videoconference.

STATUS: Closed.

MATTERS TO BE CONSIDERED: The agenda of the meeting is: Committee Chair's Opening remarks regarding the agenda; Update by the Chief Officer for Research Facilities; Discussion and vote on advice related to the renewal of Laser Interferometer Gravitational-Wave Observatory Operations and Management Award; Discussion and vote on advice related to the amended Arecibo Record of Decision.

CONTACT PERSON FOR MORE INFORMATION:

Point of contact for this meeting is: Michelle McCrackin, mmccrackin@nsf.gov, (703) 292–7000. Meeting information and updates may be found at www.nsf.gov/nsb.

Christopher Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2023–17357 Filed 8–9–23; 11:15 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of August 14, 21, 28, September 4, 11, 18, 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 and closed.

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 August 14, 2023

Monday, August 14, 2023

2:00 p.m. Affirmation Session (Public Meeting) (Tentative); Final Rule: Emergency Preparedness for Small Modular Reactors and Other New Technologies (RIN 3150–AJ68; NRC–2015–0225) (Tentative); (Contact: Wesley Held: 301–287–3591)

Additional Information: The public is invited to attend the Commission's meeting live; via teleconference. Details for joining the teleconference in listen only mode can be found at <https://www.nrc.gov/pmns/mtg>.

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.

Week of September 4, 2023—Tentative

There are no meetings scheduled for the week of September 4, 2023.

Week of September 11, 2023—Tentative

Tuesday, September 12, 2023

10:00 a.m. All Employees Meeting (Public Meeting); (Contact: Anthony de Jesus: 301–287–9219; Adrienne Brown: 301–415–3764)

Additional Information: The meeting will be held in the Two White Flint

North auditorium, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting live by webcast at the Web address—<https://video.nrc.gov/>

Thursday, September 14, 2023

10:00 a.m. Briefing on NRC International Activities (Closed—Ex. 1 & 9)

Week of September 18, 2023—Tentative

There are no meetings scheduled for the week of September 18, 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: August 9, 2023.

For the Nuclear Regulatory Commission.

Wesley W. Held,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2023–17418 Filed 8–9–23; 4:15 pm]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–212 and CP2023–216; MC2023–213 and CP2023–217; MC2023–214 and CP2023–218]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* August 15, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).*: MC2023–212 and CP2023–216; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International, First-Class Package International Service & Commercial ePacket Contract 14 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 7, 2023; *Filing Authority:*

¹ See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* August 15, 2023.

2. *Docket No(s).*: MC2023–213 and CP2023–217; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 16 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 7, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* August 15, 2023.

3. *Docket No(s).*: MC2023–214 and CP2023–218; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 17 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 7, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* August 15, 2023.

This Notice will be published in the **Federal Register**.

Mallory Richards,

Attorney-Advisor.

[FR Doc. 2023–17278 Filed 8–10–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

International Product Change—Priority Mail Express International, Priority Mail International, First-Class Package International Service & Commercial ePacket Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a Priority Mail Express International, Priority Mail International, First-Class Package International Service & Commercial ePacket contract to the list of Negotiated Service Agreements in the Competitive Product List in the Mail Classification Schedule.

DATES: *Date of notice:* August 11, 2023.

FOR FURTHER INFORMATION CONTACT: Christopher C. Meyerson, (202) 268–7820.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 7, 2023, it filed with the Postal Regulatory

Commission a *USPS Request to Add Priority Mail Express International, Priority Mail International, First-Class Package International Service & Commercial ePacket Contract 14 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2023–212 and CP2023–216.

Tram T. Pham,

Attorney, Ethics and Legal Compliance.

[FR Doc. 2023–17237 Filed 8–10–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98066; File No. SR–ISE–2023–13]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE Rules Related to Complex Orders With Respect to a System Migration

August 7, 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 25, 2023, Nasdaq ISE, LLC (“ISE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 3, Section 7, Types of Orders and Order and Quote Protocols; Options 3, Section 11, Auction Mechanisms; Options 3, Section 12, Crossing Orders, Section 13, Price Improvement Mechanisms for Crossing Transactions; Options 3, Section 14, Complex Orders; Options 3, Section 15, Simple Order Risk Protections; and Options 3, Section 16, Complex Order Risk Protections.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/ise/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In connection with a technology migration to an enhanced Nasdaq, Inc. (“Nasdaq”) functionality in 2024, the Exchange intends to adopt certain trading functionality currently utilized at Nasdaq affiliate exchanges. Also, the Exchange intends to remove certain functionality. Specifically, the following sections would be amended: Options 3, Section 7, Types of Orders and Order and Quote Protocols; Options 3, Section 11, Auction Mechanisms; Options 3, Section 12, Crossing Orders, Section 13, Price Improvement Mechanisms for Crossing Transactions; Options 3, Section 14, Complex Orders; Options 3, Section 15, Simple Order Risk Protections; and Options 3, Section 16, Complex Order Risk Protections. Each change will be described below. The proposed stock-tied functionality is identical to Phlx Options 3, Sections 13(b)(10)(ii) and 14(a)(i) with respect to utilizing NES to process and report stock-tied functionality with two differences which are explained in the proposal. Additionally, MRX recently adopted identical rules to those proposed herein.³

Stock-Related Strategies and Elimination of Trade Value Allowance

Today, ISE Members are able to trade certain Stock-Option Orders as described in ISE Options 3, Section 14(a)(2),⁴ Stock-Complex Orders as

described in ISE Options 3, Section 14(a)(3),⁵ Complex QCC with Stock Orders as described in ISE Options 3, Section 14(b)(15),⁶ QCC with Stock Orders⁷ as described in Options 3, Section 7(t) and 12(e), as described in Supplementary Material .03 of ISE Options 3, Section 14 (“Delayed Functionalities”).⁸ Additionally, today, ISE offers a Trade Value Allowance.⁹

At this time, in connection with a technology migration in 2024, ISE proposes to amend its stock-tied

the underlying stock (“convertible security”) coupled with the purchase or sale of options contract(s) on the opposite side of the market representing either (A) the same number of units of the underlying stock or convertible security, or (B) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than eight-to-one (8.00), where the ratio represents the total number of units of the underlying stock or convertible security in the option leg to the total number of units of the underlying stock or convertible security in the stock leg. See ISE Options 3, Section 14(a)(2).

⁵ The term “Stock-Complex Order” refers to an order for a Stock-Complex Strategy as defined in Options 3, Section 14(a)(3). A Stock-Complex Strategy is the purchase or sale of a stated number of units of an underlying stock or a security convertible into the underlying stock (“convertible security”) coupled with the purchase or sale of a Complex Options Strategy on the opposite side of the market representing either (A) the same number of units of the underlying stock or convertible security, or (B) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than eight-to-one (8.00), where the ratio represents the total number of units of the underlying stock or convertible security in the option legs to the total number of units of the underlying stock or convertible security in the stock leg. Only those Stock-Complex Strategies with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis, are eligible for processing. See ISE Options 3, Section 14(a)(3).

⁶ A Complex QCC with Stock Order is a Qualified Contingent Cross Complex Order, as defined in subparagraph (b)(6) of Options 3, Section 14, entered with a stock component to be communicated to a designated broker-dealer for execution pursuant to ISE Options 3, Section 12(f).

⁷ A QCC with Stock Order is a Qualified Contingent Cross Order, as defined in Options 3, Section 7(j), entered with a stock component to be communicated to a designated broker-dealer for execution pursuant to Options 3, Section 12(e). See Options 3, Section 7(t).

⁸ See note 3 above.

⁹ The Trade Value Allowance permits Stock-Option Strategies and Stock-Complex Strategies at valid increments Options 3, Section 14(c)(1), Stock-Option Strategies and Stock-Complex Strategies to trade outside of their expected notional trade value by a specified amount, in order to facilitate the execution of the stock leg and options leg(s). The Trade Value Allowance is the percentage difference between the expected notional value of a trade and the actual notional value of the trade. The amount of Trade Value Allowance permitted may be determined by the Member, or a default value determined by the Exchange and announced to Members; provided that any amount of Trade Value Allowance is permitted in mechanisms pursuant to Options 3, Sections 11 and 13 when auction orders do not trade solely with their contra-side order. See Supplementary Material .03 of ISE Options 3, Section 14.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Release Act No. 97726 (June 14, 2023), 88 FR 40344 (June 21, 2023) (SR–MRX–2023–10) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Complex Order Rules) (“SR–MRX–2023–10”). MRX’s rules are not yet operative.

⁴ The term “Stock-Option Order” refers to an order for a Stock-Option Strategy as defined in Options 3, Section 14(a)(2). A Stock-Option Strategy is the purchase or sale of a stated number of units of an underlying stock or a security convertible into

functionality. Today, ISE Members desiring to execute an order with stock or an ETF component are required to enter into a brokerage agreement with a broker-dealer designated by the Exchange and are permitted to enter into such an agreement with one or more other broker-dealers to which the Exchange is able to route stock orders.¹⁰

The Exchange proposes to amend its rules to instead require that a Member desiring to execute a Stock-Option Order or a Stock-Complex Order enter into a brokerage agreement with Nasdaq Execution Services, LLC (“NES”) which will execute the stock or ETF component of the order.¹¹ The stock component of a Qualified Contingent Cross (“QCC”) with Stock Order or a Complex QCC with Stock Order will continue to be handled by a third-party broker as provided in Options 3, Sections 12(e) and (f).¹² NES is a broker-dealer owned and operated by Nasdaq, Inc. NES, an affiliate of the Exchange, has been approved by the Commission to become a Member of the Exchange and perform inbound routing on behalf of the Exchange.¹³ Additionally, NES is permitted to route outbound orders either directly or indirectly through a third party routing broker-dealer to other market centers and perform other functions regarding the cancellation of orders and the maintenance of a NES error account.¹⁴

NES currently acts as agent for orders to buy and sell the underlying stock or ETF component of a Complex Order on Nasdaq Phlx LLC (“Phlx”).¹⁵ The functions performed by NES on Phlx today are identical to the functions that ISE proposes for NES to perform for ISE Members as well as rules recently adopted by MRX.¹⁶ Identical to Phlx,

after ISE’s System determines that a Complex Order execution is possible and identifies the prices for each component of such Complex Order, ISE will electronically communicate the stock or ETF component of the Complex Order to NES for execution.¹⁷ NES, acting as agent for the orders to buy and sell the underlying stock or ETF, will execute the orders in the over-the-counter (“OTC”) market and will handle the orders pursuant to applicable rules regarding equity trading, including the rules governing trade reporting, trade-throughs, and short sales. This function is currently performed by a third-party broker-dealer. The proposed stock-tied functionality is identical to Phlx Options 3, Sections 13(b)(10)(ii) and 14(a)(i) with respect to utilizing NES to process and report the stock or ETF component of a Complex Order.

However, there are two differences in the way Phlx and ISE handle stock-tied option orders.

First, while both Phlx and ISE have certain risk protections for complex orders, they differ. With respect to ISE, the execution price of the Complex Order must be within a certain price from the current market, as determined by the Exchange pursuant to Options 3, Section 16(a). Specifically, today, ISE Options 3, Section 16(a) provides that the System will not permit any leg of a complex strategy to trade-through the NBBO for the series or any stock component by a configurable amount calculated as the lesser of (i) an absolute amount not to exceed \$0.10, and (ii) a percentage of the NBBO not to exceed 500%, as determined by the Exchange on a class, series or underlying basis. In contrast, Phlx Options 3, Section 16(b)(i) describes Phlx’s Acceptable Complex Execution (“ACE”) Parameter which defines a price range outside of

which a complex order will not be executed. On Phlx, a complex order to sell is not executed at a price that is lower than the cNBBO¹⁸ bid by more than the ACE Parameter. Conversely, on Phlx, a complex order to buy will not be executed at a price that is higher than the cNBBO offer by more than the ACE Parameter. While ISE’s and Phlx’s price checks differ, both markets seek to prevent executions from occurring at certain prices and at certain percentages from the NBBO. ISE’s proposal would require NES to apply the same price check for stock-tied functionality that are being applied today by a third-party broker-dealer that executed the stock or ETF component of a complex strategy on behalf of ISE Members. ISE Members would continue to be subject to the same price check which is applied to all Complex Orders executed on ISE.

Second, ISE and Phlx differ with respect to the manner in which their systems handle Stock-Option Strategies and Stock-Complex Strategies that would execute against interest on the Complex Order Book at a price that does not meet the price checks in their respective rules or do not meet Regulation SHO provisions as provided for in proposed Options 3, Section 16(e)¹⁹ are handled by their respective systems. As proposed, ISE will hold orders on the Complex Order book that cannot be executed because of Regulation SHO or price check restrictions, unless the Member requests the order to be cancelled. If an ISE Member elects to have the order held on the Complex Order Book, the order would await other matching opportunities, otherwise at the Member’s election the order would be returned to the Member. In contrast, Phlx only provides for a cancellation of the order. ISE’s proposed approach would provide the Member with optionality as to the handing of the order. The Exchange believes providing the choice to have the order held on the Complex Order Book provides Members with an opportunity for an execution.

NES

NES is a registered broker-dealer and member of various exchanges and the Financial Industry Regulatory Authority

¹⁰ See Supplementary Material .02 to Options 3, Section 14.

¹¹ *Id.*

¹² ISE members may also trade QCC Orders and complex QCC Orders. See Options 3, Section 12(c) and (d). For those orders, the parties to the trade will arrange for the execution of the stock component of the order.

¹³ See Securities Exchange Act Release No. 79994 (February 9, 2017), 82 FR 10837 (February 15, 2017) (SR-ISE-2016-27) (Order Granting Approval of Proposed Rule Changes, as Modified by Amendment No. 1 Thereto, To Amend the Exchange’s Rules Regarding Routing of Orders, Cancellation of Orders, and Handling of Error Positions, and Permit Nasdaq Execution Services, LLC To Become an Affiliated Member of the Exchange To Perform Certain Routing and Other Functions).

¹⁴ *Id.* ISE is subject to certain limitations and conditions such as maintaining a Regulatory Services Agreement with FINRA, as well as an agreement pursuant to Rule 17d-2 under the Act, among other limitations and conditions.

¹⁵ See Phlx Options 3, Sections 13(b), 14(a) and 16(b).

¹⁶ See Securities Exchange Act Release No. 63777 (January 26, 2011), 76 FR 5630 (February 1, 2011)

(SR-Phlx-2010-157) (Order Approving a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to Complex Orders) (“Phlx Complex Order Approval”). NES assumed the stock execution functionalities that were previously performed by NOS. Phlx subsequently filed to permit both inbound and outbound orders to be routed through NES instead of Nasdaq Options Services LLC (“NOS”). See Securities Exchange Act Release No. 71417 (January 28, 2014), 79 FR 6253 (February 3, 2014) (SR-Phlx-2014-04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Outbound Routing) and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR-Phlx-2014-05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Inbound Routing of Options Orders). See also SR-MRX-2023-10 which rules are not yet operative.

¹⁷ See proposed Supplementary Material .08(b) to Options 3, Section 11, proposed Options 3, Section 12(b)(2), proposed Supplementary Material .09(b) to Options 3, Section 13, proposed Supplementary Material .02 to Options 3, Section 14 and proposed Options 3, Section 16(d). See also Phlx Options 3, Section 13(b)(10)(ii), Options 3, Section 16(b).

¹⁸ The term “cNBBO” means the best net debit or credit price for a Complex Order Strategy based on the NBBO for the individual options components of a Complex Order Strategy, and, where the underlying security is a component of the Complex Order, the National Best Bid and/or Offer for the underlying security. See Phlx Options 3, Section 14(a)(vi).

¹⁹ As proposed, NES will only execute Stock-Option Strategies and Stock-Complex Strategies if the underlying covered security component is in accordance with Rule 201 of Regulation SHO.

(“FINRA”). NES will be responsible for the proper execution, trade reporting, and submission to clearing of the underlying stock or ETF component of a Complex Order.²⁰ Because these trades will occur off-exchange, the principal regulator is FINRA. Furthermore, today, NES is responsible for compliance with FINRA rules generally and is subject to examination by FINRA. Specifically, NES is subject to FINRA Rule 3110, which generally requires that the policies and procedures and supervisory systems of a broker-dealer be reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA rules, including those relating to the misuse of material non-public information. To this end, today, NES has in place policies related to confidentiality and the potential for informational advantages relating to its affiliates, intended to protect against the misuse of material nonpublic information.²¹ In particular, NES will have in place policies and procedures designed to prevent the misuse of material non-public information related

to stock-tied executions. Of note, NES only receives information about the stock or ETF portion of the order from the Exchange. As mentioned herein, today, NES is responsible for the proper execution, trade reporting, and submission to clearing of the underlying stock or ETF component of a Complex Order on Phlx. ISE will adopt identical policies and procedures for its stock-tied functionality as are in place on Phlx today.

In addition, because the execution and reporting of the stock/ETF piece will occur otherwise than on ISE or any other exchange, it will be handled by NES pursuant to applicable rules regarding equity trading,²² including the rules governing trade reporting, trade-throughs and short sales. Specifically, NES will report the trades to the Trade Reporting Facility.²³ Firms that are members of FINRA are required to have a Uniform Service Bureau/Executing Broker Agreement (“AGU”) with NES in order to trade Complex Orders containing a stock/ETF component. Firms that are not members of FINRA are required to have a Qualified Special Representative (“QSR”) arrangement with NES in order to trade Complex Orders containing a stock/ETF component. This requirement is codified in proposed Supplementary Material .08 to Options 3, Section 11, proposed Options 3, Section 12(b)(1), proposed Supplementary Material .09 to Options 3, Section 13 and proposed Supplementary Material .07 to Options 3, Section 14. Accordingly, this process is available to all ISE Members and the stock/ETF component of a Complex Order, once executed, will be properly processed for trade reporting purposes. Phlx has identical requirements within its Options 3, Sections 13(b)(10) and 14(a)(i).

With respect to trade-throughs, the Exchange believes that the stock/ETF component of a Complex Order is eligible for the Qualified Contingent Trade Exemption from Rule 611(a) of Regulation NMS. A Qualified Contingent Trade is a transaction consisting of two or more component orders, executed as agent or principal, that satisfy the six elements in the Commission’s order exempting Qualified Contingent Trades (“QCTs”)

from the requirements of Rule 611(a),²⁴ which requires trading centers to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs.²⁵ The Exchange believes that the stock/ETF portion of a Complex Order under this proposal complies with all six requirements. Moreover, as explained below, ISE’s System will validate compliance with each requirement such that any matched order received by NES under this proposal has been checked for compliance with the exemption, as follows:

(1) At least one component order is in an NMS stock: The stock/ETF component must be an NMS stock, which is validated by the System;

(2) all components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent: A Complex Order, by definition consists of a single net/debit price and this price contingency applies to all the components of the order, such that the stock price computed and sent to NES allows the stock/ETF order to be executed at the proper net debit/credit price based on the execution price of each of the option legs, which is determined by the ISE System;

(3) the execution of one component is contingent upon the execution of all other components at or near the same time: Once a Complex Order is accepted and validated by the System, the entire package is processed as a single transaction and each of the option leg and stock/ETF components are simultaneously processed;

²⁴ 17 CFR 242.611(a).

²⁵ See Securities Exchange Act Release Nos. 57620 (April 4, 2008), 73 FR 19271 (April 9, 2008) (“QCT Exemptive Order”). See also Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006). The QCT Exemption applies to trade-throughs caused by the execution of an order involving one or more NMS stocks that are components of a “qualified contingent trade.” As described more fully in the QCT Exemptive Order, a qualified contingent trade is a transaction consisting of two or more component orders, executed as principal or agent, where: (1) At least one component order is an NMS stock; (2) all components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent; (3) the execution of one component is contingent upon the execution of all other components at or near the same time; (4) the specific relationship between the component orders (e.g., the spread between the prices of the component orders) is determined at the time the contingent order is placed; (5) the component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled; and (6) the Exempted NMS Stock Transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade.

²⁰ The Commission’s approval order for Phlx stated that NOS (now NES) “. . . as a facility of the Phlx, NOS is subject to oversight by the Commission and by the Phlx. In addition, NOS, a member of FINRA, is responsible for compliance with applicable rules regarding equity trading, including rules governing trade reporting, trade-throughs and short sales, and is subject to examination by FINRA. Because NOS will execute the stock or ETF component of a Complex Order in the OTC market, the principal regulator of these trades will be FINRA, rather than the Phlx or Nasdaq.” See SR-Phlx-2010-157 76 FR 5630 at 5625, footnote 20. Phlx originally set up its affiliated broker-dealers as two separate entities, NES and NOS. When Phlx replaced NOS with NES, it noted in the rule change that NES will operate the same way as NOS operated, in terms of routing options orders to destination options exchanges. See SR-Phlx-2014-04, 79 FR 6253 at 6254.

²¹ Similarly, the Exchange does establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and NES. Additionally NES undertook all NOS’ responsibilities with respect to the execution and reporting of the underlying security component of a Complex Order. See SR-Phlx-2014-04 at note 20. Therefore, members of FINRA or the NASDAQ Stock Market (“NASDAQ”) who were required to have a Uniform Service Bureau/Executing Broker Agreement (“AGU”) with NOS in order to trade Complex Orders containing a stock/ETF component and firms that are not members of FINRA or NASDAQ who were required to have a Qualified Special Representative (“QSR”) arrangement with NOS in order to trade Complex Orders containing a stock/ETF component were required to have such arrangements with NES. See Securities Exchange Act Release No. 71417 (January 28, 2014), 79 FR 6253 (February 3, 2014) (SR-Phlx-2014-04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Outbound Routing) and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR-Phlx-2014-05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Inbound Routing of Options Orders).

²² Once the orders are communicated to the broker-dealer for execution, the broker-dealer has complete responsibility for determining whether the orders may be executed in accordance with all of the rules applicable to execution of equity orders.

²³ Specifically, the trades will be reported to the FINRA/Nasdaq TRF which is a facility of FINRA that is operated by Nasdaq, Inc. and utilizes Automated Confirmation Transaction (“ACT”) Service technology.

(4) the specific relationship between the component orders (e.g., the spread between the prices of the component orders) is determined at the time the contingent order is placed: Complex Orders, upon entry, must have a size for each component and a net debit/credit, which the System validates and processes to determine the ratio between the components; an order is rejected if the net debit/credit price and size are not provided on the order;

(5) the component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled: under this proposal, the stock/ETF component must be the underlying security respecting the option legs, which is validated by the System; and

(6) the transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade: Under this proposal, the ratio between the options and stock/ETF must be a conforming ratio (8 contracts per 100 shares), which the System validates, and which under reasonable risk valuation methodologies, means that the stock/ETF position is fully hedged.²⁶

Furthermore, proposed Supplementary Material .08 to Options 3, Section 11, proposed Options 3, Section 12(b)(1), proposed Supplementary Material .09 to Options 3, Section 13 and proposed Supplementary Material .07 to Options 3, Section 14 provide that Members may only submit Complex Orders with a stock/ETF component if such orders comply with the Qualified Contingent Trade Exemption. Members submitting such Complex Orders with a stock/ETF component represent that such orders comply with the Qualified Contingent Trade Exemption. Thus, the Exchange believes that Complex Orders consisting of a stock/ETF component will comply with the exemption and that ISE's System will validate such compliance to assist NES in carrying out its responsibilities as agent for these orders.

With respect to short sale regulation, the proposed handling of the stock/ETF component of a Complex Order under this proposal should not raise any issues of compliance with the currently operative provisions of Regulation SHO.²⁷ When a Complex Order has a

stock/ETF component, Members must indicate, pursuant to Regulation SHO, whether that order involves a long or short sale. The System will accept Complex Orders with a stock/ETF component marked to reflect either a long or short position; specifically, orders not marked as buy, sell or sell short will be rejected by ISE's System.²⁸ The System will electronically deliver the stock/ETF component to NES for execution. Simultaneous to the options execution on ISE's System, NES will execute and report the stock/ETF component, which will contain the long or short indication as it was delivered by the Member to ISE's System. Accordingly, NES, as a trading center under Rule 201, will be compliant with the requirements of Regulation SHO. Of course, broker-dealers, including both NES and the Members submitting orders to ISE with a stock/ETF component, must comply with Regulation SHO. NES' compliance team updates, reviews and monitors NES' policies and procedures including those pertaining to Regulation SHO on an annual basis.

Further, proposed Supplementary Material .08(c) to Options 3, Section 11, and proposed Options 3, Section 12(b)(3), proposed Supplementary Material .09(c) to Options 3, Section 13, and proposed Options 3, Section 16(e) provide that when the short sale price test in Rule 201 of Regulation SHO²⁹ is triggered for a covered security, NES will not execute a short sale order in the underlying covered security component³⁰ of a Complex Order if the price is equal to or below the current national best bid. However, NES will execute a short sale order in the underlying covered security component of a Complex Order if such order is marked "short exempt," regardless of whether it is at a price that is equal to or below the current national best bid. If NES cannot execute the underlying covered security component of a Complex Order in accordance with Rule 201 of Regulation SHO, the Exchange will hold the Complex Order on the Complex Order Book, if consistent with Member instructions (Members may always elect to cancel the order).³¹ The

order may execute at a price that is not equal to or below the current national best bid.³² This proposed rule is similar to Phlx Options 3, Section 16(b) except that unlike Phlx, ISE will not cancel back the Complex Order to the entering Member unless the Member requests that the order be cancelled. As noted above, ISE and Phlx differ with respect to the manner in which their systems handle Stock-Option Strategies and Stock-Complex Strategies that do not meet requisite price checks in their respective rules or do not meet the requirements of Regulation SHO. As proposed, ISE will hold orders on the Complex Order book that cannot be executed pursuant to Regulation SHO restrictions, unless the Member requests the order to be cancelled.³³ If an ISE Member elects to have the order held, the order would await other matching opportunities, otherwise at the Member's election the order would be returned to the Member. In contrast, Phlx only provides for a cancellation of the order. ISE's proposed approach would provide the Member with optionality as to the handing of the order. The Exchange believes providing the choice to have the order held provides Members with an opportunity for an execution.

For these reasons, the processing of the stock/ETF component of a Complex Order under this proposal will comply with applicable rules regarding equity trading, including the rules governing trade reporting, trade-throughs and short sales. NES's responsibilities respecting these equity trading rules will be documented in NES's written policies and procedures. NES' compliance team updates, reviews and monitors NES' policies and procedures regarding equity trading rules on an annual basis. NES is regulated by FINRA and as such, NES policies and procedures are subject to review and examinations by FINRA.

As part of the execution of the stock/ETF component, NES will ensure that the execution price is within the intra-day high-low range for the day in that stock at the time the Complex Order is processed and within a certain price range from the current market pursuant to Options 3, Section 16(a),³⁴ which the Exchange will establish in an Options Trader Alert. If the stock price is not

11 and Supplementary Material .09 to Options 3, Section 13.

³² See proposed Options 3, Section 16(e).

³³ See proposed Options 3, Section 16(e).

³⁴ This intra-day high-low range check does not occur for Complex PIM Orders, Complex Facilitation Orders and Complex SOM Orders, and also does not occur for Complex Customer Cross Orders.

²⁶ A trading center may demonstrate that an Exempted NMS Stock Transaction is fully hedged under the circumstances based on the use of reasonable risk-valuation methodologies. The release approving the original exemption stated: To effectively execute a contingent trade, its component orders must be executed in full or in ratio at its predetermined spread or ratio. "In ratio" clarifies that component orders of a contingent trade do not necessarily have to be executed in full, but any partial executions must be in a predetermined ratio.

²⁷ 17 CFR 242.200 *et seq.*

²⁸ The Exchange also accepts short sell exempt orders as described herein.

²⁹ See Securities Exchange Act Release No. 61595 (February 26, 2010), 75 FR 11232 (March 10, 2010) ("Rule 201 Adopting Release").

³⁰ For purposes of this paragraph, the term "covered security" shall have the same meaning as in Rule 201(a)(1) of Regulation SHO.

³¹ See proposed Options 3, Section 16(e). In contrast, Complex Orders in an auction mechanism that cannot be executed in accordance with Regulation SHO will be cancelled back and will not rest on the Complex Order Book as provided in Supplementary Material .08 to Options 3, Section

within these parameters, the Complex Order is not executable and would be held on the order book or cancelled, consistent with Member instructions.³⁵ Today, the third-party broker-dealer would ensure the execution price is within the intra-day high-low range. With the transition to NES, the Exchange would commence performing this check. Members who transact stock-tied functionality on ISE would therefore continue to be subject to the same execution price check with NES as today.

The Exchange believes that the continued electronic submission of the stock/ETF piece of the Complex Order to NES for execution should help ensure that the Complex Order, as a whole, is executed timely and at the desired price. In addition, the Exchange's electronic communication of the stock or ETF component to NES for execution eliminates the need for each party to separately submit the stock component to a broker-dealer for execution. The execution of the stock/ETF portion of a Complex Order will be immediate; the Exchange's System will calculate the stock price based on the net debit/credit price of the Complex Order,³⁶ while also calculating and determining the appropriate options price(s), all electronically. The Exchange continues to believe that this practice would not require the Exchange to later nullify options trades if the stock price cannot be achieved. Accordingly, like Phlx, the Exchange is not proposing to adopt a rule permitting such option trade nullifications because the trade would not occur at a price that later required nullification due to the unavailability of the stock/ETF price. The Exchange further believes that the certainty associated with such electronic calculations and processing will continue to be an attractive feature for Members transacting Complex Orders with a stock or ETF component. Likewise, Phlx does not have a rule for options trade nullification for similar transactions. Phlx reasoned in its proposal to similarly use an affiliate to execute the stock or ETF component of a Complex Order that because such execution would be immediate, with Phlx's system calculating the stock or ETF price based on the net debit/credit

price of the Complex Order while also calculating and determining the appropriate options price(s), that it believed that its approach would not require Phlx to later nullify options trades if the stock price cannot be achieved.³⁷

The Exchange also believes that it is appropriate to construct a program wherein its affiliate, NES, is the exclusive conduit for the execution of the stock/ETF component of a Complex Order under this proposal, similar to Phlx.³⁸ As a practical matter, complex order programs on other exchanges involve specific arrangements with a broker-dealer to facilitate prompt execution. NES does not intend to charge a fee for the execution of the stock/ETF component of a Complex Order.³⁹ The Exchange believes that is consistent with the Act for such an arrangement to involve one broker-dealer, even one that is an affiliate, particularly to offer the aforementioned benefits of a prompt, electronic execution for Complex Orders involving stock/ETFs. Specifically, offering a seamless, automatic execution for both the options and stock/ETF components of a Complex Order is an important feature that should promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system by deeply enhancing the sort of complex order processing available on options exchanges today. Nevertheless, Members could, in lieu of this proposed arrangement with NES, choose, instead, the following alternatives: (i) avoid using Complex Orders that involve stock/ETFs, (ii) use a trading floor to execute Complex Order with stock, or

(iii) go to another options venue, several of which offer a similar feature.⁴⁰

In line with the proposed amendments, the Exchange proposes to remove language within Supplementary Material .02 of Options 3, Section 14 which states,

Members may also indicate preferred execution brokers, and such preferences will determine order routing priority whenever possible. A trade of a Stock-Option Order or a Stock-Complex Order will be automatically cancelled if market conditions prevent the execution of the stock or option leg(s) at the prices necessary to achieve the agreed upon net price. When a Stock-Option Order or Stock-Complex Order has been matched with another Stock-Option Order or Stock-Complex Order that is for less than the full size of the Stock-Option Order or Stock-Complex Order, the full size of the Stock-Option Order or Stock-Complex Order being processed by the stock execution venue will be unavailable for trading while the order is being processed.

As noted herein, Members will no longer be able to indicate preferred execution brokers which makes the first sentence within Supplementary Material .02 of Options 3, Section 14 unnecessary. The second sentence within Supplementary Material .02 of Options 3, Section 14 is being removed because the Exchange is replacing this rule text with proposed Options 3, Section 16(d) and (e) which describes price checks that will be performed for Stock-Option Orders or Stock-Complex Orders by NES. The third sentence within Supplementary Material .02 of Options 3, Section 14 is being removed because the Exchange's proposal to replace the third-party broker with NES will remove a delay that currently exists in the workflow to process a Stock-Option Order or Stock-Complex Order. NES will perform the stock leg validations proposed in Options 3, Sections 16(d) and (e) for Stock-Option Orders or Stock-Complex Orders. Thereafter, NES would print the stock components onto the Trade Reporting Facility and ISE would print the option component executions. This new workflow in which the stock or ETF component of the order will be routed to NES for execution instead of a third-party broker-dealer will obviate the possibility that the stock execution venue will be unavailable for trading while the order is being processed because ISE would no longer be reliant on a third-party broker-dealer to conduct the appropriate checks and, thereafter, relay information to ISE. With the proposed change, NES, the

³⁵ See proposed Options 3, Section 16(d). In contrast, Complex Orders in an auction mechanism that cannot be executed in accordance with Regulation SHO will be cancelled back and will not rest on the Complex Order Book as provided in Supplementary Material .08 to Options 3, Section 11 and Supplementary Material .09 to Options 3, Section 13.

³⁶ The stock/ETF price is, of course, included within the net debit/credit price of the Complex Order.

³⁷ See Phlx Complex Order Approval *supra* at 5633.

³⁸ See ISE General 2, Section 4(b) which provides that Nasdaq, Inc., which owns NASDAQ Execution Services, LLC and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NASDAQ Execution Services, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange Members in connection with the provision of inbound routing to the Exchange.

³⁹ However, Trade Reporting Facility and clearing fees, not charged by ISE or NES, may result. National Securities Clearing Corporation ("NSCC") and ACT will bill firms directly for their use of the NSCC and ACT systems, respectively. To the extent that NES is billed by NSCC or ACT, it will not pass through such fees to firms for the stock/ETF portion of a Complex Order under this proposal. ISE's fees applicable to Complex Orders appear in its Fee Schedule and may change from time to time.

⁴⁰ Existing Complex Order mechanisms at Cboe, Inc. ("Cboe") offers a similar end result. See Cboe 5.33(l).

Exchange's affiliate, would conduct the necessary price checks and would make Stock-Option Orders or Stock-Complex Orders available to ISE in the same way that it does for Phlx. The Exchange believes that this new workflow would increase the efficiency of the entire transaction, including stock component validation and reporting.

Complex Opening Process

Similarly, the Exchange proposes to amend Supplementary Material .04 to Options 3, Section 14 to provide that Stock-Option Strategies and Stock-Complex Strategies will open pursuant to the Complex Opening Price Determination described in Supplementary Material .05 to Options 3, Section 14 instead of the Complex Uncrossing Process described in Supplementary Material .06(b) to Options 3, Section 14. Similar to the discussion above, the applicable price checks for the stock/ETF component of a Stock-Option Strategy and Stock-Complex Strategy are being performed by a third-party broker-dealer, which causes a delay that prevents these strategies from participating in the Complex Opening Process. With the proposed change to utilize NES in lieu of a third-party broker-dealer, Stock-Option Strategies and Stock-Complex Strategies would be able to participate in the Complex Opening Process because there would be no delay as NES, the Exchange's affiliate, would conduct the necessary checks (*i.e.* the price checks Options 3, Section 16(d) and (e)). Thereafter, NES would make Stock-Option Order or Stock-Complex Order available to participate in the Complex Opening Process.

For example, assume that an underlying equity is in a Regulation SHO State, the underlying equity component is open on the primary underlying market, and the following strategy is created prior to the option leg being opened on ISE:

- Assume Stock Option Strategy: Buy 8 puts and buy 100 shares
- Stock Leg NBBO: 50.00 × 50.20
- Option leg opens on ISE and the NBBO is 2.00 × 2.10
- Stock-Option Strategy derived NBBO: 16.50 × 16.75⁴¹
- Firm A Customer Stock-Option Order to buy 5 strategies for 16.50 arrives

⁴¹ The derived NBBO for the Stock Option Strategy was calculated as follows: Stock Option Strategy Derived Bid = $\frac{1}{4}(2.00 \times 8) + \frac{1}{4}(50) = 16.50$ and Stock Option Strategy Derived Offer = $\frac{1}{4}(2.10 \times 8) + \frac{1}{4}(50.20) = 16.75$. The Stock Option Strategy is normalized by ISE's System by dividing the legs by the greatest common denominator of four (4). The normalized ratio was applied to the option leg price and stock leg price to determine the net price strategy.

- Firm B Stock-Option Order to buy 5 strategies for 16.50 arrives
- Firm C Stock-Option Order to sell 7 strategies for 16.50 arrives with instructions to short the stock component
- Firm D Stock-Option Order to sell 3 strategies for 16.50 arrives with instructions to Sell the Stock component

In the above scenario, only Firm A (buying 5 strategies) and Firm D (not shorting 3 strategies) can actually trade at the Opening Price despite it appearing there is a fully matched cross. Firm C (selling 7 strategies) cannot trade because the underlying is in a Regulation SHO state and the only price the stock leg can be matched at, is on the National Best Bid, which is not a permissible price to short sell for an underlying in a Regulation SHO state.

ISE does not attempt to match Stock-Option Orders and Stock-Complex Orders during the Complex Opening Price Determination because the Exchange cannot ensure that all parties in the cross are able to match at the proposed stock leg price because the checks are performed by a third party. If the third party is unable to match part of the cross, executions on the options components are busted, therefore the Exchange does not consider Stock-Option Orders and Stock-Complex Orders in the Complex Opening.

With this proposal, the price checks would be conducted by NES, an affiliate of the Exchange. Once ISE determines the stock and option leg prices, ISE will communicate the stock price and quantity to NES, who will conduct the necessary price checks. The proposed workflow provides efficiencies for the stock component execution as compared to the current process which involves a third-party broker-dealer. With this process, ISE would be able to process the option component and match the strategies during the Complex Opening Price Determination without the need for ISE to await a response from a third-party broker-dealer.

The ability to attempt this match opportunity earlier in the Complex Opening Price Determination is critical because the market can move between the Complex Opening Price Determination and the Complex Uncrossing Process⁴² in such a way that the trade could no longer be possible. By way of example, if the Stock Component adjusts to 53.00 × 54.00 before this strategy can attempt a Complex Uncrossing Process, the Stock Option Strategy derived NBBO would

⁴² See Supplementary Material .06 to ISE Options 3, Section 14.

be 17.25 × 17.70 and there would no longer be a match possible for the interest willing to buy and sell at 16.50. If the System instead had utilized the Opening Price Determination, the execution would have occurred in this instance.

Trade Value Allowance

Trade Value Allowance is a functionality that allows Stock-Option Strategies and Stock-Complex Strategies to trade outside of their expected notional trade value by a specified amount (the "Trade Value Allowance").⁴³ After calculating the appropriate options match price for a Stock-Option or Stock-Complex Order expressed in a valid one cent increment, the System calculates the corresponding stock match price rounded to the increment supported by the equity market.

The Exchange no longer desires to offer the Trade Value Allowance. The Exchange will issue an Options Trader Alert indicating its intent to decommission this functionality to provide notice to Members.⁴⁴ Very few Members have opted to utilize the Trade Value Allowance and even a smaller percentage of trades were subject to the allowance. Phlx does not have a similar allowance today. In an effort to harmonize its complex order functionality across its Nasdaq affiliated markets, the Exchange proposes to no longer offer the Trade Value Allowance functionality. With the proposed change to utilize NES, the Exchange would determine the stock leg prices, and NES would be able to execute the stock leg at two different prices to ensure that the net price of the execution is within the notional value of the original order, thus eliminating the need for the allowance.

Options 3, Section 7

The Exchange proposes to make a clarifying change to ISE Options 3, Section 7, Types of Orders and Order and Quote Protocols. The Exchange proposes to amend ISE Options 3, Section 7(t) related to QCC with Stock Orders to make clear that QCC with Stock Orders may only be entered

⁴³ The Trade Value Allowance is the percentage difference between the expected notional value of a trade and the actual notional value of the trade. See Supplementary Material .03 of ISE Options 3, Section 14.

⁴⁴ MRX issued such an alert indicating it would when it decommissioned its Trade Value Allowance. See Options Trader Alert #2023-3. See also SR-MRX-2023-10. No MRX Member expressed concern with this functionality being eliminated.

through FIX⁴⁵ and Precise.⁴⁶ ISE has 3 order entry protocols, FIX, OTTO⁴⁷ and Precise. Members only require one order entry protocol to enter orders onto ISE. While Members only require one order entry port to submit orders into ISE, the Exchange offers Members a choice between 2 different types of ports to utilize to submit QCC with Stock Orders.⁴⁸ All Members would have the ability to enter QCC with Stock Orders through FIX or Precise. Members are not required to subscribe to both FIX and Precise. QCC with Stock Orders may not be entered through OTTO.

Additionally, the Exchange proposes to amend Supplementary Material .02(d) to Options 3, Section 7 related to Immediate-or-Cancel Orders. The Exchange proposes to specifically amend Supplementary Material .02(d)(3) to Options 3, Section 7 to add QCC with Stock Orders and Complex QCC with Stock Orders to the list of order types that have a Time in Force or “TIF” of Immediate-or-Cancel or “IOC”. Because QCC with Stock Orders and Complex QCC with Stock Orders have a TIF of IOC, these order types will either execute on entry or cancel. Adding these order types to Supplementary Material .02(d)(3) to Options 3, Section 7 will make this clear.

⁴⁵ “Financial Information eXchange” or “FIX” is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders and auction orders to the Exchange. Features include the following: (1) execution messages; (2) order messages; (3) risk protection triggers and cancel notifications; and (4) post trade allocation messages. See Supplementary Material .03(a) to Options 3, Section 7.

⁴⁶ “Nasdaq Precise” or “Precise” is a front-end interface that allows Electronic Access Members and their Sponsored Customers to send orders to the Exchange and perform other related functions. Features include the following: (1) order and execution management: enter, modify, and cancel orders on the Exchange, and manage executions (e.g., parent/child orders, inactive orders, and post-trade allocations); (2) market data: access to real-time market data (e.g., NBBO and Exchange BBO); (3) risk management: set customizable risk parameters (e.g., kill switch); and (4) book keeping and reporting: comprehensive audit trail of orders and trades (e.g., order history and done away trade reports). See Supplementary Material .03(d) to Options 3, Section 7.

⁴⁷ “Ouch to Trade Options” or “OTTO” is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders, auction orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (e.g., underlying and complex instruments); (2) system event messages (e.g., start of trading hours messages and start of opening); (3) trading action messages (e.g., halts and resumes); (4) execution messages; (5) order messages; (6) risk protection triggers and cancel notifications; (7) auction notifications; (8) auction responses; and (9) post trade allocation messages. See Supplementary Material .03(b) to Options 3, Section 7.

⁴⁸ See Options 7, Section 6, Ports and Other Services.

Options 3, Section 12

The Exchange proposes to amend Options 3, Section 12(e)(4) to clarify the manner in which a Member may submit a QCC with Stock Order.⁴⁹ Today, Options 3, Section 12(e)(4) provides that, “QCC with Stock Orders can be entered with separate prices for the stock and options components, or with a net price for both.” The Exchange proposes to amend this rule text to instead reflect the current manner in which QCC with Stock Orders may be entered into ISE’s System. The proposed rule text would provide, “QCC with Stock Orders must be entered with a net price for the stock and options components through FIX. Separate prices for the stock and options components, or a net price for both may be entered through Precise. The System will calculate the individual component prices.” The current language of Options 3, Section 12(e)(4) is not correct because it does not specify the protocols. The Exchange proposes to amend this language to make clear the current System functionality. The proposed language does not result in a change to the Exchange’s System. As noted above, QCC with Stock Orders may not be entered through OTTO. The Exchange notes that requiring QCC with Stock Orders to be submitted through FIX or Precise is consistent with proposed Options 3, Section 7(t) which requires Members to enter QCC Orders through FIX or Precise. Additionally, the Exchange is specifying how the System calculates the individual component prices. Members may elect to enter orders through either FIX or Precise. Members do not need to subscribe to both protocols.

Options 3, Section 15

The Exchange proposes to amend its Market Wide Risk Protection within Options 3, Section 15(a)(1)(C) to add certain additional information concerning the current Market Wide Risk Protection along with new language that would apply as a result of the proposed changes to stock-tied functionality.

Today, the Exchange offers a Market Wide Risk Protection which is comprised of an “Order Entry Rate Protection” which protects Members against entering orders at a rate that exceeds predefined thresholds, and an “Order Execution Rate Protection,” which protects Members against executing orders at a rate that exceeds their predefined risk settings. Both of these risk protections are detailed in the

“Market Wide Risk Protection.” Today, pursuant to the proposed Market Wide Risk Protection rule, the Exchange’s System maintains one or more counting programs for each Member that count orders entered and contracts traded on ISE. Members can use multiple counting programs to separate risk protections for different groups established within the Member.

ISE Options 3, Section 15(a)(1)(C) currently states, that the counting programs will maintain separate counts, over rolling time periods specified by the Member for each count of:

(1) the total number of orders entered in the regular order book; (2) the total number of orders entered in the complex order book with only options legs; (3) the total number of orders entered in the complex order book with both stock and options legs; (4) the total number of contracts traded in regular orders; and (5) the total number of contracts traded in complex orders with only options legs.

Today, the counting programs maintain separate counts over rolling time period for the total number of orders entered in the regular order book, complex order book with only options legs; and the complex order book with both stock and options legs. Additionally, the risk protection counts the total number of contracts traded in regular orders and Complex Orders with only options legs.⁵⁰ The Exchange proposes to amend ISE Options 3, Section 15(a)(1)(C) within (2) through (5) to use the defined terms Stock-Option Order, Stock-Complex Order, and Complex Option Order. The Exchange notes that the stock portion of QCC Orders, Complex Qualified QCC Orders, QCC with Stock Orders, and Complex QCC with Stock Orders are not counted in (3) because ISE’s System does not handle the stock portion of these orders. ISE would not represent the stock leg through NES as it would for other Stock-Option Orders and Stock-Complex Orders as described herein. The Exchange notes that QCC Orders, Complex Qualified QCC Orders, QCC with Stock Orders, and Complex QCC with Stock Orders are considered, where applicable, in Options 3, Section 15(a)(1)(C)(1), (2), (4) and (5).

Today, the Exchange does not include a complex execution count for Complex Orders with a stock component as the execution counts maintained by the Order Execution Rate Protection are based solely on options contracts traded. At this time, as a result of

⁵⁰ The Member’s allowable order rate for the Order Entry Rate Protection is comprised of the parameters defined in (1) to (3), while the allowable contract execution rate for the Order Execution Rate Protection is comprised of the parameters defined in (4) and (5).

⁴⁹ QCC with Stock Orders are processed in accordance with Options 3, Section 12(e).

amending the stock-tied functionality, the Exchange proposes to add a new number (6) to ISE Options 3, Section 15(a)(1)(C) to note that the counting programs will maintain separate counts, over rolling time periods specified by the Member for each count, of the total number of Stock-Option Order and Stock-Complex Order contracts traded. The Exchange is adding new number (6) because it is introducing NES in place of a third-party broker-dealer. As a result, the Exchange will guarantee a stock-tied execution. Today, the stock-tied execution is not guaranteed by the third-party broker-dealer. Because of the ability to guarantee the execution, the Exchange is amending Options 3, Section 15(a)(1)(C) to add (6) to the list of contracts counted by the Market Wide Risk Protection because the Exchange is able to perform the risk check since NES will be handling the stock for Stock-Option Orders and Stock-Complex Orders. This risk protection will reduce risk associated with system errors or market events that may cause Members to send a large number of orders, or receive multiple, automatic executions, before they can adjust their exposure in the market. Without adequate risk management tools, such as those proposed in this filing, Members could reduce the amount of order flow and liquidity that they provide on ISE. As a result, the functionality promotes just and equitable principles of trade.

Finally, the Exchange proposes to add the defined term "DNITT" to the end of Options 3, Section 16(a) to define the instruction on a Complex Order to price each leg of the Complex Order to be executed equal to or better than the NBBO for the options series or any stock component, as applicable as a "Do-Not-Trade-Through" or "DNITT". This is not a substantive amendment, rather this change is meant to assist Members in locating this functionality within ISE's rules.

Implementation

The Exchange intends to begin implementation of the proposed rule change prior to December 20, 2024. The implementation would commence with a limited symbol migration and continue to migrate symbols over several weeks. The Exchange will issue an Options Trader Alert to Members to provide notification of the symbols that will migrate and the relevant dates.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁵¹ in general, and furthers the

objectives of Section 6(b)(5) of the Act,⁵² in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest for the reasons discussed below.

Stock-Related Strategies and Elimination of Trade Value Allowance Stock-Tied Functionality

The Exchange's proposal to amend its stock-tied functionality as described above promotes just and equitable principles of trade and removes impediments to and perfect the mechanism of a free and open market and a national market system because it will permit the Exchange to streamline its stock-tied processes as discussed more fully below. Further, the amendments to require that a Member desiring to execute an order with stock or an ETF component enter into a brokerage agreement with NES, a broker-dealer owned and operated by Nasdaq, Inc., protects investors and the general public because Members will be required to comply with NES' requirements and those requirements will be uniform for all ISE Members. The proposed stock-tied functionality is identical to Phlx Options 3, Sections 13(b)(10)(ii) and 14(a)(i) with respect to utilizing NES to process and report stock-tied functionality with two differences.

First, while both Phlx and ISE have certain risk protections for complex orders, they differ. With respect to ISE, the execution price of the Complex Order must be within a certain price from the current market, as determined by the Exchange pursuant to Options 3, Section 16(a). Specifically, today, ISE Options 3, Section 16(a) provides that the System will not permit any leg of a complex strategy to trade-through the NBBO for the series or any stock component by a configurable amount calculated as the lesser of (i) an absolute amount not to exceed \$0.10, and (ii) a percentage of the NBBO not to exceed 500%, as determined by the Exchange on a class, series or underlying basis. Phlx Options 3, Section 16(b)(i) describes Phlx's ACE Parameter which defines a price range outside of which a complex order will not be executed. On Phlx, a complex order to sell is not executed at a price that is lower than the cNBBO bid by more than the ACE Parameter. Conversely, on Phlx, a complex order to buy will not be executed at a price that is higher than the cNBBO offer by more than the ACE Parameter. While ISE's and Phlx's price

checks differ, both markets seek to prevent executions from occurring at certain prices and at certain percentages from the NBBO. The Exchange believes that this proposal promotes just and equitable principles of trade because NES would apply the same price check for stock-tied functionality that was being applied previously by a third party that executed the stock or ETF component of a complex strategy on behalf of ISE Members. Additionally, ISE Members would continue to be subject to the same price check which is applied to all Complex Orders executed on ISE.

Second, ISE and Phlx differ with respect to the manner in which their systems handle Stock-Option Strategies and Stock-Complex Strategies that would execute against interest on the Complex Order Book at a price that do not meet price checks as provided for in proposed Options 3, Section 16(d)⁵³ or do not meet Regulation SHO provisions as provided for in proposed Options 3, Section 16(e)⁵⁴ are handled by their respective systems. As proposed, ISE will hold orders on the Complex Order book that cannot be executed because of Regulation SHO or price check restrictions, unless the Member requests the order to be cancelled. If an ISE Member elects to have the order held on the Complex Order Book, the order would await other matching opportunities, otherwise at the Member's election the order would be returned to the Member. In contrast, Phlx only provides for a cancellation of the order. The Exchange believes that this proposal promotes just and equitable principles of trade because ISE's proposed approach would provide the Member with optionality as to the handling of the order. The Exchange believes providing the choice to have the order held on the Complex Order Book provides Members with an opportunity for an execution.

NES, an affiliate of the Exchange and a registered broker-dealer, has been approved by the Commission to become a Member of the Exchange and perform inbound routing on behalf of the Exchange.⁵⁵ Additionally, NES is permitted to route outbound orders either directly or indirectly through a third party routing broker-dealer to other market centers and perform other

⁵³ As proposed, the execution price of Stock-Option Strategies and Stock-Complex Strategies must be within the high-low range for the day in that stock at the time the Complex Order is processed and within a certain price from the current market pursuant to Options 3, Section 16(a), as determined by the Exchange.

⁵⁴ See *supra* note 19.

⁵⁵ See *supra* note 13.

⁵¹ 15 U.S.C. 78f(b).

⁵² 15 U.S.C. 78f(b)(5).

functions regarding the cancellation of orders and the maintenance of a NES error account.⁵⁶ The functions performed by NES on Phlx today are identical to the functions that ISE proposes for NES to perform for ISE Members.⁵⁷ Identical to Phlx, after ISE's System determines that a Complex Order is possible and identifies the prices for each component of such Complex Order, ISE will electronically communicate the stock or ETF component of the Complex Order to NES for execution.⁵⁸

NES, acting as agent for the orders to buy and sell the underlying stock or ETF, will execute the orders in the OTC market and will handle the orders pursuant to applicable rules regarding equity trading, including the rules governing trade reporting, trade-throughs, and short sales. Today, this function is performed by a third-party broker-dealer that executes the stock or ETF component of a complex strategy on behalf of ISE Members. As proposed, this structure will promote just and equitable principles of trade because NES will be responsible for the proper execution, trade reporting, and submission to clearing of the underlying stock or ETF component of a Complex Order.⁵⁹ Furthermore, today, NES is responsible for compliance with FINRA rules generally and is subject to examination by FINRA.⁶⁰ Finally, today, NES has in place policies related to confidentiality and the potential for informational advantages relating to its

affiliates, intended to protect against the misuse of material nonpublic information.⁶¹ In particular, NES will have in place policies and procedures designed to prevent the misuse of material non-public information related to stock-tied executions which will protect investors and the public interest. NES only receives information about the stock or ETF portion of the order from the Exchange. As mentioned herein, today, NES is responsible for the proper execution, trade reporting, and submission to clearing of the underlying stock or ETF component of a Complex Order on Phlx. ISE will adopt identical policies and procedures for its stock-tied functionality as are in place on Phlx today.

In addition, the execution and reporting of the stock/ETF piece will occur otherwise than on ISE or any other exchange, and will be handled by NES pursuant to applicable rules regarding equity trading,⁶² including the rules governing trade reporting, trade-throughs and short sales. The Exchange's proposal also promotes just and equitable principles of trade as NES will report the trades to the Trade Reporting Facility.⁶³ Further, all ISE Members may execute stock-tied transactions. All stock-tied transactions will have the stock/ETF component of a Complex Order, once executed, properly processed for trade reporting purposes. Phlx has identical rules for processing and reporting.⁶⁴

With respect to trade-throughs, the Exchange believes that the stock/ETF component of a Complex Order is eligible for the Qualified Contingent Trade Exemption from Rule 611(a) of Regulation NMS. The Exchange believes that the stock/ETF portion of a Complex Order under this proposal complies with all six requirements of the Qualified Contingent Trade Exemption.⁶⁵ In order to promote just

and equitable principles of trade, ISE's System will validate compliance with each requirement such that any matched order received by NES under this proposal has been checked for compliance with the exemption. Members may only submit Complex Orders with a stock/ETF component if such orders comply with the Qualified Contingent Trade Exemption.⁶⁶ Members submitting such Complex Orders with a stock/ETF component represent that such orders comply with the Qualified Contingent Trade Exemption. Thus, the Exchange believes that Complex Orders consisting of a stock/ETF component will comply with the exemption and that ISE's System will validate such compliance to assist NES in carrying out its responsibilities as agent for these orders.

With respect to short sale regulation, the proposed handling of the stock/ETF component of a Complex Order under this proposal should not raise any issues of compliance with the currently operative provisions of Regulation SHO⁶⁷ and therefore promote just and equitable principles of trade. When a Complex Order has a stock/ETF component, Members must indicate, pursuant to Regulation SHO, whether that order involves a long or short sale. The System will accept Complex Orders with a stock/ETF component marked to reflect either a long or short position; specifically, orders not marked as buy, sell or sell short will be rejected by ISE's System.⁶⁸ The System will electronically deliver the stock/ETF

the System, the entire package is processed as a single transaction and each of the option leg and stock/ETF components are simultaneously processed; (4) the specific relationship between the component orders (*e.g.*, the spread between the prices of the component orders) is determined at the time the contingent order is placed: Complex Orders, upon entry, must have a size for each component and a net debit/credit, which the System validates and processes to determine the ratio between the components; an order is rejected if the net debit/credit price and size are not provided on the order; (5) the component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled: under this proposal, the stock/ETF component must be the underlying security respecting the option legs, which is validated by the System; and (6) the transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade: Under this proposal, the ratio between the options and stock/ETF must be a conforming ratio (8 contracts per 100 shares), which the System validates, and which under reasonable risk valuation methodologies, means that the stock/ETF position is fully hedged.

⁶⁶ See Supplementary Material .07 to Options 3, Section 14.

⁶⁷ 17 CFR 242.200 *et seq.*

⁶⁸ The Exchange also accept short sell exempt orders as described herein.

⁵⁶ See *supra* note 14.

⁵⁷ See Securities Exchange Act Release No. 63777 (January 26, 2011), 76 FR 5630 (February 1, 2011) (SR-Phlx-2010-157) (Order Approving a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to Complex Orders) ("Phlx Complex Order Approval"). NES assumed the stock execution functionalities that were previously performed by NOS. Phlx subsequently filed to permit both inbound and outbound orders to be routed through NES instead of Nasdaq Options Services LLC ("NOS"). See Securities Exchange Act Release No. 71417 (January 28, 2014), 79 FR 6253 (February 3, 2014) (SR-Phlx-2014-04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Outbound Routing) and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR-Phlx-2014-05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Inbound Routing of Options Orders).

⁵⁸ See proposed Supplementary Material .08(b) to Options 3, Section 11, proposed Options 3, Section 12(b)(2), proposed Supplementary Material .09(b) to Options 3, Section 13, proposed Supplementary Material .02 to Options 3, Section 14 and proposed Options 3, Section 16(d). See also Phlx Options 3, Section 13(b)(10)(ii), Options 3, Section 16(b).

⁵⁹ See *supra* note 20.

⁶⁰ NES is subject to FINRA Rule 3110, which generally requires that the policies and procedures and supervisory systems be reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA rules, including those relating to the misuse of material non-public information.

⁶¹ See *supra* note 21.

⁶² See *supra* note 23.

⁶³ See *supra* note 24.

⁶⁴ See Phlx Options 3, Sections 13(b)(10) and 14(a)(i).

⁶⁵ The six requirements include: (1) At least one component order is in an NMS stock: The stock/ETF component must be an NMS stock, which is validated by the System; (2) all components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent: A Complex Order, by definition consists of a single net/debit price and this price contingency applies to all the components of the order, such that the stock price computed and sent to NES allows the stock/ETF order to be executed at the proper net debit/credit price based on the execution price of each of the option legs, which is determined by the ISE System; (3) the execution of one component is contingent upon the execution of all other components at or near the same time: Once a Complex Order is accepted and validated by

component to NES for execution. Simultaneous to the options execution on ISE's System, NES will execute and report the stock/ETF component, which will contain the long or short indication as it was delivered by the Member to ISE's System. Accordingly, NES, as a trading center under Rule 201, will be compliant with the requirements of Regulation SHO. Of course, broker-dealers, including both NES and the Members submitting orders to ISE with a stock/ETF component, must comply with Regulation SHO. NES' compliance team updates, reviews and monitors NES' policies and procedures including those pertaining to Regulation SHO on an annual basis.

Further, proposed Options 3, Section 16(e) provides that when the short sale price test in Rule 201 of Regulation SHO⁶⁹ is triggered for a covered security, NES will not execute a short sale order in the underlying covered security component of a Complex Order if the price is equal to or below the current national best bid. However, NES will execute a short sale order in the underlying covered security component of a Complex Order if such order is marked "short exempt," regardless of whether it is at a price that is equal to or below the current national best bid. If NES cannot execute the underlying covered security component of a Complex Order in accordance with Rule 201 of Regulation SHO, the Exchange will hold the Complex Order on the Complex Order Book, if consistent with Member instructions (Members may always elect to cancel the order).⁷⁰ The order may execute at a price that is not equal to or below the current national best bid. This proposed rule is similar to Phlx Options 3, Section 16(b) except that unlike Phlx, ISE will not cancel back the Complex Order to the entering Member unless the Member requests that the order be cancelled back. The proposal is identical to MRX Options 3, Section 16(b).

For these reasons, the processing of the stock/ETF component of a Complex Order under this proposal will comply with applicable rules regarding equity trading, including the rules governing trade reporting, trade-throughs and short sales and is consistent with the Act. NES's responsibilities respecting these equity trading rules will be

documented in NES's written policies and procedures. NES' compliance team updates, reviews and monitors NES' policies and procedures. NES is regulated by FINRA and as such, NES policies and procedures are subject to review and examinations by FINRA.

Further, as part of the execution of the stock/ETF component, the Exchange will ensure that the execution price is within the intra-day high-low range for the day in that stock at the time the Complex Order is processed and within a certain price range from the current market pursuant to Options 3, Section 16(a) which will protect investors and the general public.⁷¹ If the stock price is not within these parameters, the Complex Order is not executable and would be held on the order book or cancelled, consistent with Member instructions.⁷² Today, the third-party broker-dealer ensures the execution price is within the intra-day high-low range. With the transition to NES, the Exchange would commence performing this check. Members who transact stock-tied functionality on ISE would therefore continue to be subject to the same execution price check with NES as today. This intra-day high-low range check does not occur for certain Complex Orders auctions (e.g. Complex PIM Orders,⁷³ Complex Facilitation Orders⁷⁴ and Complex SOM Orders⁷⁵) and also does not occur for Complex Customer Cross Orders⁷⁶ or Complex QCC Orders.⁷⁷ The Exchange believes that this exception for auctions is consistent with the Act because these auctions have their own rules for auction eligibility, entry checks, and offer price improvement all of which are distinguishable from execution of orders on the Complex Order Book. Complex Customer Cross Orders are automatically executed upon entry so long as: (i) the price of the transaction is at or within the best bid and offer for the same complex strategy on the Complex Order Book; (ii) there are no Priority Customer Complex Orders for

the same strategy at the same price on the Complex Order Book; and (iii) the options legs can be executed at prices that comply with the provisions of Options 3, Section 14(c)(2). Complex Customer Cross Orders will be rejected if they cannot be executed.⁷⁸

Finally, the Exchange also believes that it is appropriate to construct a program wherein its affiliate, NES, is the exclusive conduit for the execution of the stock/ETF component of a Complex Order under this proposal, identical to Phlx and MRX.⁷⁹ As a practical matter, complex order programs on other exchanges involve specific arrangements with a broker-dealer to facilitate prompt execution. NES does not intend to charge a fee for the execution of the stock/ETF component of a Complex Order.⁸⁰ The Exchange believes that is consistent with the Act for such an arrangement to involve one broker-dealer, even one that is an affiliate, particularly to offer the aforementioned benefits of a prompt, electronic execution for Complex Orders involving stock/ETFs. Specifically, offering a seamless, automatic execution for both the options and stock/ETF components of a Complex Order is an important feature that should promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system by deeply enhancing the sort of complex order processing available on options exchanges today. Nevertheless, Members could, in lieu of this proposed arrangement with NES, choose, instead, the following alternatives: (i) avoid using Complex Orders that involve stock/ETFs, (ii) use a trading floor to execute Complex Order with stock, or (iii) go to another options venue, several of which offer a similar feature.⁸¹

The Exchange's proposal to remove the second and third sentences within Supplementary Material .02 of Options 3, Section 14⁸² is consistent with the

⁷¹ See *supra* note 35.

⁷² Similar to other order types, the Member may elect to enter the order as an Immediate-or-Cancel to avoid resting on the order book or as Day order which could rest on the order book.

⁷³ A Complex PIM Order is an order entered into the Complex Price Improvement Mechanism as described in Options 3, Section 13(e). See ISE Options 3, Section 14(b)(18).

⁷⁴ A Complex Facilitation Order is an order entered into the Complex Facilitation Mechanism as described in Options 3, Section 11(c). See ISE Options 3, Section 14(b)(16).

⁷⁵ A Complex SOM Order is an order entered into the Complex Solicited Order Mechanism as described in Options 3, Section 11(e). See ISE Options 3, Section 14(b)(17).

⁷⁶ See Options 3, Section 12(b).

⁷⁷ See Options 3, Section 12(d).

⁷⁸ Supplementary Material .01 to Options 3, Section 22 applies to Complex Customer Cross Orders.

⁷⁹ See *supra* note 39. See proposed Supplementary Material .02 to ISE Options 3, Section 14. In addition to amending Supplementary Material .02 to ISE Options 3, Section 14 to require Members to enter into a brokerage agreement, the Exchange proposes to make conforming changes to Supplementary Material .02 to ISE Options 3, Section 14 to delete provisions that allow Members to enter into a brokerage agreement with one or more brokers to route stock orders. See MRX Supplementary Material .02 to ISE Options 3, Section 14.

⁸⁰ See *supra* note 40.

⁸¹ See *supra* note 41.

⁸² The second and third sentences of Supplementary Material .02 of ISE Options 3,

⁶⁹ See *supra* note 30.

⁷⁰ See proposed Options 3, Section 16(e). In contrast, Complex Orders in an auction mechanism that cannot be executed in accordance with Regulation SHO will be cancelled back and will not rest on the Complex Order Book as provided in Supplementary Material .08 to Options 3, Section 11 and Supplementary Material .09 to Options 3, Section 13.

Act in that it protects investors and the general public because this new workflow in which the stock or ETF component of the order will be routed to NES for execution instead of a third-party broker-dealer will obviate the possibility that the stock execution venue will be unavailable for trading while the order is being processed because of the efficiency created in executing the entire transaction, including stock component validation and reporting, without the need for ISE to utilize a third-party broker-dealer and await a response from the third-party broker-dealer. ISE would no longer be reliant on a third-party broker-dealer to conduct the appropriate checks and, thereafter, relay information to ISE. With the proposed change, NES, the Exchange's affiliate, would conduct the necessary checks and thereafter the Stock-Option Order or Stock-Complex Order would be available for execution. Proposed Options 3, Sections 16(d) and (e) describe the System price checks that will be performed for Stock-Option Orders or Stock-Complex Orders by NES.

Similarly, the Exchange's proposal to amend Supplementary Material .04 to Options 3, Section 14 to provide that Stock-Option Strategies and Stock-Complex Strategies will open pursuant to the Complex Opening Price Determination described in Supplementary Material .05 to Options 3, Section 14, instead of the Complex Uncrossing Process described in Supplementary Material .06(b) to Options 3, Section 14, is consistent with the Act. Similar to the discussion above, today the applicable checks for the stock/ETF component of a Stock-Option Strategy and Stock-Complex Strategy are being performed by a third-party broker-dealer, which causes a delay that prevents these strategies from participating in the Complex Opening Process. With the proposed change to utilize NES, in lieu of a third-party broker-dealer, Stock-Option Strategies and Stock-Complex Strategies would be able to participate in the Complex Opening Process as NES, the Exchange's affiliate, would conduct the necessary price checks and would be able to make

Stock-Option Order or Stock-Complex Order available to participate in the Complex Opening Process without the need for ISE to await a response from a third-party broker-dealer. This amendment is consistent with the Act as it serves to protect investors and the general public by improving the Exchange's processes to make Stock-Option Strategies and Stock-Complex Strategies subject to the Complex Opening Price Determination similar to other order types. The Complex Opening Process seeks to maximize the interest which is traded during the Complex Opening Price Determination process and deliver a rational price for the available interest at the opening. The Complex Opening Price Determination process maximizes the number of contracts executed during the Complex Opening Process and ensures that residual contracts of partially executed orders or quotes are at a price equal to or inferior to the Opening Price.

Trade Value Allowance

The Exchange's proposal to no longer offer Trade Value Allowance is consistent with the Act because very few Members have opted to utilize the Trade Value Allowance and even a smaller percentage of trades were subject to the allowance. MRX recently removed its Trade Value Allowance as described in SR-MRX-2023-10. Phlx does not have a similar allowance today. In an effort to harmonize its complex order functionality across its Nasdaq affiliated markets, the Exchange proposes to no longer offer the Trade Value Allowance functionality. In addition, the Exchange believes that this proposal removes impediments to and perfect the mechanism of a free and open market and a national market system because the proposal removes an allowance that is no longer necessary; other options exchanges, like Phlx, do not offer such an allowance. With the proposed change to utilize NES, the Exchange would be able to determine stock leg prices, and NES would be able to execute the stock leg at two different prices to ensure that the net price of the execution is within the notional value of the original order, thus eliminating the need for the allowance.

Options 3, Section 7

The Exchange's proposal to make a clarifying change to ISE Options 3, Section 7, Types of Orders and Order and Quote Protocols is consistent with the Act. The Exchange proposes to amend ISE Options 3, Section 7(t) related to QCC with Stock Orders to make clear that QCC with Stock Orders may only be entered through FIX or

Precise. ISE has 3 order entry protocols, FIX, OTTO and Precise. QCC with Stock Orders may not be entered through OTTO. Members only require one order entry protocol to enter orders onto ISE. While Members only require one order entry port to submit orders into ISE, the Exchange offers Member a choice between 2 different types of ports to utilize to submit QCC with Stock Orders.⁸³ All Members would have the ability to enter QCC with Stock Orders through FIX or Precise. Members are not required to subscribe to both FIX and Precise. The Exchange's proposal to add rule text to Options 3, Section 7(t) will clarify the functionality, thereby protecting investors and the general public.

Additionally, the Exchange's proposal to amend Supplementary Material .02(d) to Options 3, Section 7 related to Immediate-or-Cancel Orders is consistent with the Act. The Exchange proposes to specifically amend Supplementary Material .02(d)(3) to Options 3, Section 7 to add QCC with Stock Orders and Complex QCC with Stock to the list of order types that have a Time in Force or "TIF" of Immediate-or-Cancel or "IOC". Because QCC with Stock Orders and Complex QCC with Stock have a TIF of IOC, these order types will execute either execute on entry or cancel. This amendment will make clear the manner in which the aforementioned order types trade, thereby protecting investors and the general public.

Options 3, Section 12

The Exchange's proposal to amend Options 3, Section 12(e)(4) to clarify that a Member may submit a QCC with Stock Order with a net price for the stock and options components through FIX or Members may submit separate prices for the stock and options components, or a net price for both may be entered through Precise. This amendment is consistent with the Act because the amended rule text makes clear the format in which these orders may be submitted to the System depending on the protocol. Today, the Exchange does not allow FIX to accept QCC with Stock Orders with separate prices for the stock and options components but does permit Members to do so through Precise. Each exchange may specify the manner in which certain order types may be submitted to an exchange and the format for submitting those orders. The proposal protects investors and the general public by clarifying the manner in which

⁸³ See Options 7, Section 6, Ports and Other Services.

Section 14 states, "A trade of a Stock-Option Order or a Stock-Complex Order will be automatically cancelled if market conditions prevent the execution of the stock or option leg(s) at the prices necessary to achieve the agreed upon net price. When a Stock-Option Order or Stock-Complex Order has been matched with another Stock-Option Order or Stock-Complex Order that is for less than the full size of the Stock-Option Order or Stock-Complex Order, the full size of the Stock-Option Order or Stock-Complex Order being processed by the stock execution venue will be unavailable for trading while the order is being processed."

Members may submit QCC with Stock Orders. The proposed language does not result in a change to the Exchange's System. As noted above, QCC with Stock Orders may not be entered through OTTO. The Exchange notes that requiring QCC with Stock Orders to be submitted through FIX or Precise is consistent with proposed Options 3, Section 7(t) which requires Members to enter QCC Orders through FIX or Precise.

Options 3, Section 15

The Exchange's proposal to amend its Market Wide Risk Protection within Options 3, Section 15(a)(1)(C) to add certain additional information concerning the current Market Wide Risk Protection along with new language that would apply as a result of the proposed changes to stock-tied functionality is consistent with the Act. The proposed changes to ISE Options 3, Section 15(a)(1)(C) protect investors and the public interest by clearly describing the operation of the Market Wide Risk Protection by using defined terms. Proposed ISE Options 3, Section 15(a)(1)(C)(6) adds the total number of contracts traded in Stock-Option Orders and Stock-Complex Orders to the Market Wide Risk Protection. This change protects investors and the general public because this risk protection by expanding the scope of the Market Wide Risk Protection to include additional contracts which will reduce risk associated with system errors or market events that may cause Members to send a large number of orders, or receive multiple, automatic executions, before they can adjust their exposure in the market. The Exchange notes that QCC Orders, Complex Qualified QCC Orders, QCC with Stock Orders, and Complex QCC with Stock Orders are considered, where applicable, in Options 3, Section 15(a)(1)(C)(1), (2), (4) and (5). Members will continue to be provided with the flexibility needed to appropriately tailor the Market Wide Risk Protection to their respective risk management needs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Re-Introduction of Stock-Related Strategies and Elimination of Trade Value Allowance

Stock-Tied Functionality

The Exchange's proposal to amend its stock-tied functionality does not impose

an intra-market undue burden on competition as all Members may utilize the stock-tied functionality and would be uniformly subject to the requirements associated with executing a stock-tied transaction. Also, in lieu of this proposed arrangement with NES, Members could choose, instead, the following alternatives: (i) avoid using Complex Orders that involve stock/ETFs, (ii) use a trading floor to execute Complex Order with stock, or (iii) go to another options venue, several of which offer a similar feature.⁸⁴ The Exchange's proposal to amend its stock-tied functionality does not impose an inter-market undue burden on competition as other options exchanges today may offer a similar process for handling stock-tied transactions. Today, Phlx and MRX offer an identical process for handling stock-tied transactions.⁸⁵

The Exchange's proposal to remove rule text from Options 3, Section 14 that states, "When a Stock-Option Order or Stock-Complex Order has been matched with another Stock-Option Order or Stock-Complex Order that is for less than the full size of the Stock-Option Order or Stock-Complex Order, the full size of the Stock-Option Order or Stock-Complex Order being processed by the stock execution venue will be unavailable for trading while the order is being processed," does not impose an undue burden on intra-market competition because the proposed new functionality will apply equally to all Members transacting Complex Orders on ISE. All Stock-Option Orders and Stock-Complex Orders will be handled in the same manner by the System. The Exchange's proposal to remove rule text from Options 3, Section 14 does not impose an undue burden on inter-market competition as the scope of this change is limited to ISE and its relationship with a broker-dealer handling the stock component of the order.

The Exchange's proposal to remove the rule text within Supplementary Material .02 of Options 3, Section 14⁸⁶

⁸⁴ See *supra* note 41.

⁸⁵ See Phlx Options 3, Sections 13(b)(10) and 14(a)(i). See also MRX Supplementary Material .08(b) to Options 3, Section 11 Options 3, Section 12(b)(2), Supplementary Material .09(b) to Options 3, Section 13, Supplementary Material .02 to Options 3, Section 14 and Options 3, Section 16(d).

⁸⁶ Supplementary Material .02 of Options 3, Section 14 states that, "Members may also indicate preferred execution brokers, and such preferences will determine order routing priority whenever possible. A trade of a Stock-Option Order or a Stock-Complex Order will be automatically cancelled if market conditions prevent the execution of the stock or option leg(s) at the prices necessary to achieve the agreed upon net price. When a Stock-Option Order or Stock-Complex Order has been matched with another Stock-Option

does not impose an undue burden on intra-market competition because all Members will have the ability to use the new workflow in which the stock or ETF component of the order will be routed to NES for execution instead of a third-party broker-dealer. The proposed new functionality will apply equally to all Members transacting Complex Orders on ISE. All Stock-Option Orders and Stock-Complex Orders will be handled in the same manner by the System. Additionally, this proposed amendment will not impose an undue burden on inter-market competition because all market participants that direct orders to ISE will have their orders handled in a similar manner. The proposed stock-tied functionality is identical to Phlx Options 3, Sections 13(b)(10)(ii) and 14(a)(i) with respect to utilizing NES to process and report the stock or ETF component of a Complex Order. MRX Supplementary Material .08(b) to Options 3, Section 11 Options 3, Section 12(b)(2), Supplementary Material .09(b) to Options 3, Section 13, Supplementary Material .02 to Options 3, Section 14 and Options 3, Section 16(d) also permit MRX to utilize NES to process and report the stock or ETF component of a Complex Order.

Similarly, the Exchange's proposal to amend Supplementary Material .04 to Options 3, Section 14 to provide that Stock-Option Strategies and Stock-Complex Strategies will open pursuant to the Complex Opening Price Determination described in Supplementary Material .05 to Options 3, Section 14, instead of the Complex Uncrossing Process described in Supplementary Material .06(b) to Options 3, Section 14, does not impose an undue burden on intra-market competition because all Stock-Option Strategies and Stock-Complex Strategies will be subject to the same process. All Stock-Option Orders and Stock-Complex Orders will be transacted in the Complex Opening by the System. The Exchange's proposal to amend Supplementary Material .04 to Options 3, Section 14 to provide that Stock-Option Strategies and Stock-Complex Strategies will open pursuant to the Complex Opening Price Determination described in Supplementary Material .05 to Options 3, Section 14, instead of the Complex Uncrossing Process described in Supplementary Material .06(b) to Options 3, Section 14 does not

Order or Stock-Complex Order that is for less than the full size of the Stock-Option Order or Stock-Complex Order, the full size of the Stock-Option Order or Stock-Complex Order being processed by the stock execution venue will be unavailable for trading while the order is being processed."

impose an undue burden on inter-market competition because other options markets may also elect to permit similar order types to trade in their complex opening process.

Trade Value Allowance

The Exchange's proposal to no longer offer Trade Value Allowance does not impose an undue burden on intra-market competition because no Member would be able to utilize the Trade Value Allowance. The proposed stock-tied functionality is identical to Phlx Options 3, Sections 13(b)(10)(ii) and 14(a)(i) and MRX Supplementary Material .08(b) to Options 3, Section 11 Options 3, Section 12(b)(2), Supplementary Material .09(b) to Options 3, Section 13, Supplementary Material .02 to Options 3, Section 14 and Options 3, Section 16(d). with respect to utilizing NES to process and report the stock or ETF component of a Complex Order.

The Exchange's proposal to no longer offer Trade Value Allowance does not impose an undue burden on inter-market competition because other options exchanges could choose to offer a similar functionality.

Options 3, Section 7

The Exchange's proposal to make a clarifying change to ISE Options 3, Section 7, Types of Orders and Order and Quote Protocols does not impose an undue burden on intra-market competition because all Members may enter QCC with Stock Orders through FIX or Precise. While Members only require one order entry port to submit orders into ISE, the Exchange offers Members a choice between 2 different types of ports to utilize to submit QCC with Stock Orders.⁸⁷

The Exchange's proposal to make a clarifying change to ISE Options 3, Section 7, Types of Orders and Order and Quote Protocols does not impose an undue burden on inter-market competition because other options exchanges may also create order entry protocols for their markets.

Additionally, the Exchange's proposal to amend Supplementary Material .02(d) to Options 3, Section 7 to add QCC with Stock Orders and Complex QCC with Stock to the list of order types that have a Time in Force or "TIF" of Immediate-or-Cancel or "IOC" does not impose an undue burden on intra-market competition because this amendment reflects the description of these particular order types which will either execute on entry or cancel. All QCC

with Stock Orders and Complex QCC with Stock that are entered on ISE will be handled in the same manner. Further, all Members may trade QCC with Stock Orders and Complex QCC with Stock Orders. Additionally, the Exchange's proposal to amend Supplementary Material .02(d) to Options 3, Section 7 related to Immediate-or-Cancel Orders does not impose an undue burden on inter-market competition because other options markets may adopt a similar requirement for such orders.

Options 3, Section 12

The Exchange's proposal to amend Options 3, Section 12(e)(4) to clarify that a Member may submit a QCC with Stock Order with a net price for the stock and options components through FIX or they may submit separate prices for the stock and options components, or a net price for both may be entered through Precise does not impose an intra-market burden on competition because all Members are required to uniformly submit QCC with Stock Orders in this fashion.

The Exchange's proposal to amend Options 3, Section 12(e)(4) to clarify that a Member may submit a QCC with Stock Order with a net price for the stock and options components through FIX or they may submit separate prices for the stock and options components, or a net price for both may be entered through Precise does not impose an inter-market burden on competition because each exchange may specify the manner in which certain order types may be submitted to an exchange and the format for submitting those orders. Also, requiring QCC with Stock Orders to be submitted through FIX or Precise is consistent with proposed Options 3, Section 7(t) which requires Members to enter QCC Orders through FIX or Precise.

Options 3, Section 15

The Exchange's proposal to amend its Market Wide Risk Protection within Options 3, Section 15(a)(1)(C) to utilize defined terms along with new language does not impose an undue burden on intra-market competition because the counting programs within the Market Wide Risk Protections will apply equally to all Members. The proposal to amend the Market Wide Risk Protection does not impose an undue burden on inter-market competition because other options exchanges may adopt similar risk protections for their members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act⁸⁸ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁸⁹

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-ISE-2023-13 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-ISE-2023-13. This file

⁸⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

⁸⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁸⁷ See Options 7, Section 6, Ports and Other Services.

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-ISE-2023-13 and should be submitted on or before September 1, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁰

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98072; File No. SR-ICEEU-2023-017]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments Part O of Its Delivery Procedures

August 7, 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 26,

2023, ICE Clear Europe Limited ("ICE Clear Europe" or the "Clearing House") filed with the Securities and Exchange Commission ("Commission") the proposed rule changes described in Items I, II and III below, which Items have been prepared primarily by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(4)(ii) thereunder,⁴ such that the proposed rule change was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe Limited ("ICE Clear Europe" or the "Clearing House") proposes to amend Part O of its Delivery Procedures⁵ (for Financials and Softs Cocoa Contracts) to provide for use of a new Softs Delivery Platform, make certain changes to the delivery timetable and delivery documentation, and address certain matters relating to allocation and the conversion of lots.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICE Clear Europe is proposing to amend Part O of its Delivery Procedures to amend certain delivery specifications for ICE Futures Europe Financials and Softs Cocoa Futures Contracts ("Cocoa Contracts") to reflect the implementation of a new Softs Deliveries Platform to be used for deliveries under the Contract. A conforming change would also be made

in the introductory section of the Delivery Procedures. Certain other provisions in Part O relating to the delivery timetable and allocation and conversion of lots would also be amended, as described herein, in connection with the implementation of the Softs Delivery Platform.

In the General Provisions section of the Delivery Procedures, in paragraph 21, references to the new Softs Delivery Platform as the electronic system used for making and taking delivery under cocoa contracts would be added (alongside the existing Guardian system, which will continue to be used for deliveries under coffee contracts). The amendments would also remove an incorrect reference to bonds (for which neither Guardian nor the new Softs Delivery Platform is used).

The proposed amendments in Part O of the Delivery Procedures would replace relevant references to the Guardian delivery system throughout Part O with the new Softs Delivery Platform and otherwise remove references to the Guardian delivery system, such that transfers of warrants would be made through the Softs Delivery Platform and applicable delivery notices and other specified delivery documentation relevant to Sellers and Buyers would be provided or made available through the Softs Delivery Platform.

Procedures for allocations of cocoa, including notifications and reports relating to allocations would be reorganized and consolidated into a single provision for simplicity and clarity. As proposed to be revised, reports relating to allocation details would be made available to both Sellers and Buyers through the Clearing House MFT system.

The amendments also update the content of reports made available to Seller and Buyer to remove general references to "delivery details" throughout Part O, as the relevant information is provided in the specific referenced reports provided through the Softs Delivery Platform. The names of certain reports would also be updated throughout Part O, specifically with references to final account sale reports changed to account sale reports and references to final invoice reports changed to Buyers invoice reports.

The timing for certain notifications related to the conversion of lots would be moved from by 16:00 LPT (in the case of certain directions by the Clearing House) and after 16:00 LPT (in the case of the availability of conversion details for Sellers), to after 10:00 LPT in both scenarios. The amendments would also remove an incorrect reference about

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(4)(ii).

⁵ Capitalized terms used but not defined herein have the meanings specified in the Delivery Procedures or, if not defined therein, the ICE Clear Europe Clearing Rules.

⁹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

converting bulk delivery units into large delivery units. The amendments would change the system used to send Sellers and Buyers information relating to LDU Conversion Notices from Guardian to MFT. With respect to certain notices to be provided by Sellers in response to a direction by the Clearing House to convert bulk or large delivery units, references to the use of Guardian (or a successor system) would be removed as unnecessary in light of the introduction of the Softs Delivery Platform. In the provisions relating to BDU conversion notices, the reference in the left column to “Extension to Conversion” would be deleted, as it is not necessary and does not relate to the 16:00 deadline.

The amendments also update the summary of required delivery documentation. Specifically, amendments would clarify that invoices and account sales statements would be provided through MFT. References to provisional invoices in the case of conversion would be removed as unnecessary in light of other reports made available to Buyer and Sellers. A reference to warrant delivery instructions report would be removed as outdated in light of the manner in which delivery is made under the contract.

(b) Statutory Basis

ICE Clear Europe believes that the proposed amendments to the Delivery Procedures are consistent with the requirements of Section 17A of the Act⁶ and the regulations thereunder applicable to it. In particular, Section 17A(b)(3)(F) of the Act⁷ requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest. The proposed changes to the Delivery Procedures are designed to revise ICE Clear Europe’s delivery arrangements relating to Cocoa Contracts to reflect the implementation and use of the new Softs Delivery Platform for delivery under such contracts. As part of the implementation of the Softs Delivery Platform, the delivery timetable and provisions relating to allocation and conversion of lots would be amended for clarity, to update the systems used for notice and to remove unnecessary provisions.

Notably, the amendments would replace references to use of existing Guardian system with references to use of the Softs Delivery Platform or MFT system, as appropriate. In connection with the implementation of the Softs Delivery Platform, the amendments revise and simplify the process for allocations and conversion of lots by the Clearing House and certain related delivery notification and delivery documentation requirements. The contracts will otherwise continue to be cleared by ICE Clear Europe in the same manner as they are currently. In ICE Clear Europe’s view, the amendments are thus consistent with the prompt and accurate clearance and settlement of cleared contracts and the protection of investors and the public interest. (ICE Clear Europe would not expect the amendments to affect the safeguarding of securities and funds in ICE Clear Europe’s custody or control or for which it is responsible). Accordingly, the amendments satisfy the requirements of Section 17A(b)(3)(F).⁸

In addition, Rule 17Ad–22(e)(10)⁹ requires that each covered clearing agency “establish and maintain transparent written standards that state its obligations with respect to the delivery of physical instruments, and establish and maintain operational practices that identify, monitor and manage the risks associated with such physical deliveries.” As discussed above, the amendments would clarify the delivery specifications for Cocoa Contracts to reference the new Softs Delivery Platform. The amendments would also make consistent with the new Softs Delivery Platform certain obligations of the Clearing House and Buyers and Sellers in the delivery process, including with respect to allocations and conversions and related notifications. The amendments would not otherwise change the manner in which the contracts are cleared or in which delivery is made, as supported by ICE Clear Europe’s existing financial resources, risk management, systems and operational arrangements. The amendments thus clarify the role and responsibilities of the Clearing House and Clearing Members with respect to delivery. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Rule 17Ad–22(e)(10).¹⁰

(B) Clearing Agency’s Statement on Burden on Competition

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The amendments are being adopted to update and clarify the delivery specifications in the Delivery Procedures in connection with Cocoa Contracts, principally with respect to the use of the Softs Delivery Platform. ICE Clear Europe does not expect that the proposed changes will adversely affect access to clearing or the ability of Clearing Members, their customers or other market participants to continue to clear contracts. ICE Clear Europe also does not believe the amendments would materially affect the cost of clearing or otherwise impact competition among Clearing Members or other market participants or limit market participants’ choices for selecting clearing services. Accordingly, ICE Clear Europe does not believe the amendments would impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency’s Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed amendments have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any written comments received with respect to 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 Act¹¹ and paragraph (f) of Rule 19b–4¹² 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.

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.

⁶ 15 U.S.C. 78q–1.

⁷ 15 U.S.C. 78q–1(b)(3)(F).

⁸ 15 U.S.C. 78q–1(b)(3)(F).

⁹ 17 CFR 240.17Ad–22(e)(10).

¹⁰ 17 CFR 240.17Ad–22(e)(10).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b–4(f).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>) or
- Send an email to rule-comments@sec.gov. Please include File Number SR-ICEEU-2023-017 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-ICEEU-2023-017. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at <https://www.theice.com/clear-europe/regulation>.

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-ICEEU-2023-017 and should be submitted on or before September 1, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-17211 Filed 8-10-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98073; File No. SR-BOX-2023-21]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 5020 (Criteria for Underlying Securities) To Accelerate the Listing of Options on Certain IPOs

August 7, 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 August 3, 2023, BOX Exchange LLC ("Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend BOX Rule 5020 (Criteria for Underlying Securities) to permit an underlying security having a market capitalization of at least \$3 billion based upon the offering price of its initial public offering, to be listed and traded starting on or after the second business day following the initial public offering day. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at <https://rules.boxexchange.com/rulefilings>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change

and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 is proposing a listings rule change that is substantially similar in all material respects to the proposal approved for NYSE American LLC ("NYSE American").³ Specifically, the Exchange proposes to amend BOX Rule 5020 (Criteria for Underlying Securities) to permit an underlying security having a market capitalization of at least \$3 billion based upon the offering price of its initial public offering, to be listed and traded starting on or after the second business day following the initial public offering day. This is a competitive filing that is based on a proposal recently submitted by NYSE American and approved by the Commission.⁴

The purpose of the proposed rule change is to amend Rule 5020 (Criteria for Underlying Securities) (the "Rule") as set forth below. Following discussions with other exchanges and a cross-section of industry participants and in coordination with the Listed Options Market Structure Working Group ("LOMSWG") (collectively, the "Industry Working Group"), the Exchange proposes to modify the standard set forth in the Rule for the listing and trading of options on "covered securities" to reduce the time to market.

Rule 5020(b)(5)(i) sets forth the guidelines to be considered in evaluating for option transactions underlying securities that are "covered securities," as defined in Section 18(b)(1)(A) of the Securities Act of 1933 (hereinafter "covered security" or "covered securities").⁵ Currently, the Exchange permits the listing of an option on an underlying covered

³ See Securities Exchange Act Release No. 98013 (July 27, 2023) (Order Approving SR-NYSEAMER-2023-27).

⁴ *Id.*

⁵ Rule 5020(a) requires that, for underlying securities to be eligible for option transactions, such securities must be duly registered and be an "NMS stock" as defined in Rule 600 of Regulation NMS under the Act and will be characterized by a substantial number of outstanding shares which are widely held and actively traded. See BOX Rules 5020(a)(1) and (2).

¹³ 17 CFR 200.30-3(a)(12).

¹⁵ U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

security that, amongst other things, has a market price of at least \$3.00 per share for the previous three consecutive business days preceding the date on which the Exchange submits a certificate to The Options Clearing Corporation (“OCC”) to list and trade options on the underlying security (the “three-day lookback period”).⁶ Under the current rule, if an initial public offering (“IPO”) occurs on a Monday, the earliest date the Exchange could submit its listing certificate to OCC would be on Thursday, with the market price determined by the closing price over the three-day lookback period from Monday through Wednesday. The option on the IPO’d security would then be eligible for trading on the Exchange on Friday (*i.e.*, within four business days of the IPO inclusive of the day the listing certificate is submitted to OCC).

The Exchange notes that the three-day look back period helps ensure that options on underlying securities may be listed and traded in a timely manner while also allowing time for OCC to accommodate the certification request. However, there are certain large IPOs that issue high-priced securities—well above the \$3.00 per share threshold—that would obviate the need for the three-day lookback period. In this regard, the Industry Working Group has recently identified proposed changes to Rule 5020(b)(5)(i) that would help options on covered securities that have a market capitalization of at least \$3 billion based upon the offering price of its IPO come to market earlier.⁷ The proposed change, which is intended to be harmonized across options exchanges, is designed to provide investors the opportunity to hedge their interest in IPO investments in a shorter amount of time than what is currently permitted.⁸ The Exchange believes that options serve a valuable tool to the trading community and help markets function efficiently by mitigating risk. To that end, the Exchange believes that the absence of options in the early days

after an IPO may heighten volatility in the trading of IPO’d securities.

Accordingly, the Exchange proposes to modify Rule 5020 to waive the three-day lookback period for covered securities that have a market capitalization of at least \$3 billion based upon the offering price of the IPO of such securities and to allow options on such securities to be listed and traded starting on or after the second business day following the initial public offering day (*i.e.*, not inclusive of the day of the IPO).⁹ NYSE American has reviewed trading data for IPO’d securities dating back to 2017 and stated that it is unaware of any such security that achieved a market capitalization of \$3 billion based upon the offering price of its IPO that would not have also qualified for listing options based on the three-day lookback requirement. Specifically, NYSE American determined that 202 of the 1,179 IPOs that took place between January 1, 2017, and October 21, 2022, met the \$3 billion market capitalization/IPO offering price threshold. Options on all 202 of those IPO shares subsequently satisfied the three-day lookback requirement for listing and trading, *i.e.*, none of these large IPOs closed below the \$3.00/share threshold during its first three days of its trading. As such, the Exchange believes the proposed capitalization threshold of \$3 billion based upon the offering price of its IPO is appropriate.

Under the proposed rule, if an IPO for a company with a market capitalization of \$3 billion based upon the offering price of its IPO occurs on a Monday, the Exchange could submit its listing certificate to OCC (to list and trade options on the IPO’d security) as soon as all the other requirements for listing are satisfied. If, on Tuesday, all requirements are deemed satisfied, the IPO’d security could then be eligible for trading on the Exchange on Wednesday (*i.e.*, starting on or after the second business day following the IPO day). Thus, the proposal could potentially accelerate the listing of options on IPO’d securities by two days.

The Exchange believes the proposed change would allow options on IPO’d securities to come to market sooner without sacrificing investor protection.

The Exchange represents that trading in IPO’d securities—like all other securities traded on the Exchange—is subject to surveillances administered by the Exchange and to cross-market surveillances administered by FINRA on behalf of the Exchange. Those surveillances are designed to detect violations of Exchange rules and applicable federal securities laws.¹⁰ The Exchange represents that those surveillances are adequate to reasonably monitor Exchange trading of IPO’d securities in all trading sessions and to reasonably deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.¹¹ As such, the Exchange believes that its existing surveillance technologies and procedures, coupled with NYSE American’s findings related to the IPOs reviewed as described herein, adequately address potential concerns regarding possible manipulation or price stability.

Implementation Date

The Exchange will announce the effective date of the proposed change by Notice distributed to all Participants.¹² The Exchange will coordinate the effective date to coincide with the implementation of the proposed change on the other options exchanges.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,¹³ in general, and Section 6(b)(5) of the Act,¹⁴ 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. In particular, the Exchange believes the proposed change would facilitate options transactions and would remove impediments to and perfect the mechanism of a free and

⁶ See BOX Rule 5020(b)(5)(i). The Exchange is not proposing to make any changes to the guidelines for listing securities that are not a “covered security.” See BOX Rule 5020(b)(5)(ii).

⁷ See proposed Rule 5020(b)(5)(i)(2). The Exchange proposes a non-substantive change to number the existing and proposed criteria for covered securities as (1) and (2) of paragraph (5)(i). See proposed Rule 5020(b)(5)(i).

⁸ While the Exchange acknowledges that market participants may utilize options for speculative purposes (in addition to as a hedging tool), the Exchange believes (as set forth below) that its existing surveillance technologies and procedures adequately address potential violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

⁹ The Exchange acknowledges that the Options Listing Procedures Plan (or “OLPP”) requires that the listing certificate be provided to OCC no earlier than 12:01 a.m. and no later than 11:00 a.m. (Chicago time) on the trading day prior to the day on which trading is to begin. See the OLPP, at p. 3, available here: https://www.theocc.com/getmedia/198bfc93-5d51-443c-9e5b-fd575a0a7d0f/options_listing_procedures_plan.pdf. The OLPP is a national market system plan that, among other things, sets forth procedures governing the listing of new options series.

¹⁰ FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA’s performance under this regulatory services agreement.

¹¹ See *supra* note 8.

¹² The term “Participant” means a firm, or organization that is registered with the Exchange pursuant to the Rule 2000 Series for purposes of participating in trading on a facility of the Exchange and includes an “Options Participant” and “BSTX Participant.” See BOX Rule 100(a)(42).

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

open market and a national market system, which would, in turn, protect investors and the public interest by providing an avenue for options on IPO'd securities to come to market earlier. The Exchange notes that the three-day look back period helps ensure that options on underlying securities may be listed and traded in a timely manner while also allowing time for OCC to accommodate the certification request. However, there are certain large IPOs that issue high-priced securities—well above the \$3.00 per share threshold—that would obviate the need for the three-day lookback period. As noted above, NYSE American has reviewed trading data for IPO'd securities dating back to 2017 and it is unaware of an IPO'd security with a market capitalization of \$3 billion or more (based upon the offering price of its IPO) that subsequently would have failed to qualify for listing and trading as options under the three-day lookback requirement. The Exchange believes that the proposed amendment, which would be harmonized across options exchanges, would remove impediments to and perfect the mechanism of a free and open market and a national market system by providing an avenue for investors to hedge their interest in IPO investments in a shorter amount of time than what is currently permitted. The Exchange believes that options serve a valuable tool to the trading community and help markets function efficiently by mitigating risk. To that end, the Exchange believes that the absence of options in the early days after an IPO may heighten volatility to IPO'd securities.¹⁵

Further, as noted herein, the Exchange believes the proposed change would allow options on IPO'd securities to come to market sooner (*i.e.*, at least two business days post-IPO not inclusive of the day of the IPO) without sacrificing investor protection. The Exchange represents that trading in IPO'd securities—like all other securities traded on the Exchange—is subject to surveillances administered by the Exchange and to cross-market surveillances administered by FINRA on behalf of the Exchange. Those surveillances are designed to detect violations of Exchange rules and applicable federal securities laws.¹⁶ The Exchange represents that those surveillances are adequate to reasonably monitor Exchange trading of IPO'd

securities in all trading sessions and to reasonably deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange, including wrongful efforts to manipulate the prices of those securities in order to bring them in compliance with the \$3.00/share threshold for the listing of options. As such, the Exchange believes that its existing surveillance technologies and procedures, coupled with NYSE American's findings related to the IPOs reviewed as described herein, would adequately address potential concerns regarding possible manipulation or price stability.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to a filing submitted by NYSE American that was recently approved by the Commission.¹⁷ The Exchange anticipates that the other options exchanges will adopt substantively similar proposals, such that there would be no burden on intermarket competition from the Exchange's proposal. Accordingly, the proposed change is not meant to affect competition among the options exchanges. For these reasons, the Exchange believes that the proposed rule change reflects this competitive environment and does not impose any undue burden on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section

19(b)(3)(A) of the Act¹⁸ and Rule 19b-4(f)(6) thereunder.¹⁹

A proposed rule change filed under Rule 19b-4(f)(6)²⁰ normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)²¹ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that this proposed rule change is substantially similar in all material respects to a proposal submitted by NYSE American that was recently approved by the Commission.²² The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. The Exchange represents that it will coordinate the effective date to coincide with the implementation of the proposed change on the other options exchanges. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁰ *Id.*

²¹ 17 CFR 240.19b-4(f)(6)(iii).

²² See *supra* note 3.

¹⁵ See *supra* note 8.

¹⁶ FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

¹⁷ See *supra* note 3.

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-BOX-2023-21 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-BOX-2023-21. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-BOX-2023-21 and should be submitted on or before September 1, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-17212 Filed 8-10-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98071; File No. SR-ICEEU-2023-010]

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 and Amendment No. 2, to the ICE Clear Europe Clearing Rules Relating to Non-Default Losses

August 7, 2023.

I. Introduction

On April 21, 2023, ICE Clear Europe Limited ("ICE Clear Europe") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4,² a proposed rule change to amend the ICE Clear Europe Clearing Rules (the "Rules") regarding the treatment of non-default losses. On May 2, 2023, ICE Clear Europe filed Amendment No. 1 to the proposed rule change.³ Notice of the proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on May 10, 2023.⁴ On June 21, 2023, the Commission designated a longer period for Commission action on the proposed rule change until August 8, 2023.⁵ On June 30, 2023, ICE Clear Europe filed Amendment No. 2 to the proposed rule change.⁶ Notice of Amendment No. 2 to the proposed rule change was published for comment in the **Federal Register** on July 12, 2023.⁷ The Commission did not receive comments regarding the proposed rule change, as modified by

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 amended and restated in its entirety the Form 19b-4 and Exhibit 1A in order to correct the narrative description of the proposed rule change.

⁴ Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the Clearing Rules, Exchange Act Release No. 97429 (May 4, 2023); 88 FR 30187 (May 10, 2023) (SR-ICEEU-2023-010) ("Notice").

⁵ Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the Clearing Rules; Exchange Act Release No. 97780 (June 21, 2023), 88 FR 41711 (June 27, 2023) (File No. SR-ICEEU-2023-010).

⁶ Amendment No. 2 modified Exhibit 5 to clarify when certain funds are considered available to ICE Clear Europe to be applied in accordance with the Rules as proposed to be amended.

⁷ Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Amendment No. 2 to Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the Clearing Rules, Exchange Act Release No. 97851 (July 7, 2023); 88 FR 44418 (July 12, 2023) (SR-ICEEU-2023-010).

Amendment Nos. 1 and 2 (hereafter, the "proposed rule change"). For the reasons discussed below, the Commission is approving the proposed rule change on an accelerated basis.

II. Description of the Proposed Rule Change

A. Background

ICE Clear Europe is registered with the Commission as a clearing agency for the purpose of clearing security-based swaps.⁸ In its role as a clearing agency for clearing security-based swaps, ICE Clear Europe provides services to its Clearing Members, and Clearing Members in turn transfer assets to ICE Clear Europe. For example, ICE Clear Europe's Clearing Members transfer to ICE Clear Europe cash and other assets to satisfy their margin and Guaranty Fund requirements. ICE Clear Europe maintains these assets at banks for settlement and custodianship and also invests the assets on behalf of Clearing Members.

Maintaining and investing Clearing Members' assets exposes those assets to risk. For example, if ICE Clear Europe's custodial bank were to default, ICE Clear Europe could lose access to, or suffer a decline in value of, assets that it maintains at the bank. Similarly, if an investment counterparty were to default, ICE Clear Europe could lose access to, or suffer a decline in value of, assets invested with that counterparty. These potential losses can be described generally as non-default losses because they do not arise from the default of a Clearing Member, but rather from the default of another counterparty to which ICE Clear Europe is exposed through its custody and investment of assets.

As explained in more detail below, ICE Clear Europe's Rules currently define and categorize non-default losses. The Rules also specify ICE Clear Europe's responsibility to pay for such losses, set aside financial resources to cover such losses, and allocate non-default losses among Clearing Members in certain situations.

The proposed rule change would amend the Rules to revise this overall framework for non-default losses. As described more fully below, the proposed rule change would: (i) add new types of non-default losses and amend the definitions of the existing types; (ii) define the responsibilities of ICE Clear Europe and of Clearing Members with respect to the different types of non-default losses, including the amount of financial resources put

⁸ Capitalized terms not otherwise defined herein have the meanings assigned to them in ICE Clear Europe's Clearing Rules.

²³ 17 CFR 200.30-3(a)(12).

forth by ICE Clear Europe to cover non-default losses; and (iii) make other clarifications related to the treatment of non-default losses.

B. Types of Non-Default Losses

The Rules currently divide non-default losses into two categories. First, there are Investment Losses. Investment Losses are losses that ICE Clear Europe incurs in connection with the investment of a Clearing Member's assets representing Original/Initial Margin,⁹ Guaranty Fund Contributions,¹⁰ or Permitted Cover¹¹ otherwise provided to cover margin and Guaranty Fund requirements. Second, there are Non-Default Losses. Non-Default Losses are all losses that (i) are not Investment Losses, (ii) ICE Clear Europe incurs other than by an Event of Default,¹² and (iii) threaten ICE Clear Europe's solvency.

The proposed rule change would add three new types of losses: Custodial Losses, Pledged Collateral Losses, and Title Transfer Collateral Loss.

A Custodial Loss would include a loss that ICE Clear Europe incurs with respect to Custodial Assets in connection with two events: (i) the default, Insolvency, failure, or similar event with respect to a Custodian¹³ or Delivery Facility¹⁴ and (ii) the embezzlement, theft, defalcation of, or similar event affecting, Custodial Assets. The proposed rule change would define Custodial Assets as any cash, deposit, holding, and similar property that is or represents a Clearing Member's Original/Initial Margin, Variation Margin, Guaranty Fund Contributions, Permitted Cover, proceeds thereof,

Deliverables, or settlement amounts. The definition of Custodial Losses would specifically exclude any Pledged Collateral Losses or Title Transfer Collateral Losses.

While a Custodial Loss would arise from the default of a Custodian or theft of Custodial Assets, a Title Transfer Loss would arise from a reduction in value of collateral held at a Custodian, due to, for example, a change in market value or exchange rates. Specifically, the proposed rule change would define a Title Transfer Collateral Loss as losses, liabilities, and damages incurred in connection with a reduction in value of a Clearing Member's Original/Initial Margin, Guaranty Fund Contributions, or other Permitted Cover that: (i) Clearing Members have transferred to ICE Clear Europe other than by way of Pledged Collateral and (ii) ICE Clear Europe has not invested or reinvested.

This category would include, for example, losses related to collateral held at a Custodian, rather than invested. This category would be limited, however, to losses that arise from a reduction in value, such as one resulting from a change in exchange rates. It does not cover losses arising from the default of a Custodian. Those losses, to the extent incurred by ICE Clear Europe, would be Custodial Losses.

Unlike a Title Transfer Loss, a Pledged Collateral Loss would include any losses related to Pledged Collateral, and not just those incurred in connection with a reduction in value or change in exchange rates. The proposed rule change would define a Pledged Collateral Loss as any losses, liabilities, and damages arising out of or relating to holding any Pledged Collateral or the assets in any Pledged Collateral Account. Pledged Collateral is a Clearing Member's margin or Permitted Cover that is provided in a Pledged Collateral Account. With a Pledged Collateral Account, the Clearing Member provides ICE Clear Europe a security interest in the margin rather than transferring title in the margin to ICE Clear Europe outright. Because a Clearing Member never actually transfers such collateral to ICE Clear Europe, the Clearing Member remains responsible for any losses related to such collateral. This is the case both under ICE Clear Europe's current Rule 502(j),¹⁵ and under the proposed rule change.

¹⁵ ICE Clear Europe Rule 502(j) currently provides that ICE Clear Europe "shall not be liable to any Clearing Member's Customer or other Person for any losses, liabilities, damages, costs, claims, shortfalls or expenses arising out of or relating to the holding of any Pledged Collateral or the assets in any Pledged Collateral Account . . . except to

In addition to establishing these new categories of losses, the proposed rule change would amend the existing definitions of Investment Losses and Non-Default Losses. With respect to the definition of Investment Losses, the proposed rule change would exclude Custodial Losses, Pledged Collateral Losses, and any Title Transfer Collateral Loss. The proposed rule change also would delete language, currently in the definition, that Investment Losses do not include losses incurred as a result of a default of a Custodian. This language is no longer needed because those losses would be Custodial Losses, as discussed above.

With respect to the definition of Non-Default Losses, the proposed rule change similarly would exclude Custodial Losses, Pledged Collateral Losses, and any Title Transfer Collateral Loss (the definition already excludes Investment Losses). The proposed rule change also would exclude any losses that are included in the calculation of the ICE Deposit Rate.¹⁶ Finally, the proposed rule change would delete the caveat that to be a Non-Default Loss, the loss must threaten ICE Clear Europe's solvency.

Taken together, these changes would remove certain losses from the definition of Non-Default Losses, thereby narrowing the definition. For example, the current definition of Non-Default Loss could include the sorts of losses that would be captured in the new term Custodial Losses. This could occur, for example, if a Custodian of ICE Clear Europe defaults, causing ICE Clear Europe to suffer a loss that threatens ICE Clear Europe's solvency. Moving such losses out of the definition of Non-Default Losses and into a new definition of Custodial Losses means, as discussed below, ICE Clear Europe's financial responsibility for such losses would be limited to certain predetermined financial assets.

At the same time, the proposed rule change would remove the requirement that Non-Default Losses threaten ICE Clear Europe's solvency. Under the proposed rule change, a Non-Default Loss would be any loss not incurred as part of an Event of Default, other than an Investment Loss, Custodial Loss, Pledged Collateral Loss, or Title

the extent such [losses] result from the gross negligence or wilful misconduct of the Clearing House." As discussed below, the proposed rule change would delete this provision from Rule 502(j) and move it into new Rule 919(s).

¹⁶ ICE Clear Europe generally pays Clearing Members interest on the cash balances from their margin deposits. It is possible, however, the ICE Clear Europe may charge a negative interest rate in certain circumstances.

⁹ Original Margin means Permitted Cover provided to ICE Clear Europe as collateral for the obligations of a Clearing Member in respect of F&O Contracts. Initial Margin means Permitted Cover provided to ICE Clear Europe as collateral for the obligations of a Clearing Member in respect of CDS Contracts. See ICE Clear Europe Rule 101.

¹⁰ Guaranty Fund Contribution means Permitted Cover transferred by a Clearing Member to the Clearing House as a contribution to the Guaranty Fund. See ICE Clear Europe Rule 101.

¹¹ Permitted Cover means cash in Eligible Currencies and other assets determined by ICE Clear Europe as permissible for Margin or Guaranty Fund Contributions. See ICE Clear Europe Rule 101.

¹² Rule 901(a) lists certain events that constitute an Event of Default with respect to a Clearing Member, such as a Clearing Member being unable, or likely to be unable, to meet its obligations under the Rules or in respect of any of its Contracts.

¹³ The term Custodian would mean, among other entities, any bank, custodian, sub-custodian, registry, nominee, agent, depository or settlement system. See ICE Clear Europe Rule 101.

¹⁴ The term Delivery Facility means any Person or facility used for the delivery of Deliverables, such as warehouses, balancing systems, gas networks, central securities depositories, settlement systems, designated systems, and vessels. See ICE Clear Europe Rule 101.

Transfer Collateral Loss. ICE Clear Europe could seemingly categorize less significant losses as Non-Default Losses because Non-Default Losses would no longer need to threaten ICE Clear Europe's solvency. As discussed below, this means ICE Clear Europe could cover losses using certain predetermined financial assets.

C. Responsibilities of ICE Clear Europe and Clearing Members for Losses

1. Current Rule 919

Rule 919 defines the responsibilities of ICE Clear Europe and Clearing Members with respect to losses not related to a Clearing Member's default. As discussed above, ICE Clear Europe currently categorizes such losses as either Investment Losses or Non-Default Losses. Accordingly, current Rule 919 applies to Investment Losses and Non-Default Losses only.

Rule 919 only applies where (i) there has been a Non-Default Loss or Investment Loss and (ii) there has not been a Clearing House Event.¹⁷ In that situation, Rule 919 makes ICE Clear Europe responsible for a Non-Default Loss and the first portion of an Investment Loss. With respect to a Non-Default Loss, ICE Clear Europe meets that loss first with any available Loss Assets and satisfies any remaining loss using its own capital or assets. With respect to an Investment Loss, ICE Clear Europe meets that loss first with any available Loss Assets and apportions any remaining loss among Clearing Members. Loss Assets are assets of ICE Clear Europe that are set aside to cover Non-Default Losses and Investment Losses.¹⁸

The apportionment of the remaining Investment Loss works as follows. First, ICE Clear Europe publishes a circular certifying that the Investment Loss is greater than the Loss Assets. Then, ICE Clear Europe determines the amount that each Clearing Member is required to pay to satisfy that loss, which Rule 919 calls a Collateral Offset Obligation. Each Clearing Member's Collateral Offset Obligation is determined by multiplying the amount of the remaining Investment Loss by a fraction, the numerator of which is the total of the Clearing Member's Original/Initial Margin, Guaranty Fund Contributions, and Permitted Cover, and the

denominator of which is the total of such amounts among all Clearing Members. Thus, each Clearing Member's Collateral Offset Obligation would be derived from its proportionate share of Original/Initial Margin, Guaranty Fund Contributions, and Permitted Cover. Under current Rule 919(e), a Clearing Member's total Collateral Offset Obligation could not exceed its total Original/Initial Margin, Guaranty Fund Contributions, and Permitted Cover.

2. Amended Rule 919

The proposed rule change would maintain this framework for satisfying and apportioning losses but would add the additional categories of losses discussed above. Like the current rule, Rule 919 as amended would only apply where (i) there has been a Non-Default Loss, Investment Loss, Custodial Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss and (ii) there has not been a Clearing House Event. How amended Rule 919 would treat each of these categories of losses is discussed below.

With respect to a Non-Default Loss, ICE Clear Europe would meet that loss first with any available Investment Loss Assets¹⁹ and Custodial Loss Assets.²⁰ After those sources are exhausted, ICE Clear Europe would satisfy any remaining Non-Default Loss using its own capital or assets. Rule 919 as amended therefore would treat Non-Default Losses the same as it does now, except that ICE Clear Europe could meet the loss first with any Investment Loss Assets and Custodial Loss Assets, instead of just Loss Assets.

With respect to an Investment Loss, ICE Clear Europe would meet that loss first with any available Investment Loss Assets. With respect to a Custodial Loss, ICE Clear Europe would meet that loss first with any available Custodial Loss Assets. After using the Investment Loss Assets or Custodial Loss Assets, ICE Clear Europe would apportion any remaining Investment Loss or Custodial Loss among Clearing Members. ICE Clear Europe would use the same method and formula to apportion this loss among Clearing Members discussed above, with a few additions. Under the proposed rule change, each Clearing Member's share would still be based on its portion of total Original/Initial Margin, Guaranty Fund Contributions, and Permitted Cover, but the proposed rule change would add Variation

Margin, Deliverables, and settlement amounts to this formula.²¹ A Clearing Member's total Collateral Offset Obligation could not exceed its total Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover, Variation Margin, Deliverables, and settlement amounts, which is essentially the same as the current rule.

With respect to a Pledged Collateral Loss, a Clearing Member would be responsible for that loss except in certain circumstances. New Rule 919(s) would specify that ICE Clear Europe would not be liable to any Clearing Member, Customer or other Person for any Pledged Collateral Losses and the Clearing Member or Customer would bear the risk of loss. ICE Clear Europe could be liable for a Pledge Collateral Loss, however, if the loss resulted directly from its fraud, bad faith, gross negligence or wilful misconduct. New Rule 919(s) would mirror a provision found in current Rule 502(j).²² As such, the proposed rule change would delete this provision from Rule 502(j).

With respect to a Title Transfer Collateral Loss, a Clearing Member would be solely responsible for that loss but would be entitled to get back assets equivalent to those it transferred to ICE Clear Europe. New Rule 919(u) would specify that ICE Clear Europe would not be liable to any Clearing Member, Customer or other Person for any Title Transfer Collateral Loss and the Clearing Member or Customer would bear the risk of loss. Where a Clearing Member has delivered collateral via title transfer, the Clearing Member would be entitled to get back an equivalent asset but would not be entitled to any compensation in respect of any losses. As discussed above, a Title Transfer Collateral Loss covers losses resulting from a decline in value of collateral that a Clearing Member has transferred to ICE Clear Europe, but which ICE Clear Europe has not invested, instead keeping that collateral at a Custodian. Thus, it follows that a Clearing Member would bear the risk of a Title Transfer Collateral Loss but would be entitled to the return of its collateral or an equivalent asset.

²¹ For the explanation of this particular change, see *infra* Section I.D.2 below.

²² Under current Rule 502(j), ICE Clear Europe is not liable to any Clearing Member's Customer or other Person for any losses, liabilities, damages, costs, claims, shortfalls, or expenses arising out of or relating to the holding of any Pledged Collateral or the assets in any Pledged Collateral Account, except to the extent such Custodial Losses result from the gross negligence or wilful misconduct of ICE Clear Europe.

¹⁷ A Clearing House Event generally occurs if ICE Clear Europe is insolvent or otherwise fails to make a payment when due. See ICE Clear Europe Rule 913.

¹⁸ As discussed in the next section, the proposed rule change would eliminate the current set of Loss Assets and set aside two separate amounts to cover losses, one for Investment Losses and one for Custodial Losses.

¹⁹ As discussed in the next section, Investment Loss Assets would be assets of ICE Clear Europe set aside to cover Investment Losses.

²⁰ As discussed in the next section, Custodial Loss Assets would be assets of ICE Clear Europe set aside to cover Custodial Losses.

3. Amount of ICE Clear Europe Resources To Cover Losses

Rule 919(p) currently provides that ICE Clear Europe will notify Clearing Members of the amount of Loss Assets by circular from time to time. Loss Assets are assets of ICE Clear Europe that it would use to first satisfy a Non-Default Loss or Investment Loss. Current Rule 919(p) further provides that the amount of Loss Assets is \$90 million.

The proposed rule change would delete the term Loss Assets and replace it with two separate terms: Investment Loss Assets and Custodial Loss Assets. Investment Loss Assets would be assets of ICE Clear Europe set aside to cover Investment Losses, while Custodial Loss Assets would be assets of ICE Clear Europe set aside to cover Custodial Losses.

The proposed rule change also would delete the set amount of such assets from Rule 919(p). Amended Rule 919(p) would no longer specify that Loss Assets are set at a level of \$90 million and amended Rule 919(p) would not specify any particular amount for Investment Loss Assets or Custodial Loss Assets. As under the current rule though, ICE Clear Europe would be required to notify Clearing Members from time to time, by circular, of the total amount of such assets. After issuing such a circular, ICE Clear Europe's liability for any subsequent Investment Loss or Custodial Loss would be limited to the amount of Investment Loss Assets and Custodial Loss Assets, as applicable, set out in the circular.

Despite deleting the set amount from Rule 919(p), ICE Clear Europe announced in the Notice that it is setting the current amount of Investment Loss Assets at \$195 million and Custodial Loss Assets at \$80 million.²³ Thus, the proposed rule change would increase the amount of Investment Loss Assets and Custodial Loss Assets from the current \$90 million, while maintaining ICE Clear Europe's ability to change this amount by circular notification.

Rule 919(q) sets out further details regarding the assets set aside to cover non-default losses. Currently Rule 919(q) requires that ICE Clear Europe notify Clearing Members of the total amount of Loss Assets applied in connection with any Investment Loss prior to using such assets. Rule 919(q), as amended, would similarly require that ICE Clear Europe notify Clearing Members of the total amount of Investment Loss Assets applied in

connection with any Investment Loss or Non-Default Loss prior to using such assets. Likewise, amended Rule 919(q) would require that ICE Clear Europe notify Clearing Members of the total amount of Custodial Loss Assets applied in connection with any Custodial Loss or Non-Default Loss prior to using such assets.

Rule 919(q) also allows ICE Clear Europe to replenish its capital and resources following an Investment Loss or Non-Default Loss. Such recapitalization does not reduce any Clearing Member's Collateral Offset Obligation or the amount of an Investment Loss. Similarly, ICE Clear Europe may replenish its Loss Assets by applying retained earnings, but doing so does not increase its liability beyond the amounts already set aside for Loss Assets (*i.e.*, \$90 million under the current rule). The proposed rule change would generally maintain these provisions, with amendments to incorporate the new defined terms, such as Custodial Losses and Custodial Loss Assets. Moreover, the proposed rule change would require that ICE Clear Europe, after replenishing its resources, issue a new circular pursuant to Rule 919(p) to notify Clearing Members of the amount of Investment Loss Assets and Custodial Loss Assets going forward. In such a situation though, ICE Clear Europe would not be obligated to apply the new amounts to any prior Non-Default Loss, Custodial Loss, or Investment Loss.

4. Other Sections of Rule 919

In addition to the provisions discussed above, other sections of Rule 919 affect the responsibilities of ICE Clear Europe and Clearing Members for non-default losses, the apportionment of such losses, and the financial resources to cover such losses. The proposed rule change would amend some of these other sections to be consistent with the overall changes discussed above. This section discusses these amendments in the order in which they appear in Rule 919.

Current Rule 919(f) provides details related to Collateral Offset Obligations. All Collateral Offset Obligations arise on the date specified in the circular published by ICE Clear Europe announcing the obligations. ICE Clear Europe collects the Collateral Offset Obligations using the same process for collecting additional cash Margin or Guaranty Fund Contributions. Moreover, ICE Clear Europe may offset any Collateral Offset Obligation against an obligation of ICE Clear Europe to return or pay any Original/Initial Margin, Guaranty Fund Contributions,

or other Permitted Cover to a Clearing Member. The proposed rule change would maintain these provisions largely as they are currently written, but would add Variation Margin, Deliverables, or settlement amounts to Rule 919(f).²⁴

Current Rule 919(g) requires that ICE Clear Europe apply Collateral Offset Obligations solely to meet Investment Losses. This provision is based on the current allocation framework explained above, where losses are either Non-Default Losses or Investment Losses, and Clearing Members are only liable for Investment Losses. Given that the proposed rule change would expand the categories of non-default losses, the proposed rule change also would amend this provision. As amended, Rule 919(g) would require that ICE Clear Europe apply Collateral Offset Obligations resulting from Investment Losses solely to meet those Investment Losses and Collateral Offset Obligations resulting from Custodial Losses solely to those Custodial Losses.

Current Rule 919(h) requires that ICE Clear Europe, if it recovers any money or assets that reduce an Investment Loss, pay the same amount to the Clearing Members that met their Collateral Offset Obligations, *pro rata*. In paying such recovered amounts to Clearing Members, ICE Clear Europe is allowed to pay itself back for any expenses it incurred and for any assets, other than Loss Assets, that it applied to meet the Investment Loss. The proposed rule change would largely retain this provision as written, with some edits. First, it would amend Rule 919(h) to apply to Custodial Losses, in addition to Investment Losses. Second, it would limit ICE Clear Europe's obligation to pay any money or assets to those assets that it recovers and that are received by and remain available to ICE Clear Europe. The proposed rule change also would add a more general caveat that the obligation to return amounts to Clearing Members only applies to the extent that such amounts or assets remain available to ICE Clear Europe in cleared funds and have not been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss or Title Transfer Collateral Loss. This particular change would help to recognize the possibility that such amounts could be subject to a loss before ICE Clear Europe is able to distribute them to Clearing Members. Finally, the proposed rule change would add, in new Rule 919(t), an identical provision to Rule 919(h), as amended,

²³ Notice, 88 FR at 30190.

²⁴ For the explanation of this particular change, see *infra* Section II.D.2 below.

except that Rule 919(t) would apply to a Pledged Collateral Loss.

Current Rule 919(i) generally prohibits a Clearing Member from offsetting its Collateral Offset Obligation against other obligations that it owes to ICE Clear Europe. For example, Rule 919(i) provides that a Collateral Offset Obligation does not reduce or otherwise affect the liability of a Clearing Member to make Guaranty Fund Contributions, to replenish any of its Guaranty Fund Contributions, or to pay Assessment Contributions. Clearing Members remain liable for margin, Guaranty Fund Contributions, Assessment Contributions, and amounts they may owe to ICE Clear Europe. On the other hand, ICE Clear Europe must pay or release Margin and Permitted Cover in the usual way, subject to netting to take into account any Collateral Offset Obligation. The proposed rule change would retain Rule 901(i) largely as written, but would add references to Variation Margin, Deliverables, and settlement amounts.²⁵ For example, the proposed rule change would require that a Clearing Member, despite a Collateral Offset Obligation, continue to pay Variation Margin and make and receive timely delivery of all Deliverables.

Current Rule 919(j) requires that ICE Clear Europe, if it determines that it has provided for Collateral Offset Obligations in excess of that required or actually applied against an Investment Loss, or makes a recovery under Rule 919(h), credit the excess or recovered amount to the Clearing Member's Proprietary Account. The proposed rule change would largely retain this provision as written, with two amendments. First, it would amend Rule 919(j) to apply to Custodial Losses, in addition to Investment Losses. Second, it would add a general caveat that the obligation only applies to the extent that such amounts or assets remain available to ICE Clear Europe in cleared funds and have not been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss. Similar to amended Rule 919(h) described above, this particular change would help to recognize the possibility that such amounts could be subject to a loss before ICE Clear Europe is able to distribute them to Clearing Members.

Current Rule 919(k) clarifies that a Clearing Member's liability for a Collateral Offset Obligation is independent from ICE Clear Europe's

power of assessment under Rule 909.²⁶ None of the caps on assessment liabilities found in Rule 909 or elsewhere limit any liability for a Collateral Offset Obligation. The proposed rule change would amend this provision to also refer to Rule 914,²⁷ Rule 915,²⁸ and Rule 916,²⁹ in addition to Assessment Contributions under Rule 909. Thus, a Clearing Member's liability for a Collateral Offset Obligation would be independent of any of its obligations under Rule 909, Rule 914, Rule 915, and Rule 916.

Current Rule 919(l) provides a general exception to the definition of Clearing House Event.³⁰ Specifically, if ICE Clear Europe exercises any of its authority or rights under Rule 919, then such exercise shall not be deemed to be any kind of Clearing House Event. The proposed rule change would retain this provision as written.

Current Rule 919(m) allows Clearing Members to make payments of Collateral Offset Obligations pursuant to Part 3 of the Rules and the Finance Procedures. Rule 919(m) further provides that Rule 919 does not prejudice ICE Clear Europe's right to set off any sum owed by a Clearing Member to ICE Clear Europe against sum payable by ICE Clear Europe to the Clearing Member. The proposed rule change would retain this provision as written.

Current Rule 919(n) provides that nothing in Rule 919 obligates ICE Clear Europe to pursue any litigation, claim, or other action against a Clearing Member, Defaulter, Custodian, or any other Person. The proposed rule change would retain this provision as written, with one amendment. It would further specify that ICE Clear Europe is not required to pursue any claim against a Delivery Facility, in addition to a Clearing Member, Defaulter, Custodian, or any other Person. This particular change would account for the new

definition of Custodial Losses, which includes losses in connection with the default of a Delivery Facility, as discussed above.

Current Rule 919(o) allows ICE Clear Europe to convert any amounts denominated in one currency to another currency, when making any calculations or determinations under Rule 919. The proposed rule change would retain this provision as written.

Current Rule 919(r) limits ICE Clear Europe's liability for the failure of any payment or securities services provider, including any Custodian or central securities depository. ICE Clear Europe is not liable to any Clearing Member, Customer or other Person for any losses, liabilities, damages, costs, claims, shortfalls or expenses arising out of or relating to any failure, in whole or in part, of any payment or securities services provider, including without limitation any Custodian, central securities depository, or central bank. This disclaimer of liability is subject to Rule 111, which generally limits ICE Clear Europe's liability to Clearing Members, except in certain circumstances. The proposed rule change would make a few edits to this provision. First, it would specify that the limitation applies to such losses that are incurred by a Clearing Member, Customer, or Person. It also would add a Delivery Facility to the list of entities. Thus, under Rule 919(r), as amended, ICE Clear Europe would not be liable to any Clearing Member, Customer or other Person for any losses, liabilities, damages, costs, claims, shortfalls or expenses incurred by such Clearing Member, Customer, or other Person arising out of or relating to any failure, in whole or in part, of any payment or securities services provider, including without limitation any Custodian, Delivery Facility, central securities depository or central bank.

Finally, Rule 919(w) generally would limit ICE Clear Europe's liability for investments made by Clearing Members and their clients. ICE Clear Europe would have no liability for any loss, liability, cost, claim, shortfall, or expense relating to any investment decision by any Clearing Member, Customer, or any other Person, such as choosing cash in a particular currency to satisfy a margin requirement, or for the results of any such choices or investments. New Rule 919(w) would mirror a provision currently found in Rule 502(j). As such, the proposed rule change would delete this provision from Rule 502(j).

²⁵ For the explanation of this particular change, see *infra* Section II.D.2 below.

²⁶ Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 909 allows ICE Clear Europe to assess Clearing Members for additional amounts as needed to resolve any shortfall resulting from the default.

²⁷ Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 914 allows ICE Clear Europe to reduce variation margin payments, as needed to retain cash and resolve any shortfall resulting from the default.

²⁸ Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 915 allows ICE Clear Europe to terminate open contracts that offset the defaulting Clearing Member's open contracts.

²⁹ Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 916 allows ICE Clear Europe to cease clearing specific categories of contracts.

³⁰ As discussed above, a Clearing House Event generally occurs if ICE Clear Europe is insolvent or otherwise fails to make a payment when due. See ICE Clear Europe Rule 913.

D. Other Clarifications Related to Non-Default Losses

In addition to making amendments to the types of non-default losses and the framework for covering and apportioning such losses, the proposed rule change would make other related amendments, as discussed in this section. These amendments would (i) confirm ICE Clear Europe's ability to charge a negative interest rate; (ii) add references to the terms Variation Margin, Deliverables, and settlement amounts; and (iii) clarify that ICE Clear Europe's responsibility to repay certain assets is limited to the extent those assets remain available to ICE Clear Europe.

1. Negative Interest Rate

The proposed rule change would clarify that certain provisions of Rule 919 would not limit ICE Clear Europe's ability to charge a negative interest rate. ICE Clear Europe generally pays Clearing Members interest on the cash balances from their margin deposits. It is possible, however, that ICE Clear Europe may charge a negative interest rate in certain circumstances. New Rules 919(s) and 919(u) each would specify that nothing there would limit ICE Clear Europe's ability to charge a negative or reduced ICE Deposit Rate pursuant to the Finance Procedures. Similarly, as discussed above, the revised definition of Non-Default Losses would exclude any losses that are included in the calculation of the ICE Deposit Rate. Finally, new Rule 919(v) would provide that a negative yield, negative interest rate, negative coupon or pre-agreed reduced principal repayment on a non-cash asset being or representing Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover or any Deliverable would not be an Investment Loss or Non-Default Loss and would only be for the account of the relevant Clearing Member and/or its customer.

2. Variation Margin, Deliverables, and Settlement Amounts

The proposed rule change would add the terms Variation Margin,³¹ Deliverables,³² and settlement amounts to various definitions and provisions of

the Rules. For example, the proposed rule change would include these terms in the new definition of Custodial Assets and add the terms Variation Margin and settlement amounts to the definition of Investment Losses. These amendments would have the effect of treating any losses of Variation Margin, Deliverables, and settlement amounts as Custodial Losses or Investment Losses (assuming the losses otherwise meet the definitions of those terms). Thus, losses of Variation Margin, Deliverables, and settlement amounts that meet the definition of Custodial Losses or Investment Losses could be satisfied using Investment Loss Assets and Custodial Loss Assets and, if necessary, apportioned among Clearing Members using the framework discussed above.

The proposed rule change also would add Variation Margin, Deliverables, and settlement amounts to the formula in Rule 919(d). As discussed above, ICE Clear Europe would use this formula to determine each Clearing Member's Collateral Offset Obligation. The Collateral Offset Obligation is effectively each Clearing Member's share of any remaining Investment Loss or Custodial Loss. Adding Variation Margin, Deliverables, and settlement amounts to this formula would therefore take into account the value of these holdings in determining each Clearing Member's share of an Investment Loss or Custodial Loss.

Relatedly, the proposed rule change would add Variation Margin, Deliverables, and settlement amounts to Rule 919(e). As discussed above, Rule 919(e) limits the amount of a Clearing Member's Collateral Offset Obligation. Specifically, the Clearing Member would not be obligated to pay any amount greater than the total of its Original/Initial Margin, Variation Margin, Guaranty Fund Contributions, Permitted Cover, Deliverables and settlement amounts. Thus, this change would include the value of a Clearing Member's Variation Margin, Deliverables, and settlement amounts in capping its overall liability for any Investment Loss or Custodial Loss.

For the sake of consistency with these amendments, the proposed rule change also would add Variation Margin, Deliverables, and settlement amounts to Rules 919(f) and (i). Rule 919(f) generally permits ICE Clear Europe to offset Collateral Offset Obligations owed to it by Clearing Members against amounts that ICE Clear Europe owes to Clearing Members. Currently, this offset applies to any obligation that ICE Clear Europe may have to return Original/Initial Margin, Guaranty Fund Contributions, or other Permitted Cover.

The proposed rule change would add Variation Margin, Deliverables, and settlement amounts.

Relatedly, Rule 919(i) generally prohibits a Clearing Member from offsetting its Collateral Offset Obligation against other obligations that it owes to ICE Clear Europe, as discussed above. The proposed rule change would add references to Variation Margin, Deliverables, and settlement amounts to Rule 919(i). This change would mean Clearing Members would remain liable to pay or transfer Variation Margin and Deliverables to ICE Clear Europe, despite a Collateral Offset Obligation.

3. Amendments to Rules Regarding Assets That Remain Available to ICE Clear Europe

In certain situations, ICE Clear Europe may recover funds on behalf of its Clearing Members. In those circumstances, ICE Clear Europe is generally required to return those funds to its Clearing Members. For example, Rule 301(f) describes how Clearing Members should make payments to ICE Clear Europe. Among other things, Rule 301(f) requires that all Clearing Members make payments by electronic transfer through an Approved Financial Institution.³³ Rule 301(f) further describes what happens when an Approved Financial Institution fails to make a payment to ICE Clear Europe. In that situation, the Clearing Member generally remains liable to ICE Clear Europe, while the Approved Financial Institution remains liable to ICE Clear Europe and the Clearing Member that submitted the payment. If ICE Clear Europe eventually receives money to make up the failed payment and certain other conditions are met, then Rule 301 requires ICE Clear Europe to pay back affected Clearing Members the money, net of costs and expenses, *pro rata*.

The proposed rule change would revise Rule 301(f) with respect to this last part, ICE Clear Europe's obligation to pay back to the Clearing Member the amount of money it recovered. Specifically, the proposed rule change would add a caveat that limits the obligation to return the funds to the Clearing Member. Under the proposed rule change, ICE Clear Europe would only be obligated to return the money to the extent such assets are received by and remain available to ICE Clear Europe in cleared funds, not having

³¹ Variation Margin is the cash transferred by Clearing Members to ICE Clear Europe, and vice versa, to reflect the change in the market value of a CDS contract. See ICE Clear Europe Rule 101.

³² Deliverables include any property, right, interest, register or book entry, commodity, certificate, property entitlement or Investment, which is capable of being delivered pursuant to an F&O Contract or with respect to which settlement amounts are calculated. See ICE Clear Europe Rule 101.

³³ ICE Clear Europe Rule 101 defines "Approved Financial Institution" as "a credit institution, bank, trust company or other institution . . . which has been designated as an approved financial institution by the Clearing House for purposes of making and receiving cash transfers to and from the Clearing House. . . ."

been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss or Title Transfer Collateral Loss.

The proposed rule change would add this same or a similar caveat to Rules 908, 913, 914, 916, 919, 1102, and 1103, each as described further below.

Rule 908(b) explains the order in which ICE Clear Europe may apply assets to meet the obligations, liabilities, and any shortfall of a defaulting Clearing Member that was an F&O Clearing Member or a Sponsored Principal that was authorised to clear F&O (but was not a CDS Clearing Member, an FX Clearing Member, nor authorised to clear CDS or FX). In such a circumstance, Rule 908(b)(iii) provides that any claims under any default insurance come third in the order of priority, after the defaulting Clearing Member's resources and ICE Clear Europe's own contribution. Currently, Rule 908(b)(iii) makes available any claims under any default insurance policies (including the proceeds of any claim) of which ICE Clear Europe is the beneficiary that have been received by ICE Clear Europe as a result of the Event of Default. Under the proposed rule change, Rule 908(b)(iii) would make available any claims under any default insurance policies (including the proceeds of any claim) of which ICE Clear Europe is the beneficiary that have been received by and remain available to ICE Clear Europe in Cleared Funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss. The proposed rule change would make an identical amendment to Rules 908(c),³⁴ 908(d),³⁵ and 908(g).³⁶

Rule 913 sets out the definitions that are used in Rules 914 through 919.

³⁴ Like Rule 908(b), Rule 908(c) explains the order in which ICE Clear Europe may apply assets to meet a defaulting Clearing Member's obligations, liabilities, and shortfall. Rule 908(c) specifically applies to a defaulting Clearing Member that is a CDS Clearing Member or a Sponsored Principal authorized to clear CDS (but not an F&O Clearing Member, FX Clearing Member, nor authorized to clear F&O or FX).

³⁵ Like Rule 908(b), Rule 908(d) explains the order in which ICE Clear Europe may apply assets to meet a defaulting Clearing Member's obligations, liabilities, and shortfall. Rule 908(g) specifically applies to a defaulting Clearing Member that is a FX Clearing Member or a Sponsored Principal authorized to clear FX (but not an F&O Clearing Member, CDS Clearing Member, nor authorized to clear F&O or CDS).

³⁶ Like Rule 908(b), Rule 908(g) explains the order in which ICE Clear Europe may apply assets to meet a defaulting Clearing Member's obligations, liabilities, and shortfall. Rule 908(g) specifically applies to a defaulting Clearing Member that falls in multiple membership categories at ICE Clear Europe, such as a CDS Clearing Member that is also an F&O Clearing Member.

These rules generally describe steps ICE Clear Europe could take to offset losses it may incur as a result of a Clearing Member's default or otherwise not as a result of a default (in the case of Rule 919, as discussed above). For example, as discussed above, Rule 914 authorizes ICE Clear Europe, in certain circumstances, to distribute losses to Clearing Members by implementing a haircut to variation margin payments. Rule 913 includes a formula for determining the losses incurred by ICE Clear Europe. This formula takes into account, among other things, ICE Clear Europe's Available Non-Defaulter Resources. Currently, that term as defined means the cash proceeds or equivalent cash value (as calculated by ICE Clear Europe) of the Guaranty Fund Contributions, Clearing House Contributions, Assessment Contributions, and any claims under any default insurance policies which are available to be applied pursuant to Rule 908, following a particular Event of Default. The definition also stipulates that Assessment Contributions and any claims under any default insurance policies only count as Available Non-Defaulter Resources if they have been received by the ICE Clear Europe in cleared funds at the time it calculates its resources. The proposed rule change would modify this stipulation, such that Assessment Contributions and any claims under any default insurance policies would only count if they have been received by and remain available to ICE Clear Europe, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss.

Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 914 allows ICE Clear Europe to reduce variation margin payments as needed to retain cash and resolve any shortfall resulting from the default. This process of reducing variation margin payments is also known as haircutting. If the requirements of Rule 914 are met, ICE Clear Europe can use such haircuts to distribute losses resulting from a Clearing Member's default to non-defaulting Clearing Members. Rule 914(j) generally requires that ICE Clear Europe distribute to Clearing Members certain funds that would increase ICE Clear Europe's resources and therefore reduce the amount of loss that it is sharing via the haircuts. These funds could include, for example, payments made to ICE Clear Europe by the defaulting Clearing Member, by a non-defaulting Clearing Member, or an

insurer. Under the proposed rule change, ICE Clear Europe would be obligated to distribute these funds only to the extent they remain available to ICE Clear Europe in cleared funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss.

Following the default of a Clearing Member, and if certain other conditions are satisfied, Rule 916 allows ICE Clear Europe to cease clearing specific categories of contracts. If the requirements of Rule 916 are met, ICE Clear Europe can terminate the contracts. ICE Clear Europe then calculates an amount owed to each Clearing Member with respect to the terminated contracts (or which each Clearing Member owes to ICE Clear Europe, in the case of a negative amount). Rule 916(n) generally requires that ICE Clear Europe distribute to Clearing Members certain funds that would increase this amount paid in respect of a contract termination (or decrease the amount owed by a Clearing Member). These funds could include, for example, payments made to ICE Clear Europe by the defaulting Clearing Member, by a non-defaulting Clearing Member, or an insurer. Under the proposed rule change, ICE Clear Europe would be obligated to distribute these funds only to the extent they remain available to ICE Clear Europe in cleared funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss.

The proposed rule change would add the same caveat to rules 919(b), 919(h), 919(j), and 919(t), as discussed above.³⁷

Rule 1102 describes generally Clearing Members' obligations to contribute to ICE Clear Europe's Guaranty Funds, and how ICE Clear Europe will collect, use, and in some circumstances, return the contributions. Rule 1102(k) explains that if (i) ICE Clear Europe has used the non-defaulting Clearing Members' Guaranty Fund Contributions, ICE Clear Europe's own contribution to the Guaranty Fund, or insurance proceeds, and (ii) subsequently has received payments or other monetary amounts from the defaulting Clearing Member, then (iii) ICE Clear Europe must repay the non-defaulting Clearing Members, retain assets to replenish its own contribution to the Guaranty Fund, or repay its insurers, in the reverse order to that specified in Rule 908. Rule 1102(k) sets out a number of conditions on such

³⁷ For a discussion of Rule 919, see *supra* Section II.C above.

repayments. The proposed rule change would add a new condition that ICE Clear Europe has not suffered any loss equivalent to an Investment Loss, Custodial Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss with respect to the amounts received from the defaulting Clearing Member.

Rule 1103(e) applies to ICE Clear Europe's use of default insurance policies. The rule explains how ICE Clear Europe will apply the proceeds of any claim under a default insurance policy. The rule also explains certain limitations and conditions to ICE Clear Europe's use of default insurance, such as the policies being limited to a certain set of contracts cleared by ICE Clear Europe. The proposed rule change would add another condition, that any amounts that ICE Clear Europe receives from an insurer may be subject to losses similar to an Investment Loss, Custodial Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss prior to ICE Clear Europe being able to use the proceeds to offset losses.

Rule 1103(e) also explains how ICE Clear Europe would apply the proceeds of a claim under default insurance among multiple defaulting Clearing Members. The proposed rule change would not alter this explanation, but it would add an additional caveat. ICE Clear Europe would only apply the proceeds of a claim under default insurance among multiple defaulting Clearing Members to the extent that the proceeds remain available to ICE Clear Europe in cleared funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss, or Title Transfer Collateral Loss.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.³⁸ For the reasons discussed below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act,³⁹ Section 17A(b)(3)(F) of the Act,⁴⁰ and Rule 17Ad-22(e)(17)(i) thereunder.⁴¹

A. Consistency With Section 17A(b)(3)(D) of the Act

Section 17A(b)(3)(D) of the Act requires that the rules of ICE Clear Europe provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.⁴² Based on its review of the record, and for the reasons discussed below, the Commission believes the proposed rule change is consistent with the equitable allocation of reasonable dues, fees, and other charges among ICE Clear Europe's Clearing Members.

As explained above, the proposed rule change would add three new categories of non-default losses. ICE Clear Europe would continue to be responsible for Non-Default Losses, and it first would pay for Investment Losses and Custodial Losses out of the assets it has set aside for that purpose. ICE Clear Europe would apportion any remaining Investment Losses and Custodial Losses among Clearing Members using the same method as it does now, with the additional consideration of Variation Margin, Deliverables, and settlement amounts. ICE Clear Europe would allocate losses based on each Clearing Member's share of total Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover, Variation Margin, Deliverables, and settlement amounts. Moreover, each Clearing Member's liability could not exceed the total of its Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover, Variation Margin, Deliverables, and settlement amounts.

The Commission believes this allocation of losses is equitable because it would distribute Investment Losses and Custodial Losses based on each Clearing Member's share of the assets that could potentially be depleted by such losses. As discussed above, the definition of Investment Losses would cover certain losses to Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover, Variation Margin, and settlement amounts. The definition of Custodial Losses would move over certain losses to Custodial Assets, which would be defined to include assets being or representing Original/Initial Margin, Variation Margin, Guaranty Fund Contributions or Permitted Cover, or the proceeds of any of the foregoing, Deliverables or settlement amounts. Finally, each Clearing Member's liability could not exceed its total amount with respect to these assets. Thus, the Commission believes this should help to ensure that Clearing Members only contribute to the recovery

from such losses in amounts commensurate with their Original/Initial Margin, Guaranty Fund Contributions, Permitted Cover, Variation Margin, Deliverables, and settlement amounts in the first instance.

The Commission also believes that it is consistent with 17A(b)(3)(D) of the Act⁴³ to make Clearing Members responsible for any Pledged Collateral Losses and a Title Transfer Collateral Loss as discussed above. Specifically, because a Pledged Collateral Loss relates to Pledged Collateral, the Commission believes it is consistent with 17A(b)(3)(D) of the Act⁴⁴ that a Clearing Member bear the risk of such loss and that ICE Clear Europe be liable only because of its fraud, bad faith, gross negligence, or other willful misconduct. The Commission believes this because, as discussed above, ICE Clear Europe only maintains a security interest in such collateral. Moreover, as discussed above, the new provision in Rule 919 regarding Pledged Collateral is essentially the same as an existing provision in Rule 502(j).

Because a Title Transfer Collateral Loss would result from a reduction in value or change of exchange rate of Original/Initial Margin, Guaranty Fund Contributions or Permitted Cover, the Commission believes it is consistent with 17A(b)(3)(D) of the Act⁴⁵ to allocate these losses to Clearing Members. Clearing Members are responsible for transferring assets to ICE Clear Europe to satisfy their margin and Guaranty Fund obligations. Clearing Members incur these obligations because of the transactions they submit for clearing at ICE Clear Europe. A decline in value of collateral that a Clearing Member transfers to ICE Clear Europe to satisfy its margin obligation would necessarily require the Clearing Member to transfer additional collateral to make up for that decline in value. Thus, allocating a Title Transfer Collateral Loss to a Clearing Member follows from ICE Clear Europe's overall risk management framework.

The Commission further believes the proposed rule change would not substantially alter ICE Clear Europe's responsibility for losses. ICE Clear Europe would remain responsible for Non-Default Losses. The proposed rule change would remove the caveat that a Non-Default Loss must threaten ICE Clear Europe's insolvency. This change would expand the losses for which ICE Clear Europe would be liable as Non-Default Losses, while also giving ICE

³⁸ 15 U.S.C. 78s(b)(2)(C).

³⁹ 15 U.S.C. 78q-1(b)(3)(D).

⁴⁰ 15 U.S.C. 78q-1(b)(3)(F).

⁴¹ 17 CFR 240.17Ad-22(e)(17)(i).

⁴² 15 U.S.C. 78q-1(b)(3)(D).

⁴³ 15 U.S.C. 78q-1(b)(3)(D).

⁴⁴ 15 U.S.C. 78q-1(b)(3)(D).

⁴⁵ 15 U.S.C. 78q-1(b)(3)(D).

Clear Europe access to financial resources to pay for those losses. As discussed above, ICE Clear Europe could pay for a Non-Default Loss first out of Investment Loss Assets and Custodial Loss Assets.

While that would be the case, ICE Clear Europe also would set aside more assets to cover these losses than it does currently. Currently, ICE Clear Europe has set aside \$90 million to cover a Non-Default Loss and/or an Investment Loss. Under the proposed rule change, \$195 million would be available for an Investment Loss and \$80 million would be available for a Custodial Loss. As under the current rule, ICE Clear Europe could use these amounts to cover a Non-Default Loss as well.

Finally, as discussed above in Section II.D.3, the proposed rule change would amend various ICE Clear Europe rules that require ICE Clear Europe to return money to Clearing Members in certain circumstances. As amended, these rules generally would require that ICE Clear Europe only return money to the extent ICE Clear Europe has received the assets and they remain available to ICE Clear Europe in cleared funds, not having been subject to an event similar to a Custodial Loss, Investment Loss, Pledged Collateral Loss or Title Transfer Collateral Loss. The Commission believes adding these caveats to the existing rule provisions would help to recognize the possibility that such assets could be subject to a loss before ICE Clear Europe is able to distribute them to Clearing Members. In that situation, the Commission believes not requiring ICE Clear Europe to return the assets to Clearing Members is consistent with 17A(b)(3)(D) of the Act⁴⁶ given that ICE Clear Europe would no longer possess such assets.

On balance then, the Commission believes the proposed rule change would establish an equitable allocation of losses not relating to the default of a Clearing Member as between ICE Clear Europe and its Clearing Members and among ICE Clear Europe's Clearing Members.

Therefore, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act.⁴⁷

B. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICE Clear Europe be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent

applicable, derivative agreements, contracts, and transactions.⁴⁸ Based on its review of the record, and for the reasons discussed below, the Commission believes the proposed rule change is consistent with the promotion of the prompt and accurate clearance and settlement of securities transactions.

The Commission believes that the proposed rule change would help enhance ICE Clear Europe's ability to manage non-default losses and continue operating as a going concern if it incurs losses not relating to a Clearing Member's default. Specifically, the proposed rule change would maintain ICE Clear Europe's existing framework for covering and sharing in such losses, while expanding the framework to cover new types of losses. The proposed rule change would add new categories of non-default losses, namely Custodial Losses, Pledged Collateral Losses, and a Title Transfer Collateral Loss. At the same time, the proposed rule change would cover losses to additional categories of assets, specifically Variation Margin, Deliverables, and settlement amounts.

The proposed rule change would also limit ICE Clear Europe's liability for Custodial Losses, Investment Losses, Pledged Collateral Losses, and a Title Transfer Collateral Loss. For Custodial Losses and Investment Losses, the proposed rule change would limit ICE Clear Europe's liability to the assets it has set aside, with any remaining losses apportioned among Clearing Members. ICE Clear Europe generally would have no liability for any Pledged Collateral Losses and a Title Transfer Collateral Loss except in the limited circumstances discussed above. Similarly, under new Rule 919(w), ICE Clear Europe generally would have no liability for investment decisions made by Clearing Members and their clients.

Relatedly, the proposed rule change would increase the amount of ICE Clear Europe's resources available to cover Non-Default Losses, Custodial Losses, and Investment Losses, and enhance ICE Clear Europe's ability to replenish those resources. Under the proposed rule change, ICE Clear Europe would set aside \$90 million to cover Custodial Losses and \$195 million to cover Investment Losses. This is an increase from the \$80 million set aside currently to cover Investment Losses. As noted above, ICE Clear Europe could also use these amounts to cover Non-Default Losses. Moreover, Rule 919(q) would allow ICE Clear Europe to replenish its capital and resources following an

Investment Loss, Non-Default Loss, or Custodial Loss.

Finally, the Commission believes that various aspects of the proposed rule change would help to ensure that Non-Default Losses, Investment Losses, and Custodial Losses would not affect ICE Clear Europe's ability to collect other amounts owed by Clearing Members. For example, under Rule 919(i), Clearing Members would continue to be liable for Guaranty Fund Contributions, Assessment Contributions, and margin, including Variation Margin. ICE Clear Europe also would continue to be able to charge its Clearing Members a negative interest rate, as needed. The Commission believes that these provisions would help ensure that ICE Clear Europe's treatment and allocation of losses not arising from the default of a Clearing Member do not hinder its ability to enforce Clearing Members' other financial obligations, including those related to the default of a Clearing Member.

Taken together, the Commission believes that the various components of the proposed rule change discussed above would enhance ICE Clear Europe's ability to cover and allocate losses not related to a Clearing Member's default. The Commission believes that doing so would help ICE Clear Europe to avoid disruptions to its operations, which could occur if non-default losses are not fully covered or allocated. The Commission therefore believes the proposed rule change would be consistent with the promotion of the prompt and accurate clearance and settlement of securities transactions by helping ensure that ICE Clear Europe can continue to clear and settle securities transactions even when faced with non-default losses.

Therefore, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.⁴⁹

C. Consistency With Rule 17Ad-22(e)(17)(i) Under the Act

Rule 17Ad-22(e)(17)(i) requires that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to manage its operational risks by identifying plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls.⁵⁰

The Commission believes that non-default losses, meaning losses that do not arise from the default of a Clearing Member, are a plausible source of

⁴⁶ 15 U.S.C. 78q-1(b)(3)(D).

⁴⁷ 15 U.S.C. 78q-1(b)(3)(D).

⁴⁸ 15 U.S.C. 78q-1(b)(3)(F).

⁴⁹ 15 U.S.C. 78q-1(b)(3)(F).

⁵⁰ 17 CFR 240.17Ad-22(e)(17)(i).

operational risk at ICE Clear Europe. For example, a theft of ICE Clear Europe's assets could threaten its ability to operate. The Commission therefore believes that by adding new categories of non-default losses and covering losses to additional categories of assets, as discussed above, the proposed rule change would identify plausible sources of operational risk.

The Commission further believes that the proposed rule change would mitigate the impact of non-default losses by establishing appropriate procedures for categorizing, covering, and allocating such losses. For example, as discussed above, the proposed rule change would amend the existing framework for allocating non-default losses to cover Custodial Losses. The proposed rule change also would increase the amount of ICE Clear Europe's resources available to cover Non-Default Losses, Custodial Losses, and Investment Losses, and enhance ICE Clear Europe's ability to replenish those resources. Finally, as discussed above, the proposed rule change help ensure that ICE Clear Europe can enforce Clearing Members' other financial obligations, including those related to the default of a Clearing Member, despite any non-default losses.

Taken together, the Commission believes the proposed rule change would identify non-default losses as a plausible source of operational risk and mitigate the impact of such losses through the use of appropriate procedures.

Therefore, the Commission finds that the proposed rule change is consistent with Rule 17Ad-22(e)(17)(i).⁵¹

IV. Accelerated Approval of the Proposed Rule Change as Modified by Amendment Nos. 1 and 2

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁵² to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, prior to the 30th day after the date of publication of Amendment No. 2 in the **Federal Register**. As discussed above, Amendment No. 1 amended and restated in its entirety the Form 19b-4 and Exhibit 1A in order to correct the narrative description of the proposed rule change. Amendment No. 2 modified the Exhibit 5 to clarify when certain funds are considered available to ICE Clear Europe to be applied in accordance with the Rules as proposed to be amended. By so doing, Amendment Nos. 1 and 2 provide for a

more clear and comprehensive understanding of the proposed changes.

For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the Act and the applicable rules thereunder. Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.⁵³

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change, as modified by Amendment No. 1 and Amendment No. 2, is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(D) of the Act,⁵⁴ Section 17A(b)(3)(F) of the Act,⁵⁵ and Rule 17Ad-22(e)(17)(i) thereunder.⁵⁶

It is therefore ordered pursuant to Section 19(b)(2) of the Act⁵⁷ that the proposed rule change, as modified by Amendment Nos. 1 and 2 (SR-ICEEU-2023-010), be, and hereby is, approved on an accelerated basis.⁵⁸

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁹

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-17210 Filed 8-10-23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98070; File No. SR-MEMX-2023-16]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule

August 7, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 3, 2023, MEMX LLC ("MEMX" or the

"Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members³ (the "Fee Schedule") pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to: (i) reduce the base rebate for executions of orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange (such orders, "Added Displayed Volume"); (ii) modify the Liquidity Provision Tiers by modifying the rebate for Liquidity Provision Tier 1 and the criteria for Liquidity Provision Tier 2; (iii) modify NBBO Set/Join Tier 2; (iv) modify the Displayed Liquidity Initiative Tiers by modifying the criteria for Displayed Liquidity Initiative Tier 1 and modifying the rebate for Displayed Liquidity Initiative Tier 2; (v) add a new Non-Display Add Tier 1 to the three existing Non-Display Add Tiers, which will be renamed Non-Display Add Tier 2, Non-Display Add Tier 3, and Non-

⁵³ 15 U.S.C. 78s(b)(2).

⁵⁴ 15 U.S.C. 78q-1(b)(3)(D).

⁵⁵ 15 U.S.C. 78q-1(b)(3)(F).

⁵⁶ 17 CFR 240.17Ad-22(e)(17)(i).

⁵⁷ 15 U.S.C. 78s(b)(2).

⁵⁸ In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁵⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Rule 1.5(p).

⁵¹ 17 CFR 240.17Ad-22(e)(17)(i).

⁵² 15 U.S.C. 78s(b)(2).

Display Add Tier 4, respectively; (vi) modify the required criteria under renamed Non-Display Add Tier 3 and renamed Non-Display Add Tier 4; (vii) reduce the base rebates for executions of orders in securities that add non-displayed liquidity to the Exchange (such orders, “Added Non-Displayed Volume”) in securities priced at or above \$1.00 per share; and (viii) increase the base rebates for executions of Added Non-Displayed Volume in securities priced below \$1.00 per share.⁴

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading.⁵ Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents approximately 3% of the overall market share.⁶ The Exchange in particular operates a “Maker-Taker” model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

⁴ The Exchange initially filed the proposed Fee Schedule changes on August 1, 2023 (SR-MEMX-2023-15). On August 3, 2023, the Exchange withdrew that filing and submitted this proposal.

⁵ Market share percentage calculated as of July 31, 2023. The Exchange receives and processes data made available through consolidated data feeds (i.e., CTS and UTDF).

⁶ *Id.*

Reduce Base Rebate for Added Displayed Volume

Currently, the Exchange provides a base rebate of \$0.0018 per share for executions of Added Displayed Volume in securities priced at or above \$1.00 per share. The Exchange now proposes to reduce the base rebate for executions of Added Displayed Volume to \$0.0015 per share.⁷ The purpose of reducing the base rebate for executions of Added Displayed Volume is for business and competitive reasons, as the Exchange believes that reducing such rebate as proposed would decrease the Exchange’s expenditures with respect to its transaction pricing in a manner that is still consistent with the Exchange’s overall pricing philosophy of encouraging added displayed liquidity. The Exchange notes that despite the reduction proposed herein, the proposed base rebate for executions of Added Displayed Volume remains competitive with the base rebates provided by other exchanges for executions of orders in securities priced at or above \$1.00 per share that add displayed liquidity.⁸

Liquidity Provision Tiers

The Exchange currently provides a base rebate of \$0.0018 per share for executions of Added Displayed Volume in securities priced at or above \$1.00 per share, which the Exchange is proposing to reduce to \$0.0015 per share, as described above. The Exchange also currently offers Liquidity Provision Tiers 1–6 under which a Member may receive an enhanced rebate for executions of Added Displayed Volume by achieving the corresponding required volume criteria for each such tier. The Exchange now proposes to modify the rebate for executions of Added Displayed Volume under Liquidity

⁷ The proposed base rebate for executions of Added Displayed Volume is referred to by the Exchange on the Fee Schedule under the existing description “Added displayed volume” with a Fee Code of “B”, “D” or “J”, as applicable, on execution reports.

⁸ See, e.g., the Nasdaq Stock Market LLC (“Nasdaq”) Price List—Trading Connectivity (available at <https://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2>), which reflects a base rebate of \$0.0018 per share for executions of orders in Tape A and Tape B securities priced at or above \$1.00 per share that add displayed liquidity and a base rebate of \$0.0013 per share for executions of orders in Tape C securities priced at or above \$1.00 per share that add displayed liquidity; the Cboe BZX Exchange, Inc. (“Cboe BZX”) equities trading fee schedule on its public website (available at https://www.cboe.com/us/equities/membership/fee_schedule/bzx/), which reflects a base rebate of \$0.0016 per share for executions of orders in securities priced at or above \$1.00 per share that add displayed liquidity.

Provision Tier 1, as further described below.

With respect to Liquidity Provision Tier 1,⁹ the Exchange currently provides an enhanced rebate of \$0.00335 per share for executions of Added Displayed Volume in securities priced at or above \$1.00 per share for Members that qualify for such tier by achieving an ADAV¹⁰ (excluding Retail Orders¹¹) that is equal to or greater than 0.45% of the TCV.¹² The Exchange now proposes to reduce the rebate for executions of Added Displayed Volume under Liquidity Provision Tier 1 to \$0.0033 per share. The Exchange is not proposing to change the criteria required to qualify for Liquidity Provision Tier 1. The Exchange is also not proposing to change the rebate for executions of orders in securities priced below \$1.00 per share under such tier.

With respect to Liquidity Provision Tier 2,¹³ the Exchange currently provides an enhanced rebate of \$0.00325 per share for executions of Added Displayed Volume in securities priced at or above \$1.00 per share for Members that qualify for such tier by achieving (1) an ADAV (excluding Retail Orders) that is equal to or greater than 0.25% of the TCV and (2) a Non-Displayed ADAV that is equal to or greater than 4,000,000 shares. The Exchange now proposes to eliminate the retail exclusion under qualification (1) above for such tier. Specifically, the Exchange will offer an enhanced rebate of \$0.00325 per share for executions of

⁹ The pricing for Liquidity Provision Tier 1 is referred to by the Exchange on the Fee Schedule under the existing description “Added displayed volume, Liquidity Provision Tier 1” with a Fee Code of “B1”, “D1” or “J1”, as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

¹⁰ As set forth on the Fee Schedule, “ADAV” means the average daily added volume calculated as the number of shares added per day, which is calculated on a monthly basis, and “Displayed ADAV” means ADAV with respect to displayed orders.

¹¹ As set forth in Exchange Rule 11.21(a), a “Retail Order” means an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

¹² As set forth on the Fee Schedule, “TCV” means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

¹³ The pricing for Liquidity Provision Tier 2 is referred to by the Exchange on the Fee Schedule under the existing description “Added displayed volume, Liquidity Provision Tier 2” with a Fee Code of “B2”, “D2” or “J2”, as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

Added Displayed Volume in securities priced at or above \$1.00 per share for Members that qualify for such tier by achieving (1) an ADAV that is equal to or greater than 0.25% of the TCV and (2) a Non-Displayed ADAV that is equal to or greater than 4,000,000 shares.

The purpose of reducing the rebates for executions of Added Displayed Volume under Liquidity Provision Tier 1 as proposed, which the Exchange believes in each case represents a modest reduction, is for business and competitive reasons, as the Exchange believes that such rebate reductions would decrease the Exchange's expenditures with respect to its transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The purpose of removing the retail exclusion under Liquidity Provision Tier 2 as proposed is to allow Members to more easily reach Liquidity Provision Tier 2, which, in turn, the Exchange believes will encourage more Members to seek to qualify for such Tier.

The tiered pricing structure for executions of Added Displayed Volume under the Liquidity Provision Tiers provides an incremental incentive for Members to strive for higher volume thresholds to receive higher enhanced rebates for such executions and, as such, is intended to encourage Members to maintain or increase their order flow, primarily in the form of liquidity-adding volume, to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all Members and market participants. The Exchange believes that the Liquidity Provision Tiers, as modified by the proposed changes described above, reflect a reasonable and competitive pricing structure that is right-sized and consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity. Specifically, the Exchange believes that, after giving effect to the proposed changes described above, the rebate for executions of Added Displayed Volume provided under each of the Liquidity Provision Tiers 1–6 remains commensurate with the corresponding required criteria under each such tier and is reasonably related to the market quality benefits that each such tier is designed to achieve.

NBBO Setter/Joiner Tier 2

The Exchange currently offers NBBO Setter/Joiner Tiers 1–2 under which a Member may receive an additive rebate for a qualifying Member's executions of Added Displayed Volume (other than Retail Orders) that establish the NBBO

(such orders, "Setter Volume") and executions of Added Displayed Volume (other than Retail Orders) that establish a new best bid or offer on the Exchange that matches the NBBO first established on an away market (such orders, "Joiner Volume"). With respect to NBBO Setter/Joiner Tier 2, the Exchange currently provides an additive rebate of \$0.0003 per share for executions of Setter Volume and Joiner Volume for Members that qualify for such tier by achieving an ADAV equal to or greater than 0.05% of the TCV and a Displayed ADAV with respect to orders with Fee Code B¹⁴ or J¹⁵ that is equal to or greater than 40% of the Member's Displayed ADAV with respect to orders with Fee Code B, D or J.¹⁶ The Exchange proposes to reduce the rebate for NBBO Setter/Joiner Tier 2 to \$0.0002 per share. The Exchange does not propose to change the criteria under NBBO Setter/Joiner Tier 2. The Exchange believes that the new additive rebate remains commensurate with the required criteria under such tier, as modified, and is reasonably related to the market quality benefits that such tier is designed to achieve.

Displayed Liquidity Incentive ("DLI") Tiers

The Exchange currently offers DLI Tiers 1 and 2 under which a Member may receive an enhanced rebate for executions of Added Displayed Volume by achieving the corresponding required criteria for each such tier. The DLI Tiers are designed to encourage Members, through the provision of an enhanced rebate for executions of Added Displayed Volume, to promote price discovery and market quality by quoting at the NBBO for a significant portion of each day (*i.e.*, through the applicable quoting requirement¹⁷) in a broad base

of securities (*i.e.*, through the applicable securities requirement¹⁸), thereby benefitting the Exchange and investors by providing improved trading conditions for all market participants through narrower bid-ask spreads and increased depth of liquidity available at the NBBO in a broad base of securities and committing capital to support the execution of orders.¹⁹ Now, the Exchange proposes to modify the required criteria under DLI Tier 1 and to modify the rebate under DLI Tier 2.

With respect to DLI Tier 1, currently, a Member qualifies for DLI Tier 1 by achieving (1) an NBBO Time of at least 25% in an average of at least 1,000 securities per trading day during the month and (2) an ADAV equal to or greater than 0.05% of the TCV. The Exchange proposes to modify the second criteria under DLI Tier 1 by increasing the ADAV requirement such that a Member would now qualify for DLI Tier 1 by achieving an ADAV equal to or greater than 0.10% of the TCV. The purpose of increasing the ADAV requirement is to encourage Members to strive for higher displayed volume on the Exchange, encouraging an overall increase in liquidity on the Exchange. The Exchange is not proposing to change the rebate for executions under such tier.²⁰

With respect to DLI Tier 2, currently, the Exchange provides a rebate of \$0.0028 per share under such tier. Now, the Exchange is proposing to reduce this rebate to \$0.0026.²¹ The Exchange is not proposing to change any of the criteria required to reach such tier. The purpose of reducing the rebate is for business and competitive reasons, as the Exchange believes the reduction of such rebates would decrease the Exchange's expenditures with respect to its

least one round lot at the national best bid or the national best offer.

¹⁸ As set forth on the Fee Schedule, the term "securities requirement" means the requirement that a Member meets the quoting requirement in the applicable number of securities per trading day. Currently, each of DLI Tiers 1 and 2 has a securities requirement that may be achieved by a Member meeting the quoting requirement in the specified number of securities traded on the Exchange.

¹⁹ See the Exchange's Fee Schedule (available at <https://info.memxtrading.com/fee-schedule/>) for additional details regarding the Exchange's DLI Tiers. See also Securities Exchange Act Release No. 92150 (June 10, 2021), 86 FR 32090 (June 16, 2021) (SR-MEMX-2021-07) (notice of filing and immediate effectiveness of fee changes adopted by the Exchange, including the adoption of DLI).

²⁰ The pricing for DLI Tier 1 is referred to by the Exchange on the Fee Schedule under the existing description "Added displayed volume, DLI Tier 1" with a Fee Code of Bq1, Bq1 or Jq1, as applicable.

²¹ The pricing for DLI Tier 2 is referred to by the Exchange on the Fee Schedule under the existing description "Added displayed volume, DLI Tier 2" with a Fee Code of Bq2, Dq2 or Jq2, as applicable.

¹⁴ The Exchange notes that orders with Fee Code B include orders, other than Retail Orders, that establish the NBBO.

¹⁵ The Exchange notes that orders with Fee Code J include orders, other than Retail Orders, that establish a new BBO on the Exchange that matches the NBBO first established on an away market.

¹⁶ The Exchange notes that orders with Fee Code D include orders that add displayed liquidity to the Exchange but that are not Fee Code B or J, and thus, orders with Fee Code B, D or J include all orders, other than Retail Orders, that add displayed liquidity to the Exchange. The pricing for NBBO Setter/Joiner Tier 2 is referred to by the Exchange on the Fee Schedule under the new description "NBBO Setter/Joiner Tier 2" with a Fee Code of S2 to be appended to the otherwise applicable Fee Code assigned by the Exchange on the monthly invoices for qualifying executions.

¹⁷ As set forth on the Fee Schedule, the term "quoting requirement" means the requirement that a Member's NBBO Time be at least 25%, and the term "NBBO Time" means the aggregate of the percentage of time during regular trading hours during which one of a Member's market participant identifiers ("MPIDs") has a displayed order of at

transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity and promoting the price discovery and market quality objectives of the DLI Tiers described above. The Exchange believes that the proposed reduction by \$0.0002 per share represents a modest reduction and that the proposed rebate under DLI Tier 2 remains commensurate with the required criteria under the tier. The Exchange is not proposing to change the rebates provided under such tiers for executions of orders in securities priced below \$1.00 per share.

Non-Display Add Tiers

The Exchange currently offers Non-Display Add Tiers 1–3 under which a Member may receive an enhanced rebate for executions of Added Non-Displayed Volume by achieving the corresponding required volume criteria for each such tier. The Exchange now proposes to modify the Non-Display Add Tiers by adding a new Non-Display Add Tier 1 to the three existing Non-Display Add Tiers, which will be renamed Non-Display Add Tier 2, Non-Display Add Tier 3, and Non-Display Add Tier 4, respectively. The Exchange also now proposes to modify the required criteria under renamed Non-Display Add Tier 3 and renamed Non-Display Add Tier 4.

With respect to the proposed addition of a new Non-Display Add Tier 1, the Exchange currently provides three Non-Display Add tiers. Currently, under Non-Display Add Tier 1, the Exchange provides an enhanced rebate of \$0.0027 per share for executions of Added Non-Displayed Volume in securities priced at or above \$1.00 per share for Members that qualify for such tier by achieving a Non-Displayed ADAV²² that is equal to or greater than 5,000,000 shares.²³ The Exchange also currently provides under Non-Display Add Tier 2 an enhanced rebate of \$0.0024 per share for executions of Added Non-Displayed Volume in securities priced at or above \$1.00 per share for Members that qualify for such tier by achieving a Non-Displayed ADAV that is equal to or

greater than 1,500,000 shares,²⁴ and under Non-Display Add Tier 3 the Exchange currently provides an enhanced rebate of \$0.0018 per share for executions of Added Non-Displayed Volume in securities priced at or above \$1.00 per share for Members that qualify for such tier by achieving a Non-Displayed ADAV that is equal to or greater than 500,000 shares.²⁵ The Exchange proposes to provide an enhanced rebate of \$0.0028 per share for executions of Added Non-Displayed Volume in securities priced at or above \$1.00 per share for Members that qualify for such tier by achieving a Non-Displayed ADAV that is equal to or greater than 8,000,000 shares or the Member has an ADAV (excluding Retail Orders) equal to or greater than 0.45% of the TCV. This additional rebate tier would become the new Non-Display Add Tier 1.

With respect to the former Non-Display Add Tier 1, as a result of the addition of a new Non-Display Add Tier 1 as described above, the former Non-Display Add Tier 1 would be re-named Non-Display Add Tier 2. The Exchange does not propose any changes to the amount of the rebate (\$0.0027 per share) for this tier. The Exchange also does not propose any change to the criteria required to meet this tier.

With respect to the former Non-Display Add Tier 2, as a result of the addition of a new Non-Display Add Tier 1 as described above, the former Non-Display Add Tier 2 would be renamed Non-Display Add Tier 3. The Exchange does not propose any changes to the amount of the rebate (\$0.0024 per share in securities priced at or above \$1.00 per share) for this tier. In addition to the name change, the Exchange proposes to modify the criteria required to meet this tier. Currently, in order to qualify for the rebate of \$0.0024 per share (for the current Non-Display Add Tier 2, which the Exchange proposes to rename Non-Display Add Tier 3) Members must achieve a Non-Display ADAV equal to or greater than 1,500,000 shares, as noted above. The Exchange proposes that a Member would qualify for such

tier by achieving a Non-Display ADAV equal to or greater than 2,000,000 shares. In summary, the Exchange proposes that in order to qualify for the renamed Non-Display Add Tier 3, Members must achieve a Non-Display ADAV equal to or greater than 2,000,000 shares.

With respect to the former Non-Display Add Tier 3, as a result of the addition of a new Non-Display Add Tier 1 as described above, the former Non-Display Add Tier 3 would be renamed Non-Display Add Tier 4. The Exchange does not propose any changes to the amount of the rebate (\$0.0018 per share in securities priced at or above \$1.00 per share) for this tier. In addition to the name change, the Exchange proposes to modify the criteria required to meet this tier. The Exchange currently provides an enhanced rebate of \$0.0018 per share for executions of Added Non-Displayed Volume for Members that qualify for such tier by achieving a Non-Displayed ADAV that is equal to or greater than 500,000 shares, as noted above. The Exchange now proposes that a Member would now qualify for such tier by achieving a Non-Displayed ADAV that is equal to or greater than 1,000,000 shares. In summary, the Exchange proposes that in order to qualify for the renamed Non-Display Add Tier 4, Members must achieve a Non-Display ADAV equal to or greater than 1,000,000 shares.²⁶

As described in further detail below, the Exchange is also proposing to increase the rebate for all Added Non-Displayed Volume in securities priced below \$1.00 per share. The Exchange proposed to adopt this same rebate for each of the Non-Display Add Tiers, Tiers 1 through 4, in order to maintain consistency across all executions of Added Non-Displayed Volume.

The purpose of adding a new Non-Display Add Tier 1 is for business and competitive reasons. The proposed new Non-Display Add Tier 1 is designed to encourage Members to maintain or increase their order flow to the Exchange in order to qualify for the proposed enhanced rebate for executions of Added Non-Displayed Volume. The purpose of re-naming the currently existing tiers is to present the fee schedule in a way that is easy for Members to understand, starting with the largest rebate. The purpose of raising the Non-Display ADAV required to

²² As set forth on the Fee Schedule, "Non-Displayed ADAV" means ADAV with respect to non-displayed orders (including orders subject to Display-Price Sliding that receive price improvement when executed and Midpoint Peg orders).

²³ The pricing for Non-Display Add Tier 1 is referred to by the Exchange on the Fee Schedule under the existing description "Added non-displayed volume, Non-Display Add Tier 1" with a Fee Code of "H1", "M1" or "P1", as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

²⁴ The pricing for Non-Display Add Tier 2 is referred to by the Exchange on the Fee Schedule under the existing description "Added non-displayed volume, Non-Display Add Tier 2" with a Fee Code of "H2", "M2" or "P2", as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

²⁵ The pricing for Non-Display Add Tier 3 is referred to by the Exchange on the Fee Schedule under the existing description "Added non-displayed volume, Non-Display Add Tier 3" with a Fee Code of "H3", "M3" or "P3", as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

²⁶ The pricing for Non-Display Add Tier 4 would be referred to by the Exchange on the Fee Schedule under the existing description "Added non-displayed volume, Non-Display Add Tier 4" with a Fee Code of "H4", "M4" or "P4", as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

achieve Non-Display Add Tier 3 as proposed, which the Exchange believes represents a modest increase, is for business and competitive reasons. The purpose of raising the Non-Displayed ADAV required to achieve Non-Display Add Tier 4 as proposed, which the Exchange believes represents a modest increase, is also for business and competitive reasons. The modest increase in the Non-Displayed ADAV required to achieve Tiers 3 and 4 will encourage Members to strive for higher non-displayed added volume on the Exchange, encouraging an overall increase in liquidity on the Exchange.

The tiered pricing structure for executions of Added Non-Displayed Volume under the Non-Display Add Tiers provides an incremental incentive for Members to strive for higher volume thresholds to receive higher enhanced rebates for such executions and, as such, is intended to encourage Members to maintain or increase their order flow, particularly in the form of liquidity-adding non-displayed volume, to the Exchange, thereby contributing to a deeper and more robust and well-balanced market ecosystem to the benefit of all Members and market participants. The Exchange believes that the Non-Display Add Tiers, as modified by the proposed changes described above, reflect a reasonable and competitive pricing structure that is right-sized and consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity. Specifically, the Exchange believes that, after giving effect to the proposed changes described above, the rebate for executions of Added Non-Displayed Volume provided under each of the Non-Display Add Tiers is commensurate with the corresponding required criteria under each such tier and is reasonably related to the market quality benefits that each such tier is designed to achieve.

Reduce Base Rebates for Added Non-Displayed Volume

The Exchange is also proposing to uniformly reduce the base rebates provided for executions of Added Non-Displayed Volume in securities priced at or above \$1.00 per share. Added Non-Displayed Volume is comprised of the three following types of orders: (i) Midpoint Peg Orders in securities that add liquidity to the Exchange (such orders, "Added Midpoint Volume"); (ii) orders, which are not orders subject to Display-Price Sliding that receive price improvement when executed or Midpoint Peg Orders, that add non-displayed liquidity to the Exchange (such orders, "Added Non-Midpoint

Hidden Volume"); and (iii) orders in securities subject to Display-Price Sliding that add liquidity to the Exchange and receive price improvement when executed (such orders, "Added Price-Improved Volume").

Currently, the Exchange provides base rebates of \$0.0010 per share for executions of Added Midpoint Volume, Added Non-Midpoint Hidden Volume, and Added Price-Improved Volume in securities priced at or above \$1.00 per share. The Exchange now proposes to reduce each of these base rebates to \$0.0008 per share.²⁷ The purpose of uniformly reducing the standard rebates for executions of Added Midpoint Volume, Added Non-Midpoint Hidden Volume, and Added Price-Improved Volume is for business and competitive reasons, as the Exchange believes reducing such rebates as proposed would decrease the Exchange's expenditures with respect to its transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added displayed liquidity. The Exchange notes that the proposed base rebate for executions of Added Non-Midpoint Hidden Volume remains in line and competitive with the base rebates provided by at least one other exchange for executions of similar orders.²⁸ Additionally, the Exchange believes it is appropriate to also provide the same base rebate for executions of Added Price-Improved Volume and Added Midpoint Volume as for Added Non-Midpoint Hidden Volume, as all of these orders similarly add liquidity to the Exchange and are executed at prices that are not displayed on the Exchange's order book, and the Exchange notes that all of these orders are also currently

subject to the same base rebate and pricing structure today.

Increase Rebates for Sub-Dollar Non-Displayed Volume

The Exchange is also proposing to increase the rebates provided for all sub-dollar executions of Added Non-Displayed Volume. As noted above, Added Non-Displayed Volume is comprised of the three following types of orders: (i) Added Midpoint Volume; (ii) Added Non-Midpoint Hidden Volume; and (iii) Added Price-Improved Volume. Currently, the Exchange provides no rebate and charges no fees for Added Midpoint Volume, Added Non-Midpoint Hidden Volume, and Added Price-Improved Volume in securities priced below \$1.00 per share. This pricing structure is similarly applied to all executions of Added Non-Displayed Volume by Members that qualify for enhanced rebates in securities priced at or above \$1.00 per share pursuant to the Non-Display Add Tiers. The Exchange now proposes to increase the rebate for all Added Non-Displayed Volume to 0.075% of total dollar value. Specifically, the Exchange will provide a rebate of 0.075% of total dollar value for each of Added Midpoint Volume, Added Non-Midpoint Hidden Volume, and Added Price-Improved Volume in securities priced below \$1.00 per share. The Exchange is similarly proposing to provide a rebate of 0.075% of total dollar value to Members that qualify for enhanced rebates pursuant to the Non-Display Add Tiers in securities priced below \$1.00 per share. Thus, all Added Non-Displayed Volume will qualify for the same rebate for executions in securities priced below \$1.00 per share.

The purpose of the rebate increase for sub-dollar executions in Added Non-Displayed Volume is to encourage participants to add sub-dollar liquidity on the Exchange. The increase to 0.075% of total dollar value is the same rebate provided to sub-dollar executions which provide displayed liquidity on the Exchange. The Exchange believes by offering the same rebate for sub-dollar non-displayed liquidity as for displayed liquidity, the resulting pricing structure will encourage the provision of sub-dollar liquidity on the Exchange. Additionally, the Exchange believes it is appropriate to provide the same rebate for sub-dollar executions of Added Price-Improved Volume and Added Midpoint Volume as for Added Non-Midpoint Hidden Volume, as all of these orders similarly add liquidity to the Exchange and are executed at prices that are not displayed on the Exchange's order book, and the Exchange notes that

²⁷ The proposed base rebate for executions of Added Midpoint Volume is referred to by the Exchange on the Fee Schedule under the existing description "Added non-displayed volume, Midpoint Peg" and such orders will continue to receive a Fee Code of "M" on execution reports. The proposed base rebate for executions of Added Non-Midpoint Hidden Volume is referred to by the Exchange on the Fee Schedule under the existing description "Added non-displayed volume" and such orders will continue to receive a Fee Code of "H" on execution reports. The proposed base rebate for executions of Added Price-Improved Volume is referred to by the Exchange on the Fee Schedule under the existing description "Added volume, order subject to Display-Price Sliding that receives price improvement when executed" and such orders will continue to receive a Fee Code of "P" on execution reports.

²⁸ See, e.g., the Cboe BZX equities trading fee schedule on its public website (available at <https://www.cboe.com/us/equities/membership/fee-schedule/bzx/>), which reflects a standard rebate of \$0.0008 per share for executions of orders in securities priced at or above \$1.00 per share that add non-displayed liquidity.

all of these orders are also currently subject to the same sub-dollar rebate and pricing structure today.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²⁹ in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,³⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”³¹

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange’s transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to encourage market participants to strive for higher volume on the Exchange, which the Exchange believes would promote price discovery and enhance liquidity and market quality on

the Exchange to the benefit of all Members and market participants.

The Exchange notes that volume-based incentives (such as Liquidity Provision Tiers, NBBO Setter/Joiner Tiers, Non-Display Add Tiers, and DLI Tiers) have been widely adopted by exchanges (including the Exchange), and are reasonable, equitable, and not unfairly discriminatory because they are open to all members on an equal basis and provide additional benefits or discount that are reasonably related to the value to an exchange’s market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and the introduction of higher volumes of orders into the price and volume discovery process.

The Exchange believes the proposal to reduce the base rebate for Added Displayed Volume is reasonable because, as described above, it is designed to decrease the Exchange’s expenditures with respect to its transaction pricing in a manner that is still consistent with the Exchange’s overall pricing philosophy of encouraging added and/or displayed liquidity, and the proposed new base rebate remains competitive with the base rebates provided by other exchanges in each case for executions of similar orders.³² The Exchange also believes the proposed change to the base rebate is equitable and not unfairly discriminatory because it will apply equally to all Members and because the opportunity to qualify for enhanced rebates is open to all members on an equal basis, as described above.

The Exchange believes that the proposed changes to reduce the rebates provided pursuant to Liquidity Provision Tier 1, NBBO Setter/Joiner Tier 2, and DLI Tier 2 are reasonable, because the change in rebate for each is a modest decrease and consistent with an equitable allocation of fees. The Exchange believes the proposed change are equitable and not unfairly discriminatory because it will apply to all Members equally, in that all Members will continue to have the opportunity to achieve the required criteria under such tiers. The Exchange believes that each such rebate is commensurate with the corresponding required criteria under such tiers and are reasonably related to such market quality benefits that such tiers are designed to achieve. The Exchange believes that the proposed change to the criteria in Liquidity Provision Tier 2 is reasonable, equitable, and not unfairly discriminatory because it will apply

equally to all Members and allow all Members to more easily reach Liquidity Provision Tier 2, which, in turn, the Exchange believes will encourage more Members to seek to qualify for such Tier. The Exchange believes that the proposed change is reasonably related to such market quality benefits that the tier is designed to achieve.

The Exchange believes that the proposed changes to the DLI Tier 1 criteria would continue to provide Members with an incremental incentive to achieve certain volume thresholds on the Exchange. The proposed new DLI Tier 1 criteria would provide Members with an incremental incentive to achieve certain volume thresholds on the Exchange, is available to all Members on an equal basis, and, as described above, is reasonably designed to encourage Members to maintain or increase their order flow by displaying liquidity, which the Exchange believes would promote price discovery, enhance liquidity and market quality, and contribute to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members and market participants. The Exchange believes the proposed change is equitable and not unfairly discriminatory because it will apply to all Members equally, in that all Members will continue to have the opportunity to achieve the required criteria under such tier, and this proposed increase is intended to enhance market quality in a broader range of securities on the Exchange to the benefit of all Members.

The Exchange believes that the proposed changes to add Non-Display Add Tier 1, increase the Non-Displayed ADAV requirement under Non-Display Add Tier 3 to 2,000,000 shares, and to increase the Non-Displayed ADAV requirement under Non-Display Add Tier 3 to 1,000,000 shares are reasonable, because each change is a modest increase designed to increase non-displayed liquidity on the Exchange for the benefit of all market participants. The Exchange believes the proposed changes are equitable and not unfairly discriminatory because they will apply to all Members equally, in that all Members will continue to have the opportunity to achieve the required criteria under such tier.

The Exchange believes that the proposed changes to reduce the base rebates provided for executions of Added Non-Displayed Volume are reasonable because, as described above, such changes are designed to decrease the Exchange’s expenditures with respect to its transaction pricing in a manner that is still consistent with the

²⁹ 15 U.S.C. 78f.

³⁰ 15 U.S.C. 78f(b)(4) and (5).

³¹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

³² See supra note 8.

Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity and the proposed new base rebates for Added Non-Displayed Volume remain in line and competitive with the base rebates provided by other exchanges for executions of similar orders.³³ Additionally, as noted above, the Exchange believes that providing the same base rebate for executions of Added Price-Improved Volume and Added Midpoint Volume as for Added Non-Midpoint Hidden Volume is reasonable and appropriate because all of these orders similarly add liquidity to the Exchange, are executed at prices that are not displayed on the Exchange's order book, and are currently subject to the same base rebate and pricing structure today. The Exchange also believes the proposed base rebates for executions of Added Non-Displayed Volume are equitable and not unfairly discriminatory, as such base rebates will apply equally to all Members.

The Exchange believes that the proposed change to increase the sub-dollar rebate for executions of Added Non-Displayed Volume is reasonable because an increase in rebate will encourage more Members to place executions increasing Added Non-Displayed Volume on the Exchange. The Exchange believes that the proposed changes to increase the Added Non-Displayed Volume rebate are equitable and not unfairly discriminatory as these rebates will apply equally to all Members of the Exchange.

The Exchange believes that the proposed base rebate, Liquidity Provision Tiers, NBBO Setter/Joiner Tiers, Non-Display Add Tiers, DLI Tiers, and Added Non-Display Volume rebates, each as modified by the changes proposed herein, are reasonable, equitable and not unfairly discriminatory for these same reasons, as such tiers would provide Members with an incremental incentive to achieve certain volume thresholds on the Exchange, are available to all Members on an equal basis, and, as described above, are reasonably designed to encourage Members to maintain or increase their order flow, including in the form of Added Displayed Volume and Added Non-Displayed Volume to the Exchange, which the Exchange believes would promote price discovery, enhance liquidity and market quality, and contribute to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members and market participants.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act³⁴ in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal is intended to incentivize market participants to direct additional order flow to the Exchange, which the Exchange believes would promote price discovery and enhance liquidity and market quality on the Exchange to the benefit of all Members and market participants. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."³⁵

Intramarket Competition

As discussed above, the Exchange believes that the proposal would maintain a tiered pricing structure that is still consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity and would incentivize market participants to direct additional order flow to the Exchange through volume-based tiers, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members, as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market

participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants.

The Exchange does not believe that the proposed changes would impose any burden on intramarket competition because such changes will incentivize members to submit additional order flow, thereby contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The opportunity to qualify for the modified Liquidity Provision Tiers, NBBO Setter/Joiner Tiers, Non-Displayed Add Tiers and DLI Tiers, and thus receive the corresponding enhanced rebates or discounted fees, as applicable, would be available to all Members that meet the associated volume requirements in any month. As described above, the Exchange believes that the required criteria under each such tier are commensurate with the corresponding rebate under such tier and are reasonably related to the enhanced liquidity and market quality that such tier is designed to promote. The Exchange does not believe that the proposed changes to reduce the base rebates for executions of Added Displayed Volume and Added Non-Displayed volume would impose any burden on intramarket competition because such changes will apply to all Members uniformly, in that the proposed base rebates for such executions would be the base rebates applicable to all Members, and the opportunity to qualify for enhanced rebates or discounted fees, as applicable, is available to all Members. The Exchange does not believe that the proposed changes to provide a rebate for sub-dollar executions of Added Non-Displayed Volume would impose any burden on intramarket competition because such changes will apply to all Members uniformly. For the foregoing reasons, the Exchange believes the proposed changes would not impose

³³ See *supra* note 28.

³⁴ 15 U.S.C. 78f(b)(4) and (5).

³⁵ See *supra* note 31.

any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market.

Accordingly, competitive forces constrain the Exchange's transaction fees and rebates and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As described above, the proposed changes represent a competitive proposal through which the Exchange is seeking to incentivize market participants to direct additional order flow to the Exchange through volume-based tiers, which have been widely adopted by exchanges, including the Exchange. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar pricing structures and incentives to market participants.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in

promoting market competition in its broader forms that are most important to investors and listed companies."³⁶ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. SEC*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'"³⁷ Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act³⁸ and Rule 19b-4(f)(2)³⁹ thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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.

³⁶ See *supra* note 31.

³⁷ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSE-2006-21)).

³⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

³⁹ 17 CFR 240.19b-4(f)(2).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-MEMX-2023-16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-MEMX-2023-16. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-MEMX-2023-16 and should be submitted on or before September 1, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-17209 Filed 8-10-23; 8:45 am]

BILLING CODE 8011-01-P

⁴⁰ 17 CFR 200.30-3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 12143]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: “Partisans of the Nude: An Arab Genre Art in the Age of Contest, 1920–1960” Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary display in the exhibition “Partisans of the Nude: An Arab Genre Art in the Age of Contest, 1920–1960” at the Miriam and Ira D. Wallach Art Gallery at Columbia University, New York, New York, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Reed Liriano, Program Coordinator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: section2459@state.gov). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Nicole L. Elkon,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2023–17213 Filed 8–10–23; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 12142]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: “Fashioned by Sargent” Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary display in the exhibition “Fashioned by Sargent” at the Museum of Fine Arts, Boston, in Boston, Massachusetts, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Reed Liriano, Program Coordinator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: section2459@state.gov). The mailing address is U.S. Department of State, L/PD, 2200 C Street, NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Nicole L. Elkon,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2023–17244 Filed 8–10–23; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No.: FAA–2022–0538; Summary Notice No. –2023–23]

Petition for Exemption; Summary of Petition Received; Sky Elements LLC

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public’s awareness of, and participation in, the FAA’s exemption process. Neither publication of this notice nor the inclusion nor omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before August 31, 2023.

ADDRESSES: Send comments identified by docket number FAA–2022–0538 using any of the following methods:

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

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

- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, 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: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to <http://www.regulations.gov>, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at <http://www.dot.gov/privacy>.

Docket: Background documents or comments received may be read at <http://www.regulations.gov> at any time. Follow the online instructions for

accessing the docket or go to the Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jake Troutman, (202) 683-7788, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC.

Angela O. Anderson,

Director, Regulatory Support Division, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA-2022-0538.

Petitioner: Sky Elements LLC.

Section(s) of 14 CFR Affected:

§ 107.36.

Description of Relief Sought: Sky Elements LLC requests an exemption to carry and trigger pyrotechnics effects from small unmanned aircraft systems during a drone light show conducted under their § 107.29(a)(2), § 107.29(b), and § 107.35 waiver, Waiver No. 107W-2021-02474, where the operation will be overseen by a Part 107 licensed pilot and a pyrotechnician licensed in the jurisdiction in which the operation is occurring.

[FR Doc. 2023-17201 Filed 8-10-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA-2023-0024]

Agency Information Collection

Activities: Request for Comments for a New Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection, which is summarized below under **Supplementary Information**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: October 10, 2023.

ADDRESSES: You may submit comments identified by DOT Docket ID 2023-0024 by any of the following methods:

Website: For access to the docket to read background documents or

comments received go to the Federal eRulemaking Portal: Go to <http://www.regulations.gov>.

Follow the online instructions for submitting comments.

Fax: 1-202-493-2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590-0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground, Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Lindsey Svendsen, 202-366-2035, or Arnold Feldman, 202-366-2028, Office of Real Estate Services, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 7 a.m. to 3 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Alternative Uses of the Right of Way.

Background: Government agencies that acquire real property for a Federal-aid highway project in which Federal funds participated in any phase, are charged with managing the acquired property after the project is completed, as described in 23 CFR 710 subpart D—Real Property Management. As a part of this consideration, any excess or available right-of-way (ROW) for potential disposal must be determined and inventoried. Each State Department of Transportation (SDOT) must track, manage and update its inventory continually until the property is disposed.

This survey will collect information that will support analysis of the current state of the practice of Alternative Uses of the ROW nationwide. The report will identify current processes and tools used by SDOTs to identify and track ROW available for alternative uses, the types of alternative use requests they receive, and any safety, operational, or legal issues related to alternative uses. The survey will also identify additional opportunities for improving the existing processes, tools for identifying and tracking ROW that can streamline agencies' Property Management programs and provide information to states that have shown interest in alternative uses.

Respondents: Each of the 52 SDOTs (for the 50 states, the District of Columbia, and Puerto Rico) will be

asked to respond to a written questionnaire. A subset of the state DOT's will be asked to participate in follow up interviews.

Frequency: One-time survey.

Estimated Average Burden per Response: Approximately 2 hours per survey response and 1 hour per interview.

Estimated Total Annual Burden

Hours: Approximately 120 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued on: August 8, 2023.

Michael Howell,

Information Collection Officer.

[FR Doc. 2023-17258 Filed 8-10-23; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA-2023-0025]

Agency Information Collection

Activities: Request for Comments for a New Information Collection

AGENCY: U.S. Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: The DOT invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection, which is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by September 11, 2023.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 2023-0025 by any of the following methods:

Website: For access to the docket to read background documents or

comments received go to the Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Govind Vadakpat Ph.D., 202–366–5004, Smart Infrastructure Program Manager, Intelligent Transportation Systems Joint Program Office (ITS JPO), Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: U.S. DOT Intersection Safety Challenge—System Assessment and Virtual Testing Competition.

Background: Improving the safety of pedestrians, bicyclists, and other vulnerable road users is of critical importance to achieving the objectives of the U.S. Department of Transportation (DOT) National Roadway Safety Strategy (NRSS) and DOT's vision of zero fatalities and serious injuries across our transportation system. According to data from the National Highway Traffic Safety Administration (NHTSA), in 2020 there were 10,626 traffic fatalities in the United States at roadway intersections, including 1,674 pedestrian and 355 bicyclist fatalities. These fatalities at intersections represent 27% of the total of 38,824 road traffic deaths recorded in 2020.

In response to these growing concerns and as part of the NRSS Call to Action, the DOT Intersection Safety Challenge (hereafter, “the Challenge”) incentivizes the development of new, cost-effective, real-time roadway Intersection Safety System (ISS) concepts that apply emerging technologies to identify and mitigate unsafe roadway intersection conditions involving vehicles and vulnerable road users. Innovative ISS concepts may utilize emerging technologies, e.g., machine sensing and perception, data fusion, artificial intelligence (AI) and machine learning (ML), trajectory and path prediction, vehicle-to-everything (V2X) communications, and real-time

decision-making to generate anticipatory warning systems and other safety-countermeasures.

In the U.S. DOT Intersection Safety Challenge—System Assessment and Virtual Testing Competition, participants will develop and improve algorithms for the detection, localization, and classification of vulnerable road users and vehicles using government-supplied sensor data. These government-supplied data include contemporaneous feeds from diverse sensor technology deployed at the roadside in a controlled test intersection. Participants will use these data and their resulting algorithms to predict future intersection conditions and identify potentially unsafe conditions (current or predicted). The accuracy of these predictions will be measured against observed ground truth conditions as part of a broader set of judging criteria. To be eligible for a prize, submissions must include a structured description of identified and predicted intersection conditions as well as the executable computer programming code required to support independent validation. Participants may submit an optional Concept Paper describing their ISS concept and the potential of this concept to address the vision and objectives of the Challenge. The government anticipates awarding multiple prizes. Detailed rules and judging criteria will be provided when the prize competition is formally announced.

Respondents: Approximately 40 participants (or participant teams) are expected to respond to the prize competition.

Frequency: Participants may submit the structured description and supporting computer programming code (for validation) up to three times during the duration of the U.S. DOT Intersection Safety Challenge—System Assessment and Virtual Testing Competition. Participants may submit an optional Concept Paper at any time prior to the close of the prize competition.

Estimated Average Burden per Response: Approximately 2,000 total staff-hours is estimated for a participant to complete up to 3 submissions with all required elements for the U.S. DOT Intersection Safety Challenge—System Assessment and Virtual Testing Competition. Further, the completion of the optional Concept Paper is estimated at 170 staff-hours.

Estimated Total Annual Burden Hours: 40 respondents × 2,170 hours = 86,800 hours.

Public Comments Invited: You are asked to comment on any aspect of this

information collection, including: (1) Whether the proposed collection is necessary for DOT's performance; (2) the accuracy of the estimated burdens; (3) ways for DOT to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued on: August 8, 2023.

Michael Howell,

Information Collection Officer.

[FR Doc. 2023–17276 Filed 8–10–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Extension of Information Collection Request Submitted for Public Comment; Withholding of Tax and Information Reporting With Respect to Interests in Partnerships Engaged in a U.S. Trade or Business

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service (IRS), as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning withholdings of tax and information reporting with respect to certain dispositions of interests in partnerships engaged in a trade or business within the United States.

DATES: Written comments should be received on or before October 10, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224 or by email to pra.comments@irs.gov.

Please reference the information collection's “OMB number 1545–2292” in the subject line of the message.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or

copies of the regulations should be directed to Sara Covington, at (202) 317-5744, or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at sara.l.covington@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Withholding of Tax and Information Reporting With Respect to Interests in Partnerships Engaged in a U. S. Trade or Business.

OMB Control Number: 1545-2292.

Regulation Project Number: TD 9926.

Abstract: These final regulations under section 1446(f) provide guidance related to the withholding of tax and information reporting with respect to certain dispositions of interests in partnerships engaged in a trade or business within the United States. The final regulations affect certain foreign persons that recognize gain or loss from the sale or exchange of an interest in a partnership that is engaged in a trade or business within the United States, and persons that acquire those interests. The final regulations also affect partnerships that, directly or indirectly, have foreign persons as partners.

Current Actions: There is no change to existing regulation.

Type of Review: Extension without change of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 76,000.

Estimated Time per Respondent: 40 minutes.

Estimated Total Annual Burden Hours: 50,920.

The following paragraph applies to all of the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

(b) the accuracy of the agency's estimate of the burden of the collection f information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 7, 2023.

Sara L. Covington,

IRS Tax Analyst.

[FR Doc. 2023-17196 Filed 8-10-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request Relating to Notice of Recapture Event for New Markets Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning notice of recapture event for new markets credit.

DATES: Written comments should be received on or before October 10, 2023 to be assured of consideration

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to pra.comments@irs.gov. Include OMB control number 1545-2066 or Notice of Recapture Event for New Markets Credit.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis at (202) 317-5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at Kerry.L.Dennis@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Notice of Recapture Event for New Markets Credit.

OMB Number: 1545-2066.

Form Number: 8874-B.

Abstract: Community Development Entities (CDEs) must provide notification to any taxpayer holder of a qualified equity investment (including prior holders) that a recapture event has occurred. This form is used to make the notification as required under Regulations section 1.45D-1(g)(2)(i)(B).

Current Actions: There are no changes to burden.

Type of Review: Extension of a currently approved collection.

Affected Public: Individual or households, Business or other for-profit.

Estimated Number of Respondents: 500.

Estimated Time per Response: 5 hours, 30 minutes.

Estimated Total Annual Burden Hours: 2,755 hours.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 7, 2023.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2023-17250 Filed 8-10-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY**Meeting of the Treasury Advisory Committee on Racial Equity****AGENCY:** Department of the Treasury.**ACTION:** Notice of meeting.

SUMMARY: The Department of the Treasury is hosting its fiscal year 2023 quarter 4 meeting of the Treasury Advisory Committee on Racial Equity (“TACRE” or “Committee”). The Committee is composed of 25 members who will provide information, advice, and recommendations to the Department of the Treasury on matters relating to the advancement of racial equity. This notification provides the date, time, and location of the meeting and the process for participating and providing comments.

DATES: September 19, 2023, at 9:00–11:30 a.m. and 2–5 p.m. Eastern Time (EST).

FOR FURTHER INFORMATION CONTACT:

Snider Page, Designated Federal Official, Department of the Treasury, by emailing TACRE@Treasury.gov or by calling (202) 622–0341 (this is not a toll-free number). Persons who are deaf, hard of hearing, have a speech disability or difficulty speaking may dial 7–1–1 to access telecommunications relay services.

Check: <https://home.treasury.gov/about/offices/equity-hub/TACRE> for any updates to the September 19th meeting.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (FACA) (5 U.S.C. 1001 *et seq.*), the Department has established the Treasury Advisory Committee on Racial Equity. The Department has determined that establishing this Committee was necessary and in the public interest in order to carry out the provisions of Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Throughout the Federal Government*.

Background:**Objectives and Duties**

The purpose of the TACRE Committee is to provide advice and recommendations to the Secretary of the Treasury Janet L. Yellen and Deputy Secretary Wally Adeyemo on efforts to advance racial equity in the economy and address acute disparities for communities of color. The Committee will identify, monitor, and review aspects of the domestic economy that have directly and indirectly resulted in unfavorable conditions for communities of color. The Committee plans to address topics including but not limited to: financial inclusion, access to capital,

housing stability, Federal supplier diversity, and economic development. The duties of the Committee shall be solely advisory and shall extend only to the submission of advice and recommendations to the Offices of the Secretary and Deputy Secretary, which shall be non-binding to the Department. No determination of fact or policy shall be made by the Committee.

The agenda for the meeting includes a morning session and an afternoon session. The morning session, from 9–11:30 a.m. EST, includes opening remarks from the Chair and Vice-Chair of the TACRE committee and briefings from the subcommittees on an overview of the work conducted by the subcommittees since the June 8, 2023 TACRE meeting. The afternoon session, from 2–5 p.m. EST, includes a discussion by the TACRE subcommittees regarding their noon breakout sessions and a possible vote on recommendations to make to the Department; briefings from government officials on the Internal Revenue Service’s (IRS) efforts to advance their commitment to fair and equitable tax administration and evaluating the best ways to address bias within IRS’s audit program and IRS’s efforts to implement the Inflation Reduction Act, Strategic Operating Plan; and a review, and possible discussion, of any comments received from the public. Meeting times and topics are subject to change.

Quarterly Periodic Meeting: In accordance with section 10(a)(2) of the FACA and implementing regulations at 41 CFR 102–3.150, Snider Page, the Designated Federal Officer of TACRE, has ordered publication of this notice to inform the public that the TACRE will convene its FY 2023 quarter 4 meeting on Tuesday, September 19, 2023, 9–11:30 a.m. and 2–5 p.m. EST, at the Department of the Treasury, 1500 Pennsylvania Ave. NW, Washington, DC 20220.

Process for Submitting Public Comments: Members of the public wishing to comment on the business of the TACRE are invited to submit written comments by emailing TACRE@Treasury.gov. Comments are requested no later than 15 calendar days before the public meeting in order to be considered by the Committee.

In general, the Department will post all comments received on its website <https://home.treasury.gov/about/offices/equity-hub/TACRE> without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. The Department will also make the comments available for public inspection and copying in the

Department of the Treasury’s Library, 720 Madison Place NW, Room 1020, Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect statements by telephoning (202) 622–2000. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

Process for Attending In-Person:

Treasury is a secure facility, that requires all visitors to get cleared by security prior to arrival at the building. In addition, all visitors will be required to undergo COVID screening. The COVID screening will be a self-administered test provided by Treasury and visitors will have to wait for a negative result before proceeding to the meeting. Anyone testing positive will need to immediately leave the building. Please register for the Public Meeting by visiting: <https://events.treasury.gov/s/event-template/a2m3d000000fGYAAY>. The registration process will require submission of personally identifiable information, such as, full name, email address, date of birth, social security number, citizenship, residence, and if you have recently traveled outside of the United States. You will only need to register once to attend both sessions of the TACRE meeting on September 19, 2023.

Due to the limited size of the meeting room, public attendance will be limited to the first 20 people that complete the registration process. Members of the public will need to bring a government issued identification that matches the information provided during the registration process and present that to Security, for entry into the building. Please plan on arriving 30–45 minutes prior to the meeting to allow time for security and COVID screening. If you require reasonable accommodation, please contact the Departmental Offices Reasonable Accommodations Coordinator at ReasonableAccommodationRequests@treasury.gov. If requesting a sign language interpreter, please make sure your request to the Reasonable Accommodations Coordinator is made at least five (5) days prior to the event if at all possible.

Dated: August 8, 2023.

Snider Page,

Acting Chief, Office of Diversity, Equity, Inclusion, and Accessibility and Designated Federal Officer.

[FR Doc. 2023–17277 Filed 8–10–23; 8:45 am]

BILLING CODE 4810-AK-P

DEPARTMENT OF VETERANS AFFAIRS

Research Advisory Committee on Gulf War Veterans' Illnesses, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. ch. 10, that the Research Advisory Committee on Gulf War Veterans' Illnesses will meet at the Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 in Room 230. The meeting sessions will begin and end as follows:

Dates	Times
September 7, 2023 ...	9:00 a.m. to 2:30 p.m. Eastern Time (ET).
September 8, 2023 ...	9:00 a.m. to 1:30 p.m. (ET).

All sessions will be open to the public. For interested parties who cannot attend in person, this meeting will also be available by videoconference by connecting to Webex at the following URLs:

September 7, 2023, 9:00 a.m. to 2:30 p.m. (ET): <https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=m973072c682802f428665ee5a37cb3d18> or join by phone: 1-833-558-0712 Toll-free; meeting number (access code): 2762 359 0372. Meeting password: RACGWVI_Day1

September 8, 2023, 9:00 a.m. to 1:30 p.m. (ET): <https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=m7642aa67a6afda9fedc8da87c768f2a5> or join by phone: 1-833-558-0712 Toll-free; meeting number (access code): 2761 759 7780. Meeting password: RACGWVI_DAY2

The purpose of the Committee is to provide advice and make recommendations to the Secretary of Veterans Affairs on proposed research studies, research plans, and research strategies relating to the health consequences of military service in the Southwest Asia theater of operations during the Gulf War in 1990–91.

The Committee will review VA program activities related to Gulf War Veterans' illnesses and updates on relevant scientific research published

since the last Committee meeting. This meeting will focus in part on (1) discussion of the current state of GWI case definition and scientific strength of evidence needed for translational application and implementation, (2) new technologies that may aid in advancing the understanding of Gulf War Illness, and (3) deliberation of RACGWVI recommendations.

The meeting will include time reserved for public comments before the meeting closes on September 8, 2023. Individuals who wish to address the Committee may submit a 1–2 page summary of their comments for inclusion in the official meeting record. Members of the public may submit written statements for the Committee's review or seek additional information by contacting Dr. Karen Block, Designated Federal Officer, at 202–443–5600, or at Karen.Block@va.gov.

Dated: August 8, 2023.

LaTonya L. Small,
Federal Advisory Committee Management Officer.

[FR Doc. 2023–17274 Filed 8–10–23; 8:45 am]

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FEDERAL REGISTER

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Part II

Equal Employment Opportunity Commission

29 CFR Part 1636

Regulations To Implement the Pregnant Workers Fairness Act; Proposed Rule

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1636

RIN 3046-AB30

Regulations To Implement the Pregnant Workers Fairness Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Proposed rule.

SUMMARY: The Equal Employment Opportunity Commission is issuing a proposed rule to implement the Pregnant Workers Fairness Act, which requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity.

DATES: Comments regarding this proposal must be received by the Commission on or before October 10, 2023. Please see the sections below entitled **ADDRESSES** and **SUPPLEMENTARY INFORMATION** for additional information on submitting comments.

ADDRESSES: You may submit comments, identified by RIN number 3046-AB30, by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments.

- **Fax:** 202-663-4114. Only comments of six or fewer pages will be accepted via FAX transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at 202-921-2815 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL video phone).

- **Mail:** Raymond Windmiller, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street NE, Washington, DC 20507.

- **Hand Delivery/Courier:** Raymond Windmiller, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street NE, Washington, DC 20507.

Instructions: The Commission invites comments from all interested parties. All comment submissions must include the agency name and docket number or the Regulatory Information Number (RIN) for this rulemaking. Comments need be submitted in only one of the

above-listed formats. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information you provide. However, the EEOC reserves the right to refrain from posting libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; that contain hate speech directed at race, color, sex, national origin, age, religion, disability, or genetic information; or that promote or endorse services or products.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and search for "EEOC" and "RIN 3046-AB30." The received comments also will be available for review at the Commission's library, 131 M Street NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5 p.m., from October 10, 2023 until the Commission publishes the rule in final form.

FOR FURTHER INFORMATION CONTACT:

Sharyn Tejani, Associate Legal Counsel, sharyn.tejani@eeoc.gov; Office of Legal Counsel at 202-900-8652 (voice), 1-800-669-6820 (TTY). Requests for this rulemaking in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 921-3191 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL video phone).

SUPPLEMENTARY INFORMATION:

Introduction

On December 29, 2022, President Biden signed the Pregnant Workers Fairness Act (PWFA) into law.¹ The PWFA requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the business of the covered entity. 42 U.S.C. 2000gg-3 requires the Equal Employment Opportunity Commission (EEOC or Commission) to promulgate regulations to implement the PWFA.

The PWFA requires employers to provide reasonable accommodations to qualified workers affected by pregnancy, childbirth, or related medical conditions so they can remain healthy and in their jobs. The PWFA received broad bipartisan support in both chambers of Congress and from a wide variety of

organizations representing industries, business associations, individual businesses, numerous civil rights and women's rights organizations, unions, and faith-based organizations.² The bill passed in the House by a vote of 315 to 101 and in the Senate by a vote of 73-24.³

The PWFA Addresses Limitations in Coverage Under Title VII, the ADA, and the FMLA

The PWFA recognizes that there are gaps in the Federal legal protections for workers affected by pregnancy, childbirth, or related medical conditions, even though they may have certain rights under existing civil rights laws, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (as amended by the Pregnancy Discrimination Act (PDA)) (Title VII), the Americans with Disabilities Act of 1990, 42 U.S.C. 12111 *et seq.* (ADA),⁴ the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* (FMLA), and various State and local laws.⁵

² See, e.g., *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*, Joint Hearing Before the Subcomm. on Civ. Rts. & Hum. Servs. and the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Lab., 117th Cong. 153 (2021) [hereinafter *Fighting for Fairness*] (letter from scores of civil rights and women's rights groups supporting the Pregnant Workers Fairness Act); *id.* at 151 (letter of support from over two dozen individual businesses, the U.S. Women's Chamber of Commerce, and the National Association of Manufacturers); *Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694)*, Hearing Before the Subcomm. on Civ. Rts. & Hum. Servs. of the H. Comm. on Educ. & Lab., 116th Cong. 142 (2019) [hereinafter *Long Over Due*] (letter of support from health care providers and public health professionals); *id.* at 179 (letter of support from the National WIC Association); *id.* at 183 (letter of support from the March of Dimes); 168 Cong. Rec. S7,049 (daily ed. Dec. 8, 2022) (statement of Sen. Patty Murray) ("[t]his is, fundamentally, a bipartisan bill that we have worked closely with our Republican colleagues on. Senator Cassidy coleads this bill. He has been an amazing partner"); *id.* at S7,048 (statement of Sen. Robert P. Casey, Jr.) (noting that the bill has bipartisan support and that "[e]veryone from the ACLU to the U.S. Conference of Catholic Bishops, to the U.S. Chamber of Commerce supports this legislation").

³ *Roll Call 143, Bill Number: H.R. 1065*, Office of the Clerk, U.S. House of Representatives (May 14, 2021), <https://clerk.house.gov/Votes/2021143> (setting out the House vote tally for the Pregnant Workers Fairness Act); 168 Cong. Rec. S10,071 (daily ed. Dec. 22, 2022) (setting out the Senate vote tally for the Pregnant Workers Fairness Act to be added as an amendment to the Consolidated Appropriations Act, 2023).

⁴ The references to the ADA in this preamble are intended to apply equally to the Rehabilitation Act of 1973, as all nondiscrimination standards under Title I of the ADA also apply to Federal agencies under Section 501 of the Rehabilitation Act, and Federal applicants and employees are covered by the PWFA.

⁵ See, e.g., Cal. Gov't Code 12945(a)(3); N.D. Cent. Code Ann. 14-02.4-03; W. Va. Code 5-11B-2; see also U.S. Dep't of Lab., *Employment Protections for Workers Who Are Pregnant or Nursing*, <https://www.dhs.gov/eis/2023/08/08/employment-protections-for-workers-who-are-pregnant-or-nursing>.

¹ Consolidated Appropriations Act, 2023, Public Law 117-328, Division II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. 2000gg-2000gg-6).

Under Title VII, a worker affected by pregnancy, childbirth, or related medical conditions may be able to obtain a workplace modification to allow them to continue to work.⁶ Typically courts have only found in favor of such claims if the worker can identify another individual similar in their ability or inability to work who received such an accommodation, or if there is some direct evidence of disparate treatment (such as a biased comment or a policy that, on its face, excludes pregnant workers).⁷ However, there may not always be similarly situated employees. For this reason, some pregnant workers have not received simple, common-sense accommodations, such as a stool for a cashier⁸ or bathroom breaks for a preschool teacher.⁹ And even when the pregnant worker can identify other workers who are similar in their ability or inability to work, some courts have still not found a Title VII violation.¹⁰

Under the ADA, certain workers affected by pregnancy, childbirth, or related medical conditions may have the right to accommodations if they show that they have an ADA disability; this standard does not include pregnancy

itself but instead requires the showing of a pregnancy-related disability.¹¹

Under the FMLA, covered workers can receive up to 12 weeks of job-protected unpaid leave for, among other things, a serious health condition, the birth of a child, and bonding with a newborn within one year of birth.¹² However, employees must work for an employer with 50 or more employees within 75 miles of their worksite and meet certain tenure requirements in order to be entitled to FMLA leave.¹³ Survey data from 2018 show that only 56 percent of employees are eligible for FMLA leave.¹⁴ Further, the FMLA only provides unpaid leave—it does not require reasonable accommodations that would allow workers to stay on the job and continue to be paid.

The PWFA responds to these and other limitations and fills the gaps in current Federal legal protections. Under the PWFA, as set forth fully below, coverage is the same as Title VII and the ADA, and reasonable accommodations are available to help apply for a job; to perform a job; to enjoy equal benefits and privileges of employment; and to temporarily suspend the performance of an essential function of a position, if certain conditions are met. Importantly, the PWFA allows workers¹⁵ with uncomplicated pregnancies to seek accommodations, recognizing that even uncomplicated pregnancies may create limitations for workers.¹⁶

In addition to pregnancy and childbirth, the PWFA covers “related medical conditions.”¹⁷ “Related medical conditions” is a term used in Title VII, that previously has been

defined by the Commission.¹⁸ As discussed in detail in the section-by-section analysis of part 1636.3(b), the proposed rule explains that the existing definition will be used for the PWFA, as it is appropriate for the text of the statute. This definition reflects the government’s longstanding and consistent interpretation of the phrase and, based on canons of statutory interpretation, is the legal definition Congress intended by choosing to use the same language in the same type of statute. Further, as explained in the proposed rule, the PWFA covers limitations stemming from medical conditions that are episodic in nature and related to pregnancy or childbirth. The PWFA also covers existing conditions that are exacerbated by, and therefore related to, pregnancy or childbirth, such as high blood pressure, anxiety, or carpal tunnel syndrome. While some workers may be able to address any issues that arise related to these conditions without a reasonable accommodation, indeed without even mentioning the issue at the workplace, others may need reasonable accommodations that are covered under the PWFA.

As set out in detail in the section-by-section analysis of parts 1636.3(h) and (i), the types of reasonable accommodations that a worker may seek under the PWFA include, but are not limited to: job restructuring; part-time or modified work schedules; more frequent breaks; acquisition or modification of equipment, uniforms, or devices; allowing seating for jobs that require standing or standing in jobs that require sitting; appropriate adjustment or modification of examinations or policies; permitting the use of paid leave (whether accrued, short-term disability, or another type of employer benefit) or providing unpaid leave, including to attend health care-related appointments and to recover from childbirth;¹⁹ assignment to light duty;²⁰

www.dol.gov/agencies/wb/pregnant-nursing-employment-protections (last visited Apr. 4, 2023) [hereinafter *Employment Protections for Workers Who Are Pregnant or Nursing*]. In addition, Federal laws involving Federal funding such as Title IX of the Education Amendments Act of 1972 (20 U.S.C. 1681 *et seq.*) and the Workforce Innovation and Opportunities Act (29 U.S.C. 3240) provide protection from sex discrimination, including discrimination based on pregnancy, childbirth, or related medical conditions.

⁶ Title VII protects workers from discrimination based on sex, which includes pregnancy, childbirth, or related medical conditions. 42 U.S.C. 2000e(k). Title VII’s prohibition on sex discrimination includes discrimination “with respect to . . . compensation, terms, conditions, or privileges of employment.” 42 U.S.C. 2000e–2(a)(1). Title VII also provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. 2000e(k).

⁷ See, e.g., *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229 (2015).

⁸ See, e.g., *Portillo v. IL Creations Inc.*, 2019 WL 1440129, at *5 (D.D.C. Mar. 31, 2019).

⁹ See, e.g., *Wadley v. Kiddie Acad. Int’l, Inc.*, 2018 WL 3035785, at *4 (E.D. Pa. June 19, 2018).

¹⁰ See, e.g., *EEOC v. Wal-mart Stores East, L.P.*, 46 F.4th 587, 597–99 (7th Cir. 2022) (concluding that the employer did not engage in discrimination when it failed to accommodate pregnant workers with light duty assignments, even though the employer provided light duty assignments for workers who were injured on the job); but see, e.g., *Legg v. Ulster Cnty.*, 820 F.3d 67, 69, 75–77 (2d Cir. 2016) (vacating judgment for the employer where officers injured on the job were entitled to light duty but pregnant workers were not).

¹¹ 42 U.S.C. 12102(2) & (4); 29 CFR part 1630 app. 1630(h); EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues II* (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues> [hereinafter *Enforcement Guidance on Pregnancy Discrimination*].

¹² 29 U.S.C. 2612(a)(1); 29 CFR 825.120.

¹³ 29 U.S.C. 2611(2)(A), (B).

¹⁴ Scott Brown et al., *Employee and Worksites Perspectives of the Family and Medical Leave Act: Executive Summary for Results from the 2018 Surveys 3* (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHDFMLA2018SurveyResults_ExecutiveSummary_Aug2020.pdf [hereinafter *Brown et al.*].

¹⁵ This preamble uses the term “worker” interchangeably with “employee or applicant.” For purposes of the PWFA, the term “worker” does not apply to independent contractors.

¹⁶ See, e.g., *Long Over Due*, *supra* note 2, at 7 (statement of Rep. Jerrold Nadler) (“Pregnancy is not a disability. Sometimes, due to complications or even in healthy pregnancies, workers need a reasonable accommodation from their employer.”). Throughout this document, the EEOC uses the term “uncomplicated” pregnancy rather than “healthy” or “normal.”

¹⁷ 42 U.S.C. 2000gg–1.

¹⁸ 42 U.S.C. 2000e(k); See *Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I.A.4 (2015).

¹⁹ The Commission recognizes that different types of employers use different terms for time away from work, including leave, paid time off (PTO), time off, sick time, vacation, and administrative leave, among others. Throughout the preamble, the proposed regulation, and the proposed appendix, the Commission uses the term “leave” or “time off” and intends those terms to cover leave however it is identified by the specific employer.

²⁰ The Commission recognizes that “light duty” programs, or other programs providing modified duties, can vary depending on the covered entity. EEOC, *Enforcement Guidance: Workers’ Compensation and the ADA*, text above Question 27 (1996), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and->

telework; and, accommodating a worker's inability to perform one or more essential functions of a job by temporarily suspending the requirement that the employee perform that function, if the inability to perform the essential function is temporary and the worker could perform the essential function in the near future.²¹ The proposed regulation includes a non-exhaustive list of examples of possible reasonable accommodations, and the preamble and the proposed appendix include additional examples.

Reasonable Accommodations for Pregnancy, Childbirth, or Related Medical Conditions Are Critically Important for Workers and Their Families

The reasonable accommodations provided by the PWFA for workers experiencing pregnancy, childbirth, or related medical conditions are critical to the economic security of women workers and their families. Women are the primary, sole, or co-breadwinners in nearly 64 percent of families, earning at least half of their total household income.²² As of 2021, over 66 percent of women in the United States who gave birth in the prior year were in the labor force,²³ up from about 57 percent in 2006.²⁴ Moreover, an increasing number of pregnant workers are working later into their pregnancies—over 80 percent

of first-time mothers who worked during their pregnancy worked into the last three months before their child's birth.²⁵ The lack of accommodations for pregnancy, childbirth, or related medical conditions means that pregnant workers can be faced with an impossible choice between their job and a necessary paycheck or their health or the health of their pregnancy.²⁶ Without accommodations, pregnant workers too often may find that they must quit their jobs or face being fired, which can also mean that workers lose their employer-sponsored health insurance at a time when they especially need it. Others are forced to take leave, which can mean that the worker does not have leave to recover from childbirth later. By providing a path for accommodations for these workers, the PWFA will protect workers' ability to earn, remain in the workforce, and advance in their careers.

Importantly, the economic damage done to pregnant workers and their families due to the lack of a right to reasonable accommodation during pregnancy is especially hard-hitting for workers in low-wage jobs. These workers are the least likely to have flexibility in their jobs or savings upon which to draw if they are unemployed or on unpaid leave.²⁷

Accommodations for limitations due to pregnancy, childbirth, or related medical conditions are especially necessary for pregnant workers who face complications or a high risk of complications, or for those who hold particular kinds of jobs. As Representative Jahana Hayes noted during the debate preceding the House Committee vote on the PWFA, “women of color . . . are more likely to hold inflexible and physically demanding jobs that can present specific challenges for pregnant workers, such as home

health aides, food service workers, package handlers, and cleaners. The labor-intensive requirements of these jobs sometimes require a temporary reasonable accommodation so women can remain on the job while protecting the health of themselves and their babies.”²⁸

In fact, “Black women are more than three times as likely as White women to die from pregnancy-related causes, while American Indian/Alaska Native [women] are more than twice as likely”²⁹ and a recent study shows that negative health outcomes during pregnancy disproportionately affect Black women compared to White women regardless of wealth.³⁰ Additionally, “Black mothers are more likely to experience stillbirth compared to Hispanic and White mothers.”³¹ Providing for workplace accommodations due to pregnancy, childbirth or related medical conditions is one step that may help address the maternal health crisis.³²

The PWFA Limits the Burden on Covered Entities

The PWFA is carefully designed to limit the burden on covered entities. Like the ADA, the PWFA provides for reasonable accommodations in certain circumstances. While there are not data regarding the costs of accommodations under the PWFA, there are data regarding the costs of accommodations under the ADA, which show that most accommodations are low or no cost. According to a study by the Job Accommodation Network (JAN) regarding accommodations for people

ada [hereinafter *Enforcement Guidance: Workers' Compensation*]. In the context of the proposed regulation, the Commission intends “light duty” to include the types of programs included in Questions 27 & 28 of the *Enforcement Guidance on Workers' Compensation* and any other policy, practice, or system that a covered entity has for accommodating employees, including when one or more essential functions of a position are temporarily excused.

²¹ 42 U.S.C. 2000gg(6).

²² H.R. Rep. No. 117–27, pt. 1, at 21–22 (2021) (internal citations omitted); *id.* at 25 (noting that “[p]regnant workers who are pushed out of the workplace might feel the effects for decades, losing out on everything from 401(k) or other retirement contributions to short-term disability benefits, seniority, pensions, social security contributions, life insurance, and more”). In the NPRM, when using language from specific sources, EEOC uses the language of that source (e.g., “women” or “pregnant women”).

²³ U.S. Census Bureau, *Births in the Past Year and Labor Force Participation for Women Aged 16–50, by Education: 2006 to 2019*, (select “Historical Table 5”) (Feb. 15, 2023), <https://www.census.gov/library/visualizations/time-series/demo/fertility-time-series.html> [hereinafter *Births in the Past Year and Labor Force Participation*]; see also Steven Ruggles et al., IPUMS USA: Version 12.0 (2022), <https://doi.org/10.18128/D010.V12.0> [hereinafter *IPUMS Data*] (providing that, in 2021, over 66 percent of women in the U.S. who gave birth in the prior year were in the labor force). Data are available by request to registered IPUMS USA users; please contact ipums@umn.edu.

²⁴ *Births in the Past Year and Labor Force Participation*, *supra* note 23, (select “Historical Table 5”).

²⁵ Lynda Laughlin, U.S. Census Bureau, U.S. Dep't of Com., *Maternity Leave and Employment Patterns of First-Time Mothers: 1961–2008* 6 (2011), <https://www2.census.gov/library/publications/2011/demo/p70-128.pdf> [hereinafter *Maternity Leave and Employment Patterns of First-Time Mothers*].

²⁶ See, e.g., Markup of the Paycheck Fairness Act; Pregnant Workers Fairness Act; Workplace Violence Prevention for Health Care and Social Service Workers Act 54:46 (2021), <https://www.youtube.com/watch?v=p6le2S9sTxs> [hereinafter *Markup of the Pregnant Workers Fairness Act*] (statement of Rep. Kathy Manning) (stating that the goal of the PWFA is to help pregnant workers “to deliver healthy babies while maintaining their jobs”); *id.* at 21:50 (statement of Rep. Robert C. Scott) (stating that, “without the basic protections, too many workers are forced to choose between a healthy pregnancy and their paychecks”); *id.* at 1:35:03 (statement of Rep. Lucy McBath) (stating that “no mother should ever have to choose between the health of themselves and their child or a paycheck”).

²⁷ H.R. Rep. No. 117–27, pt. 1 at 22–23.

²⁸ Markup of the Pregnant Workers Fairness Act, *supra* note 26, at 1:41 (statement of Rep. Jahana Hayes).

²⁹ White House Blueprint for Addressing the Maternal Health Crisis 15 (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/06/Maternal-Health-Blueprint.pdf>.

³⁰ Kate Kennedy-Moulton et al., *Maternal and Infant Health Inequality: New Evidence from Linked Administrative Data* 5, Nat'l Bureau of Econ. Rsch., Working Paper No. 30,693, (2022), https://www.nber.org/system/files/working_papers/w30693/w30693.pdf (finding that maternal and infant health vary with income, but infant and maternal health in Black families at the top of the income distribution is similar to or worse than that of White families at the bottom of the income distribution).

³¹ CDC, *Black Mothers Are More Likely to Experience Stillbirth Compared to Hispanic and White Mother*, (Nov. 3, 2022), <https://www.cdc.gov/ncbddd/stillbirth/features/kf-black-mothers-stillbirth.html>.

³² See U.S. Dep't of Lab., *Black Mothers at Work: A Discussion on Workplace Challenges and Supports*, (Apr. 11, 2023), <https://usdolevents.webex.com/recordingservice/sites/usdolevents/recording/654d1e18bab8103bbdf00505681d077/playback> (discussing how Federal employment laws can respond to some of the issues faced by Black mothers at work).

with disabilities, most employers report no costs or low costs for providing these accommodations. Of the 720 employers who were able to provide cost information related to accommodations they had provided, 356 (49.4 percent) said the accommodations needed by their employees cost nothing. Another 312 (43.3 percent) experienced a one-time cost. Only 52 (7.2 percent) said the accommodation resulted in an ongoing, annual cost to the company. Of those accommodations that did have a one-time cost, the median one-time expenditure as reported by the employer was \$300.³³ While there are not data regarding the cost for accommodations specifically for pregnancy, one survey concluded that the most common accommodation needed by pregnant workers was additional breaks, especially for using the bathroom, which is a low- to no-cost accommodation.³⁴ Moreover, given the nature of the accommodations required by the PWFA, virtually all will be temporary. Given these facts and the cost data from accommodations under the ADA, the actual costs an employer may face will likely be temporary and low.

Additionally, as set out in the accompanying economic analysis of the PWFA pursuant to Executive Order 12866, the number of workers seeking an accommodation from a given employer in a year will be small. The EEOC has calculated that in 2021, women of reproductive age (aged 16–50 years) comprised approximately 33 percent of U.S. workers. Of these, approximately 4.7 percent gave birth to at least 1 child the previous year.³⁵ Not all pregnant workers require an accommodation, so the actual number of accommodations may be even lower than this number suggests. And, because the law will keep pregnant workers in the workforce, even if an employer does incur costs to provide a PWFA accommodation, the employer also may

experience a reduction in turnover and money spent to hire and train a new employee.

Most of the PWFA's provisions will be familiar to covered entities because the PWFA borrows intentionally and extensively from existing civil rights laws, both in describing coverage and in imposing requirements. For example, the PWFA incorporates Title VII's definition of "employer,"³⁶ and Title VII's enforcement procedures.³⁷ The PWFA borrows the definition of "reasonable accommodation" and "undue hardship" from the ADA and uses the same interactive process as is commonly used under the ADA.³⁸ By borrowing language and concepts from Title VII and the ADA, the PWFA allows employers to build on existing policies and processes.

Like the ADA, the PWFA does not require a covered entity to provide a reasonable accommodation that would cause undue hardship.³⁹ A covered entity may therefore lawfully deny any requested accommodation that would impose significant difficulty or expense on its operations, as defined under the ADA.

Finally, the PWFA is similar to existing laws in 30 States and localities regarding accommodations for pregnant workers; employers in those States and localities already are familiar with and comply with laws similar to the PWFA.⁴⁰ The PWFA sets a standard for the entire nation so that employees have a consistent minimum level of protection regardless of where they live in the United States, and no State's employers are significantly disadvantaged by differences in State law protections for employees affected by pregnancy, childbirth, or related medical conditions.

Voluntary Compliance Is Critical for the PWFA

As with other civil rights laws, voluntary compliance is critical to the success of the PWFA. If a worker quits their job because they do not receive an accommodation, it is of little use to that worker that years later they are able to establish through litigation that they should have received an accommodation. Voluntary compliance should be the norm because, while the form of reasonable accommodation will vary depending on the job and the worker's needs, the accommodations

that most workers will seek likely will be no cost to low cost and may be as simple as access to water during the workday, additional bathroom breaks, or sitting or standing. Thus, participation in a good faith interactive process to quickly find an accommodation once it is requested is key, both for workers who need accommodations and for employers who need to keep workers on the job and avoid litigation costs.

Communication between workers and covered entities is the key to voluntary compliance. As set out in the proposed regulations, employees and applicants have the responsibility of asking for an accommodation. In doing so, they do not need to mention the PWFA, say any specific phrases, or use medical terms, and the request does not have to be in writing. Rather, the worker can communicate (or have someone communicate on their behalf) that the worker has a limitation that is related to pregnancy, childbirth, or related medical conditions and the need for an adjustment or change at work. Because the statute and the regulations emphasize employee notice that is simple and straightforward, and need not be in writing, covered entities should train first-line supervisors to recognize such requests as requests for accommodations and to act on them accordingly.

Once the need for an accommodation has been communicated, the covered entity must respond to the request. If the need is straightforward and can be easily accommodated (e.g., providing a stool for a pregnant cashier, or allowing a pregnant worker to carry a bottle of water with them and to drink as needed), the entity should act quickly and provide the accommodation. If the entity has questions or wants to explore different reasonable accommodations, the covered entity and the employee can engage in the interactive process by, for example, having an informal conversation about the employee's needs and possible accommodations. For accommodations that require more information, the entity may need to analyze the essential functions of the job and may, when necessary and permitted under the proposed PWFA rules described below, request reasonable medical documentation. In general, these steps should be familiar to covered entities, as they are similar to the reasonable accommodation provisions, including the interactive process, of the ADA.

Importantly, the physical or mental condition leading the worker to seek an accommodation can be a modest, minor, and/or episodic problem or impediment: there is no threshold of

³³ Job Accommodation Network, *Costs and Benefits of Accommodation*, (May 4, 2023), <https://askjan.org/topics/costs.cfm> [hereinafter *Costs and Benefits of Accommodation*].

³⁴ Eugene R. Declercq et al., *Listening to Mothers III: New Mothers Speak Out* 36 (2013), <https://www.nationalpartnership.org/our-work/resources/health-care/maternity/listening-to-mothers-iii-new-mothers-speak-out-2013.pdf> [hereinafter *Listening to Mothers III*].

³⁵ See IPUMS Data, *supra* note 23; see also *Fighting for Fairness*, *supra* note 2, at 109 (testimony of Fatima Goss Graves, President & CEO, National Women's Law Center) (noting that even in occupations in which women are the most likely to be employed, the number of pregnancies per year is quite small; "[f]or example pregnant women are most likely to work as elementary school teachers and middle school teachers, but only 3.2 percent of all elementary and middle school teachers are pregnant in a given year").

³⁶ 42 U.S.C. 2000gg(2)(B)(i).

³⁷ 42 U.S.C. 2000gg–2(a).

³⁸ 42 U.S.C. 2000gg(7).

³⁹ 42 U.S.C. 2000gg–2(g).

⁴⁰ *Employment Protections for Workers Who Are Pregnant or Nursing*, *supra* note 5.

severity required under the PWFA. This is to ensure that employees and applicants, including those with uncomplicated pregnancies, have access to accommodations and that accommodations are available in order for workers to maintain their health or the health of their pregnancies. A severity threshold is not supported by the text of the PWFA and would frustrate the purposes of the Act.

Executive Summary of the PWFA's Major Provisions and an Outline of This NPRM

The PWFA requires a covered entity to provide reasonable accommodations, absent undue hardship, to a qualified employee or applicant with a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The Commission's proposed rule addresses each element of this requirement in greater detail; this section contains a summary in outline form. As required by the PWFA, the proposed regulations also provide examples of reasonable accommodations.

(1) Coverage (42 U.S.C. 2000gg(2) & (3)):

a. The PWFA covers employers (as well as unions and employment agencies), employees, applicants, and former employees who are currently covered by (1) Title VII; (2) the Congressional Accountability Act of 1995, 2 U.S.C. 1301 *et seq.*,⁴¹ (3) the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16b; 2000e–16c (GERA); or (4) section 717 of Title VII, 42 U.S.C. 2000e–16, which covers Federal employees. Whoever satisfies the definition of an “employer” or “employee” under any of these statutes is an employer or employee for purposes of the PWFA.

(2) Remedies and Enforcement (42 U.S.C. 2000gg–2):

a. The procedures for filing a charge or claim under the PWFA, as well as the available remedies, including the ability to obtain damages, are the same as under (1) Title VII; (2) the Congressional Accountability Act; (3) GERA; and (4) section 717 of Title VII, for the employees covered by the respective statutes. Limitations regarding available remedies under these statutes likewise apply under the PWFA. As with the ADA, damages are limited if the claim

involves the provision of a reasonable accommodation, and the employer makes a good faith effort to meet the need for a reasonable accommodation.

(3) Known Limitation (42 U.S.C. 2000gg(4)):

a. “Known limitation” is a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the employer whether or not such condition meets the definition of disability” under the ADA.

b. The proposed regulation explains the operative terms in this definition.

i. “Known” means “the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the covered entity.”

ii. “Limitation” means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The physical or mental condition that is the limitation may be a modest, minor, and/or episodic impediment or problem. The physical or mental condition also may be that a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy. The definition also includes when a worker is seeking health care related to pregnancy, childbirth, or a related medical condition itself.

iii. “Pregnancy, childbirth, or related medical conditions” is a phrase used in Title VII (42 U.S.C. 2000e(k)) and has the same meaning as in that statute; the proposed regulation also provides additional examples of related medical conditions.

(4) Qualified (42 U.S.C. 2000gg(g)):

a. The PWFA has two definitions of qualified.

i. First, the PWFA uses language from the ADA (“an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position” is qualified).

ii. Second, the PWFA allows an employee or applicant to be “qualified”—even if they cannot perform one or more essential functions of the job—if the inability to perform the essential function(s) is “temporary,” the worker could perform the essential function(s) “in the near future,” and the inability to perform the essential function(s) can be reasonably accommodated. The proposed rule defines the terms “temporary” (lasting for a limited time, not permanent, and may extend beyond “in the near

future”) and “in the near future” (generally within forty weeks). It also discusses the meaning of the requirement that the inability to perform the essential functions(s) can be reasonably accommodated.

(5) Essential Function:

This is a term from the ADA, and the proposed rule uses the same definition as in the ADA. In general terms, it means the fundamental duties of the job.

(6) Reasonable Accommodation (42 U.S.C. 2000gg(7)):

This is a term from the ADA, and the PWFA uses a similar definition as in the ADA. Generally, it means a change in the work environment or how things are usually done. Because of the text and purpose of the PWFA, the proposed rule includes supplemental provisions and specific examples of reasonable accommodations, as explained in detail below.

(7) Undue Hardship (42 U.S.C. 2000gg(7)):

This is a term from the ADA and the PWFA uses a similar definition as in the ADA. Generally, it means significant difficulty or expense for the operation of the covered entity. Because of the text and purpose of the PWFA, the proposed regulation includes supplemental provisions to the ADA's definition, as explained in detail below.

(8) Interactive Process (42 U.S.C. 2000gg(7)):

This is a method from the ADA to help the covered entity and the worker figure out a reasonable accommodation; the PWFA anticipates that covered entities will use it for requests to accommodate known limitations related to pregnancy, childbirth, or related medical conditions. Generally, it means a discussion or two-way communication between an employer and an employee or applicant to identify a reasonable accommodation.

(9) Prohibited Acts (42 U.S.C. 2000gg–1):

a. The PWFA prohibits a covered entity from denying a qualified employee or applicant with a known limitation a reasonable accommodation, absent undue hardship.

b. The PWFA prohibits a covered entity from requiring a qualified employee or applicant to accept an accommodation other than one arrived at through the interactive process.

c. The PWFA prohibits a covered entity from denying employment opportunities to a qualified employee or applicant if the denial is based on the covered entity's need to make a reasonable accommodation for the known limitation of the employee or applicant.

⁴¹ The EEOC does not have enforcement authority for the Congressional Accountability Act; thus, these proposed regulations do not apply to workers or employers covered by that law. The PWFA directs the Office of Congressional Workplace Rights to issue regulations within six months after the Commission issues a final rule in this rulemaking. 42 U.S.C. 2000gg–3(b).

d. The PWFA prohibits a covered entity from requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists, absent undue hardship.

e. The PWFA prohibits a covered entity from taking an adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation for a known limitation.

(10) Prohibition on Retaliation and Coercion (42 U.S.C. 2000gg(f)):

a. Like Title VII and the ADA, the PWFA prohibits retaliation against any employee, applicant, or former employee because that person has opposed acts or practices made unlawful by the PWFA or has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the PWFA.

b. Like the ADA, the PWFA prohibits coercion, intimidation, threats, or interference with any individual in the exercise or enjoyment of rights under the PWFA or with any individual aiding or encouraging any other individual in the exercise or enjoyment of rights under the Act. The proposed regulation also specifically provides that like the ADA's retaliation and interference provisions, the PWFA's retaliation and coercion provisions prohibit harassment based on an individual's exercise or enjoyment of rights under the PWFA or aid or encouragement of any other individual in doing so.

Section-by-Section Analysis of the Regulation

The Commission seeks comment on any part of the proposed regulation, the section-by-section analysis, and the appendix. The proposed appendix, entitled Appendix A to 29 CFR part 1636—Interpretive Guidance on the Pregnant Workers Fairness Act, will become part of 29 CFR part 1636 when the proposed rule is finalized. The Interpretive Guidance represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by the regulation and the Interpretive Guidance when enforcing the PWFA. The material currently in the appendix comes from the preamble to the proposed rule. In addition, in the section-by-section analysis the Commission has identified certain topics about which it is specifically seeking comment. For ease of reference, the list of directed questions appears at

the end of the section-by-section analysis.

Where applicable, throughout the proposed rule, this preamble, and the proposed appendix, the Commission proposes using definitions from the ADA or Title VII, the ADA's implementing regulations, or the EEOC's enforcement guidance regarding both statutes.

Section 1636.1 Purpose

In this section, the Commission sets forth the provisions of the PWFA in general terms to describe the purpose of the law.

Section 1636.2 Definitions—General

Rather than redefine “Commission,” “covered entity,” “respondent,” “employer,” “employing office,” and “employee,” the PWFA incorporates existing definitions from other civil rights statutes. In the proposed rule, the Commission uses the same language as the statutory provisions, except that it provides a full description of the types of employers and employees covered by the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16(c)(a)) (GERA), rather than merely referencing GERA's definitions.

The PWFA at 42 U.S.C. 2000gg(3) uses “employee (including an applicant)” in its definition of “employee.” Thus, throughout the statute, the proposed regulations, and the proposed appendix, the term “employee” should be understood to include “applicant” where relevant. Because the PWFA relies on Title VII for its definition of “employee,” the proposed rule clarifies that the term also includes “former employee,” where relevant.⁴² The PWFA applies to “covered entities,” which include, as under Title VII, public or private employers with fifteen or more employees, unions, employment agencies, and the Federal Government.

The NPRM, proposed regulation, and proposed appendix use the term “covered entity” and the term “employer” interchangeably. The NPRM, proposed regulation, and proposed appendix use the term “employee or applicant” and “employee”; where appropriate, “employee” or “employee or applicant”

⁴² 42 U.S.C. 2000e(f). Under Title VII, the term “employee” includes former employees. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that including former employees within sec. 704(a) of Title VII's coverage of “employee” was “consistent with the broader context of Title VII and the primary purpose of § 704(a)”; see also EEOC, *Compliance Manual Section 2: Threshold Issues 2–III.A* (2009), <http://www.eeoc.gov/policy/docs/threshold.html#2-III-A>.

means “employee, applicant, or former employee.”

Section 1636.3 Definitions Specific to PWFA

1636.3(a) Known Limitation

The proposed rule reiterates the definition of “known limitation” from section 2000gg(4) of the PWFA and then provides definitions for the operative terms.

1636.3(a)(1) Known

Paragraph (1) adopts the definition of “known” based on the PWFA and thus defines it to mean that the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the covered entity.

1636.3(a)(2) Limitation

Paragraph (2) adopts the definition of “limitation” based on the PWFA and thus defines it to mean a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The “physical or mental condition” that is the limitation may be a modest, minor, and/or episodic impediment or problem. The definition encompasses when a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy.⁴³ The definition also includes when the worker is seeking health care related to the pregnancy, childbirth, or a related medical condition itself. This is consistent with the ADA which permits reasonable accommodations for obtaining medical treatment⁴⁴ and recognizes that for pregnancy, childbirth, or related medical conditions the proper course of care can include regular appointments and monitoring by a health care professional.⁴⁵

⁴³ The preamble, proposed regulation, and proposed appendix use the term “maintain health or the health of the pregnancy.” This includes avoiding risk to the employee's or applicant's health or to the health of their pregnancy.

⁴⁴ EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text after n. 49 (2002), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [hereinafter *Enforcement Guidance on Reasonable Accommodation*].

⁴⁵ See, e.g., Office of Women's Health, U.S. Dep't of Health and Human Servs., *Prenatal Care* (last visited July 18, 2023) (stating that during pregnancy usually visits are once a month until week 28, twice a month from weeks 28–36 and once a week from weeks 36 to birth) <https://www.womenshealth.gov/a-z-topics/prenatal-care>; Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 736, *Optimizing Post-Partum Care* (stating the importance of regular post-partum care) (2021)

The general principle informing the proposed rule's definition is that the physical or mental condition (the limitation) required to trigger the obligation to provide a reasonable accommodation under the PWFA does not require a specific level of severity. This is clear from the text of the statute, which does not contain a level of severity, other than stating that the limitation does not need to meet the definition of a "disability" under the ADA.⁴⁶ The lack of a level of severity is also necessary given the need the statute seeks to fill. Workers who can show that their pregnancy-related condition meets the definition of a disability may be eligible to receive an accommodation under the ADA; workers whose limitations do not reach that threshold are ineligible for such accommodations, and the PWFA is intended to cover those workers.⁴⁷ Additionally, the definition covers situations where a worker seeks an accommodation in order to maintain their health or the health of their pregnancy and avoid more serious consequences and when a worker seeks health care for their pregnancy, childbirth, or related medical conditions.⁴⁸ Practically,

(<https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/05/optimizing-postpartum-care>) & Opinion No. 826, *Protecting and Expanding Medicaid to Improve Women's Health* (encouraging the expansion of Medicaid to improve post-partum care) (2021) (<https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/06/protecting-and-expanding-medicare-to-improve-womens-health>).

⁴⁶ 42 U.S.C. 2000gg(4).

⁴⁷ 42 U.S.C. 2000gg(4). See, e.g., H.R. Rep. No. 117–27, pt. 1, at 12 (workers whose pregnancy-related impairments do not substantially limit a major life activity and who are not covered by the ADA can be covered by the PWFA); *id.* at 22–23 (accommodations are frequently needed by, and should be provided to, people with healthy pregnancies); *id.* (example of an "uneventful pregnancy" in which a woman needed more bathroom breaks); *id.* at 14–22 (outlining the gaps left by Title VII and the ADA that the PWFA is intended to fill so that pregnant workers can receive reasonable accommodations); *id.* at 56 (noting that "minor limitations" can be covered because they presumably only require minor accommodations).

⁴⁸ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at text above Question 17 (providing reasons for which an employee may receive an accommodation, including to obtain medical treatment and to avoid temporary adverse conditions in the work environment because of the effect on the worker's health). See, e.g., *Markup of the Pregnant Workers Fairness Act*, *supra* note 26, at 54:46 (statement of Rep. Kathy E. Manning) (goal of the PWFA is help pregnant workers "to deliver healthy babies while maintaining jobs"); *id.* at 21:50 (statement of Rep. Robert C. Scott) ("[W]ithout these protections, too many workers are forced to choose between a healthy pregnancy and their paychecks"); *id.* at 1:35 (statement of Rep. Lucy McBath) ("[N]o mother should ever have to choose between the health of themselves and their child or paycheck."); *id.* at 1:44 (statement of Rep. Suzanne Bonamici)

allowing for accommodations to maintain health and attend medical appointments also increases the chances that the accommodation is minor and may decrease the need for a more extensive accommodation because the worker may be able to avoid more serious complications.

Because the standard for known limitation in the statute does not include a specific level of severity and accommodations are available for non-severe physical or mental conditions, whether a worker has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions shall be construed broadly to the maximum extent permitted by the PWFA.

Related to, Affected by, or Arising Out of

Whether a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions usually will be obvious. For example, if an employee is pregnant and as a result has pain when standing for long periods of time, the employee's physical or mental condition (pain when standing for a protracted period) is related to the employee's pregnancy. An employee who is pregnant and because of the pregnancy cannot lift more than 20 pounds has a physical condition related to pregnancy. An employee who is pregnant and is seeking time off for prenatal health care appointments is attending a medical appointment related to the pregnancy. An employee who requests an accommodation to attend therapy appointments for postpartum depression has a medical condition related to pregnancy (postpartum depression) and is obtaining health care for the related medical condition. A pregnant employee who is seeking an accommodation to limit exposure to secondhand smoke to protect the health of their pregnancy has a physical or mental condition (trying to maintain the employee's health or the health of their pregnancy or increased sensitivity to secondhand smoke) related to pregnancy. A pregnant worker seeking time off in order to get an amniocentesis is attending a medical appointment related to the pregnancy. An employee who requests leave for IVF treatment for the worker to get pregnant has a related medical condition (difficulty in becoming pregnant or infertility) and is seeking health care related to it. An employee whose pregnancy is causing fatigue has a physical condition (fatigue)

("[P]regnant workers should not have to choose between a healthy pregnancy and a paycheck.").

related to pregnancy. An employee whose pregnancy is causing back pain has a physical condition (back pain) related to pregnancy. This is not an exhaustive list of physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

The Commission recognizes, however, that some physical or mental conditions or limitations, including some of those in the examples above, may occur even if a person is not pregnant (e.g., depression, hypertension, constraints on lifting). To the extent that a covered entity has reasonable concerns about whether a physical or mental condition or limitation is "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," the employer may request information from the employee regarding the connection, using the principles set out in section 1636.3(l) about the interactive process and supporting documentation. For the most part, the Commission anticipates that determining whether a limitation or physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions will be a straightforward determination that can be accomplished through a conversation between the employer and the employee as part of the interactive process and without the need for the employee to obtain documentation or verification, such as documentation from a health care provider. Of course, even if a covered entity concludes that a limitation is not covered by the PWFA, the covered entity should consider whether the limitation constitutes a disability that is covered by the ADA.

There may be situations where a physical or mental condition begins as something that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and, once the pregnancy, childbirth, or related medical condition is over, the limitation remains. If an employer has questions regarding whether the limitation is still related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the employer may use the principles set out in the sections regarding the interactive process and supporting documentation. Additionally, there may be situations where that limitation qualifies as a disability under the ADA. In those situations, an employer may use the principles set out in the sections on the interactive process and supporting documentation for the ADA.

1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions

The PFWA uses the term “pregnancy, childbirth, or related medical conditions,” which appears in Title VII’s definition of sex.⁴⁹ Because Congress chose to write the PFWA using the same language as Title VII, in the proposed rule the Commission gives the term “pregnancy, childbirth, or related medical conditions” the same meaning under the PFWA as under Title VII.⁵⁰

To assist workers and covered entities, the proposed regulation includes a non-exhaustive list of examples of pregnancy, childbirth, or related medical conditions that the Commission has concluded generally fall within the statutory definition. These include conditions that Federal courts and the EEOC have already concluded are part of the definition under Title VII as well as other conditions that are based on the expertise of medical professionals. The list in the proposed regulation for the definition of “pregnancy, childbirth, or related medical conditions” includes current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions.⁵¹ The

current pregnancy, past pregnancy, potential or intended pregnancy, infertility treatment, use of contraception, lactation, breastfeeding, and the decision to have or not to have an abortion, among other conditions); *see, e.g., Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259–60 (11th Cir. 2017) (finding lactation and breastfeeding covered under the PDA, and asserting that “[t]he PDA would be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related physiological process”) (internal citation and quotation omitted); *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 429–30 (5th Cir. 2013) (“[A]s both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of ‘pregnancy, childbirth, or related medical conditions’”); *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that the PDA prohibits an employer from discriminating against a female employee because she has exercised her right to have an abortion); *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005) (stating that the plaintiff “cannot be refused employment on the basis of her potential pregnancy”); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (finding the termination of a pregnant employee because she contemplated having an abortion violated the PDA); *Piraino v. Int’l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (rejecting “surprising claim” by the defendant that no pregnancy discrimination can be shown where the challenged action occurred after the birth of the plaintiff’s baby); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987) (referencing the PDA’s legislative history and noting commentator agreement that “[b]y broadly defining pregnancy discrimination, Congress clearly intended to extend protection beyond the simple fact of an employee’s pregnancy to include ‘related medical conditions’ such as nausea or potential miscarriage”) (citations and internal quotations omitted); *Ducharme v. Crescent City Déjà Vu, L.L.C.*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (finding that “abortion is encompassed within the statutory text prohibiting adverse employment actions ‘because of or on the basis of pregnancy, childbirth, or related medical conditions’”); *Donaldson v. Am. Banco Corp., Inc.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996) (“It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place. The plain language of the statute does not require it, and common sense precludes it.”); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402–03 (N.D. Ill. 1994) (PDA gives women “the right . . . to be financially and legally protected before, during, and after her pregnancy” and stating “[a]s a general matter, a woman’s medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for purposes of the Pregnancy Discrimination Act.”) (internal citations and quotations omitted); *Neessen v. Arona Corp.*, 2010 WL 1731652, at *7 (N.D. Iowa Apr. 30, 2010) (finding the plaintiff covered by the PDA where the defendant allegedly refused to hire her because she had recently been pregnant and given birth); 29 CFR part 1604 app. Questions 34–37 (1979); H.R. Rep. No. 95–1786, at 4 (1978), as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 (“Because the bill applies to all situations in which women are ‘affected by pregnancy, childbirth, and related medical conditions,’ its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.”); EEOC, *Commission Decision on Coverage of Contraception* (2000), <https://www.eeoc.gov/>

Commission emphasizes that the list in the regulation is non-exhaustive, and to receive an accommodation an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition.

However, to be a “related medical condition” as applied to the specific employee or applicant in question, the condition must relate to pregnancy or childbirth. Some of the “related medical conditions” listed in the regulation are conditions that commonly, but not necessarily, relate to pregnancy or childbirth. If a worker has a condition that is listed in the regulation but, in their situation, it does not relate to pregnancy or childbirth, the condition shall not be covered under the PFWA. For example, if a worker has high blood pressure but that medical condition is not related to pregnancy or childbirth, a physical or mental condition related to the worker’s high blood pressure is not eligible for an accommodation under the PFWA. Other civil rights statutes, such as the ADA, separately may entitle the worker to reasonable accommodation. If an employer has questions regarding whether a condition is related to pregnancy or childbirth, the employer may use the principles set out in the sections regarding the interactive process and supporting documentation.

“Related medical conditions” include conditions that existed before pregnancy or childbirth (and for which an individual was perhaps receiving reasonable accommodation under the ADA) but that may be or have been exacerbated by pregnancy or childbirth, such that additional or different accommodations are needed. For example, a worker who was using unpaid leave as an accommodation to attend treatment for anxiety may experience a worsening of anxiety due to pregnancy or childbirth and request an additional accommodation. A worker who received extra breaks to eat or drink due to Type 2 diabetes before pregnancy may need additional accommodations during pregnancy to monitor and manage the diabetes more closely and avoid or minimize adverse health consequences to the worker or their pregnancy. A worker may have high blood pressure that can be managed prior to the pregnancy, but once the worker is pregnant, the high blood pressure poses a risk to the pregnancy and the worker needs bed rest.

commission-decision-coverage-contraception (“The PDA’s prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman’s use of contraceptives.”).

⁴⁹ 42 U.S.C. 2000e(k).

⁵⁰ *See, e.g., Texas Dep’t of Housing & Cmty. Affs. v. Inclusive Cmty. Project*, 576 U.S. 519, 536 (2015) (“If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.” (omissions in original) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012)); *Bragdon v. Abbott*, 524 U.S. 624, 644–45 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”); *Hall v. U.S. Dep’t of Agric.*, 984 F.3d 825, 840 (9th Cir. 2020) (“Congress is presumed to be aware of an agency’s interpretation of a statute. We most commonly apply that presumption when an agency’s interpretation of a statute has been officially published and consistently followed. If Congress thereafter reenacts the same language, we conclude that it has adopted the agency’s interpretation.”) (citations and internal quotations omitted); Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012) (“[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning.”).

⁵¹ *Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I.A. (“pregnancy, childbirth, or related medical conditions” include

In these situations, an employee could request an additional accommodation under the ADA or an accommodation under the PWFA.

1636.3(c) Employee's Representative

Paragraph (c) of this section of the proposed rule defines "employee's representative" because the known limitation may be communicated to the covered entity by the employee or the employee's representative. Under the ADA, a representative may also make the request for an accommodation.⁵² Thus, the proposed rule uses the same definition from the ADA and states that this term encompasses any representative of the employee or applicant, including a family member, friend, health care provider, or other representative.

1636.3(d) Communicated to the Employer

Paragraph (d) of this section of the proposed rule states that the PWFA's requirement that the known limitation be "communicate[d] to the employer" means to make known to the covered entity either by communicating with a supervisor, manager, someone who has supervisory authority for the employee (or the equivalent for an applicant), or human resources personnel, or by following the covered entity's policy to request an accommodation. This should not be a difficult task, and the employer should permit an employee or applicant to request an accommodation through multiple avenues and means. Given that many accommodations requested under the PWFA will be straightforward—like additional bathroom breaks or water—the Commission emphasizes the importance of employees being able to obtain accommodations by communicating with the people who assign them daily tasks and whom they would normally consult if they had questions or concerns. Employees should not be made to wait for a reasonable accommodation that is simple and imposes negligible cost, and is often likely temporary, because they asked the wrong supervisor. The Commission seeks comment on whether the definition of whom the employee or applicant may communicate with to start the reasonable accommodation process is appropriate or whether it should be expanded or limited with the understanding that the process should not be burdensome for the worker.

Paragraphs (d)(1) and (2) explain that a request for a reasonable accommodation under the PWFA, as

with the ADA, does not need to be in writing or use any specific words or phrases. Instead, employees or applicants may request accommodations in conversation or may use another mode of communication to inform the employer.⁵³ A covered entity may choose to write a memorandum or letter confirming a request or may ask the employee or applicant to fill out a form or submit the request in written form. However, the covered entity cannot ignore or close the initial request because that initial request is sufficient to place the employer on notice.⁵⁴ Additionally, even though it is not required, an employee may choose email or other similar written means to submit a request for an accommodation to ensure clarity and create a record.

Paragraph (d)(3) of this section of the proposed regulation sets out what an employee or applicant must communicate to the employer to request an accommodation under the PWFA. Such a request has two parts. First, the employee or applicant (or their representative) must identify the limitation that is the physical or mental condition and that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Second, the employee or applicant (or their representative) must indicate that they need an adjustment or change at work. As with the ADA, to request an accommodation, an employee or applicant may use plain language and need not mention the PWFA; use the phrases "reasonable accommodation," "known limitation," "qualified," "essential function;" use any medical terminology; or use any other specific words or phrases.

Examples

Example 1636.3 #1: A pregnant employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of morning sickness."

Morning sickness is a physical condition related to pregnancy that impedes a person's ability to eat and drink and requires access to a bathroom. The employee has identified a change needed at work (change in work schedule). This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #2: An employee who gave birth three months ago tells the person who assigns her work at the employment agency, "I need an hour off once a week for treatments to help with my back problem that started during my pregnancy."

The back problem is a physical condition related to pregnancy, and the employee has identified a change needed at work (leave for medical appointments). This is a request for

a reasonable accommodation under the PWFA.

Example 1636.3 #3: An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy.

The employee has a limitation because they have a need or a problem related to maintaining their health or the health of their pregnancy, the employee identified a change needed at work (assistance with lifting), and the employee communicated this information to the employer. This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #4: An employee's spouse, on the employee's behalf, requests light duty for the employee because the employee has a lifting restriction related to pregnancy; the employee's spouse uses the employer's established process for requesting a reasonable accommodation or light duty for the employee.

The lifting restriction is a physical condition related to the employee's pregnancy, and the employee's representative (their spouse) has identified a change needed at work (light duty). This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #5: An employee verbally informs a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is pregnant, but does not complete the employer's online form for requesting accommodation.

The need to urinate more frequently is a physical condition related to pregnancy, and the employee has identified a change needed at work (additional bathroom breaks). An employee need not use specific words or any specific form or template to make a request for accommodation. This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #6: An employee tells a supervisor that she needs time off to recover from childbirth.

The need or a problem is related to maintaining the employee's health after childbirth, and the employee has identified a change needed at work (time off). This is a request for a reasonable accommodation under the PWFA.⁵⁵

1636.3(e) Mitigating Measures

There may be steps that a worker can take to mitigate, or lessen, the effect of a known limitation. Paragraph (e) of this section of the proposed rule explains that, as with the ADA, the ameliorative, or positive, effects of mitigating

⁵² Enforcement Guidance on Reasonable Accommodation, *supra* note 44, Question 2.

⁵³ *Id.* at Question 3.

⁵⁴ *Id.*

⁵⁵ See *infra* § 1636.3(h) Particular Matters Regarding Leave as a Reasonable Accommodation for a discussion of how requests for leave interact with situations where an employee has a right to leave under an employer's policy or another law; see also EEOC, *Employer-Provided Leave and the Americans with Disabilities Act*, Communication After an Employee Requests Leave (2016), <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act> [hereinafter *Technical Assistance on Employer-Provided Leave*], for an explanation of this interaction and other helpful information about the interaction between the ADA and other laws requiring employers to provide leave to employees.

measures, as that term is defined in the Commission's ADA regulations, shall not be considered when determining if the employee has a limitation under the PWFA. However, again as under the ADA, the detrimental or non-ameliorative effects of mitigating measures, such as negative side effects of medication, the burden of following a particular treatment regimen, and complications that arise from surgery, may be considered when determining if an employee has a limitation under the PWFA.⁵⁶

1636.3(f) Qualified Employee or Applicant

An employee or applicant must meet the definition of "qualified" in the PWFA in one of two ways.⁵⁷

In paragraph (f) of this section, the proposed rule reiterates the statutory language that "qualified employee" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position. Additionally, following the statute, the proposed rule also states that an employee or applicant shall be considered qualified if: (1) any inability to perform an essential function is for a temporary period; (2) the essential function could be performed in the near future; and (3) the inability to perform the essential function can be reasonably accommodated. The proposed rule relies on the ADA's definition of "qualified individual" for applicants and employees,⁵⁸ with necessary modifications to account for differences in the language of the statutes, as explained below.

As with the ADA, the determination of whether an employee with a known limitation is qualified should be based on the capabilities of the employee at the time of the relevant employment decision and should not be based on speculation that the employee may become unable in the future to perform certain tasks, may require leave, or may cause increased health insurance premiums or workers' compensation costs.⁵⁹

1636.3(f)(1) The First Part of PWFA's Definition of Qualified Employee or Applicant—With or Without Reasonable Accommodation

Under 42 U.S.C. 2000gg(6), employees are qualified if they can perform the essential functions of their jobs with or without reasonable accommodation, which is the same language as in the ADA and is interpreted accordingly in the proposed rule. "Reasonable" has the same meaning as under the ADA on this topic—an accommodation that "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases," "feasible," or "plausible."⁶⁰ Many workers seeking reasonable accommodations under the PWFA will meet this part of the definition. For example, a pregnant attorney who uses the firm's established telework program to work at home during morning sickness does not need an accommodation to perform the essential functions of the job and therefore is qualified without a reasonable accommodation. A pregnant cashier who needs a stool to perform the job will be qualified with the reasonable accommodation of a stool. A teacher recovering from childbirth who needs additional bathroom breaks will be qualified with a reasonable accommodation that allows such breaks.

Determining "Qualified" for the Reasonable Accommodation of Leave

The proposed rule explains that when determining whether an employee who needs leave as a reasonable accommodation meets the definition of "qualified," the relevant inquiry is whether the employee would be able to perform the essential functions of the position, with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated), with the benefit of a period of intermittent leave, after a period of part-time work, or at the end of a period of leave or time off.⁶¹

⁶⁰ *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002); *see, e.g., Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 360 (3d Cir. 2002) (citing the definition from *Barnett*); *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1267 (10th Cir. 2015) (citing the definition from *Barnett*); *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 762 (7th Cir. 2012) (citing the definition from *Barnett*); *see also Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at text accompanying nn.8–9 (citing the definition from *Barnett*).

⁶¹ If the employee will not be able to perform all of the essential functions at the end of the leave period, with or without accommodation, the employee may still be qualified under the second

Thus, an employee who needs some form of leave to recover from a known limitation caused, for example, by childbirth or a miscarriage, can meet the definition of "qualified" because it is reasonable to conclude that once they return from the period of leave (or during the time they are working if it is intermittent leave) they will be able to perform the essential functions of the job, with or without additional reasonable accommodations or will be qualified under the second part of the PWFA definition that is described in the next subsection. Of course, if an employer can demonstrate that leave would pose an undue hardship, for example, due to the length, frequency, or unpredictable nature of the time off that was requested, it may lawfully deny the request.⁶²

1636.3(f)(2) The Second Part of PWFA's Definition of Qualified Employee or Applicant—Temporary Inability To Perform an Essential Function

The PWFA provides that an employee or applicant can meet the definition of "qualified" even if they cannot perform one or more essential functions of the position in question, provided three conditions are met: (1) the inability to perform an essential function(s) is for a temporary period; (2) the essential function(s) could be performed in the near future; and (3) the inability to perform the essential function(s) can be reasonably accommodated.⁶³

Based on the overall structure and wording of the statute, the second part of the definition of "qualified" is relevant only when an employee or applicant cannot perform one or more essential functions of the job in question because of a known limitation under the PWFA. It is not relevant in any other circumstance. If the employee or applicant can perform the essential functions of the position with or without a reasonable accommodation, the first definition of "qualified" applies (able to do the job with or without a reasonable accommodation). For example, if a pregnant worker requests additional restroom breaks, the question of whether they are qualified is simply whether they can perform the essential

part of the PWFA's definition of qualified employee or applicant. 42 U.S.C. 2000gg(6).

⁶² As with the ADA, in determining whether leave under the PWFA causes an undue hardship, an employer may consider leave that the employee has already used under, for example, the FMLA. *See Technical Assistance on Employer-Provided Leave*, *supra* note 55, at Examples 17 and 18. For more information regarding leave as a reasonable accommodation, *see infra* § 1636.3(h) *Particular Matters Regarding Leave as a Reasonable Accommodation*.

⁶³ 42 U.S.C. 2000gg(6).

⁵⁶ 29 CFR 1630.2(j)(1)(vi), (4)(ii); *see also* 29 CFR part 1630 app. 1630.2(j)(1)(vi).

⁵⁷ The PWFA does not address prerequisites for a position; thus, whether an employee or applicant is qualified for the position in question is determined based on whether the employee or applicant can perform the essential functions of the position, with or without a reasonable accommodation, or based on the second part of the PWFA's definition of "qualified." 42 U.S.C. 2000gg(6).

⁵⁸ 42 U.S.C. 12111(8); 29 CFR 1630.2(m).

⁵⁹ 29 CFR part 1630 app. 1630.2(m).

functions of their job with the reasonable accommodation of additional restroom breaks, and there is no need to apply the definitions of “temporary” or “in the near future,” or to determine whether the inability to perform an essential function can be reasonably accommodated (as no such inability exists).

By contrast, some examples of situations where the second definition may be relevant include: (1) a pregnant construction worker is told by their health care provider to avoid lifting more than 20 pounds during the second through ninth months of pregnancy, an essential function of the worker’s job requires lifting more than 20 pounds, and there is not a reasonable accommodation that will allow the worker to perform that function without lifting more than 20 pounds; and (2) a pregnant police officer is unable to perform patrol duties during the third through ninth months of the pregnancy, patrol duties are an essential function of the job, and there is not a reasonable accommodation that will allow the worker to perform the essential functions of the patrol position.

Example 1636.3 #7/Qualified Employee: Launa has been working as a landscaper for two years, and her job regularly involves moving bags of soil that weigh 35–40 pounds. Launa becomes pregnant and lets her supervisor know that she has a lifting restriction of 20 pounds because of her pregnancy.

1. Known Limitation: Launa’s lifting restriction is a physical condition related to pregnancy; Launa needs a change or adjustment at work; Launa has communicated this information to the employer.

2. Qualified:

a. Launa may be qualified with a reasonable accommodation of a device that helps with lifting.

b. If there is no device or other reasonable accommodation (or the device or other reasonable accommodation is too expensive or otherwise causes undue hardship for the employer) the employer must consider whether Launa meets the second definition of qualified: whether (1) the inability to perform the essential function is temporary, (2) Launa could perform the essential function in the near future, and (3) the inability to perform the essential function can be reasonably accommodated.

If the employer establishes that all possible accommodations that would allow the employee to temporarily suspend one or more essential functions would impose an undue hardship, then the employee will not be qualified under the PWFA’s second definition of qualified (because the inability to

perform the essential function cannot be reasonably accommodated).⁶⁴

The PWFA does not provide definitions of the terms “temporary” or “in the near future,” nor does it give any additional explanation of the third prong of this definition. The Commission has provided definitions for these terms pursuant to its authority to issue regulations to implement the PWFA.⁶⁵

1636.3(f)(2)(i) Temporary

The proposed rule defines the term “temporary” to mean that the need to suspend one or more essential functions is “lasting for a limited time,⁶⁶ not permanent, and may extend beyond ‘in the near future.’” As explained below, how long it may take before the essential function can be performed is further limited by the definition of “in the near future.”

1636.3(f)(2)(ii) In the Near Future

The proposed rule defines “in the near future” to mean generally forty weeks from the start of the temporary suspension of an essential function. This is based on the time of a full-term pregnancy (forty weeks). In the Commission’s view, to define “in the near future” as less than generally forty weeks—*i.e.*, the duration of a full-term pregnancy—would run counter to a central purpose of the PWFA of keeping pregnant workers in the workforce even when pregnancy, childbirth, or related medical conditions necessitate the reasonable accommodation of temporarily suspending the performance of one or more essential functions of a job.⁶⁷ Of course, if an

⁶⁴ If there is no reasonable accommodation that allows the worker to continue to work, absent undue hardship, the employee may be qualified for leave as a reasonable accommodation if leave does not cause an undue hardship.

⁶⁵ 42 U.S.C. 2000gg–3.

⁶⁶ *Temporary*, Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/temporary> (“lasting for a limited time”) (last visited June 13, 2023). This definition is consistent with *Robert v. Bd. of Cnty. Comm’rs’ of Brown Cnty., Kan.*, 691 F.3d 1211, 1218 (10th Cir. 2012) which was cited in the House Report in the discussion of this term. H.R. Rep. No. 117–27, at n.109 (when determining whether a request for leave could be “reasonable” under the ADA, defining “temporary” as that the essential function can be resumed).

⁶⁷ See H.R. Rep. No. 117–27, pt. 1, at 5 (“When pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy. Ensuring that pregnant workers have access to reasonable accommodations will promote the economic well-being of working mothers and their families and promote healthy pregnancies.”); *id.* at 22 (“When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of

accommodation is sought that requires the temporary suspension of an essential function, regardless of the amount of time sought, the employer may raise the undue hardship defense.

The Commission also recognizes there may be physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions for which workers may seek the temporary suspension of an essential function when the worker is not currently pregnant. These conditions include pre-pregnancy limitations such as infertility, and post-pregnancy limitations such as acute cardio-vascular problems that are a consequence of the pregnancy. Although the length of pre- and post-partum physical or mental conditions will vary, the Commission proposes using “generally forty weeks” to measure whether the worker meets the “in the near future” requirement in the second definition of “qualified” in every situation where the reasonable accommodation sought under the PWFA is the temporary suspension of one or more essential functions.

The Commission’s decision is based on several factors. First, in the first year after childbirth, severe health conditions, including ones that may require the temporary suspension of an essential function, are common.⁶⁸ According to a Centers for Disease Control and Prevention (CDC) study, 53% of pregnancy-related deaths occurred from one week to one year after delivery, and 30% occurred one and one half months to one year post-partum.⁶⁹ Likely for similar reasons,

their babies.”); *id.* at 24 (“Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most.”); *id.* at 33 (“The PWFA is about ensuring that pregnant workers can stay safe and healthy on the job by being provided reasonable accommodations for pregnancy, childbirth, or related medical conditions. . . . The PWFA is one crucial step needed to reduce the disparities pregnant workers face by ensuring that pregnant women, and especially pregnant women of color, can remain safe and healthy at work.”).

⁶⁸ Susan Trost et al., *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017–2019*, Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health and Human Servs. (2022), <https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html>.

⁶⁹ *Id.* More deaths occurred seven to 365 days after delivery than occurred during delivery itself (53.3% v. 21.6%). The leading causes of death were mental health conditions, hemorrhage, cardiac and coronary conditions, infection, thrombotic embolism, and cardiomyopathy. The leading causes of death varied by race and ethnicity. For Black individuals, cardiac and coronary conditions were the leading causes of death; for White individuals and Hispanic individuals, the leading cause was mental health conditions; for Asian individuals, the leading cause of death was hemorrhage. The leading

thirty-five States and the District of Columbia provide twelve months of comprehensive Medicaid coverage after delivery, rather than sixty days.⁷⁰ Thus, allowing a worker to meet the second definition of “qualified” if they need an essential function temporarily suspended for generally forty weeks after return to work from childbirth (or for other reasons related to a known limitation) is a reasonable approximation of the period of time needed “in the near future” for conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and therefore is consistent with the purpose of the PWFA. Finally, in the Commission’s view, one definition for “in the near future” will allow for simplified administration.

The Commission emphasizes that the definition in this section does not mean that the essential function(s) must always be suspended for forty weeks, or that if an employee seeks the temporary suspension of an essential function(s) for forty weeks it must be automatically granted. The actual length of the temporary suspension of the essential function(s) will depend upon what the employee requires, and the covered entity always has available the defense that it would create an undue hardship. However, the mere fact that the temporary suspension of one or more essential functions is needed for any time period up to and including generally forty weeks will not, on its own, render a worker unqualified under the PWFA.

Further, the Commission recognizes that workers may need an essential function temporarily suspended because of pregnancy; may take leave to recover from childbirth; and, upon returning to work, may need the same essential function or a different one temporarily suspended due to a new or different physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. In keeping with the requirement that the determinations as to whether an individual is qualified under the PWFA should be made based on the situation at hand and the accommodation currently at issue,⁷¹ the

Commission proposes that the determination of “in the near future” would be made when the employee asks for each accommodation that requires the suspension of one or more essential functions. Thus, a worker who is three months pregnant seeking an accommodation of the temporary suspension of an essential function will meet the definition of “qualified” for “in the near future” because the pregnancy will be over in less than forty weeks. When the worker returns from leave after childbirth, if the worker needs an essential function temporarily suspended, they will meet the definition of “qualified” for “in the near future” if they could perform the essential function within forty weeks of the suspension. In other words, for “in the near future,” the forty weeks would restart once the pregnancy is over and the worker returns to work after leave.

In the Commission’s view, restarting the calculation of “generally forty weeks” in the definition of “qualified” for “in the near future” is necessary because it would often be difficult, if not impossible, for a pregnant employee to predict what their limitations (if any) will be after pregnancy. Before childbirth, they may not know whether, and if so, for how long, they will have a known limitation or need an accommodation after giving birth. They also may not know whether the accommodation after childbirth will require the temporary suspension of an essential function, and, if so, for how long. All of these questions may be relevant under the PWFA’s second definition of “qualified.”

Further, a rule that allows a covered entity to combine periods of the temporary suspension of essential function(s) during pregnancy and the post-partum period in order to determine if a worker is “qualified” would raise questions about, for example, whether the requests were close enough in time to be combined and whether the forty weeks should restart if a different essential function needs to be temporarily suspended. Determining where and how those lines should be drawn would require litigation regarding the term “qualified” and create confusion around implementation of the statute.

The Commission notes that leave related to recovery from pregnancy, childbirth, or related medical conditions does not count as time when an essential function is suspended and

thus is not relevant for the second prong of the definition of qualified. If an individual needs leave as a reasonable accommodation under the PWFA or, indeed, any reasonable accommodation other than the temporary suspension of an essential function, only the first definition of “qualified” is relevant. In the case of leave, the question would be whether the individual, after returning from the requested period of leave, would be able to perform the essential functions of the position with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated). Furthermore, for some workers, leave to recover from childbirth will not require a reasonable accommodation because they have a right to leave under Federal, State, or local law or as part of an employer policy. Thus, for the purpose of determining whether the employee is qualified under the second prong of “qualified” regarding the suspension of an essential function, the Commission does not intend for employers or workers to count time on leave for recovery from childbirth.⁷²

The Commission does not believe that its definition of “in the near future” will cause excessive difficulties for covered entities because the “generally forty weeks” time period is only to determine if the worker can be considered qualified under this definition. If the temporary suspension of the essential function causes undue hardship or (as explained in the next section) the temporary suspension of the essential function cannot be reasonably accommodated, the employer does not have to provide the reasonable accommodation.

The Commission seeks comment on the proposed definition of “in the near future” including (a) whether the definition of “in the near future” post-pregnancy should be one year rather than generally forty weeks; (b) whether periods of temporary suspension of an essential function during pregnancy and post-pregnancy should be combined, and, if so, how should that be done and what rule should be adopted to ensure that a pregnant worker is not required to predict what limitations they will experience after pregnancy given that a pregnant worker will not generally be

cause of death for Native American individuals was not reported due to small sample size.

⁷⁰ Centers for Medicare & Medicaid Services, U.S. Dep’t of Health and Human Servs., *States that have Expanded Postpartum Coverage*, (last visited July 19, 2023) <https://www.medicaid.gov/medicaid/quality-of-care/downloads/image-maternity-care-expansion.png>.

⁷¹ See 29 CFR part 1630 app. 1630.1 (“The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. The determination

should be based on the capabilities of the individual with the disability at the time of the employment decision, and not be based on speculation that the employee may become unable in the future”).

⁷² For additional information on how leave should be addressed under the PWFA, see *supra* *With or Without Reasonable Accommodation—Leave and infra* § 1636.3(h) *Particular Matters Regarding Leave as a Reasonable Accommodation*.

able to do so; and (c) whether there are alternative approaches that would more effectively ensure that workers are able to seek the accommodations they need while limiting the burden on covered entities.

1636.3(f)(2)(iii) Can Be Reasonably Accommodated

The proposed rule also explains that to satisfy the PWFA's second definition of "qualified," the covered entity must be able to reasonably accommodate the inability to perform one or more essential functions without undue hardship. For some positions, this may mean that one or more essential functions are temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of the job. For other jobs, some of the essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may be assigned other tasks to replace them. In yet other situations, one or more essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them, or the employee may participate in the employer's light or modified duty program.⁷³ Throughout this process, as with other reasonable accommodation requests, an employer may need to consider more than one alternative to identify a reasonable accommodation that does not pose an undue hardship. Depending on how the temporary suspension is accomplished, the covered entity may have to prorate or change a performance or production standard so that the accommodation is effective.⁷⁴

Example 1636.3 #8: One month into a pregnancy, Akira, a worker in a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of the essential functions of this job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to switch duties with another worker whose job does not require the same exposure but otherwise involves the same functions. There are numerous other tasks

that Akira could accomplish while not being exposed to the chemicals.

1. Known limitation: Akira has a need or a problem relating to maintaining the health of her pregnancy, which is a physical condition related to pregnancy; Akira needs a change or adjustment at work; Akira has communicated this information to her employer.

2. Qualified: Akira needs the temporary suspension of an essential function.

a. Akira's inability to perform the essential function is temporary.

b. Akira could perform the essential functions of her job in the near future because Akira needs an essential function suspended for less than forty weeks.

c. Akira's inability to perform the essential function may be reasonably accommodated. The employer can suspend the essential function that requires her to work with the chemicals and have her do the remainder of her job. Alternatively, Akira can perform the other tasks that are referenced or switch duties with another worker. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #9: Two months into a pregnancy, Lydia, a delivery driver, is told by her health care provider that she should not lift more than 20 pounds. Lydia routinely has to lift 30–40 pounds as part of the job. She discusses the limitation with her employer. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.

1. Known limitation: Lydia's lifting restriction is a physical condition related to pregnancy; she needs a change in work conditions; and she has communicated this information to the employer.

2. Qualified: Lydia needs the temporary suspension of an essential function.

a. Lydia's inability to perform the essential function is temporary.

b. Lydia could perform the essential functions of her job in the near future because Lydia needs an essential function suspended for less than forty weeks.

c. Lydia's need to temporarily suspend an essential function of her job may be reasonably accommodated through the existing light duty program. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

1636.3(g) Essential Functions

The proposed rule adopts the Commission's definition of "essential function" contained in the regulations implementing the ADA regulations: "the fundamental job duties of the employment position the individual . . . holds or desires," excluding "the marginal functions of the position."⁷⁵ Thus, in determining whether something is an essential function, the first consideration is whether employees in the position actually are required to

perform the function, and relevant evidence includes both the position description and information from incumbents (including the employee requesting the accommodation) about what they actually do on the job.⁷⁶

The Commission seeks comments on whether there are additional factors that should be considered in determining whether a function is essential for purposes of the PWFA.⁷⁷ For example, given that many, if not all, known limitations under the PWFA will be temporary, should the definition of "essential function" under the PWFA consider whether the function is essential to be performed by the worker in the limited time for which an accommodation will be needed.

1636.3(h) Reasonable Accommodation—Generally

42 U.S.C. 2000gg(7) states that the term "reasonable accommodation" has the meaning given to it in section 101 of the ADA and shall be construed as it is construed under the ADA and the Commission's regulations implementing the PWFA. As stated in the Appendix to the ADA Regulations, "[t]he obligation to make reasonable accommodation is a form of non-discrimination" and is therefore "best understood as a means by which barriers to the equal employment opportunity [of an employee or applicant with a known limitation under the PWFA] are removed or alleviated."⁷⁸ A modification or adjustment is reasonable if it "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible."⁷⁹ An accommodation also must be effective in meeting the needs of the employee or applicant, meaning it removes a workplace barrier and provides the individual with equal opportunity.⁸⁰

Under the PWFA, a reasonable accommodation has the same definition

⁷⁶ 29 CFR 1630.2(n); 29 CFR part 1630 app. 1630.2(n).

⁷⁷ See H.R. Rep. No. 117–27, pt. 1, at 28 (stating that the factors adopted by the EEOC to determine essential functions under the ADA are "instructive, although not determinative" for the PWFA).

⁷⁸ 29 CFR part 1630 app. 1630.9.

⁷⁹ See *supra* note 60.

⁸⁰ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 9 and 29 CFR part 1630 app. 1630.9 (providing that a reasonable accommodation "should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.").

⁷³ See H.R. Rep. No. 117–27, pt. 1, at 27 ("the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker 'unqualified. . . . there may be a need for a pregnant worker to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able.'").

⁷⁴ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 19.

⁷⁵ 29 CFR 1630.2(n).

as under the ADA.⁸¹ Therefore, like the ADA, reasonable accommodations under the PWFA include modifications or adjustments to the job application process that enable a qualified applicant with a known limitation to be considered for the position; modifications or adjustments to the work environment, or to the manner or circumstances under which the position is done to allow a person with a known limitation to perform the essential functions of the job; and modifications or adjustments that enable an employee with a known limitation to enjoy equal benefits and privileges of employment.⁸² Because the PWFA also provides for reasonable accommodations when a worker temporarily cannot perform one or more essential functions of a position but could do so in the near future, reasonable accommodation under the PWFA also includes modifications or adjustments that allow an employee with a known limitation to temporarily suspend one or more essential functions of the position.

Additions to the Definition of Reasonable Accommodation

Because 42 U.S.C. 2000gg(7) states that “reasonable accommodation”

should have the meaning of the term under the ADA and the regulations set forth in for the PWFA, the proposed rule takes the definition of “reasonable accommodation” provided in the regulations implementing the ADA⁸³ and makes five additions to apply it in the context of the PWFA.

First, the proposed rule replaces references to “individual with a disability” and similar terms with “employee with a known limitation” and similar terms.⁸⁴

Second, the proposed rule includes an addition to the ADA’s definition of reasonable accommodation that is required by the PWFA. As explained in the discussion of the term qualified employee above, the PWFA provides that the temporary suspension of one or more essential functions is a potential reasonable accommodation by defining “qualified employee” to include an employee who cannot perform one or more essential functions of the position for a temporary period, provided they could do so in the near future, and the inability to perform the essential function(s) can be reasonably accommodated without undue hardship. The proposed rule illustrates the implications, meaning, and application of this requirement.

Third, the proposed rule incorporates certain examples of accommodations long recognized by the EEOC as reasonable accommodations for individuals with disabilities but not explicitly included in the non-exhaustive examples of reasonable accommodation in the ADA regulation. These are discussed below in § 1636.3(i).

Fourth, in addition to noting paid leave (whether accrued, short-term disability, or another type of employer benefit) and unpaid leave as examples of reasonable accommodations, the proposed rule states that either type of leave to recover from childbirth is an example of a potential reasonable accommodation for pregnancy, childbirth, or related medical conditions. This is explained in more detail below.

Finally, the proposed rule provides details about potential reasonable accommodations related to lactation.

Alleviating Increased Pain or Risk to Health Due to the Known Limitation

Under the PWFA and the proposed rule, a worker may seek a reasonable accommodation in order to alleviate increased pain or increased risk to health that is attributable to the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that has been communicated to the employer (the known limitation).⁸⁵ When dealing with requests for accommodation concerning the alleviation of increased pain or increased risk to health associated with a known limitation, the goal is to provide an accommodation that allows the worker to alleviate the identified increase in pain or risk to health.

Example 1636.3 #10: Celia is a factory worker whose job requires her to move boxes that weigh 50 pounds regularly. Prior to her pregnancy, Celia occasionally felt pain in her knee when she walked for extended periods of time. After returning to work after having a cesarean section, Celia’s health care provider says she should limit the tasks that require moving boxes to no more than 30 pounds for three months because heavier lifting could increase the risk to her health and recovery. Celia can seek an accommodation that would help her lift between 30 and 50 pounds because it is needed for her known limitation related to childbirth. However, the PWFA would not require the employer to provide an accommodation regarding Celia’s knee pain because that situation is not attributable to Celia’s known limitation, unless there is evidence that the pain in walking was exacerbated by Celia’s pregnancy, childbirth, or related medical conditions. The employer may have accommodation responsibilities regarding Celia’s knee pain under the ADA.

Example 1636.3 #11: Lucille has opioid use disorder that she controls with medication. After giving birth, she experiences postpartum depression. As a result, she is put on an additional medication that she must take with food, and she starts therapy with a new provider. Under the PWFA, Lucille requests that she be allowed to take breaks to eat when she needs to take her medication and that she be allowed to use intermittent leave to attend her therapy appointments. Under the PWFA, the employer is required to provide the requested accommodations (or other reasonable ones) absent undue hardship. The employer does not have to provide an accommodation for Lucille’s underlying opioid use disorder under the

⁸¹ 42 U.S.C. 2000gg(7).

⁸² 29 CFR 1630.2(o)(1)(i–iii). The requirement for reasonable accommodations that provide for equal benefits and privileges is shorthand for the requirement that an accommodation should provide the individual with an equal employment opportunity (29 CFR part 1630 app. 1630.9). This requirement stems from the ADA’s prohibition on discrimination in “terms, conditions, and privileges of employment.” 42 U.S.C. 12112(a). The PWFA prohibits adverse action in the terms, conditions, or privileges of employment against a qualified employee for using or requesting an accommodation and Title VII—which applies to workers affected by pregnancy, childbirth, or related medical conditions—prohibits discrimination in the terms, conditions, and privileges of employment. 42 U.S.C. 2000e–2(a)(1). Based on the text of the PWFA, Title VII, and the requirement under the PWFA that reasonable accommodation has the same definition as in the ADA, the same requirement applies. Thus, a reasonable accommodation under the PWFA includes a change to allow employees affected by pregnancy, childbirth, or related medical conditions. nondiscrimination in the terms, conditions, or privileges of employment or, in shorthand, to enjoy equal benefits and privileges. See also EEOC Compliance Manual Section 613 *Terms, Conditions, and Privileges of Employment*, 613.1(a) (1982) (“‘terms, conditions, and privileges of employment’ are ‘to be read in the broadest possible terms’ and ‘a distinction is rarely made between terms of employment, conditions of employment, or privileges of employment’”), <https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment#:~:text=The%20following%20employment%20practices%20or%20activities%20which%20are,or%20activity%20is%20considered%20in%20its%20broad%20sense> [hereinafter *Compliance Manual on Terms, Conditions, and Privileges of Employment*].

⁸³ 29 CFR 1630.2(o).

⁸⁴ The proposed rule also deletes examples of reasonable accommodation that are unlikely to be relevant to the PWFA, i.e., “provision of qualified readers or interpreters.” A person covered by the PWFA who is blind or deaf who needs these reasonable accommodations because of their disability may be entitled to them under the ADA. Nothing added or deleted from the PWFA’s proposed list of reasonable accommodations is intended to alter the ADA’s standards. Nor does the exclusion of these reasonable accommodations mean that they could not be required under the PWFA in appropriate circumstances, such as when pregnancy exacerbates a pre-existing medical condition.

⁸⁵ Depending on the facts of the case, the accommodation sought will allow the employee to apply for the position, to perform the essential functions of the job, to enjoy equal benefits and privileges of employment, or allow the temporary suspension of an essential function of the job.

PWFA, although it may have accommodation responsibilities under the ADA.

Example 1636.3 #12: Jackie's position at a fabrication plant involves working with certain chemicals, which Jackie thinks is the reason she has a nagging cough and chapped skin on her hands. Once she becomes pregnant, Jackie seeks the accommodation of a temporary suspension of an essential function of working with the chemicals because the chemicals create an increased risk to her pregnancy. The employer provides the accommodation. After Jackie gives birth and returns to work, she no longer has any known limitations. Thus, she can be assigned to work with the chemicals again even if she would rather not do that work, because the PWFA only requires an employer to provide an accommodation that is needed due to the known limitation related to pregnancy, childbirth, or related medical conditions. Jackie's employer may also have accommodation responsibilities under the ADA.

Example 1636.3 #13: Margaret is a retail worker who is pregnant. Because of her pregnancy, Margaret feels pain in her back and legs when she has to move stacks of clothing from one area to the other, which is one of the essential functions of her position. She can still manage to move the clothes, but, because of the pain, she requests a cart to use when she is moving the garments. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation), absent undue hardship, because doing so accommodates Margaret's limitation arising out of her pregnancy. If Margaret also has wrist pain that is not caused or exacerbated by the pregnancy, Margaret's employer is under no obligation under the PWFA to provide an accommodation for the wrist pain because it is not related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. However, the employer may have accommodation responsibilities regarding Margaret's wrist pain under the ADA.

Particular Matters Regarding Leave as a Reasonable Accommodation

The Commission has long recognized the use of all forms of paid and unpaid leave as a potential reasonable accommodation under the ADA, including for part-time schedules.⁸⁶ Given Congress' extensive use of ADA terms and provisions in the PWFA—including specifically the definition of “reasonable accommodation”—the Commission proposes to include these potential reasonable accommodations in this proposal's definition of reasonable accommodation.

Leave, including intermittent leave, may be a reasonable accommodation even if the covered entity does not offer

it as an employee benefit.⁸⁷ If an employee requests leave as an accommodation or if there is no other reasonable accommodation that does not cause an undue hardship, the covered entity must consider providing leave as a reasonable accommodation under the PWFA, even if the employee is not eligible for leave under the employer's leave policy or the employee has exhausted the leave the covered entity provides as a benefit (including leave exhausted under a workers' compensation program, the FMLA, or similar State or local laws).⁸⁸

The proposed rule also provides that leave to recover from childbirth, miscarriage, stillbirth, or other related conditions is a potential reasonable accommodation (absent undue hardship).⁸⁹ The proposed rule further explains that workers protected by the PWFA must be permitted to choose whether to use paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to choose between these various types of leave.⁹⁰ However, as under the ADA, an employer is not required to provide additional paid leave under the PWFA beyond the amount to which the employee is otherwise entitled.

The Commission recognizes that there may be situations where an employer accommodates a pregnant employee with a stool or additional breaks or temporarily suspends one or more essential functions under the PWFA, and then the employee requests leave to recover from childbirth. In these situations, the covered entity should consider the request for the reasonable accommodation of leave to recover from childbirth in the same manner that it would any other request for leave as a

reasonable accommodation. This requires first considering whether the employee will be able to perform the essential functions of the position with or without a reasonable accommodation after the period of leave, or, if not, whether, after the period of leave, the employee will meet the second definition of “qualified” under the PWFA.

Under the ADA regulations, a reasonable accommodation cannot excuse an employee from complying with valid production standards that are applied uniformly to all employees.⁹¹ However, for example, when the reasonable accommodation is leave, the employee may not be able to meet a production standard during the period of leave or, depending on the length of the leave, meet that standard for a defined period of time (e.g., the production standard measures production in one year and the employee was on leave for four months). Thus, if the reasonable accommodation is leave, the production standard may need to be prorated to account for the reduced amount of time the employee worked.⁹² For example, if a call center employee with a known limitation requests and is granted two hours of leave in the afternoon for rest, the employee's required number of calls may need to be reduced proportionately, as could the employee's pay. Alternatively, the accommodation could allow for the employee to make up the time at a different time during the day so that the employee's production standards and pay would not be reduced.

As under the ADA, an employee with a known limitation who is granted leave as a reasonable accommodation under the PWFA is entitled to return to their same position unless the employer demonstrates that holding open the position would impose an undue hardship.⁹³ Likewise, an employer must continue an employee's health insurance benefits during their leave period to the extent that it does so for other employees in a similar leave status. When the employee is ready to return to work, the employer must allow the individual to return to the same

⁸⁷ See *Technical Assistance on Employer-Provided Leave*, *supra* note 55, at text above Example 4.

⁸⁸ *Id.* Of course, if an employee has a right to leave under the FMLA, an employer policy, or a State or local law, the employee is entitled to leave regardless of whether they request leave as a reasonable accommodation. An employee who needs leave beyond what they are entitled to under those laws or policies will need to request leave as a reasonable accommodation.

⁸⁹ H.R. Rep. No. 117–27, pt. 1, at 29 (noting that “leave is one possible accommodation under the PWFA, including time off to recover from delivery”).

⁹⁰ A failure to allow a worker affected by pregnancy, childbirth, or related medical conditions to use paid or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to do so may be a violation of Title VII as well.

⁹¹ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at text accompanying n.14.

⁹² *Id.* at Question 19.

⁹³ See *id.* at Question 18. As under the ADA, if an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue their leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

⁸⁶ See 29 CFR 1630.2(o)(2)(ii); 29 CFR part 1630 app. 1630.2(o); *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at text accompanying nn.48–49.

position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (*i.e.*, the employee can perform the essential functions of the position with or without reasonable accommodation or if the employee meets the PWFA's second definition of qualified).⁹⁴

Under the PWFA, an employer may deny a reasonable accommodation if it causes an undue hardship—a significant difficulty or expense. Thus, if an employer can demonstrate that the leave requested as a reasonable accommodation poses an undue hardship—for example, because of its length, frequency, or unpredictable nature, or because of another factor—it may lawfully deny the requested leave under the PWFA.

Ensuring That Workers Are Not Penalized for Using Reasonable Accommodations

Covered entities making reasonable accommodations must ensure that their ordinary workplace policies or practices do not operate to penalize employees for utilizing such accommodations. For example, when a reasonable accommodation involves a pause in work—such as a break, a part-time or other reduced work schedule, or leave—an employee cannot be penalized for failing to perform work during such a non-work period. Similarly, policies that monitor workers for time on task (whether through automated means or otherwise) and penalize them for being off task may need to be modified to avoid imposing penalties for non-work periods that the employee was granted as a reasonable accommodation. Likewise, if an accommodation under the PWFA involves the temporary suspension of an essential function of the position, a covered entity may not penalize an employee for not performing the essential function that has been temporarily suspended.

Penalizing an employee in these situations would be retaliation for the employee's use of a reasonable accommodation to which they are entitled under the law.⁹⁵ It would also render the accommodation ineffective, thus making the covered entity liable for failing to provide a reasonable accommodation.⁹⁶ The Commission seeks comment on whether there are other situations where this may apply and whether examples would be helpful to illustrate this point.

Personal Use

The obligation to provide reasonable accommodation under the PWFA, like the ADA, does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a known limitation. However, adjustments or modifications that might otherwise be considered personal may be required as reasonable accommodations “where such items are specifically designed or required to meet job-related rather than personal needs.”⁹⁷

For example, if a warehouse employee is pregnant and is having difficulty sleeping, the PWFA would not require as a reasonable accommodation for the employer to provide a pregnancy pillow and a white noise machine to help with sleeping because they are strictly for an employee's personal use. However, allowing the employee some flexibility in start times for the workday may be a reasonable accommodation because it modifies an employment-related policy. In a different context, if the employee who is having trouble sleeping works at a job that involves sleeping between shifts on-site, such as a job as a firefighter, sailor, emergency responder, health care worker, or truck driver, a pregnancy pillow may be a reasonable accommodation because the employee is having a difficult time sleeping because of the pregnancy, the employer is providing the place and items necessary for sleeping, and the employee needs a modification of the items and place.

All Services and Programs

Under the PWFA, as under the ADA, the obligation to make reasonable accommodation applies to all services and programs and to all non-work facilities provided or maintained by an employer for use by its employees so that employees or applicants with known limitations can enjoy equal benefits and privileges of employment.⁹⁸ Accordingly, the obligation to provide reasonable accommodation, barring undue hardship, includes providing access to employer-sponsored placement or counseling services, such as employee assistance programs, and to employer-provided cafeterias, lounges, gymnasiums, auditoriums, transportation, and to similar facilities, services, or programs.⁹⁹

Interim Reasonable Accommodation

Providing an interim reasonable accommodation is a best practice under the PWFA in certain circumstances.¹⁰⁰ An employee may have an urgent need for a reasonable accommodation due to the nature or sudden onset of a known limitation under the PWFA. For example, a pregnant employee may experience vaginal bleeding, which may indicate a more serious problem. Upon discovering the bleeding, the employee may ask for immediate leave to go see their health care provider. The employee then may need additional leave, telework, rest breaks, or a later start time, beginning immediately. In this situation, a covered entity, as a best practice, should consider providing an interim reasonable accommodation that meets the employee's needs while the interactive process is conducted. Similarly, an employee recovering from childbirth may ask for the reasonable accommodation of more frequent or longer bathroom breaks, and the covered entity should consider meeting that need, as an interim reasonable accommodation, before the conclusion of the interactive process. Covered entities that do not provide interim reasonable accommodations are reminded that an unnecessary delay in the interactive process or providing a reasonable accommodation may lead to liability under 42 U.S.C. 2000gg–1(1) even if the reasonable accommodation is eventually granted, as explained in detail in § 1636.4(a) of the proposed regulation.

1636.3(i) Reasonable Accommodation—Examples

The definition of “reasonable accommodation” in the proposed PWFA rule incorporates certain accommodations long recognized by the EEOC as reasonable accommodations but not explicitly included in the non-exhaustive examples of reasonable accommodations in the ADA regulation. The inclusion of these possible reasonable accommodations in the proposed regulation also helps to meet the requirement in 42 U.S.C. 2000gg–3 that EEOC's regulations provide examples of reasonable accommodations addressing known

¹⁰⁰ The same is true under the ADA. EEOC, *Final Report on Best Practices for Employment of People with Disabilities in the State Government* II.B.1 (2005), <http://www.eeoc.gov/laws/guidance/final-report-best-practices-employment-people-disabilities-state-government> [hereinafter *Best Practices State Government*] (noting that “[t]emporary accommodations may enable a worker who has made a request for reasonable accommodation under the ADA to continue working while a final determination of whether to grant or deny the accommodation is being made”).

⁹⁴ *Id.* at Question 21.

⁹⁵ *Id.* at Question 19; see also 2000gg–1(5), 2000gg–2(f) and the accompanying regulations.

⁹⁶ *Id.* at Question 19.

⁹⁷ 29 CFR part 1630 app. 1630.9.

⁹⁸ *Id.*

⁹⁹ *Id.*

limitations related to pregnancy, childbirth, or related medical conditions. The Commission notes that an employee or applicant may need more than one of these accommodations at the same time or as a pregnancy progresses.

- **Frequent breaks.** The EEOC has long construed the ADA to require additional breaks as a reasonable accommodation, absent undue hardship.¹⁰¹ For example, a pregnant employee might need more frequent breaks due to shortness of breath; an employee recovering from childbirth might need more frequent restroom breaks or breaks due to fatigue because of recovery from childbirth; or an employee who is lactating might need more frequent breaks for water or food.¹⁰²

- **Sitting/Standing.** The Commission has recognized the provision of seating for jobs that require standing and standing for those that require sitting as a potential reasonable accommodation under the ADA.¹⁰³ Reasonable accommodation of these needs might include, but is not limited to, policy modifications and the provision of equipment, such as seating, a sit/stand desk, or anti-fatigue floor matting, among other possibilities.

- **Schedule changes, part-time work, and paid and unpaid leave.** The Appendix to the ADA Regulations explains that permitting the use of paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or providing additional unpaid leave is a potential reasonable accommodation under the ADA.¹⁰⁴ Additionally, the Appendix recognizes that leave for medical treatment can be a reasonable accommodation.¹⁰⁵ By way of example, an employee could need a schedule

change to attend a round of IVF appointments to get pregnant; a part-time schedule to address fatigue during pregnancy; or additional unpaid leave for recovery from childbirth, medical treatment, post-partum treatment or recuperation related to a cesarean section, episiotomy, infection, depression, thyroiditis, or preeclampsia.

- **Telework.** Telework or “work from home” has been recognized by the EEOC as a potential reasonable accommodation.¹⁰⁶ Telework could be used to accommodate, for example, a period of bed rest or a mobility impairment.

- **Parking.** Providing reserved parking spaces if the employee is otherwise entitled to use employer-provided parking may be reasonable accommodation to assist a worker who is experiencing fatigue or limited mobility because of pregnancy, childbirth, or related medical conditions.

- **Light duty.** Assignment to light duty or placement in a light duty program has been recognized by the EEOC as a potential reasonable accommodation under the ADA, even if the employer’s light duty positions are normally reserved for those injured on-the-job and the person with a disability seeking a light duty position does not have a disability stemming from an on-the-job injury.¹⁰⁷

- **Making existing facilities accessible or modifying the work environment.**¹⁰⁸ Examples of reasonable accommodations might include allowing access to an elevator not normally used by employees; moving the employee’s workspace closer to a bathroom; providing a fan to regulate temperature; or moving a pregnant or lactating employee to a different workspace to avoid exposure to chemical fumes. As noted in the proposed regulation, this also may include modifications of the work environment to allow an employee to pump breast milk at work.¹⁰⁹

- **Job restructuring.**¹¹⁰ Job restructuring might involve, for example, removing a marginal function that required a pregnant employee to climb a ladder or occasionally retrieve boxes from a supply closet.

- **Temporarily suspending one or more essential functions.** For some positions, this may mean that one or more essential functions are temporarily suspended, and the employee continues to perform the remaining functions of the job. For others, the essential function(s) will be temporarily suspended, and the employee may be assigned other tasks. For others, the essential function(s) will be temporarily suspended, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them. For yet others, the essential function(s) will be temporarily suspended, and the employee will participate in the employer’s light or modified duty program.

- **Acquiring or modifying equipment, uniforms, or devices.**¹¹¹ Examples of reasonable accommodations might include providing uniforms and equipment, including safety equipment, that account for changes in body size during and after pregnancy, including during lactation; providing devices to assist with mobility, lifting, carrying, reaching, and bending; or providing an ergonomic keyboard to accommodate pregnancy-related hand swelling or tendonitis.

- **Adjusting or modifying examinations or policies.**¹¹² Examples of reasonable accommodations include

Nursing Mothers Act (PUMP Act) (Pub. L. 117–328 Division KK). The law extended coverage of the Fair Labor Standards Act’s (FLSA) protections for nursing employees to apply to most workers. The FLSA provides most workers with the right to break time and a place to pump breast milk at work. 29 U.S.C. 218d; U.S. Dep’t of Lab., Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work (Jan. 2023), <https://www.dol.gov/agencies/whd/pump-at-work.2023>, <https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers>. Employees who are not covered by the PUMP Act or employees who seek to pump longer than one year may seek reasonable accommodations regarding pumping under the PWFA. Further, employees who are covered by the PUMP Act may seek additional related accommodations, such as access to a sink, a refrigerator, and electricity. See, e.g., U.S. Dep’t of Lab., *Notice on Reasonable Break Time for Nursing Mothers*, 75 FR 80073, 80075–76 (Dec. 21, 2010) (discussing space requirements and noting factors such as the location of the area for pumping compared to the employee’s workspace, the availability of a sink and running water, the location of a refrigerator to store milk, and electricity may affect the amount break time needed). The PUMP Act is enforced by the Department of Labor, not the EEOC.

¹¹⁰ 29 CFR 1630.2 (o)(2)(ii).

¹¹¹ *Id.*

¹¹² *Id.*

¹⁰¹ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 22; see also *See* H. R. Rep. 117–27, pt. 1, at 22; 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.).

¹⁰² Breaks may be paid or unpaid depending on the employer’s normal policies and other applicable laws. Breaks may exceed the number that an employer normally provides because reasonable accommodations may require an employer to alter its policies, barring undue hardship.

¹⁰³ See *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at General Principles, Example B; see also H.R. Rep. No. 117–27, pt. 1, at 11, 22, 29.

¹⁰⁴ 29 CFR part 1630 app. 1630.2(o); see also *Technical Assistance on Employer-Provided Leave*, *supra* note 55. Additionally, an employer prohibiting a worker from using accrued leave for pregnancy-related reasons or while allowing other workers to use leave for similar reasons may also violate Title VII.

¹⁰⁵ 29 CFR part 1630 app. 1630.2(o).

¹⁰⁶ See, e.g., *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 34.

¹⁰⁷ EEOC, *Enforcement Guidance: Workers’ Compensation*, *supra* note 20, at Question 28; see also 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.) (“What are other types of reasonable accommodations that pregnant workers may request? Light duty is a common example.”); *id.* at S7,049 (statement of Sen. Patty Murray) (noting that workers need accommodations because “their doctors say they need to avoid heavy lifting”); H.R. Rep. 117–27, pt. 1, at 14–17 (discussing *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015), a case involving light duty for pregnant workers).

¹⁰⁸ 29 CFR 1630.2(o)(1)(ii); (2)(i).

¹⁰⁹ On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for

allowing workers with a known limitation to postpone an examination that requires physical exertion. Adjustments to policies also could include increasing the time or frequency of breaks to eat or drink or to use the restroom.

The proposed PWFA rule includes these additional examples in the regulatory language.

Below the Commission provides some examples of types of reasonable accommodations and how they can be analyzed. The Commission seeks comment on whether more examples would be helpful and, if so, the types of conditions and accommodations that should be the focus of the additional examples.

Examples of Types of Reasonable Accommodations

Example 1636.3 #14/Telework: Gabriela, a billing specialist in a doctor's office, experiences nausea and vomiting beginning in her first trimester of pregnancy. Her doctor believes the nausea and vomiting will pass within a couple of months. Because the nausea makes commuting extremely difficult, Gabriela makes a verbal request to her manager stating she has nausea and vomiting due to her pregnancy and requests that she be permitted to work from home for the next two months so that she can avoid the difficulty of commuting. The billing work can be done from her home or in the office.

1. Known limitation: Gabriela's nausea and vomiting is a physical condition related to pregnancy; Gabriela needs an adjustment or change at work; Gabriela has communicated the information to the employer.

2. Qualified: Gabriela can do the billing work with the reasonable accommodation of telework.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #15/Temporary Suspension of an Essential Function: Nisha, a nurse assistant working in a large elder care facility, is advised in the fourth month of pregnancy to stop lifting more than 25 pounds for the rest of the pregnancy. One of the essential functions of the job is to assist patients in dressing and bathing, and moving them from or to their beds, tasks that typically require lifting more than 25 pounds. Nisha sends an email to human resources asking that she not be required to lift more than 25 pounds for the remainder of her pregnancy and requesting a place in the established light duty program under which workers who are hurt on the job take on different duties while coworkers take on their temporarily suspended duties.

1. Known limitation: Nisha's lifting restriction is a physical condition related to pregnancy; Nisha needs an adjustment or change at work; Nisha has communicated that information to the employer.

2. Qualified: Nisha is asking for the suspension of an essential function. The suspension is temporary, and Nisha could perform the essential functions of the job "in

the near future" (generally within forty weeks). It appears that the inability to perform the function can be reasonably accommodated through its temporary suspension and Nisha's placement in the established light duty program.

3. The employer must grant the reasonable accommodation of temporarily suspending the essential function, or another reasonable accommodation, absent undue hardship. As part of the temporary suspension, the employer may assign Nisha to the light duty program.

Example 1636.3 #16: Same facts as above but the employer establishes the light duty program is limited to 10 slots and that all 10 slots are filled for the next 6 months. In these circumstances, the employer must consider other possible reasonable accommodations, such as the temporary suspension of an essential function without assigning Nisha to the light duty program, or job restructuring outside of the established light duty program. If such accommodations cannot be provided without undue hardship, then the employer must consider a temporary reassignment to a vacant position for which Nisha is qualified, with or without reasonable accommodation. For example, if the employer has a vacant position that does not require lifting patients which Nisha could perform with or without a reasonable accommodation, the employer must offer her the temporary reassignment as a reasonable accommodation, absent undue hardship.

Example 1636.3 #17/Assistance with Performing an Essential Function: Mei, a warehouse worker, requests via her employer's online accommodation process that a dolly be provided to assist her in moving items that are bulky to accommodate her post-cesarean section medical restrictions for three months.

1. Known Limitation: Mei's need for assistance in moving bulky items is a physical condition related to childbirth; Mei needs an adjustment or change at work; Mei has communicated this information to the employer.

2. Qualified: Mei could perform the essential functions of her position with the reasonable accommodation of a dolly.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #18/Appropriate Uniform and Safety Gear: Ava, a pregnant police officer, asks their union representative for help getting a larger size uniform and larger size bullet proof vest in order to cover their growing pregnancy. The union representative asks management for an appropriately sized uniform and vest for Ava.

1. Known Limitation: Ava's inability to wear the standard uniform and safety gear is a physical condition related to pregnancy; Ava needs an adjustment or change at work; Ava's representative has communicated this information to the employer.

2. Qualified: Ava is qualified with the reasonable accommodation of appropriate gear.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #19/Temporary Suspension of Essential Function(s): Darina,

a pregnant police officer in the third month of pregnancy, talks to human resources about being taken off of patrol and put on light duty for the remainder of her pregnancy to avoid physical altercations such as subduing suspects that may harm her pregnancy. The department has an established light duty program that it uses for officers with injuries that occurred on the job.

1. Known Limitation: Darina has a need or a problem related to maintaining the health of her pregnancy; Darina needs an adjustment or change at work; Darina has communicated this information to the employer.

2. Qualified: The suspension of the essential functions of patrol duties is temporary and could end "in the near future" (within generally forty weeks) And it appears that the temporary suspension of the essential function can be accommodated through the light duty program.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship. In determining if there is an undue hardship, the employer cannot rely on the fact that this type of modification is normally reserved for those with on-the-job injuries. The fact that the employer provides this type of modification for other employees points to this not being an undue hardship.

Example 1636.3 #20/Temporary Suspension of Essential Function(s): Rory works in a fulfillment center where she is usually assigned to a line where she has to move packages that weigh 20 pounds. After returning from work after giving birth, Rory has a lifting restriction of 10 pounds due to sciatica during her pregnancy. The restriction is for 12 weeks. The employer does not have an established light duty program. There are other lines in the warehouse that do not require lifting more than 10 pounds and some of the packages on Rory's usual line weigh less than 10 pounds.

1. Known Limitation: Rory has a known limitation related to pregnancy, childbirth, or a related medical condition.

2. Qualified: The suspension of the essential function of lifting packages that weigh up to 20 pounds is temporary and Rory could be able to perform the essential function in the near future. It appears that the temporary suspension of the essential function could be accommodated by temporarily suspending the requirement that Rory lift more than 10 pounds or by assigning her to a different line.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #21/Unpaid Leave: Tallah, a newly hired cashier at a small bookstore, has a miscarriage in the third month of pregnancy and asks a supervisor for ten days of leave to recover. As a new employee, Tallah has only earned 2 days of paid leave. The employer is not covered by the FMLA and does not have a company policy regarding the provision of unpaid leave, but Tallah is covered by the PWFA.

1. Known limitation: Tallah's need to recover from the miscarriage is a physical or mental condition related to pregnancy or arising out of a medical condition related to

pregnancy; Tallah needs an adjustment or change at work; Tallah has communicated this information to the employer.

2. Qualified: After the reasonable accommodation of leave, Tallah will be able to do the essential functions of the position with or without accommodation.

3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example 1636.3 #22/Unpaid Leave for Prenatal Appointments: Margot started working at a retail store shortly after she became pregnant. She has an uncomplicated pregnancy. Because she has not worked at the store very long, she has earned very little leave and is not covered by the FMLA. In her fifth month of pregnancy, she asks her supervisor for the reasonable accommodation of unpaid time off beyond the leave she has earned to attend her regularly scheduled prenatal appointments.

1. Known limitation: Margot's need to attend health care appointments is a need or a problem related to maintaining her health or the health of her pregnancy; Margot needs an adjustment or change at work; Margot has communicated the information to the employer.

2. Qualified: Margot can do her job with the reasonable accommodation of leave to attend health care appointments.

3. The employer must grant the accommodation of unpaid time off (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #23/Unpaid Leave for Recovery from Childbirth: Sofia, a custodian, is pregnant and will need six to eight weeks of leave to recover from childbirth. Sofia is nervous about asking for leave so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy but no policy for longer periods of leave. Sofia does not qualify for FMLA leave.

1. Known limitation: Sofia's need to recover from childbirth is a physical condition; Sofia needs an adjustment or change at work; Sofia's representative has communicated this information to the employer.

2. Qualified: After the reasonable accommodation of leave, Sofia will be able to do the essential functions of the position.

3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #24/Unpaid Leave for Medical Appointments: Taylor, a newly hired member of the waitstaff, requests time off to attend therapy appointments for postpartum depression. As a new employee, Taylor has not yet accrued sick or personal leave and is not covered by the FMLA. Taylor asks her manager if there is some way that she can take time off.

1. Known limitation: Taylor's postpartum depression is a medical condition related to pregnancy, and she is seeking health care; Taylor needs an adjustment or change at work; Taylor has communicated this information to the employer.

2. Qualified: Taylor can do the essential functions of the job with a reasonable

accommodation of time off to attend the therapy appointments.

3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example 1636.3 #25/Unpaid Leave or Schedule Change: Claudine is six months pregnant and needs to have regular check-ups. The clinic where Claudine gets her health care is an hour drive away, and they frequently get backed up and she has to wait for her appointment. Depending on the time of day, between commuting to the appointment, waiting for the appointment, and seeing her provider, Claudine may miss all or most of an assigned day at work. Claudine is not covered by the FMLA and does not have any sick leave left. Claudine asks human resources for a reasonable accommodation such as time off or changes in scheduling so she can attend her medical appointments.

1. Known limitation: Claudine needs health care related to her pregnancy; Claudine needs an adjustment or change at work; Claudine has communicated that information to the employer.

2. Qualified: Claudine can do the essential functions of the job with a reasonable accommodation of time off or a schedule change to attend medical appointments.

3. The employer must grant the accommodation of time off or a schedule change (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #26/Telework: Raim, a social worker, is in the seventh month of pregnancy and is very fatigued as a result. She asks her supervisor if she can telework and see clients virtually so she can rest between appointments.

1. Known limitation: Raim's fatigue is a physical condition related to pregnancy; Raim needs an adjustment or change at work; Raim has communicated that information to the employer.

2. Qualified: Assuming the appointments can be conducted virtually, Raim can perform the essential functions of her job with the reasonable accommodation of working virtually. If there are certain appointments that must be done in person, the reasonable accommodation could be a few days of telework a week and then other accommodations that would give Raim time to rest, such as assigning Raim in-person appointments at times when traffic will be light so that they are easy to get to or setting up Raim's assignments so that on the days when she has in-person appointments she has breaks between them. Or the reasonable accommodation could be the temporary suspension of the essential function of in-person appointments.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #27/Temporary Workspace/Possible Temporary Suspension of an Essential Function: Brooke, a pregnant research assistant in her first trimester of pregnancy, asks the lead researcher on the project for a temporary workspace that would allow her to work in a well-ventilated area because her work involves hazardous

chemicals that her health care provider has told her to avoid. She also points out that there are several research projects she can work on that do not involve exposure to hazardous chemicals.

1. Known limitation: Brooke's need to avoid the chemicals is a physical or mental condition related to maintaining the health of her pregnancy; Brooke needs a change or adjustment at work; Brooke has communicated this information to the employer.

2. Qualified: If working with hazardous chemicals is an essential function of the job, Brooke may be able to perform that function with the accommodation of a well-ventilated work area. If providing a well-ventilated work area would be an undue hardship, Brooke could still be qualified with the temporary suspension of the essential function of working with the hazardous chemicals because Brooke's inability to work with hazardous chemicals is temporary, and Brooke could perform the essential functions in the near future (within generally forty weeks). And it appears that her need to avoid exposure to hazardous chemicals could also be accommodated by allowing her to focus on the other research projects.

3. The employer must provide an accommodation such as a well-ventilated space or another reasonable one, absent undue hardship. If the employer cannot accommodate Brooke in a way that allows Brooke to continue to perform the essential functions of the position, the employer must consider alternative reasonable accommodations, including temporarily suspending one or more essential function(s), absent undue hardship.

Example 1636.3 #28/Temporary Transfer to Different Location: Katherine, a budget analyst who has cancer, is also pregnant, which creates complications for her treatment. She asks the manager for a temporary transfer to an office in a larger city that has a medical center that can address her medical needs due to the combination of cancer and pregnancy.

1. Known limitation: Katherine has a need or problem related to maintaining her health or the health of her pregnancy; Katherine needs a change or adjustment at work; Katherine has communicated that information to the employer.

2. Qualified: Katherine is able to do the essential functions of her position with the reasonable accommodation of a temporary transfer to a different location.

3. As under the ADA, a PWFA reasonable accommodation can include a workplace change to facilitate medical treatment, including accommodations such as leave, a schedule change, or a temporary transfer to a different work location needed in order to obtain treatment. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #29/Pumping Breast Milk: Salma gave birth thirteen months ago and wants to be able to pump breast milk at work. Salma works at an employment agency that sends her to different jobs for a day or week at a time. Salma asks the person at the agency who makes her assignments to only assign her to employers who will allow her to take a break to pump breast milk at work.

1. Known limitation: Salma's need to express breast milk is a physical condition related to lactation which is a related medical condition; Salma needs a change or adjustment at work; Salma has communicated this information to the covered entity.

2. Qualified: Salma is able to perform the functions of the jobs to which she is assigned with the reasonable accommodation of being assigned to workplaces that will allow her to pump at work.

3. The agency must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #30/Additional Breaks: Afefa, a pregnant customer service agent, requests two additional 10-minute rest breaks and additional bathroom breaks as needed during the workday. The employer determines that these breaks would not pose an undue hardship and grants the request. Because of the additional breaks, Afefa responds to three fewer calls during a shift. Afefa's supervisor should evaluate her performance taking into account her productivity while on duty, excluding breaks. Penalizing an employee for failing to meet production standards due to receipt of additional breaks as a reasonable accommodation would render the additional breaks an ineffective accommodation. It also may constitute retaliation for use of a reasonable accommodation. However, if there is evidence that Afefa's lower production was due not to the additional breaks, but rather to misconduct (for example, if she has frequent and unexcused absences to make or receive personal phone calls) or other performance issues, the employer may consider the lower production levels consistent with the employer's production and performance standards.

1636.3(j) Undue Hardship

The PWFA at 42 U.S.C. 2000gg(7) uses the definition of "undue hardship" from section 101 of the ADA. The PWFA provides that the term shall be construed under the PWFA as it is under the ADA and as set forth in these regulations. The proposed rule, at (j)(1) of this paragraph, reiterates the definition of undue hardship provided in the ADA regulations, which explains that undue hardship means significant difficulty or expense incurred by a covered entity. The proposed rule then, at (j)(2) of this paragraph, outlines some factors to be considered when determining if undue hardship exists.¹¹³

Consistent with the ADA, a covered entity that claims that a reasonable accommodation will cause an undue hardship must consider whether there are other reasonable accommodations it can provide, absent undue hardship.¹¹⁴ Additionally, if the employer can only provide a part of the reasonable

accommodation absent undue hardship—for example, the employer can provide six weeks of leave absent undue hardship but the eight weeks that the employee is seeking would cause undue hardship—the employer must provide the reasonable accommodation up to the point of creating an undue hardship. Thus, in the example, the employer would have to provide the six weeks of leave and then consider if there are other reasonable accommodations it could provide that would not cause an undue hardship.

Example 1636.3 #31/Undue Hardship: Patricia, a convenience store clerk, requests that she be allowed to go from working full-time to part-time for the last 3 months of her pregnancy due to extreme fatigue. The store assigns two clerks per shift, and if Patricia's hours are reduced, the other clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Based on these facts, the employer likely can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce Patricia's hours. The employer, however, should explore whether any other reasonable accommodation will assist Patricia without causing undue hardship, such as providing a stool and allowing rest breaks throughout the shift.

Example 1636.3 #32/Undue Hardship: Shirin, a dental hygienist who is undergoing IVF treatments, is fatigued and needs to attend medical appointments near her house every other day. She asks her supervisor if she can telework for the next 3 months. Full-time telework may be an undue hardship for the employer because Shirin's essential functions include treating patients at the dental office. However, the employer must consider other reasonable accommodations, such as part-time telework while Shirin can perform the billing functions of her job, a schedule that would allow Shirin breaks between patients, part-time work, or a reduced schedule.

An employer's claim that the accommodation a worker seeks would cause a safety risk to co-workers or clients will be assessed under the PWFA's undue hardship standard. For example, consider a pregnant worker in a busy fulfillment center that has narrow aisles between the shelves of products. The worker asks for the reasonable accommodation of a cart to use while they are walking through the aisles filling orders. The employer's claim that the aisles are too narrow and its concern for the safety of other workers being bumped by the cart would be a defense based on undue hardship, specifically § 1636.3(j)(2)(v) ("the impact of the accommodation upon the operation of the facility,

including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."'). As with other requested reasonable accommodations, if a particular reasonable accommodation causes an undue hardship because of safety, the employer must consider if there are other reasonable accommodations that would not do so. Importantly, claims by employers that workers create a safety risk merely by being pregnant (as opposed to a safety risk that stems from a pregnancy-related limitation) should be addressed under Title VII's bona fide occupational qualification (BFOQ) standard and not under the PWFA.¹¹⁵

1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function

To address that under the PWFA an employer may have to accommodate an employee's temporary inability to perform an essential function, the proposed rule adds additional factors that may be considered when determining if the temporary suspension of an essential function causes an undue hardship. These additional factors include consideration of the length of time that the employee or applicant will be unable to perform the essential function(s); whether, through the methods listed in 1636.3(f)(2)(iii) (describing potential reasonable accommodations related to the temporary suspension of essential functions) or otherwise, there is work for the employee or applicant to accomplish; the nature of the essential function, including its frequency; whether the covered entity has provided other employees or applicants in similar positions who are unable to perform essential function(s) of their positions with temporary suspensions of those functions and other duties; if necessary, whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and whether the

¹¹⁵ See, e.g., *UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women); *Everts v. Sushi Brokers LLC*, 247 F. Supp. 3d 1075, 1082–83 (D. Ariz. 2017) (relying on *Johnson Controls* and denying BFOQ in a case regarding a pregnant worker as a restaurant server noting that "[u]nlike cases involving prisoners and dangers to customers where a BFOQ defense may be colorable, the present situation is exactly the type of case that Title VII guards against"); *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201, 1214 (W.D. Mo. 2014) (relying on *Johnson Controls* and denying a BFOQ allegedly in place for the "privacy" and "safety" of women workers); *Enforcement Guidance on Pregnancy Discrimination*, supra note 11, at I(B)(1)(c).

¹¹³ 29 CFR 1630.2(p).

¹¹⁴ *Enforcement Guidance on Reasonable Accommodations*, supra note 44, at text after n.116.

essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

As with other reasonable accommodations, if the covered entity can establish that accommodating a worker's temporary suspension of an essential function(s) would impose an undue hardship if extended beyond a certain period of time, the covered entity would only be required to provide that accommodation for the period of time that it does not impose an undue hardship. For example, consider the situation where an employee seeks to have an essential function suspended for six months. The employer can go without the function being done for four months, but after that, it will be an undue hardship. The employer must accommodate the worker's inability to perform the essential function for the four months and then consider whether there are other reasonable accommodations that it can provide, absent undue hardship.

1636.3(j)(4) Undue Hardship—Predictable Assessments

The proposed rule adds to the definition of “undue hardship” a paragraph titled “predictable assessments.” The Commission anticipates that many accommodations sought under the PWFA will be for modest or minor changes in the workplace for limitations that will be temporary. Without the accommodation, a pregnant worker may quit their job or risk their health, thereby frustrating the purpose of the Act. Thus, in the proposed regulation, the Commission identifies a limited number of simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by an employee due to pregnancy.

Under the ADA, the Commission has determined that certain conditions will, in virtually all cases, result in a determination of coverage as disabilities.¹¹⁶ In a similar manner, the Commission seeks to improve how quickly employees will be able to receive certain simple, common accommodations for pregnancy under the PWFA and to reduce litigation. The identification of certain modifications as “predictable assessments” does not alter the definition of undue hardship or deprive a covered entity of the opportunity to bring forward facts to demonstrate a proposed accommodation

imposes an undue hardship for its business under its own particular circumstances. Instead, it explains that in virtually all cases a limited number of simple modifications are reasonable accommodations that do not impose undue hardship when requested by an employee due to pregnancy.

These modifications are: (1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, and (4) allowing an employee breaks, as needed, to eat and drink.¹¹⁷

The proposed rule includes this addition after reviewing the information provided by legislators and congressional witnesses that these changes are regularly requested by pregnant workers and that in practice these modifications are virtually always reasonable accommodations that do not impose an undue hardship.¹¹⁸ Additionally, certain State laws that are analogous to the PWFA single out these modifications as ones that cannot be challenged as an undue hardship or where different rules regarding documentation may apply.¹¹⁹

¹¹⁷ The first and fourth categories of predictable accommodations are related but separate. The first category of accommodations addresses a worker's ability to carry water on the worker's person to where the worker carries out job duties, facilitating ready access to water without requiring the worker to take a break to access and drink it. The Commission recognizes that there may be work locations where, unlike the presence of water in most (if not all) work locations, the presence of food or non-water beverages could contribute to an undue hardship due to safety or other issues, such that a worker must take a break from the location in which the worker performs her duties in order to access and consume those items. The fourth category of accommodations addresses a worker's ability to take additional, short breaks in performing work (either at the worker's work location or a break location) to eat and drink (including beverages which are not water).

¹¹⁸ See H.R. Rep. 117–27, pt. 1, at 11, 22, 29, 113; *Fighting for Fairness*, supra note 2, at 4 (statement of Rep. Suzanne Bonamici); *Long Over Due*, supra note 2, at 7 (statement of Rep. Jerrold Nadler); 25 (statement of Iris Wilbur, Vice President of Government Affairs and Public Policy, Greater Louisville, Inc.); 83 (statement of Rep. Barbara Lee); 168 Cong. Rec. H10,527 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S7,079 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. H2,324 (daily ed. May 14, 2021) (statement of Rep. Suzanne Bonamici).

¹¹⁹ See Wash. Rev. Code 43.10.005(1)(d) (prohibiting the undue hardship defense if the accommodation is frequent, longer, or flexible restroom breaks; modifying a no food or drink policy; providing seating or allowing employee to sit more frequently if the job requires standing; and certain lifting restrictions); Mass. Gen. Laws ch. 151B(4)(1E)(c) (limiting medical documentation if the accommodation is more frequent restroom, food, or water breaks, and certain lifting restrictions).

Finally, the Commission emphasizes that adoption of the predictable assessments provision does not alter the meaning of the terms “reasonable accommodation” or “undue hardship.” Likewise, it does not change the requirement that, as under the regulation implementing the ADA, employers must conduct an individualized assessment when determining whether a modification is a reasonable accommodation that will impose an undue hardship. Instead, the proposed paragraph informs covered entities that for these specific and simple modifications, in virtually all cases, the Commission expects that individualized assessments will result in a finding that the modification is a reasonable accommodation that does not impose an undue hardship.

Below, the Commission provides some examples regarding predictable assessments and how they can be analyzed. The Commission seeks comment on whether the adoption of the predictable assessment approach facilitates compliance with the PWFA by identifying some of the accommodations most commonly requested by workers due to pregnancy that are simple, inexpensive, and easily available. The Commission further seeks comment on whether different, fewer, or additional types of accommodations should be included in the “predictable assessment” category and whether the category should include predictable assessments for childbirth and/or related medical conditions.

Examples Regarding Predictable Assessments

Example 1636.3 #33/Predictable Assessments: Amara, a quality inspector for a manufacturing company, experiences painful swelling in her legs, ankles, and feet during the final three months of her pregnancy. Her job requires standing for long periods of time. Amara asks the person who assigns her daily work for a stool so that she can sit while she performs her job. Amara's swelling in her legs and ankles is a physical condition related to pregnancy. Amara's request is for a modification that will virtually always be a reasonable accommodation that does not impose an undue hardship. The employer argues that it has never provided a stool to any other worker who complained of difficulty standing but points to nothing that suggests that this modification is not reasonable or that it would impose an undue hardship in this particular case on the operation of the employer's business. The request must be granted.

Example 1636.3 #34/Predictable Assessments: Jazmin, a pregnant teacher who typically is only able to use the bathroom when her class is at lunch, requests additional bathroom breaks during her 6th

¹¹⁶ See 29 CFR 1630.2(j)(3). There, as here, the Commission did not supplant or alter the individualized inquiry required by the statute but provided common examples to illustrate its application in frequently occurring circumstances.

month of pregnancy. Additional bathroom breaks are one of the modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship. The employer argues that finding an adult to watch over the teacher's class when she needs to take a bathroom break imposes an undue hardship, but Jazmin points out that there are several teachers with nearby classrooms, some classrooms have aides, and there is an administrative assistant who works in the front office, and that with a few minutes' notice, one of them would be able to either stand in the hallway between classes to allow Jazmin a trip to the bathroom or, in the case of the administrative assistant, sit in the teacher's classroom for a few minutes several times a day. The employer has not established that providing Jazmin with additional bathroom breaks imposes an undue hardship.

Example 1636.3 #35/Predictable Assessments: Addison, a clerk responsible for receiving and filing construction plans for development proposals, needs to maintain a regular intake of water throughout the day to maintain a healthy pregnancy. They ask their manager if an exception can be made to the office policy prohibiting liquids at workstations. The ability to access water during the day is one of the modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship. Here, although the manager decides against allowing Addison to bring water into their workstation, he proposes that a table be placed just outside the workstation where water can be easily accessed and gives permission for Addison to access this water as needed. The employer has satisfied its obligation to provide reasonable accommodation.

1636.3(j)(5) Undue Hardship—Cannot Be Demonstrated by Assumption or Speculation

Lastly, the proposed rule provides that a covered entity cannot demonstrate that a reasonable accommodation imposes an undue hardship based on an assumption or speculation that other employees might seek a reasonable accommodation—even the same reasonable accommodation—or the same employee might seek another reasonable accommodation in the future.¹²⁰ Relatedly, a covered entity that receives numerous requests for the same or similar accommodation at the same time (for example, parking spaces closer to the factory) cannot deny all of them simply because processing the volume of current or anticipated requests is, or would be, burdensome or because it cannot grant all of them as requested. Rather, the covered entity must evaluate and provide reasonable

accommodations unless or until doing so imposes an undue hardship. The covered entity may point to past and cumulative costs or burden of accommodations that have already been granted to other employees when claiming the hardship posed by another request for the same or similar accommodation.

1636.3(k) Interactive Process

General Definition and Additions

The PWFA at 42 U.S.C. 2000gg(7) refers to the definitions from the ADA that apply to the PWFA and states that this includes the “interactive process,” a term from the ADA, and how it “will typically be used to determine an appropriate reasonable accommodation.” The proposed rule largely adopts the explanation of the interactive process in the regulations implementing the ADA so that the interactive process under the PWFA generally mirrors the same process under the ADA.¹²¹ The proposed rule also notes that there are no rigid steps that must be followed when engaging in the interactive process under the PWFA. The proposed regulation makes the following adjustments to the definition of interactive process from the ADA in order to apply it to the PWFA.

First, the definition replaces references to “individual with disability” and similar terms with “employee with known limitations” and similar terms.

Second, the proposed rule does not include the words “precise limitations resulting from the disability” from the ADA’s explanation of “interactive process.” As a result, the second sentence is: “This process should identify the known limitations and potential reasonable accommodations that could overcome those limitations.” Under the ADA, the interactive process may begin with the individual identifying the “precise limitations” of the disability as well as identifying potential reasonable accommodations that could overcome those limitations.¹²² It is not necessary under the PWFA that the “precise limitation” be identified because the statute makes clear that an individual is entitled to an accommodation if the “limitation” is known.

Step-by-Step Process

The Appendix to the ADA Regulations provides an example of the steps in a reasonable accommodation process and, for ease of reference, the Commission includes it below with

minor changes reflecting the PWFA’s requirement to provide reasonable accommodations for known limitations.¹²³ A covered entity may use these steps and its established ADA-related processes to address requests for reasonable accommodations for workers under PWFA. As with the ADA, a covered entity should respond expeditiously to a request for reasonable accommodation and act promptly to provide the reasonable accommodation.¹²⁴

When an employee with a known limitation has requested a reasonable accommodation regarding the performance of the job, the covered entity, using a problem-solving approach, should:

a. Analyze the particular job involved and determine its purpose and essential functions;

b. Consult with the employee with a known limitation to ascertain what kind of accommodation is necessary given the known limitation;

c. In consultation with the employee with the known limitation, identify potential accommodations and assess the effectiveness each would have in enabling the employee to perform the essential functions of the position. If the employee’s limitation means that they are temporarily unable to perform one or more essential functions of the position, the parties must also consider whether suspending the performance of one or more essential functions may be a part of the reasonable accommodation if the known limitation is temporary in nature and the employee could perform the essential function(s) in the near future (within generally forty weeks); and

d. Consider the preference of the employee to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the covered entity.¹²⁵

Steps (b)–(d) outlined above can be adapted and applied to requests for reasonable accommodations related to the application process and to benefits and privileges of employment. In those situations, in step (c), the consideration should be how to enable the applicant with a known limitation to be considered for the position in question or how to provide an employee with a known limitation with the ability to

¹²³ 29 CFR part 1630 app. 1630.9.

¹²⁴ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 10. Following the steps laid out for the interactive process is not a defense to liability if the employer fails to provide a reasonable accommodation that it could have provided absent undue hardship.

¹²⁵ See 29 CFR part 1630 app. 1630.9.

¹²⁰ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at n.113.

¹²¹ 29 CFR 1630.2(o)(3).

¹²² *Id.*

enjoy equal benefits and privileges of employment.

In many instances, the appropriate reasonable accommodation may be obvious to either or both the employer and the employee with the known limitation, such that it may not be necessary to proceed in this step-by-step fashion. Although covered entities are cautioned that under 42 U.S.C. 2000gg–1(2) and proposed § 1636.4(b) they cannot unilaterally require a worker with a limitation to accept a specific accommodation, the step-by-step approach may not be necessary when, for example, a pregnant worker requests certain modifications such as allowing the employee to drink water regularly during the workday, additional restroom breaks, modifications in policies regarding sitting or standing, or modifications in policies regarding eating or drinking. These requested modifications will virtually always be found to be reasonable accommodations that do not impose an undue hardship and are therefore unlikely to require significant discussion in the interactive process, and there may be other accommodations that are equally easy to provide. However, in some instances, neither the employee or applicant requesting the accommodation, nor the covered entity, may be able to readily identify an appropriate accommodation. For example, an applicant needing an accommodation may not know enough about the equipment used by the covered entity or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the covered entity may not know enough about the employee's known limitation and its effect on the performance of the job to suggest an appropriate accommodation. In these situations, the steps above may be helpful. In addition, parties may consult outside resources such as State or local entities, non-profit organizations, or the Job Accommodation Network (JAN) for ideas regarding potential reasonable accommodations.¹²⁶

Failure To Engage in Interactive Process

Failing to engage in the interactive process, in and of itself, is not a violation of the PWFA just as it is not a violation of the ADA. However, a covered entity's failure to initiate or participate in the interactive process with the employee or applicant after receiving a request for reasonable accommodation could result in liability

if the employee or applicant does not receive a reasonable accommodation even though one is available that would not have posed an undue hardship.¹²⁷ Relatedly, an employee's unilateral withdrawal from or refusal to participate in the interactive process can constitute sufficient grounds for denying the reasonable accommodation.

1636.3(l) Supporting Documentation

In determining when and what types of documentation a covered entity may request of an employee or applicant to support their request for a reasonable accommodation, the Commission is guided by existing rules under the ADA, differences between the relevant statutory provisions of the ADA and the PWFA, and the recognition that accommodations under the PWFA may be small, temporary modifications that may not always lend themselves to medical documentation.

First, and most importantly, a covered entity is not required to seek supporting documentation from a worker who seeks an accommodation under the PWFA. For example, under the ADA, an employer may simply discuss with the employee or applicant the nature of the limitation and the need for an accommodation;¹²⁸ the same is true under the PWFA, and this approach is entirely consistent with the PWFA's emphasis on the importance of the interactive process as described in § 1636.3(k).

Additionally, the Commission notes that pregnant workers may experience limitations and, therefore, require accommodations, before they have had any medical appointments. For example, some workers may experience morning sickness and nausea early in their pregnancies and need accommodations such as later start times, breaks, or telework.

The Commission further recognizes that it may be difficult for a pregnant employee to obtain an immediate appointment with a health care provider early in a pregnancy. For example, according to one study, almost a quarter of women did not receive prenatal care during their first trimester, and 12% of births take place in counties with limited or no access to maternity care.¹²⁹ Further, even for those who

have access to medical care, known limitations may develop between scheduled medical appointments, such that requiring documentation in those situations would increase the cost to the worker and may require them to take additional leave in order to obtain the documentation. Therefore, consistent with the purposes of the PWFA, the Commission encourages employers who choose to require documentation, when that is permitted under this regulation, to grant interim accommodations as a best practice if an employee indicates that they have tried to obtain documentation but there is a delay in obtaining it, and the documentation will be provided at a later date. For example, if a pregnant employee requests an accommodation for a pregnancy-related limitation in lifting, which may involve the temporary suspension of an essential function, but the employee will not be able to provide a note from a health care practitioner for several weeks, the employer should consider providing an interim reasonable accommodation.¹³⁰

If a covered entity decides to require supporting documentation, it is only permitted to do so under the proposed rule if it is reasonable to require documentation under the circumstances for the covered entity to determine whether to grant the accommodation. When requiring documentation is reasonable, the employer is also limited to requiring documentation that itself is reasonable. The preamble, rule, and appendix set out examples of when it would not be reasonable for the employer to require documentation. The proposed rule also defines "reasonable documentation" as documentation that describes or confirms (1) the physical or

first trimester); Christina Brigance et al., March of Dimes, *Nowhere to Go: Maternity Care Deserts Across the U.S.* 4 (2022), <https://www.marchofdimes.org/research/maternity-care-deserts-report.aspx> (reporting that approximately 12 percent of births in the United States occur in counties with limited or no access to maternity care); American Pregnancy Association, *Your First Prenatal Visit*, <https://americanpregnancy.org/healthy-pregnancy/planning/first-prenatal-visit/> (last visited Apr. 3, 2023) (stating that the first prenatal visit for individuals who did not meet with their health care provider pre-pregnancy is generally around 8 weeks after their last menstrual period); University of Utah Health, *Pregnancy—First Trimester, Weeks 1–13*, <https://healthcare.utah.edu/womenshealth/pregnancy-birth/1st-trimester> (last visited Apr. 3, 2023) (stating that doctors recommend scheduling the first obstetric appointment between the 8th and 10th week of pregnancy); Boston Medical Center, *Newly Pregnant?*, <https://www.bmc.org/newly-pregnant> (last visited Apr. 3, 2023) (stating that the first prenatal appointment will be scheduled between the 8th and 12th weeks of pregnancy).

¹³⁰ See *Best Practices State Government*, supra note 100. See also above discussion on Interim Reasonable Accommodations.

¹²⁶ The Job Accommodation Network (JAN) provides free assistance regarding workplace accommodation issues. See generally Job Accommodation Network, <https://askjan.org/> (last visited July 28, 2023).

¹²⁷ *Enforcement Guidance on Reasonable Accommodation*, supra note 44, at Question 10.

¹²⁸ *Id.* at Question 6.

¹²⁹ Medical care often is not available or immediately obtained early in a pregnancy. See, e.g., Joyce A. Martin et al., Ctrs. for Disease Control, *Births in the United States, 2019 2* (2020), <https://www.cdc.gov/nchs/data/databriefs/db387-H.pdf> (indicating that in 2019, almost 23% of women who gave birth did not receive prenatal care during the

mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason.

As explained below, and set forth at § 1636.4(a)(3), an employer may not defend the denial of an accommodation under 42 U.S.C. 2000gg–1(1) based on the lack of documentation if its request for documentation does not comport with the proposed rule. In these situations, the worker will have met the requirements of § 1636.3(d)(3), and the employer will have sufficient information regarding the known limitation and the need for accommodation. Further, requests for documentation that violate the proposed rule may be a violation of the prohibition on retaliation and coercion in 42 U.S.C. 2000gg–2(f), as set forth in proposed §§ 1636.5(f)(1)(iv), (v) and (f)(2)(iv), (v) because they may deter workers from seeking accommodations.

1636.3(l)(1) Reasonable To Require Documentation Under the Circumstances

Under the proposed rule, a covered entity may require documentation only if it is reasonable to do so under the circumstances for the covered entity to decide whether to grant the accommodation. The regulation provides several examples of when it would not be reasonable for the employer to require documentation.

First, it is not reasonable for the employer to require documentation when both the limitation and the need for reasonable accommodation are obvious.¹³¹ For example, when an obviously pregnant¹³² worker states or confirms they are pregnant and asks for a different size uniform or related safety gear, both the limitation and the need for the accommodation are obvious, and “known” under the statute, and the employer may not require supporting documentation. If the pregnancy is obvious, and the worker states or confirms that they are pregnant, but the limitation related to the pregnancy or

parameters of a potential accommodation are not, the employer may only request documentation relevant to the accommodation. For example, if a worker who is obviously pregnant, states or confirms that they are pregnant, and asks to avoid lifting heavy objects, it may be reasonable for the employer to request documentation about the limitation such as the extent of the lifting restriction and its expected duration, but not about the pregnancy itself. Similarly, if an obviously pregnant employee requests the reasonable accommodation of leave related to childbirth and recovery and states or confirms that they are pregnant it may be reasonable for the employer to require documentation regarding the amount of time the worker anticipates needing to recover from childbirth, but not reasonable to require documentation of the pregnancy itself.

Second, when the employee or applicant has already provided the employer with sufficient information to substantiate that the worker has a known limitation and needs a change or adjustment at work, it is not reasonable for the employer to require documentation. If a worker has already provided documentation stating that because of their recent cesarean section, they should not lift over 20 pounds for two months, the employer may not require further documentation during those two months because the employee has already provided the employer with sufficient information to substantiate that they have a limitation and need a change at work.

A third example of when it is not reasonable for an employer to require documentation is when a worker at any time during their pregnancy states or confirms that they are pregnant and seeks one of the following accommodations: (1) carrying water and drinking, as needed; (2) taking additional restroom breaks; (3) sitting, for those whose work requires standing, and standing, for those whose work requires sitting; and (4) breaks, as needed, to eat and drink. It is not reasonable to require documentation, beyond self-attestation, when a worker is pregnant and seeks one of the four listed modifications because these are a small set of commonly sought accommodations that are widely known to be needed during an uncomplicated pregnancy and where documentation would not be easily obtainable or necessary. As noted above, particularly early in pregnancy, employees and applicants are less likely to have sought or been able to obtain an appointment with a health care provider for their pregnancy. Further, they may not be

able to obtain an appointment with a health care provider repeatedly on short notice for every limitation, as each becomes apparent. The Commission notes that this position is consistent with the overarching goal of the PWFA to assist workers affected by pregnancy to remain on the job by providing them with simple accommodations quickly.

A fourth example of when it is not reasonable to require documentation is when the limitation for which an accommodation is needed involves lactation. Usually, beginning around or shortly after birth, lactation occurs. As the initiation of lactation around birth is nearly universal, the Commission considers the fact of breastfeeding obvious, such that it will not be reasonable for an employer to require documentation regarding lactation or pumping. Pragmatically, the Commission notes that health care providers may not be able to provide documentation regarding whether a worker is pumping, nor the types of accommodations needed in order to pump breast milk.¹³³ Of course, not all workers can or choose to breastfeed; those who do elect to breastfeed do so for widely varying lengths of time. Although the proposed rule states that it is generally not reasonable for an employer to require supporting documentation for lactation or pumping, an employer will not violate the proposed rule simply by asking the employee whether they require an appropriate place to express breastmilk while at a worksite. Employee confirmation—or a simple request to pump at work—is sufficient confirmation.

If the request for supporting documentation was not reasonable under the circumstances for the covered entity to determine whether to grant the accommodation, a covered entity cannot defend the denial of an accommodation based on the lack of documentation provided by the worker, as set forth in proposed § 1636.4(a)(3). Further, proposed § 1636.5(f) states that it could violate the retaliation and coercion provisions of the PWFA if a covered entity requires the submission of supporting documentation that is not reasonable under the circumstances to determine whether to grant the accommodation because, for example, (1) both the limitation and the need for reasonable accommodation are obvious; (2) the employee or applicant already has provided the employer with sufficient information to substantiate

¹³¹ This is similar to the ADA under which requesting documentation when the disability and the need for the accommodation are obvious or otherwise already known would violate the prohibition on disability-related inquiries without a business justification. *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*, Question 5 (2000), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees> [hereinafter *Enforcement Guidance on Disability-Related Inquiries*].

¹³² Early or initial physical indications of pregnancy may not be sufficient to make it obvious to an employer that an employee is pregnant.

¹³³ See *supra* note 109, for discussion of the PUMP Act and the types of accommodations that may be requested with regard to pumping.

that the individual has a known limitation and needs a change or adjustment at work; (3) a pregnant worker is seeking one of the modifications listed at 1636.3(j)(4); or (4) the accommodation requested involves lactation.

Example 1636.3 #36/Documentation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Cora, a production worker who is 8 months pregnant, requests additional bathroom breaks, and the employer applies the policy to her, refusing to provide the accommodation until she submits medical documentation. Cora therefore makes a medical appointment that she does not need and brings in documentation to establish that she is pregnant and has a physical condition that requires additional bathroom breaks. The employer grants the requested accommodation shortly before Cora gives birth. Despite the fact that the accommodation was granted, this employer may have violated the PWFA, 42 U.S.C. 2000gg–1(a) and/or 2000gg–2(f).

Example 1636.3 #37/Documentation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Fourteen months after giving birth, Alex wants to continue to pump breastmilk at work, explains that to her supervisor, and asks, as a reasonable accommodation, for breaks to pump and that the room that is provided have a chair, a table, and access to electricity and running water. Alex's employer refuses to provide the accommodations unless Alex provides supporting documentation from her health care provider. Alex cannot provide the information, so she stops pumping. The employer cannot use the lack of documentation as a defense to the denial of the accommodation because documentation was not reasonable under the circumstances for the employer to determine whether to grant to accommodation, as set forth in proposed § 1636.4(a)(3).

1636.3(l)(2) Reasonable Documentation

When it is reasonable to require documentation under the circumstances for the covered entity to determine whether to grant the accommodation, the covered entity is permitted to require reasonable documentation, including from a health care provider. The proposed rule defines “reasonable documentation” as documentation that describes or confirms: (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason. For example, if an employee asks for leave as a reasonable accommodation to attend therapy appointments due to anxiety early in the employee's pregnancy, the employer could, but is not required to, ask for

documentation confirming that there is a physical or mental condition that is related to, affected by, or arising out of pregnancy, and information about how frequent and long the leave would need to be.

Adopting the longstanding approach under the ADA, proposed § 1636.4(f)(1)(v) and (f)(2)(v) explain that if an employee or applicant provides documentation that is sufficient, continued efforts by the covered entity to require that the individual provide more documentation could be a violation of the PWFA's prohibitions on retaliation and coercion. However, if a covered entity requests additional information based on a good faith belief that the documentation the employee submitted is insufficient, it would not be liable for retaliation or coercion.¹³⁴

The Commission seeks comment regarding this proposed approach to documentation, including: (1) whether this approach strikes the correct balance between what an employee or applicant can provide and the interests of the covered entity; (2) whether it is always reasonable under the circumstances for covered entities to require confirmation of pregnancy beyond self-attestation when the pregnancy is not obvious; (3) if allowed, whether the confirmation of a non-obvious pregnancy should be limited to less invasive methods such as the confirmation of a pregnancy through a urine test; (4) the ability of employees or applicants to obtain relevant information from a health care provider, particularly early in pregnancy; and (5) whether there are other common limitations that occur early in pregnancy, such as fatigue or morning sickness, for which an employer should not be permitted to require documentation beyond self-attestation.

1636.3(l)(3) Appropriate Health Care Provider To Provide Documentation

If the covered entity meets the requirements laid out above to request documentation and does so, the covered entity may request documentation from an appropriate health care provider in the particular situation. An appropriate provider may vary depending on the situation; the proposed regulation contains a non-exhaustive list of possible health care providers that is based on the non-exhaustive list for the ADA.¹³⁵ The Commission seeks comment on whether other types of

health care providers should be included on this list.

The Commission does not believe that it will be practical or necessary for a covered entity to request or require that an employee be examined by a health care provider of the covered entity's choosing based on the PWFA's lower threshold for requiring reasonable accommodations, the temporary duration of PWFA accommodations, and the minimal nature of at least some of the most common reasonable accommodations associated with general limitations of pregnancy, childbirth, or related medical conditions.

The Commission seeks comment about whether there are situations in which an employer should be permitted to require such an examination, what limits should be placed on such a process, and what effect allowing such an examination may have on the willingness of workers to request accommodations under the PWFA.

1636.3(l)(4) Confidentiality

The PWFA does not include a provision specifically requiring covered entities to maintain the confidentiality of medical information obtained in support of accommodation requests under the PWFA. However, applicants, employees, and former employees covered by the PWFA also are covered by the ADA.¹³⁶ Under the ADA, covered entities are required to keep medical documentation of applicants, employees, and former employees confidential, with limited exceptions.¹³⁷ These ADA rules on keeping medical information confidential apply to all medical information, including medical information voluntarily provided as part of the reasonable accommodation process, and, therefore, include medical information obtained under the PWFA. Moreover, as explained in § 1636.5(f), an employer's intentional disclosure of medical information obtained through PWFA's reasonable accommodation process may violate the PWFA's prohibition on retaliation and/or coercion.

Section 1636.4 Prohibited Practices

42 U.S.C. 2000gg–1 sets out five possible violations involving the

¹³⁶ See 42 U.S.C. 12111(5)(a) & 4 (ADA); 42 U.S.C. 2000gg(1)(B)(i) & (3)(A).

¹³⁴ *Enforcement Guidance on Reasonable Accommodation*, supra note 44, at n.33; *Enforcement Guidance on Disability-Related Inquiries*, supra note 114, at Question 11.

¹³⁵ See *Enforcement Guidance on Reasonable Accommodation*, supra note 44, at Question 6.

¹³⁷ 29 CFR 1630.14(b) & (c); *Enforcement Guidance on Disability-Related Inquiries*, supra note 114, at text accompanying nn.9–10; EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, at text accompanying n.6 (1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>.

provision of reasonable accommodations.

1636.4(a) Failing To Provide Reasonable Accommodation

42 U.S.C. 2000gg–1(1) prohibits a covered entity from failing to make a reasonable accommodation for a qualified employee or applicant with a known limitation unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. This provision of the PWFA uses the same language as the ADA, and the proposed rule likewise uses the language from the corresponding ADA regulation, replacing references to “individual with a disability” and similar terms with “employee with a known limitation” and similar terms.¹³⁸ Because 42 U.S.C. 2000gg–1(1) uses the same operative language as the ADA, the Commission proposes interpreting it in a similar manner.

This section is violated when a covered entity denies a reasonable accommodation to a qualified employee or applicant with a known limitation, absent undue hardship. As under the ADA, however, a covered entity does not violate 42 U.S.C. 2000gg–1(1) merely by refusing to engage in the interactive process; for a violation, there also must have been a reasonable accommodation that the employer could have provided absent undue hardship.

1636.4(a)(1) Unnecessary Delay in Responding to a Request for a Reasonable Accommodation

Given that pregnancy-related limitations are frequently temporary, a delay in providing an accommodation may mean that the period necessitating the accommodation could pass without action simply because of the delay.¹³⁹ Proposed § 1636.4(a)(1) addresses this issue. As with the ADA, an unnecessary delay in responding to a request for a reasonable accommodation may result in a violation of the PWFA if the delay results in a failure to provide a reasonable accommodation.¹⁴⁰ This can be true even if the reasonable accommodation is eventually provided, when the delay was unnecessary.

The factors set out in § 1636.4(a)(1) include the same factors that are used when determining if a delay in the provision of a reasonable accommodation violates the ADA.¹⁴¹ This proposed regulation adds to these established factors two new factors. First, in determining whether a delay in providing a reasonable accommodation was unnecessary, the question of whether providing the accommodation was simple or complex is a factor to be considered. There are certain modifications, set forth in § 1636.3(j)(4), that will virtually always be found to be reasonable accommodations that do not impose an undue hardship: (1) allowing a pregnant employee to carry and drink water, as needed; (2) allowing a pregnant employee additional restroom breaks; (3) allowing a pregnant employee whose work requires standing to sit and whose work requires sitting to stand; and (4) allowing a pregnant employee breaks to eat and drink, as needed. If there is a delay in providing these accommodations, it will virtually always be found to be unnecessary because of the presumption that these modifications will be reasonable accommodations that do not impose an undue hardship. Second, another factor to be considered when determining if a delay in providing a reasonable accommodation was unnecessary is whether the covered entity offered the employee or applicant an interim reasonable accommodation during the interactive process or while waiting for the covered entity’s response. The provision of such an interim accommodation will decrease the likelihood that an unnecessary delay will be found. Under this factor, leave is not considered an appropriate interim reasonable accommodation if there is another interim reasonable accommodation that would not cause an undue hardship and would allow the employee to continue working, unless the employee selects or requests leave as an interim reasonable accommodation.¹⁴²

1636.4(a)(2) Employee or Applicant Declining a Reasonable Accommodation

The proposed rule provides, as in the ADA, that if an employee declines a reasonable accommodation, and without it the employee cannot perform one or more essential functions of the position, then the employee will no longer be considered qualified.¹⁴³ However, because the PWFA allows for the

temporary suspension of one or more essential functions in certain circumstances, an employer must also consider whether one or more essential functions can be temporarily suspended pursuant to the PWFA before a determination is made pursuant to this section that the employee is not qualified.

1636.4(a)(3) Covered Entity Denying a Reasonable Accommodation Due to Lack of Supporting Documentation

As set out in the section of this preamble regarding supporting documentation, if the request for documentation was not reasonable under the circumstances for the covered entity to determine whether to grant the accommodation, a covered entity cannot defend the denial of an accommodation based on the lack of documentation provided by the worker. The proposed rule contains this provision in § 1636.4(a)(3).

1636.4(a)(4) Choosing Among Possible Accommodations

Similar to the ADA, if there is more than one effective accommodation, the employee’s or applicant’s preference should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between potential reasonable accommodations and may choose, for example, the less expensive accommodation or the accommodation that is easier for it to provide, or generally the accommodation that imposes the least hardship.¹⁴⁴ In the situation where the employer is choosing between reasonable accommodations and does not provide the accommodation that is the worker’s preferred accommodation, the employer does not have to show that it is an undue hardship to provide the worker’s preferred accommodation.

A covered entity’s “ultimate discretion” to choose a reasonable accommodation is limited by certain other considerations. First, the accommodation must provide the individual with a known limitation with an equal employment opportunity, meaning an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a known limitation.¹⁴⁵ Thus, if

¹³⁸ 42 U.S.C. 12112(b)(5)(A); 29 CFR 1630.9(a).

¹³⁹ See, e.g., *Long Over Due*, *supra* note 2, at 96 (statement of Rep. Suzanne Bonamici) (praising the PWFA because it would allow pregnant workers to get accommodations without waiting months or years; 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert Casey, Jr.) (noting that “pregnant workers need immediate relief to remain healthy and on the job”).

¹⁴⁰ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at Question 10, n.38.

¹⁴¹ *Id.*

¹⁴² The restriction on using leave as an interim accommodation is based on 42 U.S.C. 2000gg–1(4).

¹⁴³ See 29 CFR 1630.9(d).

¹⁴⁴ 29 CFR part 1630 app. 1630.9.

¹⁴⁵ 29 CFR part 1630 app. 1630.9 (providing that a reasonable accommodation “should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the

there is more than one accommodation that does not impose an undue hardship, but one of them does not provide the employee with an equal employment opportunity, the employer must choose the one that provides the worker with equal employment opportunity.¹⁴⁶ Depending on the facts, selecting the accommodation that does not provide equal opportunity could violate 42 U.S.C. 2000gg–1(1), 2000gg–1(5) or 2000gg–2(f).¹⁴⁷ The proposed rule, § 1636.4(a)(4), sets out this prohibition.

The Commission seeks comment on whether it should include language in the rule explaining that an employer may not unreasonably select an accommodation that negatively affects an employee's or applicant's employment opportunities or terms and conditions of employment when another available accommodation would not do so or whether the protections in 42 U.S.C. 2000gg–1(1) and (5) and 2000gg–2(f) alone are sufficiently clear in this regard.¹⁴⁸

Second, 42 U.S.C. 2000gg–1(2) prohibits a covered entity from requiring a qualified employee or applicant affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than a reasonable accommodation arrived at through the interactive process. Third, 42 U.S.C. 2000gg–1(4) prohibits a covered entity from requiring a qualified employee with a known limitation to take leave if there is a reasonable

same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.”); 29 CFR part 1630 app. 1630.2(o) (explaining that reassignment should be to a position with equivalent pay, status, etc., if possible); see also *Enforcement Guidance on Reasonable Accommodation*, *supra* note 44, at text following n.80 (“However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.”); Cf. EEOC, *Compliance Manual on Religious Discrimination*, 12–IV.3 (2021) (stating that in the context of a religious accommodation, an accommodation would not be reasonable “if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.”) <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> [hereinafter *Religious Discrimination Compliance Manual*].

¹⁴⁶ *Enforcement Guidance on Reasonable Accommodations*, *supra* note 44, Question 9 Example B.

¹⁴⁷ Depending on the facts, this could be a violation of Title VII's prohibition on sex discrimination as well.

¹⁴⁸ Cf. 29 CFR 1605.2(c)(2)(ii) (when more than one means of accommodation would not cause undue hardship, the employer or labor organization must offer the accommodation that least disadvantages the individual with respect to employment opportunities).

accommodation that will allow the employee to continue to work, absent undue hardship. Fourth, 42 U.S.C. 2000gg–1(5) prohibits a covered entity that is, for example, selecting from an array of accommodations, all of which are effective and do not impose an undue hardship, from picking one that results in the covered entity taking adverse action in terms, conditions, or privileges of employment of the employee or applicant. Fifth, 42 U.S.C. 2000gg–2(f) prohibits retaliation and coercion by covered entities. These limitations to the “ultimate discretion” of a covered entity to choose between reasonable accommodations are described in the discussions of § 1636.4(b), (d), and (e) and § 1636.5(f) below.

Example 1636.4 #38/Failing to Provide an Accommodation: Yasmin's job requires her to travel to meet with clients. Because of her pregnancy, she is not able to travel for three months. She asks that she be allowed to conduct her client meetings via video conferencing. Although this accommodation would allow her to perform her essential job functions and does not impose an undue hardship, her employer reassigns her to smaller, local accounts. Being assigned only to these accounts limits Yasmin's ability to compete for promotions and bonuses as she had in the past.

This could be a violation of 42 U.S.C. 2000gg–1(1), because Yasmin is denied an equal opportunity to compete for promotions and is thus denied a reasonable accommodation. The employer's actions could also violate 42 U.S.C. 2000gg–1(5) and 42 U.S.C. 2000gg–2(f), or Title VII's prohibition against pregnancy discrimination.

1636.4(b) Requiring Employee or Applicant To Accept an Accommodation

42 U.S.C. 2000gg–1(2) prohibits a covered entity from requiring an employee or applicant to accept an accommodation other than any reasonable accommodation arrived at through the interactive process. This provision responds to concerns that some employers may unilaterally curtail what a pregnant worker can do in the mistaken belief that the worker needs some type of help.¹⁴⁹ Pursuant to this

¹⁴⁹ Cf. EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* II.A.3 (2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities> (describing situations in which employers incorrectly assume based on stereotypes that workers with caregiving responsibilities need a change to their workload or work environment); see also *UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women); *Long Over Due*, *supra* note 2, at 192 (written answers of Dina Bakst, Co-

provision in the PWFA and the proposed rule, a covered entity cannot force an employee or applicant to accept an accommodation such as light duty or a temporary transfer, or delay of an examination that is part of the application process, without engaging in the interactive process, even if the covered entity's motivation is concern for the applicant's or employee's health or pregnancy.

42 U.S.C. 2000gg–1(2) does not require that the employee or applicant have a limitation, known or not; thus, a violation of 42 U.S.C. 2000gg–1(2) could occur if a covered entity notices that an employee or applicant is pregnant and decides, without engaging in the interactive process with the employee or applicant, that the employee or applicant needs a particular accommodation, and unilaterally requires the employee or applicant to accept that accommodation, even though the employee or applicant has not requested it and can perform the essential functions of the job without it. For example, this provision could be violated if an employment agency, without discussing the situation with the candidate, decided that a candidate recovering from a miscarriage needed an accommodation in the form of not being sent to certain jobs that the agency viewed as too physical, or if an employer decided to excuse a pregnant worker from overtime as an accommodation, without discussing it with them.¹⁵⁰

Additionally, a violation could occur if a covered entity receives a request for a reasonable accommodation and unilaterally imposes an accommodation that was not requested without engaging in the interactive process.

Example 1636.4 #39: Kia, a restaurant server, is pregnant. She asks for additional breaks during her shifts as her pregnancy progresses because she feels tired, and her feet are swelling. Her employer, without engaging in the interactive process with Kia, directs Kia to take host shifts for the remainder of her pregnancy, because she can sit for long periods during the shift. The employer has violated 42 U.S.C. 2000gg–1(2) and § 1636.4(b) of the proposed rule, because it required Kia to accept an accommodation other than one arrived at through the interactive process, even if Kia's earnings did not decrease and her terms, conditions, and

Founder & Co-President, A Better Balance) (explaining that employers have been known to unilaterally cut a worker's hours or stop a worker from working late in an attempt to “help” the employee or because the employer felt sorry for the worker, even though an employee did not ask for such accommodation and did not need it).

¹⁵⁰ These actions also could violate Title VII's prohibition of disparate treatment based on sex. See *Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I.B.1.

privileges of employment were not harmed. The Commission recognizes that the relief in this situation may be limited to requiring the employer to engage in the interactive process with the employee.

By contrast, if the host shift does not provide Kia with equal terms, conditions, and privileges of employment (e.g., Kia's wages decrease or Kia no longer can earn tips), the covered entity also may have violated 42 U.S.C. 2000gg-1(1) (requiring reasonable accommodation absent undue hardship); 42 U.S.C. 2000gg-1(5) (prohibiting adverse action in terms, benefits, or privileges of employment); or 42 U.S.C. 2000gg-2(f) (prohibiting retaliation and coercion) (implemented in the proposed rule at § 1636.4(a), (e) and § 1636.5(f)).

Finally, this provision also could be violated if a covered entity has a rule that requires all pregnant workers to stop a certain function—such as traveling—automatically, without any evidence that the particular worker is unable to perform that function. The Commission seeks comment on whether there are other factual scenarios that would violate this provision and whether additional examples would be helpful.

1636.4(c) Denying Opportunities

42 U.S.C. 2000gg-1(3) prohibits a covered entity from denying employment opportunities to a qualified employee or applicant with a known limitation if the denial is based on the need of the covered entity to make reasonable accommodations to the known limitations of the employee or applicant. Thus, an employee's or applicant's known limitation and need for a reasonable accommodation cannot be part of the covered entity's decision regarding hiring, discharge, promotion, or other employment decisions, unless the reasonable accommodation would impose an undue hardship on the covered entity. This provision in the PWFA uses language similar to that of the ADA, and the proposed rule likewise uses the language similar to the corresponding ADA regulation.¹⁵¹ Additionally, the proposed rule includes situations where the covered entity's decision is based on the future possibility that a reasonable accommodation will be needed, i.e., 42 U.S.C. 2000gg-1(3) prohibits a covered entity from making a decision based on its belief that an individual may need a reasonable accommodation in the future even if the individual has not asked for one. Thus, under the proposed rule, this prohibition would include situations where a covered entity refuses to hire a pregnant applicant because the covered entity believes that the applicant will

need leave to recover from childbirth, even if the covered entity does not know the exact amount of leave the applicant will require, or the applicant has not mentioned the need for leave as a reasonable accommodation to the covered entity. The Commission proposes this addition to ensure that workers are protected in situations where the employer's actions are based on avoiding the provision of a reasonable accommodation, even if one is not requested.

1636.4(d) Requiring Employee To Take Leave

Sometimes, when employees notify their employers that they are pregnant, employers place them on leave or direct them to use leave.¹⁵² Workers on unpaid leave risk their economic security, and workers who use their leave—whether paid or unpaid—prior to giving birth may not have leave when they need it to recover from childbirth.¹⁵³

42 U.S.C. 2000gg-1(4) seeks to limit this practice. Under this provision, a covered entity may not require a qualified employee with a known limitation to take leave, whether paid or unpaid, if another reasonable accommodation can be provided, absent undue hardship. In other words, under the PWFA, an employee cannot be forced to take leave if another reasonable accommodation can be provided that would not impose an undue hardship and would allow the employee to continue to work.

Of course, this limitation does not prohibit the provision of leave as a reasonable accommodation if leave is the reasonable accommodation requested or selected by the employee, or if it is the only reasonable accommodation that does not cause an undue hardship. As explained above in the preamble's discussion of § 1636.3(h) and (i), both paid leave (accrued, short-term disability, or another employer benefit) and unpaid leave are potential reasonable accommodations under the PWFA. 42 U.S.C. 2000gg-1-(4) and the proposed rule merely prohibits an employer from requiring an employee to take leave if there is another reasonable accommodation that would not impose an undue hardship and would allow the employee to remain on the job.

1636.4(e) Adverse Action on Account of Requesting or Using a Reasonable Accommodation

The PWFA contains overlapping provisions that protect workers seeking or using reasonable accommodations. Importantly, nothing in the PWFA limits which provision a worker may use to protect their rights.

One of these provisions is 42 U.S.C. 2000gg-1(5), which prohibits a covered entity from “tak[ing] adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to pregnancy, childbirth, or related medical conditions of the employee.” 42 U.S.C. 2000gg-1(5) only applies to situations involving a qualified employee who asks for or uses a reasonable accommodation. The protections provided by 42 U.S.C. 2000gg-1(5) are likely to have significant overlap with 42 U.S.C. 2000gg-2(f), which prohibits retaliation. As explained in the preamble's discussion of 42 U.S.C. 2000gg-2(f) (proposed § 1636.5(f)), however, the PWFA's anti-retaliation provisions apply to a broader group of employees and actions than 42 U.S.C. 2000gg-1(5) does.

The term “take adverse action” in 42 U.S.C. 2000gg-1(5) is not taken from Title VII or the ADA. From the context of this provision and the basic dictionary definitions of the terms, this prohibits an employer from taking a harmful action against an employee.¹⁵⁴

“Terms, conditions, or privileges of employment” is a term from Title VII, and the EEOC has interpreted it to encompass a wide range of activities or practices that occur in the workplace including, but not limited to, discriminatory work environment or atmosphere; duration of work (such as the length of an employment contract, hours of work, or attendance); work rules; job assignments and duties; and job advancement (such as training, support, and performance evaluations).¹⁵⁵ In addition, for the purposes of 42 U.S.C. 2000gg-1(5), “terms, conditions, and privileges of

¹⁵² H.R. Rep. No. 117–27, pt. 1, at 24.

¹⁵³ *Long Over Due*, *supra* note 2, at 81 (statement of Rep. Jahana Hayes) (explaining that she kept working while pregnant in order to save her leave for after childbirth).

¹⁵⁴ *Adverse*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/adverse> (“hostile,” “unfavorable” and “harmful.”) (last visited June 13, 2023).

¹⁵⁵ 42 U.S.C. 2000e-2(a)(1); *Compliance Manual on Terms, Conditions, and Privileges of Employment*, *supra* note 82, at 613.1(a) (stating that the language is to be read in the broadest possible terms and providing a list of examples).

¹⁵¹ 42 U.S.C. 12112(b)(5)(B); 29 CFR 1630.9(b).

employment” can include hiring, discharge, or compensation.¹⁵⁶

Thus, this provision may be violated when, for example, a covered entity grants a reasonable accommodation but then penalizes the employee.

Example 1636.4 #40: Nava took leave to recover from childbirth as a reasonable accommodation under the PWFA, and, as a result, failed to meet the sales quota for that quarter, which led to a negative performance appraisal. The negative appraisal could be a violation of 42 U.S.C. 2000gg–1(5) because Nava received it due to the use of a reasonable accommodation.

Also, an employer may violate this provision if there is more than one accommodation that does not impose an undue hardship, and the employer, after the interactive process, chooses the accommodation that causes an adverse action with respect to the terms, conditions, or privileges of employment, despite the existence of an alternative accommodation that would not do so.

Example 1636.4 #41: Ivy asks for additional bathroom breaks during work because of pregnancy, including during overtime shifts. After talking to Ivy, rather than providing the breaks during overtime, Ivy’s supervisor decides Ivy should simply not work overtime, because during the overtime shift there are fewer employees, and the supervisor does not want to bother figuring out coverage for Ivy, although it would not be an undue hardship to do so. As a result, Ivy is not assigned overtime and loses earnings.

This conduct could violate 42 U.S.C. 2000gg–1(5) in two ways. First, Ivy’s request for a reasonable accommodation led to an adverse action in terms, conditions, or privileges of employment. Second, Ivy’s use of the accommodation of not working overtime led to a reduction in pay, *i.e.*, an adverse action in terms, conditions, or privileges of Ivy’s employment, and there was an alternative accommodation (assigning coverage for Ivy as needed) that would not have done so.

Example 1636.4 #42: Leyla asks for telework due to morning sickness. Through the interactive process, it is determined that both telework and a later schedule combined with an hour rest break in the afternoon would allow Leyla to perform the essential functions of her job and would not impose an undue hardship. Although Leyla prefers telework, the employer would rather Leyla be in the office. It would not be a violation of 42 U.S.C. 2000gg–1(5) to offer Leyla the schedule change/rest break instead of telework as a reasonable accommodation.

The facts set out in examples 40 and 41 could also violate 42 U.S.C. 2000gg–1(1) and 2000gg–2(f).

As stated at the beginning of this section, the PWFA has overlapping protections for workers who request or use reasonable accommodations. The Commission emphasizes that qualified employees with known limitations may bring actions under any of these provisions. Finally, the Commission seeks comment on whether there are other factual scenarios that would violate 42 U.S.C. 2000gg–1(5) and whether additional examples would be helpful.

Section 1636.5 Remedies and Enforcement

In crafting the PWFA remedies and enforcement section, Congress recognized the advisability of using the existing mechanisms in place for redress of other forms of employment discrimination. In this regard, the PWFA and the proposed regulation provide the following:

1636.5(a) Remedies and Enforcement Under Title VII

As explained in PWFA, 42 U.S.C. 2000gg–2(a) and (e), the applicable enforcement mechanism and remedies available to employees and others covered by Title VII apply to the PWFA as well. The proposed rule parallels the statutory language, noting that the powers, remedies, and procedures provided in sections 705–707, 709–711, and 717 of Title VII, 42 U.S.C. 2000e–4, shall be the powers, remedies, and procedures provided by the PWFA.

The Commission also emphasizes that its implementing regulations found at 29 CFR parts 1601 (procedural regulations), 1602 (recordkeeping and reporting requirements under Title VII, the ADA, and the Genetic Information Nondiscrimination Act (GINA)), and 1614 (Federal sector equal employment opportunity) apply to the PWFA as well. Thus, employees covered by section 706 of Title VII may file charges with the EEOC, and the EEOC will investigate them using the same process as set out in Title VII. Similarly, employees covered by section 717 of Title VII may file complaints with the relevant Federal agency which will investigate them, and the EEOC will process appeals using the same process as set out in Title VII for Federal employees.

1636.5(b) Remedies and Enforcement Under the Congressional Accountability Act

Employees covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1401 *et seq.* (CAA) must use the procedures set forth in that statute. The Commission has no authority with respect to the

enforcement of the PWFA as to employees covered by the CAA.

1636.5(c) Remedies and Enforcement Under Chapter 5 of Title 3, United States Code

The applicable procedures and available remedies for employees covered by 3 U.S.C. 401 *et seq.* are set forth in 3 U.S.C. 451–454. These sections provide for counseling and mediation of employment discrimination allegations and the formal processing of complaints before the Commission using the same administrative process generally applicable to employees in the Executive Branch of the Federal Government; that is, the process set forth in 29 CFR part 1614.

1636.5(d) Remedies and Enforcement Under GERA

The applicable procedures and available remedies for employees covered by sections 302 and 304 of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16b and –16c (GERA), apply under the PWFA. EEOC regulations applicable to GERA are found at 29 CFR part 1603.

1636.5(e) Remedies and Enforcement Under Section 717 of the Civil Rights Act of 1964

The applicable procedures and available remedies for employees covered by section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16, apply under the PWFA.

Damages

As with other Federal employment discrimination laws, the PWFA provides for recovery of pecuniary and non-pecuniary damages, including compensatory and punitive damages. The statute’s incorporation by reference of section 1977A of the Revised Statutes of the United States, 42 U.S.C. 1981a, also imports the limitations on the recovery of compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses, and punitive damages generally applicable in employment discrimination cases, depending on the size of the employer. Punitive damages are not available in actions against the Federal Government or against State or local government employers. The proposed rule lays out these requirements involving damages in separate paragraphs under § 1636.5(a)–(e).

¹⁵⁶ The PWFA’s use of the phrase “terms, conditions, and privileges of employment” includes hiring, discharge, and compensation, which are also included within the scope of Title VII. 42 U.S.C. 2000e–2(a)(1).

Poster Requirement

Because the PWFA adopts the powers, remedies, and procedures provided in various sections of Title VII, including section 711, covered entities are required to post notices in conspicuous places describing applicable PWFA provisions. The Commission published an updated EEO poster that includes the PWFA when the PWFA went into effect.

1636.5(f) Prohibition Against Retaliation

The anti-retaliation provisions of the PWFA should be interpreted broadly, like those of Title VII and the ADA, to effectuate Congress's broad remedial purpose in enacting these laws.¹⁵⁷ The protections of these provisions extend beyond qualified employees and applicants with known limitations and cover activity that may not yet have occurred, such as a circumstance in which a covered entity threatens an employee or applicant with termination if they file a charge or requires an employee or applicant to sign an agreement that prohibits such individual from filing a charge with the EEOC.¹⁵⁸

1636.5(f)(1) Prohibition Against Retaliation

The proposed regulation reiterates the statutory prohibition against retaliation from 42 U.S.C. 2000gg–2(f)(1), which uses the same language as Title VII and the ADA.¹⁵⁹ Thus, the types of conduct prohibited and the standard for determining what constitutes retaliatory conduct under the PWFA are the same as they are under Title VII. Accordingly, this provision prohibits discrimination against individuals who engage in protected activity, which includes “‘participating’ in an EEO process or ‘opposing’ discrimination.”¹⁶⁰ Title VII’s anti-retaliation provision is broad and protects an individual from

conduct, whether related to employment or not, that a reasonable person would have found “‘materially adverse,’” meaning that the action “‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’”¹⁶¹ The same interpretation applies to the PWFA’s anti-retaliation provision.¹⁶²

The proposed rule contains five other provisions based on the statutory language and established anti-retaliation concepts under Title VII and the ADA.

First, like Title VII and the ADA, the proposed rule protects employees, applicants, and former employees because 42 U.S.C. 2000gg–2(f)(1) protects “‘employees,’” not “‘qualified employees with a known limitation.’” Therefore, the proposed rule states that an employee, applicant, or former employee need not establish that they have a known limitation or are qualified under the PWFA to bring a claim under 42 U.S.C. 2000gg–2(f)(1).¹⁶³ Second, the proposed rule explains that, consistent with the ADA and Title VII, a request for a reasonable accommodation under the PWFA constitutes protected activity, and therefore retaliation for such a request is prohibited.¹⁶⁴ Third, the proposed rule provides that an employee, applicant, or former employee does not have to actually be deterred from exercising or enjoying rights under this section for the retaliation to be actionable.¹⁶⁵ Fourth, as explained in the preamble’s discussion of the documentation that can be required in support of a request for reasonable accommodation, the proposed rule notes that it may violate this section for a covered entity to require documentation when it is not reasonable under the circumstances to determine whether to provide the accommodation. Finally, the proposed

rule explains that when an employee or applicant provides sufficient documentation to describe the relevant limitation and need for accommodation, continued efforts on the covered entity’s part to obtain documentation violates the retaliation prohibition unless the covered entity has a good faith belief that the submitted documentation is insufficient.

1636.5(f)(2) Prohibition Against Coercion

The PWFA’s anti-coercion provision uses the same language as the ADA’s interference provision, with one minor variation in the title of the section.¹⁶⁶ Similar to the ADA, the scope of the PWFA coercion provision is broader than the anti-retaliation provision; it reaches those instances “‘when conduct does not meet the ‘materially adverse’ standard required for retaliation.’”¹⁶⁷

The proposed rule follows the language of 42 U.S.C. 2000gg–2(f)(2) and protects “‘individuals,’” not “‘qualified employees with a known limitation under the PWFA.’” Thus, the proposed rule specifies that, consistent with the ADA’s interference provisions, the individual need not be an employee, applicant, or former employee and need not establish that they have a known limitation or that they are qualified (as those terms are defined in the PWFA) to bring a claim for coercion under the PWFA.¹⁶⁸

The purpose of this provision is to ensure that workers are free to avail themselves of the protections of the statute. Thus, consistent with the ADA regulations for the same provision, the proposed rule adds “‘harass’” to the list of prohibitions, as harassment may be a method to coerce a worker into not availing themselves of their PWFA rights.¹⁶⁹ The proposed rule also states that an individual does not, in fact, have to be deterred from exercising or enjoying rights under this section for the coercion to be actionable.¹⁷⁰

The proposed rule contains three examples of actions that could be violations. First, the proposed rule states that it prohibits coercion, intimidation, threats, harassment, or

¹⁵⁷ EEOC, *Enforcement Guidance on Retaliation and Related Issues* II.A. A.1 (2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues> [hereinafter *Enforcement Guidance on Retaliation*] (describing the broad protection of the participation clause); *id.* at A.2, A.2.a (describing the broad protection of the opposition clause).

¹⁵⁸ EEOC, *Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes* II (1997), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-non-waivable-employee-rights-under-eeoc-enforced-statutes> (“[P]romises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy. Agreements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.”).

¹⁵⁹ 42 U.S.C. 2000e–3(a); 42 U.S.C. 12203(a).

¹⁶⁰ *Enforcement Guidance on Retaliation*, *supra* note 157, at II.A.; *see also id.* at II.A.1–A.2 (describing protected activity under Title VII’s anti-retaliation clause).

¹⁶¹ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal citations and quotations omitted).

¹⁶² All retaliatory conduct under Title VII (and the ADA), including retaliation that takes the form of harassment, is evaluated under the legal standard for retaliation. *See Enforcement Guidance on Retaliation*, *supra* note 157, at II.B.3.

¹⁶³ *See Enforcement Guidance on Retaliation*, *supra* note 157, at III (recognizing that under the ADA, individuals need not establish that they are covered under the statute’s substantive discrimination provisions in order to be protected against retaliation); *id.* at II.A.3; *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that Title VII protects former employees from retaliation).

¹⁶⁴ *Enforcement Guidance on Retaliation*, *supra* note 157, at II.A.2.e and Example 10.

¹⁶⁵ *Id.* at II.B.1, B.2 (stating that the retaliation “‘standard can be satisfied even if the individual was not in fact deterred’” and that “[i]f the employer’s action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it falls short of its goal”).

¹⁶⁶ The ADA uses the term “‘Interference, coercion, or intimidation’” to preface the prohibition against interference (42 U.S.C. 12203(b)), whereas the PWFA uses “‘Prohibition against coercion.’” The language of the prohibitions is otherwise identical.

¹⁶⁷ *Enforcement Guidance on Retaliation*, *supra* note 157, at III.

¹⁶⁸ *Id.*

¹⁶⁹ 29 CFR 1630.12(b).

¹⁷⁰ *Enforcement Guidance on Retaliation*, *supra* note 157, at II.B.1–B.2 (noting that actions can be challenged as retaliatory even if the person was not deterred from engaging in protected activity).

interference because an individual, including an employee, applicant, or former employee, has asked for a reasonable accommodation under the PWFA.

Second, the proposed rule provides that coercion could include situations in which the covered entity requires documentation in support of a request for reasonable accommodation when it is not reasonable under the circumstances to determine whether to provide the accommodation.

Third, the proposed rule states that a covered entity that has sufficient information regarding the known limitation and the need for reasonable accommodation but continues to require additional information or documentation violates the anti-coercion provision unless the covered entity has a good faith belief that the documentation is insufficient.

Some other examples of coercion include:

- coercing an individual to relinquish or forgo an accommodation to which they are otherwise entitled;
- intimidating an applicant from requesting an accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- issuing a policy or requirement that purports to limit an employee's or applicant's rights to invoke PWFA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
- interfering with a former employee's right to file a PWFA lawsuit against a former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because they assisted a coworker in requesting a reasonable accommodation.¹⁷¹

Examples of Retaliation and/or Coercion

Actions that the courts or the Commission have previously determined may qualify as retaliation or coercion under Title VII or the ADA may qualify under the PWFA as well. Depending on the facts, a covered entity's retaliatory action for activity protected under the PWFA may violate 42 U.S.C. 2000gg-1(5), 2000gg-2(f)(1) and/or 2000gg-2(f)(2), as implemented by proposed rule §§ 1636.4(e) and 1636.5(f). The following examples would likely violate 42 U.S.C. 2000gg-

2(f) and may also violate 42 U.S.C. 2000gg-1(5).

Example 1636.5 #43: Perrin requests a stool due to pregnancy. Lucy, Perrin's supervisor, denies Perrin's request. The corporate human resources department instructs Lucy to grant the request because there is no undue hardship. Angry about being overruled, Lucy thereafter gives Perrin an unjustified poor performance rating and denies Perrin's request to attend training that Lucy approves for Perrin's coworkers.

Example 1636.5 #44: Marisol files an EEOC charge after Cyrus, her supervisor, refused to provide her with the reasonable accommodation of help with lifting after her cesarean section. Marisol also alleges that after she asked for the accommodation, Cyrus asked two coworkers to conduct surveillance on Marisol, including watching her at work, noting with whom she associated in the workplace, suggesting to other employees that they should avoid her, and reporting her breaks to Cyrus.

Example 1636.5 #45: Mara provides her employer with a note from her health care provider explaining that she is pregnant, has morning sickness, and needs to start work later on certain days. Mara's supervisor requires that Mara confirm the pregnancy through an ultrasound, even though the employer already has sufficient information regarding Mara's pregnancy.

Example 1636.5 #46: During an interview at an employment agency, Arden tells the human resources staffer, Stanley, that Arden is dealing with complications from their recent childbirth and may need time off for doctor's appointments during their first few weeks at work. Stanley counsels Arden that needing leave so soon after starting will be a "black mark" on their application.

Example 1636.5 #47: Merritt, a client of an employment agency, is discharged from an employer after requesting an accommodation under the PWFA. The employment agency refuses to refer Merritt to other employers, telling Merritt that they only refer workers who will not cause any trouble.

Example 1636.5 #48: Jessie, a factory union steward, ensures that workers know about their rights under the PWFA and encourages workers with known limitations to ask for reasonable accommodations. Jessie helps employees navigate the reasonable accommodation process and provides suggestions of possible reasonable accommodations. Factory supervisors are annoyed at the number of PWFA reasonable accommodation requests and write up Jessie for petty safety violations and other actions that had not been worthy of discipline before.

Example 1636.5 #49: While she was pregnant, Laila requested and received the reasonable accommodation of a temporary suspension of the essential function of moving heavy boxes and placement in the light duty program. After giving birth, Laila tells her employer that she has decided to resign and stay home for a year. Her employer responds by saying that if Laila follows through and resigns now, the employer will have no choice but to give her a negative reference because Laila demanded an accommodation but did not have the loyalty to come back after having her baby.

Example 1636.5 #50: Robbie, a retail worker, is visibly pregnant and would like to sit while working at the cash register. Robbie explains the situation to the manager, who requires Robbie to produce a signed doctor's note saying that Robbie is pregnant and needs to sit. Because Robbie is obviously pregnant, has confirmed the pregnancy, and requests one of the simple modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship, the covered entity is not permitted to require additional medical documentation.

Protection of Confidential Medical Information

As explained in the preamble's discussion of § 1636.3(l) *Documentation*, the established ADA rules requiring covered entities to keep medical information of applicants, employees, and former employees confidential apply to medical information obtained in connection with a reasonable accommodation request under the PWFA.¹⁷² Medical information obtained by the employer in the process of a worker seeking a reasonable accommodation under the PWFA must be protected as set out in the ADA and failing to do so would violate the ADA. For example, the fact that someone is pregnant or has recently been pregnant, is medical information about that person, as is the fact that they have a medical condition related to pregnancy or childbirth. Thus, disclosing that someone is pregnant, has recently been pregnant, or has a related medical condition violates the ADA, unless an exception applies, as does disclosing that someone is receiving or has requested an accommodation under the PWFA or has limitations for which they requested or are receiving a reasonable accommodation under the PWFA (because revealing this information discloses that the person is pregnant, has recently been pregnant, or has a related medical condition).¹⁷³

In addition, releasing medical information, threatening to release medical information, or requiring an employee or applicant to share their medical information with individuals who have no role in processing a request for reasonable accommodation may violate the PWFA's retaliation and coercion provisions.¹⁷⁴

¹⁷² *Enforcement Guidance on Disability-Related Inquiries*, supra note 114, at text accompanying n.9; EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, at text accompanying n.6 and nn.23-25 (1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>.

¹⁷³ 29 CFR 1630.14(c); *Enforcement Guidance on Disability-Related Inquiries*, supra note 114, at A.

¹⁷⁴ See § 1636.5(f)(1) and (2).

¹⁷¹ *Id.* at III.

1636.5(f)(3) Remedies for Retaliation and Coercion

The PWFA provides that the remedies and procedures for retaliation and coercion claims are the same as the remedies and procedures used for the PWFA nondiscrimination provisions. The proposed rule reiterates the statutory language on this subject.

1636.5(g) Good Faith Efforts

The PWFA at 42 U.S.C. 2000gg–2(g) and the proposed rule, using the language of the Civil Rights Act of 1991, 42 U.S.C. 1981(a)(3), provide a limitation on damages based on a “good faith effort” to provide a reasonable accommodation. Specifically, damages may not be awarded if the covered entity demonstrates good faith efforts, in consultation with the employee with a known limitation, to identify and make a reasonable accommodation that would provide the employee with an equally effective opportunity and would not cause an undue hardship. The covered entity bears the burden of proof for this affirmative defense.

Section 1636.6 Waiver of State Immunity

Because States are employers covered by Title VII, and the PWFA adopts Title VII’s definition of employers, States are employers covered by the PWFA. The PWFA at 42 U.S.C. 2000gg–4 waives State immunity under the 11th Amendment in an action in a Federal or State court of competent jurisdiction for a violation of the PWFA. The PWFA at 42 U.S.C. 2000gg–4 also makes remedies at law and in equity available in actions under the PWFA against States to the same extent that such remedies are available for such a violation against any public or private entity other than a State.

Section 1636.7 Relationship to Other Laws

The PWFA at 42 U.S.C. 2000gg–5 and this section of the proposed regulation address the PWFA’s relationship to other Federal, State, and local laws.

1636.7(a) Relationship to Other Laws Generally

42 U.S.C. 2000gg–5(a)(1) addresses the relationship of the PWFA to other Federal, State, and local laws governing protections for individuals affected by pregnancy, childbirth, or related medical conditions and makes clear that the PWFA does not limit the rights of individuals affected by pregnancy, childbirth, or related medical conditions under a Federal, State, or local law that provides greater or equal protection. It is equally true that Federal, State, or

local laws that provide less protection for individuals affected by pregnancy, childbirth, or related medical conditions than the PWFA do not limit the rights provided by the PWFA. The proposed regulation reiterates the statutory provision addressing the relationship of the PWFA to other Federal, State, and local laws governing protections for individuals affected by pregnancy, childbirth, or related medical conditions.

Thirty States and five localities have laws that provide accommodations for pregnant workers.¹⁷⁵ Federal laws, including, but not limited to, Title VII, the ADA, the FMLA, the Rehabilitation Act, and the PUMP Act, also provide protections for certain workers affected by pregnancy, childbirth, or related medical conditions.¹⁷⁶ All of the protections regarding discrimination based on pregnancy, childbirth, or related medical conditions in these laws are unaffected by the PWFA.

Additionally, if there are greater protections in other laws, those would apply. For example, the State of Washington’s Healthy Starts Act provides that certain accommodations, including lifting restrictions of 17 pounds or more, cannot be the subject of an undue hardship analysis.¹⁷⁷ If a worker in Washington is seeking a lifting restriction as a reasonable accommodation for a pregnancy-related reason under the Healthy Starts Act, an employer in Washington cannot argue that a lifting restriction of 20 pounds is an undue hardship, even though that defense could be raised if the claim were brought under the PWFA.

Furthermore, employees and applicants may bring claims under multiple State or Federal laws. Thus, a pregnant applicant denied a position because they are pregnant and will need leave for recovery from childbirth may bring a claim under both Title VII for sex discrimination and the PWFA for the denial of an employment opportunity based on the applicant’s need for an accommodation. Similarly, a worker with postpartum depression who, for that reason, is denied an equal employment opportunity may bring a claim under both the PWFA and the ADA, and possibly Title VII.

Under Title VII, employees affected by pregnancy, childbirth, or related medical conditions may be able to receive accommodations if they can identify a comparator “similar in their

ability or inability to work.”¹⁷⁸ Under the PWFA, employees affected by pregnancy, childbirth, or related medical conditions will be able to seek reasonable accommodations whether or not other employees have those accommodations and whether or not the affected employees are similar in their ability or inability to work as employees not so affected. Additionally, if the covered entity offers a neutral reason or policy to explain why employees affected by pregnancy, childbirth or related medical conditions cannot access a specific benefit, the employee with a known limitation under the PWFA still may ask for a waiver of that policy as a reasonable accommodation. Under the PWFA, the employer must grant the waiver, or another reasonable accommodation, absent undue hardship. If, for example, an employer denies a pregnant worker’s request to join its light duty program as a reasonable accommodation, arguing that the program is for workers with on-the-job injuries, it may be difficult for the employer to prove that allowing the worker with a known limitation under the PWFA to use that program is an undue hardship. Finally, employers in this situation should remember that if there are others to whom the benefit is extended, the *Young v. United Parcel Serv., Inc.*, Court stated that “[the employer’s] reason [for refusing to accommodate a pregnant employee] normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates.”¹⁷⁹ Thus, if the undue hardship defense of the employer under the PWFA is based solely on cost or convenience, that defense could, under certain fact patterns, lead to liability under Title VII.

42 U.S.C. 2000gg–5(a)(2) makes clear that an employer-sponsored health plan is not required under the PWFA to pay for or cover any item, procedure, or treatment and that the PWFA does not affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement. For example, nothing in the PWFA requires or forbids an employer to pay for health insurance benefits for an abortion. The proposed regulation, at § 1636.6, reiterates the statutory provision regarding such coverage.

¹⁷⁵ *Employment Protections for Workers Who Are Pregnant or Nursing*, *supra* note 5.

¹⁷⁶ For an explanation of the interaction between the FMLA and the ADA, *see* 29 CFR 825.702.

¹⁷⁷ Wash. Rev. Code 43.10.005(1)(d).

¹⁷⁸ 42 U.S.C. 2000e(k).

¹⁷⁹ *Young*, 575 U.S. at 229.

1636.7(b) Rule of Construction

42 U.S.C. 2000gg–5(b) provides a “[r]ule of construction”¹⁸⁰ stating that the law is “subject to the applicability to religious employment” set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a). The relevant portion of section 702(a) provides that “[Title VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”¹⁸¹

The proposed regulation reiterates the PWFA’s statutory language and adds that nothing in the text of the proposed rule limits the rights of covered entities under the U.S. Constitution, and that nothing in the proposed rule or 42 U.S.C. 2000gg–5(b) limits the rights of an employee, applicant, or former employee under other civil rights statutes. As with assertions of section 702(a) in Title VII matters, when 42 U.S.C. 2000gg–5(b) is asserted by a respondent employer, the Commission will consider the application of the provision on a case-by-case basis.¹⁸²

Given the Commission’s obligation to give effect to the remedial purpose of the PWFA and provide examples of how the statute’s reasonable accommodation requirement applies in certain circumstances, the Commission is considering whether to provide examples that implicate 42 U.S.C. 2000gg–5(b) and whether to adopt a

more detailed rule setting forth a specific interpretation of 42 U.S.C. 2000gg–5(b) that would inform the Commission’s case-by-case consideration of whether that provision applies to a particular set of facts. The Commission therefore seeks information on how section 702(a) of Title VII, adopted as a rule of construction in PWFA at 42 U.S.C. 2000gg–5(b), may apply in the context of concrete factual scenarios.¹⁸³ Specifically, the Commission invites the public to provide examples of:

(1) What accommodations provided under PWFA, 42 U.S.C. 2000gg–1, may impact a religious organization’s employment of individuals of a particular religion, and what accommodations may not impact a religious organization’s employment of such individuals;

(2) How accommodations provided under PWFA, 42 U.S.C. 2000gg–1, may affect those individuals’ performance of work connected with the religious organization’s activities, and when they may not affect those individuals’ performance of such work;

(3) When the prohibition on retaliatory or coercive actions in PWFA, 42 U.S.C. 2000gg–2(f), may impact a religious organization’s employment of individuals of a particular religion, and when it may not impact a religious organization’s employment of such individuals;

(4) When prohibiting retaliatory or coercive actions as described in PWFA, 42 U.S.C. 2000gg–2(f), may affect those individuals’ performance of work connected with the religious organization’s activities, and when it may not affect those individuals’ performance of such work; and

(5) Whether any of the above factual scenarios is expected to arise with such regularity that, to facilitate compliance with this provision, the public would benefit from the Commission providing a more detailed interpretation of PWFA, 42 U.S.C. 2000gg–5(b), that would inform the Commission’s case-by-case consideration of whether that provision applies to a particular set of facts. Possible alternatives for a more detailed interpretation of 42 U.S.C. 2000gg–5(b) that the Commission could adopt include: (a) a rule of construction that “allows religious institutions to continue to prefer coreligionists in the pregnancy accommodation context,” specifically in connection with accommodations that involve reassignment to a job or to duties for which a religious organization has

decided to employ a coreligionist;¹⁸⁴ or (b) a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity’s religion.¹⁸⁵

The Commission also seeks comments regarding any alternative interpretations of PWFA, 42 U.S.C. 2000gg–5(b), that commenters believe, given their answers to questions 1–5, that the Commission should consider.

The Commission will evaluate the comments it receives using the following framework and considerations.

Ministerial Exception and RFRA

Religious entities may have a defense to a PWFA claim under the First Amendment or the Religious Freedom Restoration Act (RFRA).

Under the religion clauses of the First Amendment, a religious organization may, in certain circumstances, select those who will “personify its beliefs,” “shape its own faith and mission,” or “minister to the faithful.”¹⁸⁶ This rule is known as the “ministerial exception” and may provide an affirmative defense to an otherwise cognizable claim under certain anti-discrimination laws, including Title VII¹⁸⁷ and the PWFA. The exception applies to discrimination claims involving the selection, supervision, and removal by a religious institution of employees who perform vital religious duties at the core of the mission of the religious institution.¹⁸⁸ In determining whether the ministerial exception applies to a claim, the Commission applies the Supreme Court’s reasoning in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*¹⁸⁹ and *Our Lady of Guadalupe School v. Morrissey-Berru*¹⁹⁰ on a case-by-case basis, including reviewing the factors set out by the Supreme Court.

RFRA provides that “[g]overnment shall not substantially burden a person’s

¹⁸⁰ 42 U.S.C. 2000gg–5(b) (heading).

¹⁸¹ The PWFA makes no mention of section 703(e)(2) of the Civil Rights Act of 1964, which provides a second statutory exemption for religious educational institutions in certain circumstances.

¹⁸² The EEOC’s procedures ensure that employers have an opportunity to raise religious defenses and that any religious defense to a charge of discrimination is carefully considered. See *Religious Discrimination Compliance Manual*, *supra* note 145, at 12–I(C)(3) (discussing the “nuanced balancing” required and instructing investigators to “take great care”); 29 CFR 1601 *et seq.* (setting out the EEOC’s charge procedures). The EEOC recognizes employers’ valid religious defenses and dismisses charges at the administrative stage accordingly. See *Newsome v. EEOC*, 301 F.3d 227, 229–230 (5th Cir. 2002) (*per curiam*) (EEOC dismissed a charge where the employer offered evidence it fell under the religious organization exemption). The EEOC has no authority to impose penalties on private employers, see *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 363 (1977); thus, if the EEOC rejects a private employer’s asserted religious defense, the EEOC cannot force the employer to resolve the charge or pay any type of damages. To obtain any type of relief if the EEOC is unsuccessful at obtaining voluntary compliance, the EEOC would have to bring a case in Federal court, where the validity of the employer’s religious defense would be determined.

¹⁸³ PWFA, 42 U.S.C. 2000gg–5(b).

¹⁸⁴ See 168 Cong. Rec. H10,527–28 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler).

¹⁸⁵ See 168 Cong. Rec. S10,063, S10,070 (daily ed. Dec. 22, 2022) (statement of Senator Bill Cassidy that “the title VII religious exemption” addresses the same issue as a rejected amendment to the PWFA from Senator James Lankford, which stated: “This division shall not be construed to require a religious entity described in section 702(a) of the Civil Rights Act of 1964 to make an accommodation that would violate the entity’s religion”).

¹⁸⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

¹⁸⁷ *Religious Discrimination Compliance Manual*, *supra* note 145, at 12–I.C.2.

¹⁸⁸ *Id.* at 12–I.C.2 (noting that “unlike the statutory religious organization exemption, the ministerial exception applies regardless of whether the challenged employment decision was for ‘religious’ reasons”).

¹⁸⁹ 565 U.S. at 190–94.

¹⁹⁰ 140 S. Ct. 2049, 2063–69 (2020).

exercise of religion” even if the burden “results from a rule of general applicability” except when the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”¹⁹¹ Most courts to consider the issue have held that a RFRA defense does not apply in suits involving only private parties.¹⁹² The Commission carefully considers assertions of a defense under RFRA on a case-by-case basis.¹⁹³

Section 702(a) of the Civil Rights Act of 1964

Entities Considered Religious Organizations

Under section 702(a) of the Civil Rights Act of 1964, an employer that is a “religious corporation, association, educational institution, or society” qualifies for the religious exemption set forth in that provision. This exemption only applies to those organizations whose purpose and character are primarily religious. Courts have articulated different factors to determine whether an entity is a religious organization, including: (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity’s articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with, or financially supported by a formally religious entity such as a church or synagogue; (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its

membership is made up by coreligionists.¹⁹⁴

Courts have recognized that engaging in secular activities does not disqualify an employer from being a “religious organization” within the meaning of section 702(a).¹⁹⁵ Section 702(a) does not distinguish between nonprofit and for-profit status, and Title VII case law has not definitively determined whether a for-profit corporation that satisfies the other factors referenced above can constitute a religious corporation under Title VII.¹⁹⁶ When the religious organization exemption is asserted by a respondent employer, the Commission considers on a case-by-case basis whether an employer is a religious organization, utilizing the factors outlined above; no one factor is dispositive in determining if a covered entity is a religious organization under section 702(a).

Application of Section 702(a) to Sex- and Pregnancy-Based Discrimination and the PWFA

“Religious organizations are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, and national origin (as well as the anti-discrimination provisions of the other EEO laws such as the ADEA, ADA, and GINA), and they may not engage in related retaliation.”¹⁹⁷

¹⁹⁴ *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007); *Religious Discrimination Compliance Manual*, *supra* note 145, at 12–I.C.1.

¹⁹⁵ *See, e.g., LeBoon*, 503 F.3d at 229 (holding that a Jewish community center was a religious organization under Title VII, despite engaging in secular activities such as secular lectures and instruction with no religious content, employing overwhelmingly Gentile employees, and failing to ban non-kosher foods).

¹⁹⁶ *Religious Discrimination Compliance Manual*, *supra* note 145, at 12–I.C.1; *see LeBoon*, 503 F.3d at 229 (stating that “the religious organization exemption would not extend to an enterprise involved in a wholly secular and for-profit activity”); *see also EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988) (holding that evidence the company was for profit, produced a secular product, was not affiliated with a church, and did not mention a religious purpose in its formation documents, indicated that the business was not “primarily religious” and therefore did not qualify for the religious organization exemption).

¹⁹⁷ *Religious Discrimination Compliance Manual*, *supra* note 145, at 12–I.C.1 n.65 (citing *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (holding that the exemption “does not exempt religious organizations from Title VII’s provisions barring discrimination on the basis of race, gender, or national origin”); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that the exemption “does not . . . exempt religious educational institutions with respect to all discrimination”); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) (“Religious institutions that otherwise qualify as ‘employer[s]’ are subject to Title VII provisions relating to discrimination based on race, gender and national origin”); *Rayburn v. Gen. Conf. of Seventh-*

Indeed, every U.S. court of appeals to have considered the question has held that section 702(a) does not exempt religious organizations from Title VII’s prohibitions against discrimination when an employment decision is based upon race, color, sex, or national origin.¹⁹⁸ However, the Commission has previously stated that a qualified religious organization may argue as a defense that it made the challenged decision on the basis of religion.¹⁹⁹

The PWFA addresses sex discrimination by making it an unlawful employment practice for a covered entity to deny a reasonable accommodation (absent undue hardship) to a qualified employee with a known limitation related to pregnancy, childbirth, or related medical conditions,²⁰⁰ and uses the same language as Title VII’s definition of sex.²⁰¹ Because the PWFA uses the same language as Title VII and, like Title VII, addresses sex discrimination, it is logical that the language in the rule of construction set forth in 42 U.S.C. 2000gg–5(b) of the PWFA should be interpreted the same as the Title VII language. The Title VII language does not categorically exempt religious organizations from making reasonable accommodations to the known limitations of employees under the PWFA.

Additional Considerations

The Commission’s review of the comments regarding this provision also will be informed by the fact that individuals may bring claims under

Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) (“While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin.”); *cf. Garcia v. Salvation Army*, 918 F.3d 997, 1004–05 (9th Cir. 2019) (holding that Title VII retaliation and hostile work environment claims related to religious discrimination were barred by the religious organization exception, but adjudicating the disability discrimination claim on the merits)).

¹⁹⁸ *Id.* For additional information about the Commission’s position on the scope of section 702(a), *see Religious Discrimination Compliance Manual*, *supra* note 145, at 12–I.C.1, nn.67, 69–70.

¹⁹⁹ *See Religious Discrimination Compliance Manual*, *supra* note 145, at 12–I.C.1; *but see* Rescission of Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption Rule, 88 FR 12842, 12854 (Mar. 1, 2023) (“In OFCCP’s view, however, the cases cited in the EEOC’s 2021 Compliance Manual do not support the proposition that asserting such a defense exempts the organization from the Title VII prohibitions against discrimination on the basis of race, color, sex, and national origin.”).

²⁰⁰ 42 U.S.C. 2000gg–1(1); *see, e.g.*, 42 U.S.C. 12112(b)(5)(A) (listing the denial of reasonable accommodations under the ADA as a type of discrimination).

²⁰¹ 42 U.S.C. 2000gg(4); *see* 42 U.S.C. 2000e(k).

¹⁹¹ 42 U.S.C. 2000bb–1(a)–(b).

¹⁹² *See, e.g., Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736–37 (7th Cir. 2015); *Gen. Conf. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 409–12 (6th Cir. 2010). The Second Circuit has held otherwise, *Hankins v. Lyght*, 441 F.3d 96, 103–04 (2d Cir. 2006) (holding that an employer could raise RFRA as a defense to an employee’s Age Discrimination in Employment Act (ADEA) claim because the ADEA is enforceable both by the EEOC and private litigants), but the court has questioned the correctness of *Hankins* given the text of RFRA, *Rweyemamu v. Cote*, 520 F.3d 198, 203 & n.2 (2d Cir. 2008).

¹⁹³ *Religious Discrimination Compliance Manual*, *supra* note 145, at 12–I.C.3 (counseling EEOC investigators to “take great care” in situations involving the First Amendment and RFRA).

both Title VII and the PWFA; the legislative history of the PWFA, which is different from that of Title VII; and possible decisions by the courts of appeals in pending cases.²⁰²

Section 1636.8 Severability

The PWFA at 42 U.S.C. 2000gg–6 contains a severability provision that allows for parts of the statute to continue to be applicable even if other parts are held invalid as to particular persons or held unconstitutional. The proposed regulation repeats the statutory provision and also addresses the Commission's intent regarding the severability of the Commission's proposed regulation.

Following Congress's rule for the statute, in places where the proposed regulation uses the same language as the statute, if any of those identical proposed regulatory provisions, or the application of those provisions to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision of the regulation to other persons or circumstances shall not be affected. For example, if § 1636.4(b) of the regulation is held to be invalid or unconstitutional, it is the intent of the Commission that the remainder of the regulation shall not be affected.

In other places, where the proposed regulation provides additional guidance to carry out the PWFA, including examples of reasonable accommodations, following Congress's intent regarding the severability of the provisions of the statute, it is the Commission's intent that if any of those proposed regulatory provisions or the application of those provisions to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision of the regulation to other persons or circumstances shall not be affected. For example, if § 1636.3(j)(4) is held to be invalid or unconstitutional, it is the Commission's intent that the remainder of the regulation shall not be affected.

Consolidated List of NPRM Directed Questions

The Commission encourages the public to comment on the proposed rule in general. In addition, the Commission specifically seeks comment on the following topics:

1. Section 1636.3(d): Definition of "Communicated to the Employer"

The Commission seeks comment on whether the definition of whom the employee or applicant may communicate with to start the reasonable accommodation process is appropriate, or whether it should be expanded or limited with the understanding that the process should not be burdensome for the worker.

2. Section 1636.3(f)(2)(i)–(iii): Definitions of "Temporary," "In the Near Future," and "The Inability To Perform the Essential Function Can Be Reasonably Accommodated"

The Commission seeks comment regarding the proposed definitions of the terms from 42 U.S.C. 2000gg(6)(A)–(C) ("temporary," "in the near future," and "the inability to perform the essential function can be reasonably accommodated"), including: (a) whether the definition of "in the near future" post-pregnancy should be one year rather than generally forty weeks; (b) whether periods of temporary suspension of an essential function during pregnancy and post-pregnancy should be combined, and, if so, how should that be done, and what rule should be adopted to ensure that a pregnant worker is not required to predict what limitations they will experience after pregnancy given that a pregnant worker will not generally be able to do so; and (c) whether there are alternative approaches that would more effectively ensure that workers are able to seek the accommodations they need while limiting the burden on covered entities.

3. Section 1636.3(g): Definition of "Essential Functions"

The Commission seeks comment on whether there are additional factors that should be considered in determining whether a function is essential for purposes of the PWFA. For example, given that many, if not all, known limitations under the PWFA will be temporary, should the definition of "essential function" under the PWFA consider whether the function is essential to be performed by the worker in the limited time for which an accommodation will be needed.

4. Section 1636.3(h): Ensuring That Workers Are Not Penalized for Using Reasonable Accommodations

The Commission seeks comment on its explanation ensuring that workers are not penalized for using reasonable accommodations, whether there are other situations where this may apply, and whether examples would be helpful to illustrate this point.

5. Section 1636.3(i): Reasonable Accommodation Examples

Throughout the preamble, the Commission provides examples of reasonable accommodations and related analysis. The Commission seeks comment on whether more examples would be helpful and, if so, the types of conditions and accommodations that should be the focus of the additional examples.

6. Section 1636.3(i) Reasonable Accommodation Examples

The Commission seeks comment on whether there are examples or other information that should be included to account for situations in which a worker who already has a reasonable accommodation for an existing disability (1) develops a known limitation and needs new accommodations or modifications to their existing reasonable accommodations or (2) needs to ensure the continuation of their disability-related reasonable accommodations if the worker is moved to another position or given different duties as part of the reasonable accommodation for a known limitation. Further, the Commission seeks comment on ways to ensure that in circumstances described in this question, the respective accommodations can be provided in a timely and coordinated way.

7. Section 1636.3(j)(4): Predictable Assessments of Undue Hardship

The Commission seeks comment on whether the adoption of the predictable assessment approach facilitates compliance with the PWFA by identifying some of the accommodations most commonly requested by workers due to pregnancy that are simple, inexpensive, and easily available. The Commission further seeks comment on whether different, fewer, or additional types of accommodations should be included in the "predictable assessment" category and whether the category should include predictable assessments for childbirth and/or related medical conditions.

8. Section 1636.3(l): Documentation

A. The Commission seeks comment on its proposed approach to supporting documentation, including: (1) whether this approach strikes the correct balance between what an employee or applicant can provide and the interests of the covered entity; (2) whether it is always reasonable under the circumstances for covered entities to require confirmation of a pregnancy beyond self-attestation when the pregnancy is not obvious; (3) if allowed, whether the confirmation of a non-obvious pregnancy should be limited to less invasive methods, such as the confirmation of a pregnancy through a urine test; (4) the ability of employees or applicants to obtain relevant information from a health care provider, particularly early in pregnancy; and (5) whether there are other common limitations that occur early in pregnancy, such as fatigue or morning sickness, for which an employer should not be permitted to require documentation beyond self-attestation.

B. Section 1636.3(l)(3): Non-Exhaustive List of Health Care Providers. The Commission seeks comment on whether

²⁰² E.g., *Billard v. Charlotte Cath. High Sch.*, No. 3:17–cv–00011, 2021 WL 4037431 (W.D.N.C. Sept. 3, 2021) (rejecting a Catholic school's argument that it was exempt from the plaintiff's sex-based discrimination claims under Title VII's religious exemption provisions), *appeal filed* (4th Cir. Apr. 25, 2022); *Garrick v. Moody Bible Inst.*, 494 F. Supp. 3d 570, 576–77 (N.D. Ill. 2020) (rejecting religious educational institution's argument that it was exempt, under section 702(a), from the plaintiff's sex discrimination and retaliation claims where the plaintiff alleged that her employer's asserted "religious justification [for firing her was] a pretext for gender discrimination") (emphasis in original), *appeal filed* (7th Cir. Sept. 14, 2021).

other types of health care providers should be included in the non-exhaustive list in the regulation.

C. Section 1636.3(l)(3): Appropriate Health Care Provider to Provide Documentation. The Commission seeks comment on whether there are situations in which an employer should be permitted to require an employee seeking a reasonable accommodation to be examined by a health care provider chosen by the employer; what limits that should be placed on the employer or the health care provider; and what effect allowing such an examination may have on the willingness of workers to request accommodations under the PWFA.

9. Section 1636.4(1): Choosing Between Accommodations

The Commission seeks comment on whether it should include language in the rule explaining that an employer may not unreasonably select an accommodation that negatively affects an employee's or applicant's employment opportunities or terms and conditions of employment when another available accommodation would not do so or whether the protections in 42 U.S.C. 2000gg-1(1) and (5) and 2000gg-2(f) alone are sufficiently clear in this regard.

10. Section 1636.4(b): Requiring Employee To Accept an Accommodation

The Commission seeks comment on whether there are other factual scenarios that would violate this provision and whether additional examples would be helpful.

11. Section 1636.4(e): Adverse Action on Account of Requesting or Using a Reasonable Accommodation

The Commission seeks comment on whether there are other factual scenarios that would violate this provision and whether additional examples would be helpful.

12. Section 1636.7(b): Rule of Construction

The Commission invites the public to provide examples of:

A. What accommodations provided under PWFA, 42 U.S.C. 2000gg-1 may impact a religious organization's employment of individuals of a particular religion, and what accommodations may not impact a religious organization's employment of such individuals;

B. How accommodations provided under PWFA, 42 U.S.C. 2000gg-1 may affect those individuals' performance of work connected with the religious organization's activities, and when they may not affect those individuals' performance of such work;

C. When the prohibition on retaliatory or coercive actions in PWFA, 42 U.S.C. 2000gg-2(f) may impact a religious organization's employment of individuals of a particular religion, and when it may not impact a religious organization's employment of such individuals;

D. When prohibiting retaliatory or coercive actions as described in PWFA, 42 U.S.C. 2000gg-2(f) may affect those individuals' performance of work connected with the religious organization's activities, and when it may not affect those individuals' performance of such work.

E. The Commission also seeks comment regarding whether any of the above factual

scenarios are expected to arise with such regularity that, to facilitate compliance with this provision, the public would benefit from a more detailed rule by the Commission than the case-by-case approach proposed and whether there are alternative interpretations of 42 U.S.C. 2000gg-5(b) of the PWFA that commenters believe, given their answers to questions A–D, that the Commission should consider.

13. Economic Analysis

A. The Commission has identified five primary benefits of the proposed rule and underlying statute. The Commission seeks comment regarding these and any other benefits to individuals who may be affected by the accommodations and protections set forth in the proposed rule and the PWFA, or who may have been affected by a lack of such accommodations and protections in the past, including qualitative or quantitative research and anecdotal evidence.

B. The Commission seeks comment regarding whether the health benefits that are expected to result from the PWFA and its implementing regulations are quantifiable; in particular, the Commission seeks comments regarding any existing data specifying how often pregnancy-related health problems may be attributed to the unavailability of work accommodations and the resulting cost of such problems.

C. The Commission seeks comment regarding the ways in which the proposed rule and the PWFA enhance human dignity, including qualitative or quantitative research and anecdotal evidence addressing this benefit.

D. The Commission seeks comment regarding any existing data quantifying the proportion of pregnant workers who need workplace accommodations.

E. The Commission seeks comment on whether the annual cost of providing non-zero cost accommodations should be calculated based on durable goods with a useful life of five years.

F. The Commission seeks comment regarding any existing data quantifying the average cost of pregnancy-related accommodations.

G. The Commission seeks comment on whether 90 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that do not already have laws substantially similar to the PWFA and for the Federal Government, and whether 30 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that have existing laws similar to the PWFA.

H. The Commission invites members of the public to comment on any aspect of this IRIA, and to submit to the Commission any data that would further inform the Commission's analysis.

I. The Commission seeks comment regarding its analysis and conclusion that the regulation will not have a significant economic impact on small entities; in particular, the Commission seeks comment regarding any existing data quantifying impacts on small entities.

J. The Commission has attempted to draft this NPRM in plain language. The Commission invites comment on any aspect

of this NPRM that does not meet this standard.

Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review)

I. Introduction

Under Executive Order (E.O.) 12866, the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) determines whether a regulatory action is significant.²⁰³ Section 3(f) of E.O. 12866, as amended by E.O. 14094, defines 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 \$200 million or more (adjusted every three years by the Administrator of OIRA for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, 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 legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O.²⁰⁴

Executive Orders 12866 and 13563 direct agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society; that it is consistent with achieving the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits.²⁰⁵ E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.²⁰⁶

²⁰³ 58 FR 51735, 51737–8 (Oct. 4, 1993), as amended by Executive Order (E.O.) 14094, 88 FR 21879 (Apr. 11, 2023).

²⁰⁴ 58 FR at 51738, as amended by E.O. 14094, 88 FR at 21879.

²⁰⁵ 76 FR 3821 (Jan. 21, 2011).

²⁰⁶ *Id.*

II. Summary

Based on our estimates, OIRA has determined this rulemaking is significant per E.O. 12866 section 3(f)(1), as amended by E.O. 14094. Therefore, the Commission has completed an Initial Regulatory Impact Analysis (IRIA) as required under E.O. 12866 and E.O. 13563, as amended by E.O. 14094.

As detailed in the Analysis section below, the proposed rule and underlying statute are expected to provide numerous unquantifiable benefits to qualified employees and applicants with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, especially in States that currently do not have laws substantially similar to the PWFA. It will also benefit covered entities and the U.S. economy and society as a whole. These unquantifiable benefits include improved maternal and infant health; improved economic security for pregnant workers; increased equity, human dignity, and fairness; improved clarity of enforcement standards; and efficiencies in litigation.

The quantitative section in the analysis below provides estimates of the two main expected costs associated with the proposed rule and underlying statute: (a) annual costs associated with providing reasonable accommodations to qualified applicants and employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions by employers in States that do not currently have such a requirement, and (b) one-time administrative costs for covered entities, which include becoming familiar with the rule, posting new equal employment opportunity posters,²⁰⁷ and updating EEO policies and handbooks. The Commission expresses the quantifiable impacts in 2022 dollars and uses discount rates of 3 and 7 percent, pursuant to OMB Circular A–4.

The analysis concludes that approximately 49.4 percent of the reasonable accommodations that will be required by the rule and underlying statute will have no cost to covered entities, and that the average annual cost for the remaining 50.6 percent of such accommodations is approximately \$60.00 per year per accommodation. Taking into account that many entities covered by the PWFA are already required to provide such

accommodations under State and local laws, the total impact on the U.S. economy to provide reasonable accommodations under the rule and underlying statute is estimated to be between \$7.1 million and \$21.2 million per year.

The estimated one-time costs associated with administrative tasks is quite low on a per-establishment basis—between \$56.76 and \$170.27, depending on the State. Despite the low per-establishment cost, the proposed rule is a “significant regulatory action” under section 3(f)(1) of E.O. 12866, as amended by E.O. 14094, because the number of regulated entities—hence the number of entities expected to incur one-time administrative costs—is extremely large (including all public and private employers with 15 or more employees and the Federal Government). As a result, the Commission has concluded that the overall cost to the U.S. economy will be in excess of \$200 million.²⁰⁸ Of course, this does not take into account the previous cost of gender inequality in the labor market and the fact that PWFA will improve gender equality and thus have a positive effect on the economy.

III. Preliminary Economic Analysis of Impacts

A. The Need for Regulatory Action

The PWFA and the proposed regulation respond to the previously limited Federal legal protections that provide accommodations for workers affected by pregnancy, childbirth, or related medical conditions. Although Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (as amended by the Pregnancy Discrimination Act (PDA)) (Title VII) provided some protections for workers affected by pregnancy, childbirth or related medical conditions, court decisions regarding the ability of workers affected by pregnancy, childbirth, or related medical conditions to obtain workplace accommodations created “unworkable” standards that did not adequately protect pregnant workers.²⁰⁹ Similarly,

²⁰⁸ H.R. Report No. 117–27, pt.1, at 41 (2021) (the Congressional Budget Office (CBO) did not review the PWFA for intergovernmental or private-sector mandates because “[s]ection 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provision that would establish or enforce statutory rights prohibiting discrimination,” and CBO “determined that the bill falls within that exclusion because it would extend protections against discrimination in the workplace based on sex to employees requesting reasonable accommodations for pregnancy, childbirth, or related medical conditions”).

²⁰⁹ H.R. Rep. No. 117–27, pt.1, at 14–16 (2021) (describing court rulings under Title VII and the Supreme Court’s decision in *Young v. United Parcel*

prior to the PWFA, some pregnant workers could obtain protections under the Americans with Disabilities Act of 1990, 42 U.S.C. 12111 *et seq.* (ADA), but these were limited.²¹⁰ Pregnant workers who could not obtain accommodations risked their economic security which had harmful effects for themselves and their families.²¹¹ Furthermore, the loss of a job can affect a pregnant worker’s economic security for decades, as they lose out on “retirement contributions . . . short term disability benefits, seniority, pensions, social security contributions, life insurance, and more.”²¹² Additionally, the lack of workplace accommodation can harm the health of the worker and their pregnancy.²¹³ While numerous States have laws that provide for accommodations for pregnant workers, the lack of a national standard before the passage of the PWFA meant that workers’ rights varied depending on the State and that millions of workers were unprotected.²¹⁴

The PWFA at 42 U.S.C. 2000gg–3(a) provides:

Not later than 1 year after [the date of enactment of the Act,], the Commission shall issue regulations in an accessible format in accordance with subchapter II of chapter 5 of title 5[, United States Code,] to carry out this chapter. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.

Pursuant to 42 U.S.C. 2000gg–3, the EEOC is issuing this proposed rule following the procedures codified at 5 U.S.C. 553(b).

B. Baseline

The PWFA is a new law that requires covered entities to provide reasonable accommodations to the known limitations related to, arising out of, or affected by pregnancy, childbirth, or related medical conditions of qualified employees. As set out in the NPRM, the

Serv., Inc., 575 U.S. 206 (2015); see *supra* Preamble of Notice of Proposed Rule Making (NPRM).

²¹⁰ *Id.* at 19–21 (describing court decisions under the ADA that failed to find coverage for workers with pregnancy-related disabilities).

²¹¹ *Id.* at 22 (“When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies”); *id.* at 24 (noting that “families increasingly rely on pregnant workers’ incomes.”).

²¹² *Id.* at 25.

²¹³ *Id.* at 22. (“According to the American College of Obstetricians and Gynecologists (ACOG), providing reasonable accommodations to pregnant workers is critical for the health of women and their children”); *id.* (describing how a lack of an accommodation led to a miscarriage for a worker).

²¹⁴ See *infra* Table 1 for a calculation of the number of workers who live in states without PWFA-analog laws.

²⁰⁷ The Commission posted an updated poster on its website (<https://www.eeoc.gov/poster>) prior concurrent with the PWFA’s effective date of June 27, 2023.

PWFA seeks to fill gaps in the Federal and State legal landscape regarding protections for workers affected by pregnancy, childbirth, or related medical conditions.

Workers affected by pregnancy, childbirth, or related medical conditions have certain rights under existing civil rights laws, such as Title VII, the ADA, the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* (FMLA), and various State and local laws.²¹⁵

Under Title VII, a worker affected by pregnancy, childbirth, or related medical conditions may be able to obtain a workplace modification to allow them to continue to work.²¹⁶ Typically courts have only found in favor of such claims if the worker can identify another individual similar in their ability or inability to work who received such an accommodation, or if there is some direct evidence of disparate treatment (such as a biased comment or a policy that, on its face, excludes pregnant workers). However, there may not always be similarly situated employees. For this reason, some pregnant workers have not received simple, common-sense accommodations, such as a stool for a cashier²¹⁷ or bathroom breaks for a preschool teacher.²¹⁸ And even when the pregnant worker can identify other workers who are similar in their ability or inability to work, some courts have still not found a Title VII violation.²¹⁹

²¹⁵ For a list of State laws, see *infra* Table 1. In addition, Federal laws regarding Federal funding such as Title IX of the Education Amendments Act of 1972 (20 U.S.C. 1681 *et seq.*) and the Workforce Innovation and Opportunities Act (29 U.S.C. 3240) provide protection from sex discrimination, including discrimination based on pregnancy, childbirth, or related medical conditions.

²¹⁶ As relevant here, Title VII protects workers from discrimination based on pregnancy, childbirth, or related medical “with respect to . . . compensation, terms, conditions, or privileges of employment[] because of such individual’s . . . sex.” 42 U.S.C. 2000e-2(a)(1). Discrimination because of sex includes discrimination based on “pregnancy, childbirth, or related medical conditions.” 42 U.S.C. 2000e(k). Title VII also provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” *Id.*

²¹⁷ See, e.g., *Portillo v. IL Creations Inc.*, 2019 WL 1440129, at *5 (D.D.C. Mar. 31, 2019).

²¹⁸ See, e.g., *Wadley v. Kiddie Acad. Int’l, Inc.*, 2018 WL 3035785, at *4 (E.D. Pa. June 19, 2018).

²¹⁹ See, e.g., *EEOC v. Wal-Mart Stores East, L.P.*, 46 F.4th 587, 597–99 (7th Cir. 2022) (concluding that the employer did not engage in discrimination when it failed to accommodate pregnant workers with light duty assignments, even though the employer provided light duty assignments for workers who were injured on the job); but see, e.g., *Legg v. Ulster Cnty.*, 820 F.3d 67, 69, 75–77 (2d Cir. 2016) (vacating judgment for the employer where officers injured on the job were entitled to light duty but pregnant workers were not).

Under the ADA, certain workers affected by pregnancy, childbirth, or related medical conditions may have the right to accommodations if they show that they have an ADA disability; this standard does not include pregnancy itself but instead requires the showing of a pregnancy-related disability.²²⁰

Under the FMLA, covered workers can receive up to 12 weeks of job-protected unpaid leave for, among other things, a serious health condition, the birth of a child, and bonding with a newborn within one year of birth.²²¹ However, employees must work for an employer with 50 or more employees within 75 miles of their worksite and meet certain tenure requirements in order to be entitled to FMLA leave.²²² Survey data from 2018 show that only 56 percent of employees are eligible for FMLA leave.²²³ Further, the FMLA only provides unpaid leave—it does not require reasonable accommodations that would allow workers to stay on the job and continue to be paid.

As set out in Table 1, thirty States currently have laws similar to the PWFA that provide for accommodations for pregnant workers. In most States, again as set out in Table 1, the State laws cover the same employers that are covered by the PWFA. Workers in the remainder of the States and Federal Government workers have the rights set out in the Federal laws described above and, until the passage of the PWFA, did not have the protections of a law like the PWFA.

C. Nonquantifiable Benefits

The proposed rule and the underlying statute create many important benefits that stem from “values that are difficult or impossible to quantify,” including “equity, human dignity, [and] fairness.”²²⁴ The Commission has identified five primary benefits of the proposed rule and underlying statute. The Commission seeks comment regarding these and any other benefits to individuals who may be affected by the accommodations and protections set forth in the proposed rule and the PWFA, or who may have been affected by a lack of such accommodations and protections in the past, including

²²⁰ 42 U.S.C. 12102(2) & (4); 29 CFR part 1630 app. 1630(h); EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues II* (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues> [hereinafter *Enforcement Guidance on Pregnancy Discrimination*].

²²¹ 29 U.S.C. 2612(a)(1); 29 CFR 825.120.

²²² 29 U.S.C. 2611(2)(A), (B).

²²³ *Brown et al.*, *supra* note 14.

²²⁴ 76 FR 3821, *supra* note 205.

qualitative or quantitative research and anecdotal evidence.

1. Improvements in Health for Pregnant Workers and Their Babies

Congress enacted the PWFA in large part to improve maternal and infant health outcomes. The legislative history emphasizes that the new law was needed because “[n]o worker should have to choose between their health, the health of their pregnancy, and the ability to earn a living.”²²⁵ Congress further concluded that “providing reasonable accommodations to pregnant workers is critical to the health of women and their children.”²²⁶ The need to improve the health of health outcome surrounding pregnancy is critical—as a recent report noted, “women in our country are dying at a higher rate from pregnancy-related causes than in any other developed nation.”²²⁷ Additionally, “Black women are more than three times as likely as White women to die from pregnancy-related causes, while American Indian/Alaska Native [women] are more than twice as likely”²²⁸ and a recent study shows that negative health outcomes during pregnancy disproportionately affect Black women compared to White women regardless of wealth.²²⁹

Some studies have shown increased risk of miscarriage,²³⁰ preterm birth,²³¹

²²⁵ H.R. Rep. No. 117–27, pt.1, at 11.

²²⁶ *Id.* at 11, 22.

²²⁷ White House, *White House Blueprint for Addressing the Maternal Health Crisis* 1 (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/06/Maternal-Health-Blueprint.pdf>.

²²⁸ *Id.* at 15.

²²⁹ Kate Kennedy-Moulton et al., *Maternal and Infant Health Inequality: New Evidence from Linked Administrative Data* 5 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30,693, 2022), https://www.nber.org/system/files/working_papers/w30693/w30693.pdf (finding that maternal and infant health vary with income, but infant and maternal health in Black families at the top of the income distribution is similar to or worse than that of White families at the bottom of the income distribution).

²³⁰ H.R. Rep. No. 117–27, pt.1, at 22; Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 733, *Employment Considerations During Pregnancy and the Postpartum Period* e119 (2018), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.pdf> [hereinafter *ACOG Committee Opinion*] (discussing studies that showed an increased risk of miscarriage or stillbirth associated with night work, working more than 40 hours a week, or extensive lifting, but noting that “[i]t is difficult to draw definitive conclusions from these studies.”).

²³¹ H.R. Rep. No. 117–27, pt.1, at 22; *ACOG Committee Opinion*, *supra* note 230, at e119–20 (discussing studies that found a “slight to modest risk increase” of preterm birth with some work conditions, but also noting that it is hard to know

low birth weight, urinary tract infections, fainting, and other health problems for pregnant workers because of workplace conditions.²³² Several witnesses submitted personal stories to Congress connecting the lack of accommodations at work and dangers to the health of the employee or their pregnancy.²³³ Further, both the legislative history of the PWFA and surveys of pregnant workers demonstrate that denial of reasonable accommodations at work may negatively impact not only the physical health of pregnant workers and their families, but also their mental health by contributing to emotional stress, anxiety, and fear.²³⁴

whether these results were due to “bias and confounding or to an actual effect”).

²³² H.R. Rep. No. 117–27, pt.1, at 22; see also Kaylee J. Hackney et al., *Examining the Effects of Perceived Pregnancy Discrimination on Mother and Baby Health*, 106 J. Applied Psych. 774, 781 (2021) [hereinafter *Hackney Study*] (describing two studies that demonstrated that perceived pregnancy discrimination serves as a threat to women’s resources which leads to increased postpartum depressive symptoms for mothers, decreased birth weight and gestational age, and increased doctors’ visits for their babies, via mothers’ stress); Renee Mehra et al., “*Oh Gosh, Why Go? ‘Cause They Are Going to Look At Me and Not Hire’: Intersectional Experiences of Black Women Navigating Employment During Pregnancy and Parenting*,” 23:17 BMC Pregnancy & Childbirth 2 (2023), <https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/s12884-022-05268-9> [hereinafter *Mehra Study*] (describing studies that found that policies that protect women in the workplace during pregnancy and the postpartum period are important for maternal and infant health outcomes); H. M. Salihu et al., *Pregnancy In the Workplace*, 62 Occupational Med. 88, 94 (2012), <https://academic.oup.com/occmed/article/62/2/88/1480061?login=false> [hereinafter *Salihu Study*] (finding that while physically demanding jobs do not pose a substantial risk to fetal health, “[a] moderate temporary reduction in job physicality may promote improved maternal and foetal health”); ACOG Committee Opinion, *supra* note 230, at e117 (discussing modifications for physical work and how they could help the health of pregnant workers).

²³³ See, e.g., *Long Over Due*, *supra* note 2 (statement from the International Brotherhood of Teamsters) (discussing attached *New York Times* article concerning workers’ miscarriages at a warehouse in Tennessee after the workers had been denied light duty); *id.* at 41 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing worker denied accommodation of access to water who ended up in the ER with severe dehydration); *id.* at 94 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (presenting testimony about a pregnant worker denied a lifting accommodation who suffered a miscarriage); H.R. Report No. 117–27, pt.1, at 23 (statement of Rep. Jahana Hayes) (describing how the denial of bathroom breaks during her pregnancy “led to further complications with bladder issues so what started out as an uneventful pregnancy ended up having complications as a result of this minor accommodation not being met”).

²³⁴ *Long Over Due*, *supra* note 2, at 92 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing clients “who have suffered

Moreover, workers who do not receive needed accommodations, and who quit their jobs as a result in order to maintain a healthy pregnancy, often lose employer-sponsored health insurance.²³⁵ In a letter to Congress, a group of leading health care practitioner organizations explained that when a pregnant worker loses health insurance, “the impact on both mother and baby may be long-lasting and severe. One of the main predictors of a healthy pregnancy is early and consistent prenatal care. Loss of employment and health benefits impact family resources, threatening the ability to access vital health care when a woman needs it the most.”²³⁶

Finally, by helping pregnant workers avoid health risks to themselves and their pregnancies, the PWFA will help contribute to improved maternal and child health and lower health care costs nationally.

The Commission did not attempt to quantify the health benefits that are expected to result from the PWFA and its implementing regulations, however, because it is unaware of any data specifying precisely how often pregnancy-related health problems may be attributed specifically to the

profound emotional stress” when they were forced out of jobs due to lack of accommodations); *id.* at 14–15 (statement of Kimberlie Michelle Durham) (testifying that her pregnancy was filled with anxiety and fear due to denial of accommodation); see also *Mehra Study*, *supra* note 232, at 7–8 (describing the experience of pregnant women experiencing or planning around pregnancy discrimination and bias and lack of family-friendly workplace policies throughout their reproductive years in a way that caused immense financial burden and stress); *id.* at 11 (reporting that “Black people with the capacity for pregnancy experienced pregnancy discrimination and bias which was harmful to their . . . mental health”); *Hackney Study*, *supra* note 232, at 780 (stating that women who perceived pregnancy discrimination at work were more likely to suffer from postpartum depressive symptoms); *Salihu Study*, *supra* note 232, at 95 (noting that the impact of work culture can have profound implications for maternal psychosocial health).

²³⁵ *Fighting for Fairness*, *supra* note 2 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing workers who lose their income and, as a result, lose their health insurance, forcing them to delay or avoid critical pre- or post-natal care).

²³⁶ *Long Over Due*, *supra* note 2, at 142 (including a letter from professional medical associations, including the American Academy of Family Physicians, the American Academy of Pediatrics, the American Public Health Association, the American College of Nurse-Midwives, the American College of Obstetricians and Gynecologists, the Association of Women’s Health, Obstetric and Neonatal Nurses, the National Alliance to Advance Adolescent Health, and Physicians for Reproductive Health); *Fighting for Fairness*, *supra* note 235, at 30–31 (statement of Dina Bakst, Co-Founder and Co-President, A Better Balance) (discussing Julia Barton, a pregnant corrections officer who quit her job because she did not receive an accommodation and therefore lost her health insurance).

unavailability of work accommodations and the resulting cost of such problems. The Commission seeks comment regarding whether the health benefits that are expected to result from the PWFA and its implementing regulations are quantifiable; in particular, the Commission seeks comments regarding any existing data specifying how often pregnancy-related health problems may be attributed to the unavailability of work accommodations and the resulting cost of such problems.

2. Improvements in Pregnant Workers’ Economic Security

Access to reasonable accommodations at work will help workers with limitations related to pregnancy, childbirth, or related medical conditions to stay in the workforce, maintain their income, and provide for themselves and their families.²³⁷ Based on anecdotal evidence, unavailability of accommodations often forces workers to take unpaid leave, quit their jobs, or seek jobs that are potentially less lucrative, threatening their economic security.²³⁸ The lack of an accommodation may also have far-reaching economic effects. As the House Committee on Education and Labor Report for the PWFA stated, “[p]regnant workers who are pushed out of the workplace might feel the effects for decades, losing out on everything from 401(k) or other retirement contributions to short-term disability benefits, seniority, pensions, social security contributions, life insurance, and more.”²³⁹ Provision of reasonable accommodations may also have economic benefits to society as a whole by keeping people attached to the labor force and lowering the likelihood of some workers being compelled to seek public assistance after they are forced to quit their jobs.²⁴⁰

²³⁷ The Commission is not able to monetize or quantify this benefit because, although anecdotal evidence establishes that lack of accommodation has led workers to quit their jobs, there are no data on how frequently this happens.

²³⁸ *Long Over Due*, *supra* note 2, at 15 (statement of Kimberlie Michelle Durham) (describing losing her job because she needed an accommodation and explaining that her new job did not provide overtime or benefits); *id.* at 150–53 (letter from the ACLU) (describing the ACLU’s legal representation of pregnant workers, many of whom were forced to take unpaid leave or lost their jobs).

²³⁹ See H.R. Rep. No. 117–27, pt.1, at 21–22, 25.

²⁴⁰ See *Long Over Due*, *supra* note 2, at 15 (statement of Kimberlie Michelle Durham) (describing when she was forced to go on unpaid leave after she asked for an accommodation and, as a consequence, was unable to find new employment, moved back in with family, and was unable to find a job with benefits comparable to those offered by her EMT job, including health insurance; her child is on Medicaid); *id.* at 41 (statement of Dina Bakst, Co-Founder & Co-

Providing needed workplace accommodations to qualified applicants and employees with limitations related to, arising out of, or affected by pregnancy, childbirth, or related medical conditions is another step toward ensuring women's continued and increased participation in the labor force.²⁴¹ Women's increasing labor force participation was one of the most notable labor market developments in the United States in the second half of the 20th century, helping drive economic growth.²⁴² In 2022, 57 percent of all women participated in the labor force.²⁴³ This is significantly higher than the 34 percent participation rate in 1950.²⁴⁴ Among other things, women's participation in the labor force is heavily impacted by pregnancy and the demands associated with raising young children.²⁴⁵ The passage of the Pregnancy Discrimination Act, 42 U.S.C. 2000e *et seq.* (PDA) in 1978, which prohibits employment discrimination based on pregnancy, childbirth, or related medical conditions and requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same as other individuals similar in their ability or inability to work, increased the participation rate of pregnant women in the labor market.²⁴⁶

President, A Better Balance) (discussing a pregnant cashier who needed lifting restriction but was sent home and, without income, became homeless); *id.* at 46 (statement of Dina Bakst) (discussing an armored truck company employee who requested to avoid heavy lifting at the end of pregnancy but was instead sent home; as a result, she lost health insurance and needed to rely on public benefits such as food stamps); *id.* at 70 (statement of Dina Bakst) (presenting stories from State legislatures that describe savings to government assistance programs stemming from the passage of PWFA-like laws in their states).

²⁴¹ *Id.* at 25 (statement of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville, Inc., The Metro Chamber of Commerce) (“[T]he Act will help boost our country’s workforce participation rate among women. In states like Kentucky, which ranks 44th in the nation for female labor participation, we know one contributor to this abysmal statistic is a pregnant worker who is forced out or quits a job due to a lack of reasonable workplace accommodations.”).

²⁴² *Women In the Labor Force: A Databook*, BLS Reports, Bureau of Lab. Stat. (Mar. 2022), <https://www.bls.gov/opub/reports/womens-databook/2021/home.htm>.

²⁴³ *Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race*, U.S. Bureau of Lab. Stat. (Jan. 25, 2023), <https://www.bls.gov/cps/cpsaat03.htm>.

²⁴⁴ *Labor Force Participation Rate—Women*, Fed. Rsr. Bank of St. Louis (June 9, 2023), <https://fred.stlouisfed.org/series/LNS11300002>.

²⁴⁵ Catherine Doren, *Is Two Too Many? Parity and Mothers’ Labor Force Exit*, 81 J. of Marriage & Fam. 327, 341 (April 2019) (“transition to motherhood is the primary turning point in women’s labor force participation”).

²⁴⁶ Sankar Mukhopadhyay, *The Effects of the 1978 Pregnancy Discrimination Act on Female Labor Supply*, 53 Int’l Econ. Rev. 1133 (2012).

As of 2021, over 66 percent of women in the United States who gave birth in the prior year were in the labor force,²⁴⁷ up from about 57 percent in 2006.²⁴⁸ Moreover, an increasing number of pregnant workers are working later into their pregnancies—over 65 percent of first-time mothers who worked during their pregnancy worked into the last month before their child’s birth.²⁴⁹ By requiring reasonable accommodations for workers with conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the PWFA and this proposed rule will further support and enhance women’s labor force participation, and, in turn, grow the U.S. economy.

3. Non-Discrimination and Other Intrinsic Benefits

Providing accommodations to workers with limitations related to, arising out of, or affected by pregnancy, childbirth, or related medical conditions also has important implications for equity, human dignity, and fairness.

First, by allowing pregnant workers to care for their health and the health of their pregnancies, the PWFA enhances human dignity. Workers will be able to prioritize their health and the health of their future children, giving their children the best possible start in life while also protecting their economic security. The Commission seeks comment regarding the ways in which the proposed rule and the PWFA enhance human dignity, including qualitative or quantitative research and anecdotal evidence addressing this benefit.

Second, the PWFA will diminish the incidence of sex discrimination against qualified workers, enable them to reach their full potential, reduce exclusion, and promote self-respect. The statute and the proposed regulations provide for reasonable accommodations to workers who would otherwise not receive them and thus could be forced to leave their jobs or the workforce because of their pregnancy, childbirth, or related medical conditions. Next, the statute and the proposed regulation require a covered entity to engage an employee in an interactive process, rather than simply assigning the

employee an accommodation, which combats stereotypes about the capabilities of workers affected by pregnancy, childbirth, or related medical conditions. Finally, the statute and the proposed regulations protect workers against retaliation and coercion for using the protections of the statute. These protections against discrimination promote human dignity and equity by enabling qualified workers to participate or continue to participate in the workforce.²⁵⁰

Third, because the PWFA applies to so many covered entities, it will improve equity in the workforce. Currently, workers affected by pregnancy, childbirth, or related medical conditions in higher paying jobs and non-physical jobs are much more likely to be able to control their schedules, take bathroom breaks, eat, drink water, or telework when necessary.²⁵¹ These workers may not have to request accommodations from their employers to meet many of their pregnancy-related needs. Workers in low-paid jobs, however, are much less likely to be able to organize their schedules to allow them to take breaks that may be necessary due to pregnancy, childbirth, or related medical conditions.²⁵² Nearly one-third of Black

²⁵⁰ See *Salihu Study*, *supra* note 232, at 94 (finding that “[w]omen who perceive employers and superiors as supportive are more likely to return to work after childbirth. This reduces the risk to employers regarding loss in skill and training. Similarly, businesses that plan for and proactively approach pregnancy in the workplace show lower rates of quitting and greater ease of shifting workloads in the event of a pregnancy, which increases productivity and decreases losses”); *Long Over Due*, *supra* note 2, at 15 (testimony of Kimberlie Michelle Durham) (“I wanted to work. I loved my job”; see also *Salihu Study*, *supra* note 232, at 93 (describing steps pregnant women take to combat the perception that they are a liability in the workforce and reinforce their role as “professionals”); *Long Over Due*, *supra* note 2, at 41 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing a worker who was denied an accommodation but who “desperately wanted to continue working”); *Hackney Study*, *supra* note 232, at 780 (explaining that managers may make incorrect assumptions about what pregnant employees want, such as assuming a reduced workload is beneficial, whereas pregnant workers might find this accommodation demeaning or discriminatory, and noting the importance of managers “hav[ing] an open dialogue with their employees about what types of support [are] needed and desired”).

²⁵¹ *Long Over Due*, *supra* note 2, at 83 (statement of Rep. Barbara Lee) (describing her own pregnancy, which required bedrest, and contrasting her experience with the experience of workers in less flexible jobs).

²⁵² *Fighting for Fairness*, *supra* note 2235, at 108 (statement of Fatima Goss Graves, President and CEO of the National Women’s Law Center) (“[O]ver 40% of full-time workers in low-paid jobs report that their employers do not permit them to decide when to take breaks, and roughly half report having

Continued

and Latina workers are in low-paid jobs,²⁵³ the types of jobs that are less likely to currently provide accommodations.²⁵⁴ Therefore, the PWFA and this proposed rule will improve equity in the workforce by ensuring that low-paid workers, including Black and Latina workers, who may have a more difficult time securing voluntary accommodations, will have a right to them.

Fourth, providing reasonable accommodations to workers who would otherwise have been denied them yields third-party benefits that include diminishing stereotypes regarding workers who are experiencing pregnancy, childbirth, or related medical conditions;²⁵⁵ promoting design, availability, and awareness of accommodations that can have benefits for the general public, including non-pregnant workers, and attitudinal benefits;²⁵⁶ increasing understanding and fairness in the workplace;²⁵⁷ and creating less discriminatory work environments that benefit workers, employers, and society.²⁵⁸

very little or no control over the scheduling of hours.”).

²⁵³ *Id.*

²⁵⁴ *Id.* at 204 (Letter from the National Partnership for Women & Families) (stating that women of color and immigrants are “disproportionately likely to work in jobs and industries where accommodations during pregnancy are not often provided (such as working as home health aides, food service workers, package handlers, and cleaners)”); *id.* at 207–08 (Letter from Physicians for Reproductive Choice) (stating that “the absence of legislation like the Pregnant Workers Fairness Act disproportionately impacts pregnant people with low-incomes and migrant workers who are more likely to work in arduous settings. These are the same communities that are also most at risk of experiencing increased maternal mortality.”).

²⁵⁵ See *Salihu Study*, *supra* note 232, at 93 (describing studies that have “substantiated the pervasiveness of negative perceptions of pregnant women” and the common belief that they serve as a liability in the workplace); *id.* at 94–95 (concluding that the issue of pregnancy in the workplace needs to be addressed proactively with an emphasis on combating stereotypes of pregnant women as incompetent or uncommitted).

²⁵⁶ See Elizabeth F. Emens, *Integrating Accommodation*, 156 U. Pa. L. Rev. 839, 850–59 (2008) (describing a wide range of potential third-party benefits that may arise from workplace accommodations for individuals with disabilities, many of which are also relevant to accommodations for individuals protected by the PWFA).

²⁵⁷ See *id.* at 883–96 (describing attitudinal third-party benefits that arise when co-workers work with individuals receiving accommodations in the workplace under the ADA, many of which are relevant to accommodations for individuals protected by the PWFA).

²⁵⁸ See *Long Over Due*, *supra* note 2, at 3 (statement of Rep. Suzanne Bonamici) (describing the PWFA as “an opportunity for Congress to finally fulfill the promise of the Pregnancy Discrimination Act and take an important step towards workplace gender equity,” among other benefits).

4. Clarity in Enforcement and Efficiencies in Litigation

Congress, in describing the goals of the PWFA, also focused on the clarity that the PWFA would bring to the question of when employers must provide accommodations for limitations related to pregnancy, childbirth, or related medical conditions: “The PWFA eliminates a lack of clarity in the current legal framework that has frustrated pregnant workers’ legal rights to reasonable accommodations while providing clear guidance to both workers and employers.”²⁵⁹ By creating a national standard, the PWFA also may increase compliance with State laws requiring accommodations for pregnant workers,²⁶⁰ as coming into compliance with the PWFA may increase employers’ knowledge about these laws in general.

Additionally, by clarifying the rules regarding accommodations for pregnant workers, the PWFA and the proposed rule will decrease the need for litigation regarding accommodations under the PWFA. To the extent that litigation remains unavoidable in certain circumstances, the PWFA and the proposed rule are expected to eliminate the need to litigate whether the condition in question is a “disability” under the ADA, and to limit discovery and litigation costs that arise under Title VII regarding determining if there are valid comparators, thus streamlining the issues requiring judicial attention.²⁶¹

5. Benefits for Covered Entities

Providing accommodations needed due to pregnancy, childbirth, or related medical conditions also are likely to provide benefits to covered entities. By providing accommodations to workers affected by pregnancy, childbirth, or

²⁵⁹ H.R. Rep. No. 117–27, pt.1, at 11; *id.* at 31 (“By guaranteeing pregnant workers the right to reasonable accommodations in the workplace, the PWFA could also decrease employers’ legal uncertainty.”); see also *Long Over Due*, *supra* note 2, at 24 (statement of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville, Inc., Metro Chamber of Commerce) (“For our members, uncertainty means dollars. A consistent and predictable legal landscape means a business-friendly environment. Before Kentucky’s law was enacted this summer, our employers were forced to navigate a complex web of Federal laws and court decisions to figure out their obligations. And now this guidance is especially beneficial for the smaller companies we represent who cannot afford expensive legal advisors.”).

²⁶⁰ See *infra* Table 1 for a list of these laws.

²⁶¹ See H.R. Report No. 117–27, pt.1, at 14–17 (describing the need to find comparators under Title VII and the difficulties it has caused pregnant workers seeking accommodations); *id.* at 17–21 (describing the protections available for pregnant workers under the ADA and the fact that frequently even pregnancies with severe complications are found by courts not to be “disabilities”).

related medical conditions and retaining them as employees, employers will save money from having to replace and train a new employee. According to one study, 85 percent of employers that provided accommodations to individuals with disabilities reported that doing so enabled them to retain a valued employee; 53 percent reported an increase in that employee’s productivity; 46 percent reported elimination of costs associated with training a new employee; 48 percent reported an increase in that employee’s attendance; 33 percent noted that providing the accommodation increased diversity in the company; and 23 percent reported a decrease in workers’ compensation or other costs. Employers also noted several indirect benefits: 30 percent noted an increase in company morale, and 21 percent noted an increase in overall company productivity.²⁶²

D. Costs

1. Covered Entities and Existing Legal Landscape

Entities covered by the PWFA and the proposed regulation include all employers covered by Title VII and the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16b, 2000e–16c (GERA), including private and public sector employers with at least 15 employees, Federal agencies, employment agencies, and labor organizations.²⁶³

In addition to the legal protections described earlier in the preamble pertaining to Title VII, the ADA, and the FMLA, there are three other important legal considerations that impact the costs of accommodations under the PWFA and this regulation.

First, 30 States and five localities have laws substantially similar to the PWFA, requiring covered employers to provide reasonable accommodations to pregnant workers.²⁶⁴ As a result, this proposed rule will impose minimal, if any, additional costs on the covered entities in these States and localities.²⁶⁵

²⁶² *Costs and Benefits of Accommodation*, *supra* note 33.

²⁶³ See 42 U.S.C. 2000gg(2)(A). The PWFA also applies to employers covered by the Congressional Accountability Act (CAA) of 1995 (42 U.S.C. 2000gg(2)(B)(ii)). The proposed regulation does not apply to employers covered under CAA, as the Commission does not have the authority to enforce the PWFA with respect to employees covered by the CAA.

²⁶⁴ See *infra* Table 1; see also *Employment Protections for Workers Who Are Pregnant or Nursing*, *supra* note 5.

²⁶⁵ The PWFA analogs in Alaska, North Carolina and Texas only cover certain public employers. The laws in Louisiana and Minnesota apply to employers larger than the PWFA threshold of 15

Second, when it enacted the PWFA, Congress also enacted the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), which requires employers who are covered by the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, (FLSA) to provide reasonable break time for an employee to express breast milk for their nursing child each time such employee has need to express milk for one year after the child's birth. The PUMP Act also requires employers to provide a place to pump at work, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public.²⁶⁶ As a result, the Commission anticipates that most workers will not need to seek reasonable accommodations regarding a time and place to pump at work under the PWFA because they will already be entitled to these under the PUMP Act.

Third, the Federal Government provides 12 weeks of paid parental leave to eligible Federal employees upon the birth of a new child.²⁶⁷ As a

result, these Federal workers may make fewer requests for leave as a reasonable accommodation under the PWFA as they are already guaranteed a certain amount of paid leave.

2. Estimate of the Number of Reasonable Accommodations That Will Be Provided as a Result of the Proposed Rule and Underlying Statute

As set out in Tables 1 and 2 and explained in detail *infra*, the proposed rule and underlying statute cover approximately 117 million employees of private establishments with 15 or more employees, 18.8 million State and local government employees, and 2.3 million Federal employees. Only a small percentage of these employees are expected to seek and be entitled to accommodations as a result of the proposed rule and underlying statute.

Approximately 52 percent of private sector enterprises with 15 or more employees in the United States (1.4 million establishments), employing about 61.2 million workers (accounting for 52 percent of employment in those

States) are currently subject to State or local laws that are substantially similar to the PWFA. The enactment of the PWFA and promulgation of the proposed rule, therefore, should not result in additional accommodation-related costs for these employers. Subtracting 61.2 million workers from the total number of covered workers employed by private sector enterprises (117 million) yields a total of approximately 55.5 million employees of private sector establishments who will be covered by the proposed rule and underlying statute, and who are not also covered by State or local laws that are substantially similar to the PWFA. Tables 1 and 2 display each State's share of the total national number of private sector establishments that have 15 or more employees and thus will be subject to the PWFA, and the percentage of workers in the State employed by such establishments. States with laws substantially similar to the PWFA are in Table 1; States without such a law are in Table 2.

TABLE 1—SHARE OF EMPLOYERS WITH 15 OR MORE EMPLOYEES IN STATES ALREADY SUBJECT TO LOCAL PREGNANCY ACCOMMODATION LAWS SIMILAR TO THE PWFA²⁶⁸

State	Statute	Threshold ²⁷⁰	Share in U.S. Total ²⁶⁹	
			Establishments	Employment
California	Cal. Gov't Code sec. 12945(a)(3)	5	10.6%	11.6%
Colorado	Colo. Rev. Stat. sec. 24–34–402.3	5	1.9%	1.8%
Connecticut	Conn. Gen. Stat. sec. 46a–60(b)(7)(A)–(K)	3	1.2%	1.2%
Delaware	Del. Code Ann. tit. 19, sec. 711(a)(3)(b)–(f)	4	0.4%	0.3%
District of Columbia	DC Code sec. 32–1231.02	1	0.4%	0.4%
Hawaii	Haw. Code R. sec. 12–46–107.	1	0.4%	0.4%
Illinois	775 Ill. Comp. Stat. 5/2–102(I)–(J)	1	3.9%	4.2%
Kentucky	Ky. Rev. Stat. sec. 344.040	15	1.4%	1.3%
Louisiana ²⁷¹	La. Rev. Stat. sec. 23:341–342	25	1.3%	1.2%
Maine	Me. Rev. Stat. tit. 5, sec. 4572–A	1	0.5%	0.4%
Maryland	Md. Code, State Gov't sec. 20–609	15	1.9%	1.8%
Massachusetts	Mass. Gen. Laws ch. 151B, sec. 4(1E)(a)	6	2.3%	2.6%
Minnesota ²⁷²	Minn. Stat. sec. 181.939	21	1.7%	2.0%
Nebraska	Neb. Rev. Stat. sec. 48–1102(11), 1102(18)	15	0.7%	0.6%
Nevada	Nev. Rev. Stat. sec. 613.438	15	0.9%	1.0%
New Jersey	N.J. Stat. Ann. sec. 10:5–3.1	1	2.6%	2.8%
New Mexico	N.M. Code R. sec. 9.1.1.7(HH)(2)	4	0.6%	0.5%
New York	N.Y. Exec. Law sec. 292(21–e) and (21–f), 296(3)	4	5.2%	6.3%

employees (25 or more employees in Louisiana; 21 or more employees in Minnesota). As explained below, the analysis takes these differences into account.

²⁶⁶ U.S. Dep't of Lab., *FLSA Protections to Pump at Work*, <https://www.dol.gov/agencies/whd/pump-at-work> (last visited Apr. 2, 2023).

²⁶⁷ Federal Employee Paid Leave Act, Public Law 116–92 (2019).

²⁶⁸ *The Number of Firms and Establishments, Employment, and Annual Payroll by State, Industry, and Enterprise Employment Size: 2020*, Stats. of U.S. Bus. Ann. Datasets by Establishment Indus. (2020), https://www2.census.gov/programs-surveys/susb/tables/2020/us_state_naics_detailedsizes_2020.xlsx [hereinafter *Firms and Establishments Data by State*]. Percentages in the Table reflect filtering by employer size and summing by state.

²⁶⁹ This number is limited to enterprises with at least 15 employees.

²⁷⁰ This denotes the minimum number of employees that an employer must have to be covered by the State law.

²⁷¹ These numbers only account for enterprises with at least 25 employees because Louisiana's pregnancy accommodations law applies to employers with 25 or more employees. See La. Rev. Stat. Ann. sec. 23:341 (2021).

²⁷² These numbers only account for enterprises with at least 25 employees because Minnesota's pregnancy accommodation law applies to employers with 21 or more employees. Minn. Stat. sec. 181.940, 181.9414, 181.9436 (2014). Data on enterprises with 21 to 24 employees are not available.

²⁷³ Pennsylvania does not have a state-wide pregnancy accommodation law, but Philadelphia does. See Phila. Code sec. 9–1128 (2014).

Philadelphia accounts for approximately 9 percent of Pennsylvania establishments and approximately 12 percent of individuals employed in Pennsylvania. See *The Number of Firms and Establishments, Employment, and Annual Payroll by Congressional District, Industry, and Enterprise Employment Size: 2019*, Statistics of U.S. Bus. Ann. Datasets by Establishment Indus. (2019), https://www2.census.gov/programs-surveys/susb/tables/2019/cd_naicssector_2019.xlsx [hereinafter *Firms and Establishments Data by Congressional District*]. The calculation is based on the total number of establishments and total employment in Pennsylvania and in Philadelphia County and the shares of employment in each.

²⁷⁴ This total does not include Alaska, North Carolina, and Texas, where the pregnancy accommodation laws only apply to certain public employees.

TABLE 1—SHARE OF EMPLOYERS WITH 15 OR MORE EMPLOYEES IN STATES ALREADY SUBJECT TO LOCAL PREGNANCY ACCOMMODATION LAWS SIMILAR TO THE PWFA²⁶⁸—Continued

State	Statute	Threshold ²⁷⁰	Share in U.S. Total ²⁶⁹	
			Establishments	Employment
North Dakota	N.D. Cent. Code Ann. sec. 14–02.4–03	1	0.3%	0.3%
Oregon	Or. Rev. Stat. sec. 659A.029	6	1.4%	1.2%
Pennsylvania ²⁷³	Phila. Code sec. 9–1128	1 (Philadelphia) ...	0.4%	0.5%
Rhode Island	R.I. Gen. Laws sec. 28–5–7.4(a)(1)–(3)	4	0.3%	0.3%
South Carolina	S.C. Code Ann. sec. 1–13–80(A)(4)	15	1.6%	1.5%
Tennessee	Tenn. Code. Ann. sec. 50–10–103	15	2.2%	2.1%
Utah	Utah Code sec. 34A–5–106(1)(g)	15	0.9%	1.1%
Vermont	Vt. Stat. Ann. tit. 21, sec. 495k(a)(1)	1	0.2%	0.2%
Virginia	Va. Code sec. 2.2–3901	5	2.8%	2.6%
Washington	Wash. Rev. Code sec. 43.10.005(2)	15	2.3%	2.2%
West Virginia	W. Va. Code sec. 5–11B–2	12	0.6%	0.4%
Total ²⁷⁴ .....	.....	.....	51%	52%
Total (in millions) ...	.....	.....	1.4	61.2

TABLE 2—SHARE OF TOTAL U.S. EMPLOYER ESTABLISHMENTS WITH 15 OR MORE EMPLOYEES IN STATES THAT WILL BE IMPACTED BY PWFA²⁷⁵

State	Share in U.S. Total ²⁷⁶	
	Establishments	Employment
Alabama	1.5%	1.3%
Alaska ²⁷⁷	0.2%	0.2%
Arizona	2.0%	2.0%
Arkansas	0.9%	0.8%
Florida	6.0%	6.8%
Georgia	3.1%	3.1%
Idaho	0.6%	0.4%
Indiana	2.2%	2.1%
Iowa	1.1%	1.0%
Kansas	1.0%	0.9%
Louisiana ²⁷⁸	0.2%	0.1%
Michigan	2.9%	3.0%
Minnesota ²⁷⁹	0.3%	0.1%
Mississippi	0.9%	0.7%
Missouri	2.1%	1.9%
Montana	0.4%	0.2%
New Hampshire	0.5%	0.5%
North Carolina ²⁸⁰	3.2%	3.0%
Ohio	3.8%	3.8%
Oklahoma	1.2%	1.0%
Pennsylvania ²⁸¹	3.8%	3.7%
South Dakota	0.3%	0.3%
Texas ²⁸²	8.5%	8.5%
Wisconsin	2.0%	2.0%
Wyoming	0.2%	0.1%
Total	49%	48%
Total (in millions)	1.3	55.5

²⁷⁵ *Firms and Establishments Data*, *supra* note 268. Percentages in the Table reflect filtering by size and summing by state.

²⁷⁶ This number is limited to enterprises with at least 15 employees.

²⁷⁷ Alaska's statute, codified at Alaska Stat. sec. 39.20.520 (1992), covers public employers only.

²⁷⁸ These numbers only include enterprises with 15–24 employees because Louisiana's pregnancy accommodations law applies to employers with 25 or more employees. La. Rev. Stat. Ann. sec. 23:341 (2021).

²⁷⁹ These numbers only include enterprises with 15–24 employees because Minnesota's pregnancy accommodation law applies to employers with 21 or more employees. Minn. Stat. sec. 181.940, 181.9414, 181.9436 (2014). Data on enterprises with 15–20 employees are not available.

²⁸⁰ N.C. E.O. No. 82 (2018) covers public employers only.

²⁸¹ Pennsylvania does not have a state-wide pregnancy accommodation law, but Philadelphia does. *See* Phila. Code sec. 9–1128 (2014). Philadelphia accounts for approximately 9 percent

of Pennsylvania establishments and approximately 12 percent of individuals employed in Pennsylvania. *See Firms and Establishments Data by Congressional District*, *supra* note 273. The calculation is based on the total number of establishments and total employment in Pennsylvania and in Philadelphia County and the shares of employment in each.

²⁸² The Texas statute, codified at Tex. Loc. Gov't Code sec. 180.004 (2001), covers local public employers only.

Similarly, approximately 11.5 million State and local government employees are covered by laws that are substantially similar to the PWFA.²⁸³ Subtracting this number from the total number of covered State and local government employees (18.8 million) yields a total of 7.3 million State and local government employees who will be covered by the proposed rule and underlying statute, and who are not already covered by State or local laws substantially similar to the PWFA.

Finally, there are 2.3 million Federal workers. The Federal Government does

not currently require accommodations for pregnant workers; thus, the PWFA provides a new right for these workers.

Again, however, not all employees who are now covered by the PWFA will seek and be entitled to accommodations as a result of the proposed rule and underlying statute; only a small percentage will become pregnant and need accommodations in a given year. In 2021, women of reproductive age (aged 16–50 years) comprised approximately 33 percent of U.S. workers.²⁸⁴ Of these, approximately 4.7 percent gave birth to at least one child

the previous year.²⁸⁵ Applying these percentages²⁸⁶ to the numbers above yields totals (rounded to the nearest 10,000) of, in a given year, 850,000 private sector employees ($55,500,000 \times 0.33 \times 0.047$), 110,000 State and local government employees ($7,300,000 \times 0.33 \times 0.047$), and 40,000 Federal employees ($2,310,000 \times 0.33 \times 0.047$) who are both newly eligible for reasonable accommodations under the proposed rule and underlying statute, and who may be expected to become pregnant in a given year. Tables 3, 4, and 5 display these calculations.

TABLE 3—COMPUTATION OF EXPECTED NUMBER OF PREGNANT WOMEN ELIGIBLE FOR PWFA ACCOMMODATIONS AT PRIVATE EMPLOYERS²⁸⁷

Total employment in establishments covered under PWFA (i.e., those with at least 15 employees)	117 million.
Total employment in establishments covered under PWFA, with existing PWFA-type accommodations under State/local laws (from Table 1).	61.2 million.
Total employment in establishments covered under PWFA, without existing PWFA-type accommodations under State/local laws (from Table 2).	55.5 million.
Share of 16–50 years old women	33%.
Total number of women employees newly eligible for accommodations under PWFA (33% of 55.5 million)	18.1 million.
Expected share of women employees to be pregnant in a year	4.7%.
Expected number of pregnant employees newly eligible for accommodations under PWFA (4.7% of 18.1 million)	850,000.

TABLE 4—COMPUTATION OF EXPECTED NUMBER OF PREGNANT WOMEN ELIGIBLE FOR PWFA ACCOMMODATIONS IN STATE AND LOCAL GOVERNMENT EMPLOYMENT²⁸⁸

Total State and local government employment	18.8 million.
Total State and local government employment in States with existing PWFA-type accommodations under State/local laws ²⁸⁹ .	11.5 million.
Total State and local government employment in States without existing PWFA-type accommodations under State/local laws ²⁹⁰ .	7.3 million.
Share of 16–50 years old women	33%.
Total number of State and local government women employees newly eligible for accommodations under PWFA (33% of 7.3 million).	2.4 million.
Expected share of women employees to be pregnant in a year	4.7%.
Expected number of pregnant State and local government employees newly eligible for accommodations under PWFA (4.7% of 2.4 million).	110,000.

TABLE 5—COMPUTATION OF EXPECTED NUMBER OF PREGNANT WOMEN ELIGIBLE FOR PWFA ACCOMMODATIONS IN FEDERAL GOVERNMENT EMPLOYMENT

Total Federal Government civilian employment ²⁹¹	2.31 million.
Share of 16–50 years old women	33%.

²⁸³ U.S. Census Bureau, *2021 ASPEP Datasets & Tables* (2021), <https://www.census.gov/data/datasets/2021/econ/apes/annual-apes.html> [hereinafter *ASPEP Datasets*]. The calculation is based on data from the “State Government Employment & Payroll Data” and the “Local Government Employment & Payroll” files, “Government Function” column.

²⁸⁴ See *IPUMS Data*, *supra* note 23. Data are available by request to registered IPUMS–USA users; please contact ipums@umn.edu.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *ASPEP Datasets*, *supra* note 283. The calculation is based on data as described in note 61.

²⁸⁹ This number includes 12 percent of State and local government employment in Pennsylvania to account for Philadelphia’s PWFA-type law, excludes local government employment in North Carolina because the existing law only applies to State employees, and excludes State government employment in Texas because the existing law only applies to local governments.

²⁹⁰ This number includes State and local government employment in Pennsylvania not

accounted for by Philadelphia, includes local government employment in North Carolina because the existing law only applies to State employees, and includes State government employment in Texas because the existing law only applies to local governments.

²⁹¹ *Full-Time and Part-Time Employees by Industry*, U.S. Bureau of Econ. Analysis, <https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&1921=survey#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDNdLCJkYXRhIjpbWyJkYXRlZD29yaWVzIiwU3VydmV5Il0sWyJOSVBBX1RhYm90X0xp3QjIjIjOTMiXV19> (last visited June 12, 2023).

TABLE 5—COMPUTATION OF EXPECTED NUMBER OF PREGNANT WOMEN ELIGIBLE FOR PWFA ACCOMMODATIONS IN FEDERAL GOVERNMENT EMPLOYMENT—Continued

Total number of women Federal Government employees newly eligible for accommodations under PWFA	0.8 million.
Expected share of women employees to be pregnant in a year	4.7%.
Expected number of pregnant Federal Government employees newly eligible for accommodations under PWFA	40,000.

The sum of the expected number of pregnant women eligible for PWFA accommodations in the private sector (850,000), State and local government (110,000), and Federal Government (40,000) is 1,000,000.

Further, not all individuals who become pregnant will need a reasonable accommodation. Because there is very little research on the proportion of pregnant workers who need workplace accommodations, the Commission has generated a ranged estimate. The Commission seeks comment regarding any existing data quantifying the proportion of pregnant workers who need workplace accommodations.

Survey research has shown that 71 percent of pregnant workers experience some type of pregnancy-related limitation that might require an accommodation.²⁹² The Commission thus adopts 71 percent as its upper-bound estimate of the percentage of pregnant workers needing

accommodation. Applying this percentage yields upper-bound estimates of 600,000 private sector employees (71 percent of 850,000), 80,000 State and local government employees (71 percent of 110,000), and 30,000 Federal sector employees (71 percent of 40,000), in total 710,000, who will need, and be newly entitled to, reasonable accommodations under the proposed rule and underlying statute in a given year.

Based on this research,²⁹³ the Commission has calculated that approximately 23 percent of pregnant workers have faced a pregnancy-related limitation but did not receive a workplace accommodation, either because they did not ask for one or because the employer did not address the need when the issue was raised. The Commission utilized the survey research to calculate the number of workers who needed a particular accommodation (for example, 71

percent of 598 respondents, or 425 respondents, needed more frequent breaks); the number of workers who asked employers to address the need (58 percent of 425 respondents, or 246 respondents); and the number of those workers whose employers did not attempt to address the need (5 percent of 246 respondents, or 12 respondents). Additionally, the Commission calculated the number of workers who needed an accommodation but did not ask their employers to address the need (42 percent of 425 respondents, or 179 respondents) and used these two numbers to identify the percentage of workers who faced a limitation and did not previously receive an accommodation but will have a right to an accommodation under the PWFA ($12+179/598=32$ percent). The Commission calculated this percentage for the four accommodations identified in the survey data and determined an average of those four percentages.

TABLE 6—SHARE OF PREGNANT WOMEN CURRENTLY WITHOUT PREGNANCY-RELATED EMPLOYER SUPPORT ²⁹⁴

Employer support during pregnancy	% Faced with pregnancy-related limitation with paid job ²⁹⁵	Of those who faced a limitation, % that didn't ask employer to address need ²⁹⁶	Of those who faced a limitation, % that asked the employer to address need but whose employer didn't attempt to address concern	% Of pregnant women who faced a limitation, didn't receive an accommodation previously, but will have a right to it under PWFA
To take more frequent breaks, such as extra bathroom breaks	71	42	3	32
A change in schedule or more time off, for example, to see prenatal care providers	61	26	7	20
A change in duties, such as less lifting or more sitting	53	37	6	23
Some other type of workplace adjustment due to a pregnancy-related condition	40	38	8	18
Average				23

Accordingly, these data suggest that the proposed rule and underlying statute will result in a new obligation on employers in only 23 percent of instances in which a worker requires reasonable accommodations related to pregnancy, childbirth, or related medical conditions. The Commission thus adopts 23 percent as its lower-bound estimate of the percentage of

pregnant workers who will need, and be newly entitled to, a reasonable accommodation under the proposed rule and underlying statute. Applying this percentage yields lower-bound estimates of approximately 200,000 private sector employees (23 percent of 850,000), 30,000 State and local government employees (23 percent of 110,000), and 10,000 Federal sector

employees (23 percent of 40,000), in total 240,000, who will need, and be newly entitled to, reasonable accommodations under the proposed rule and underlying statute in a given year.

3. Cost of Accommodation

Accommodations that allow pregnant workers to continue to perform their job

²⁹² *Listening to Mothers III*, *supra* note 34.

²⁹³ See *id.* at 36; see also *infra* Table 6.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

duties, thereby allowing them to receive continued pay and benefits, include permission to take additional rest or bathroom breaks, to use a stool or chair, to change duties in order to avoid strenuous physical activities, and to change schedules to attend prenatal appointments.²⁹⁷ Some of these accommodations, especially additional rest or bathroom breaks and provision of a stool or chair, are expected to impose minimal or no additional costs on the employer. Certain other types of accommodations, such as allowing the employee to avoid heavy lifting or exposure to certain types of chemicals, may be easy to provide in some jobs but more difficult to provide in others, necessitating temporary restructuring of responsibilities or transfer to a different position.

The Commission was unable to find any data on the average cost of reasonable accommodations related specifically to pregnancy, childbirth, or related medical conditions. The Commission has therefore relied on the available data on the cost of accommodations for individuals with disabilities for purposes of this analysis.

A survey conducted by the Job Accommodation Network (JAN) indicates that most workplace accommodations for individuals with disabilities are low-cost.²⁹⁸ Of the employers participating in this survey between 2019 and 2022, 49.4 percent

reported that they provided an accommodation needed because of a disability that did not cost anything to implement. The Commission believes that the percentage of no-cost accommodation is likely to be higher for accommodations related specifically to pregnancy, childbirth, or related medical conditions, because many will be simple and no-cost like access to water, stools, or more frequent bathroom breaks, and because the vast majority will be temporary. Nevertheless, because the Commission is unable to locate any data on the percentage of accommodations needed because of pregnancy-related conditions that have no cost, the Commission conservatively assumes for purposes of this analysis that the percentages are the same.

The same research showed that another 43.3 percent of employers provided an accommodation that involved a one-time cost; the median one-time cost of providing such an accommodation was \$300. Only 7.2 percent of employers reported that they provided an accommodation that resulted in ongoing annual costs. Because pregnancy is a temporary condition, the ongoing costs incurred by 7.2 percent of employers is unlikely to be applicable to pregnancy-related accommodations, and the Commission adopts \$300 as the median one-time cost for employers that incurred a cost (50.6 percent of employers). Again, although

the Commission believes that the average cost is likely lower for accommodations needed specifically for pregnancy, childbirth, or related medical conditions, it will use the data for the purposes of this analysis.

Because non-zero cost accommodations generally involve durable goods such as additional stools, infrastructure for telework, and machines to help with lifting, and because these goods generally have a useful life of five years, the Commission will assume that the annual cost of providing these accommodations is approximately \$60 per year per accommodation.²⁹⁹ The Commission seeks comment on whether the annual cost of providing non-zero cost accommodations should be calculated based on durable goods with a useful life of five years.

Using these cost estimates, and applying them to the upper- and lower-bound estimates for the number of additional accommodations that will likely be required by the rule and underlying statute, the estimated annual costs for private employers is between \$6 million and \$18 million; the estimated annual costs for State and local governments is between \$0.8 million and \$2.4 million, and the estimated annual costs for the Federal Government is between \$0.3 million and \$0.8 million. See Tables 7, 8, and 9.

TABLE 7—ESTIMATED REASONABLE ACCOMMODATION COSTS TO PRIVATE EMPLOYERS WITH MORE THAN 15 EMPLOYEES

Cost of accommodation	Lower bound (23%)	Upper bound (71%)
Number of women needing accommodation	200,000	600,000.
Number of non-zero cost accommodations (50.6%)	100,000	300,000.
Annual cost of accommodation	\$6 million	\$18 million.

TABLE 8—ESTIMATED REASONABLE ACCOMMODATION COSTS TO STATE AND LOCAL GOVERNMENT EMPLOYERS

Cost of accommodation	Lower Bound (23%)	Upper Bound (71%)
Number of women needing accommodation	30,000	80,000.
Number of non-zero cost accommodations (50.6%)	11,000	40,000.
Annual cost of accommodation	800,000	\$2.4 million.

TABLE 9—ESTIMATED REASONABLE ACCOMMODATION COSTS TO THE FEDERAL GOVERNMENT

Cost of accommodation	Lower Bound (23%)	Upper Bound (71%)
Number of women needing accommodation	10,000	30,000.
Number of non-zero cost accommodations (50.6%)	0.004 million	13,000.
Annual cost of accommodation	\$300,000	\$800,000.

²⁹⁷ *Id.*; see also *Long Over Due*, *supra* note 2, at 79 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing potential accommodations).

²⁹⁸ *Costs and Benefits of Accommodation*, *supra* note 33.

²⁹⁹ The Commission made a similar assumption of a five-year life for accommodations in its cost analysis of the amendments to the ADA. 76 FR 16977, 16994 (March 25, 2011).

Thus, the overall economic impact on the U.S. economy of the proposed rule and underlying statute is estimated to be between \$7.1 million and \$21.2 million annually.

The costs in Tables 7, 8, and 9 likely overestimate the costs to covered entities in at least six respects:

- The estimates are based on costs of accommodations for individuals with disabilities generally, not only those related to pregnancy, among the JAN survey respondents. The Commission believes that the average cost of accommodations related to pregnancy, childbirth, or related medical conditions is less than the average cost of disability-related accommodations because many of the reasonable accommodations requested under the PWFA will be simple and inexpensive to provide, and the vast majority will be temporary. The Commission seeks comment regarding any existing data quantifying the average cost of accommodations related to pregnancy, childbirth, or related medical conditions.

- The sample obtained in the JAN study may not be representative of all employers, because employers who consult with JAN are likely to be facing more difficult and costly accommodation issues than employers overall.³⁰⁰

- The estimate did not account for the fact that some workers who will be entitled to reasonable accommodations under the PWFA and the proposed rule are independently entitled to accommodations under the ADA or Title VII, to break time and a private place to pump at work under the PUMP Act, and, in some cases, leave under the FMLA or the Federal Employees Paid Leave Act.³⁰¹

- The estimate does not account for the fact that some employers voluntarily provide accommodations to workers affected by pregnancy, childbirth, or

related medical conditions and may not incur new costs.

- The Commission did not offset the costs associated with providing accommodations with the potential costs associated with not providing them. In some instances where an individual is denied an accommodation, the individual separates from the employer because they quit, or they are forced to leave. In these instances, the employer must replace the employee. Replacement costs for an employee vary based on salary; estimates range from \$2,000–\$7,000,³⁰² with \$4,000 being a common average.³⁰³ Thus, in these situations, the accommodations will save the employer more than the accommodation will cost.

- This analysis does not account for the fact that not all workers who seek accommodations will meet the definition of “qualified,” and an employer may decline to provide a reasonable accommodation if doing so creates an undue hardship.

The Commission did not include costs related to processing requests for accommodation in its estimate because it expects these costs to be extremely low. Employers that are covered by State or local laws substantially similar to the PWFA already have these procedures in place. The Commission assumes that employers not covered by such State or local laws, and the Federal Government, will adapt existing procedures for providing accommodations under Title VII and the ADA and for providing leave under the FMLA.

4. One-Time Administrative Costs for Covered Entities

Administrative costs, which include rule familiarization, posting new equal employment opportunity posters, and updating EEO policies and handbooks, represent additional, one-time direct costs to covered entities.

It is estimated that in States that do not already have laws substantially similar to the PWFA, compliance activities for a covered entity would

take an average of 90 minutes by an Equal Opportunity Officer who is paid a fully loaded wage of \$113.51 per hour³⁰⁴ (\$68.57 for a State or local government worker).³⁰⁵ In States with already existing laws similar to the PWFA, an Equal Opportunity Officer will take an average of 30 minutes for compliance activities. For the Federal Government, which does not have an existing PWFA, it is estimated that compliance activities would take an average of ninety minutes by an Equal Opportunity Officer at a GS 14–5 salary.³⁰⁶ These calculations are displayed in Table 10. The Commission seeks comment on whether 90 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that do not already have laws substantially similar to the PWFA and for the Federal Government, and whether 30 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that have existing laws similar to the PWFA.

³⁰⁴ The Commission anticipates that the bulk of the workload under this proposed rule would be performed by employees in occupations similar to those associated with the Standard Occupational Classification (SOC) code of SOC 11–3121 (Human Resources Managers). According to the U.S. Bureau of Labor Statistics, the mean hourly wage rate for Human Resources Managers in May 2022 was \$70.07. See U.S. Bureau of Lab. Stats., *Employment of Human Resources Managers, by State, May 2022* (2022), <https://www.bls.gov/oes/current/oes113121.htm#st>). For this analysis, the Commission used a fringe benefits rate of 45 percent and an overhead rate of 17 percent, resulting in a fully loaded hourly compensation rate for Human Resources Managers of \$113.51 ($\$70.07 + (\$70.07 \times 0.45) + (\$70.07 \times 0.17)$).

³⁰⁵ U.S. Bureau of Lab. Stats., *Employer Costs for Employee Compensation for State and Local Government Workers by Occupational and Industry Group* (Mar. 17, 2023), <https://www.bls.gov/news.release/ecec.t03.htm>. Total employer compensation costs for State and local government averaged \$57.60 per hour worked (see row 1, column 1 of the cited table). Average wages and salaries ranged from \$68.57 in management, professional, and related occupations (row 3) to \$40.05 (row 7) in sales and office occupation. This analysis uses the high estimate of \$68.57 per hour worked, which includes average wage and salary cost of \$43.87 per hour (row 3, column 3) and average benefit costs of \$24.70 per hour (row 3, column 5).

³⁰⁶ In 2023, a GS–14, Step 5 salary is \$63.21 per hour. See Office of Pers. Mgmt., *Salary Table 2023–RUS* (Jan. 2023), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/RUS_h.pdf.

³⁰⁰ The Job Accommodation Network (JAN) provides free assistance regarding workplace accommodation issues. See generally Job Accommodation Network, <https://askjan.org/> (last visited Apr. 2, 2023).

³⁰¹ Brown et al., *supra* note 14, at 6 (finding that about 56 percent of U.S. employees were eligible for FMLA in 2018, and 25 percent of the FMLA leaves taken in the prior 12 months accounted for the arrival of a new child).

³⁰² Arindrajit Dube et al., *Employee Replacement Costs*, 2 IRL, Univ. of Cal. Berkeley, Working Paper No. 201–10 (2010), <https://irle.berkeley.edu/files/2010/Employee-Replacement-Costs.pdf>.

³⁰³ *Id.*

TABLE 10—ONE-TIME ADMINISTRATIVE COSTS

	Number of establishments	Time for rule familiarization	Equal opportunity officer fully loaded wage	Rule familiarization cost
	(a)	(b)	(c)	(a) × (b) × (c)
Private employers in States with existing PWFA-type laws.	1.4 million	0.5 hours	\$113.51	\$79 million.
Private employers in States without existing PWFA-type laws.	1.3 million	1.5 hours	113.51	221 million.
Public employers in States with existing PWFA-laws.	3,255 ³⁰⁷	0.5 hours	68.57	100,000.
Public employers in States without existing PWFA-type laws.	2,533 ³⁰⁸	1.5 hours	68.57	260,000.
Federal Government	209 ³⁰⁹	1.5 hours	³¹⁰ 93.01	30,000.
Total				\$300.39 million.

Table 11 provides the analysis of upper bound costs of providing information for the one-time discount rates at 3% and 7% as required accommodations. Table 12 provides that administrative costs by OMB Circular A-4 for the lower and

TABLE 11—ANNUALIZED REASONABLE ACCOMMODATION COSTS (IN \$ MILLIONS) AT 0% (UNDISCOUNTED), 3%, 7% DISCOUNT RATES ³¹¹

	Private—all	Federal government	State and local government
Lower Bound			
Estimated reasonable accommodation costs	\$30.4	\$1.3	\$4.0
Assuming useful life of accommodations to be 5 years			
Annualized, 0% discount rate, 5 years	6.07	0.3	0.8
Annualized, 3% discount rate, 5 years	6.63	0.27	0.87
Annualized, 7% discount rate, 5 years	7.40	0.31	0.97
Total, 0% discount rate, 5 years	30.4	1.3	4.0
Total, 3% discount rate, 5 years	33.1	1.4	4.3
Total, 7% discount rate, 5 years	37.0	1.5	4.8
Assuming useful life of accommodations to be 10 years			
Annualized, 0% discount rate, 10 years	3.04	0.1	0.4
Annualized, 3% discount rate, 10 years	3.56	0.15	0.46
Annualized, 7% discount rate, 10 years	4.32	0.18	0.56
Total, 0% discount rate, 10 years	30.4	1.3	4.0
Total, 3% discount rate, 10 years	35.6	1.5	4.6
Total, 7% discount rate, 10 years	43.2	1.8	5.6
Upper Bound			
Estimated reasonable accommodation costs	91.1	3.8	12.1
Assuming useful life of accommodations to be 5 years			
Annualized, 0% discount rate, 5 years	18.22	0.8	2.4
Annualized, 3% discount rate, 5 years	19.89	0.84	2.65
Annualized, 7% discount rate, 5 years	22.21	0.94	2.96
Total, 0% discount rate, 5 years	91.1	3.8	12.1
Total, 3% discount rate, 5 years	99.4	4.2	13.2

³⁰⁷ Based on the distinct number of State and local government filers of the 2021 EEO-4 survey where available and the 2021 Annual Survey of Public Employment & Payroll (ASPEP) when not available.

³⁰⁸ *Id.*

³⁰⁹ See U.S. Equal Emp. Opportunity Comm'n, *Department or Agency List with Second Level Reporting Components*, [https://www.eeoc.gov/federal-sector/management-directive/department-](https://www.eeoc.gov/federal-sector/management-directive/department-or-agency-list-second-level-reporting-components)

or-agency-list-second-level-reporting-components (last visited Mar. 22, 2023).

³¹⁰ As described above, a GS-14, Step 5 salary is \$63.21 per hour. See Off. of Pers. Mgmt., *Salary Table 2023—RUS* (Jan. 2023), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/RUS_h.pdf. This is then adjusted for average hourly benefits for Federal workers. See Cong. Budget Off., *Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015*, at 14 (Apr. 25, 2017)

<https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf> (reporting that the average benefits for Federal employees range from \$21.30 per hour to \$29.80 per hour). This analysis uses the high estimate of \$29.80 to compute the total hourly compensation at \$93.01 (\$63.21 + \$29.80).

³¹¹ Off. of Mgmt. and Budget, *Circular A-4* (Sept. 17, 2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/ (addressing discount rates).

TABLE 11—ANNUALIZED REASONABLE ACCOMMODATION COSTS (IN \$ MILLIONS) AT 0% (UNDISCOUNTED), 3%, 7% DISCOUNT RATES³¹¹—Continued

	Private—all	Federal government	State and local government
Total, 7% discount rate, 5 years	111.1	4.7	14.8
Assuming useful life of accommodations to be 10 years			
Annualized, 0% discount rate, 10 years	9.11	0.38	1.21
Annualized, 3% discount rate, 10 years	10.68	0.45	1.42
Annualized, 7% discount rate, 10 years	12.97	0.55	1.73
Total, 0% discount rate, 10 years	91.1	3.8	12.1
Total, 3% discount rate, 10 years	106.8	4.5	14.2
Total, 7% discount rate, 10 years	129.7	5.5	17.3

TABLE 12—ANNUALIZED ADMINISTRATIVE COSTS

Year	Estimated administrative costs (in \$ millions)		
	Private—all	Federal government	State and local government
1	\$301	\$0.03	\$0.37
2	0	0	0
3	0	0	0
4	0	0	0
5	0	0	0
6	0	0	0
7	0	0	0
8	0	0	0
9	0	0	0
10	0	0	0
Annualized, 3% discount rate, 10 years	35.26	0.003	0.04
Annualized, 7% discount rate, 10 years	42.83	0.004	0.05
Total, 3% discount rate, 10 years (in millions)	353	0.03	0.44
Total, 7% discount rate, 10 years (in millions)	428	0.04	0.53

E. Time Horizon of Analysis

Neither the PWFA nor the proposed rule contains a sunset provision.

The cost analysis assumes a one-time administrative cost for employers, and the amount of time varies depending on whether the employer is in a State with or without its own version of the PWFA.

The cost and benefit analysis calculates the annual cost of accommodations per pregnant worker who may need them. Because different workers enter the labor market every year and may become pregnant, or a worker who was pregnant may become pregnant again, the Commission does not believe that the need for accommodations or the costs or benefits will substantially change over time.

F. Range of Regulatory Alternatives

The range of alternatives available to the Commission consistent with the Executive Order is narrow:

- Because 42 U.S.C. 2000gg–3(a) requires the Commission to issue regulations, the Commission could not consider non-regulatory alternatives.
- Because 42 U.S.C. 2000gg determine coverage, the Commission

could not consider exemptions based on firm size or geography.

- Because 42 U.S.C. 2000gg–2 of the PWFA provides how the statute will be enforced, the Commission could not consider alternative methods of enforcement, such as market-oriented approaches, performance standards, default rules, monitoring by other agencies, or reporting.

- Because section 109 of the PWFA states when the law will go into effect, the Commission could not consider alternative compliance dates.³¹²

Further, because the PWFA is a Federal law that intentionally sets a national standard, the Commission could not consider deferring to State or local regulations. The one exception to this is that 42 U.S.C 2000gg–5(a)(1) provides that nothing in the PWFA invalidates or limits rights under Federal, State, or local laws that provide equal or greater protection for individuals affected by pregnancy, childbirth, or related medical conditions. The proposed rule includes this language. Thus, the proposed rule

does not preempt State or local regulations that provide equal or greater protection relative to the PWFA.

The Commission considered two regulatory alternatives, discussed below. The Commission does not believe that either alternative would decrease the costs for covered entities.

1. Definition of “In the Near Future”

42 U.S.C 2000gg(6) of the PWFA defines a “qualified” employee to include employees whose inability to perform one or more essential functions of the job is temporary, who will be able to perform the essential functions “in the near future,” and whose inability to perform essential function(s) can be reasonably accommodated without undue hardship.

The proposed rule defines “in the near future” to mean “generally within forty weeks.” The Commission considered, but rejected, shorter periods such as six months or less³¹³ for several

³¹² Consolidated Appropriations Act, 2023, Public Law 117–328, Division II, 136 Stat. 4459, 6089 (2022).

³¹³ H.R. Report No. 117–27, pt.1 at 28 (citing *Robert v. Bd. of Cnty. Comm’rs of Brown Cnty.*, 691 F.3d 1211, 1218 (10th Cir. 2012)). Although it does not define “in the near future,” *Robert* cites to *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 (8th Cir. 2003), which found that under the ADA, a request for leave that would last six months was too long.

reasons. First, pregnancy generally lasts forty weeks; a rule that a worker is only “qualified” if they are able to perform all the essential functions of the job within six months of the function(s) being temporarily excused as a reasonable accommodation could classify many workers who need a temporary suspension of an essential function(s) for a longer period as “unqualified” and therefore ineligible for reasonable accommodations. The Commission believes that this outcome would frustrate the purpose of the statute, which is to enable employees who need temporary accommodations related to pregnancy, childbirth, or related medical conditions to continue working.

Second, defining “in the near future” to mean “generally forty weeks” does not mean that the employer will be required to actually provide a reasonable accommodation for that length of time. The definition of “in the near future” is one step in the definition of qualified; even if an employee can meet this part of the definition, an employer still may refuse to provide an accommodation if the employer cannot reasonably accommodate the temporary suspension of the essential function or if doing so would impose undue hardship (defined as significant difficulty or expense, relative to the employer’s overall resources). It is the Commission’s hope that setting a single standard for the meaning of “in the near future” will benefit both employers and employees by reducing litigation over the meaning of the term and placing the focus on the central issue of whether the accommodation would impose an undue hardship.

If the definition of “qualified” is “generally forty weeks” rather than “less than six months,” more workers will be able to meet the definition of qualified. It is not possible to estimate how many. The Commission anticipates that there will be little or no additional cost to covered entities because it is the act of providing an accommodation—not classifying an individual as meeting part of the definition of qualified—that imposes actual costs on the employer. A covered entity can still argue that the accommodation would impose an undue hardship. Further, even if it provides the accommodation, the covered entity is likely to experience a cost saving from not having to recruit, hire, or train a new worker.

The Commission also considered not defining the term “in the near future,” but determined that doing so would

harm employers by increasing uncertainty and harm employees by failing to ensure equal treatment.

2. Predictable Assessments

In the section defining “undue hardship,” the proposed rule lists four job modifications often sought by pregnant workers that, in virtually all cases, will be found to be reasonable accommodations that do not impose undue hardship: (1) carrying water and drinking water as needed; (2) allowing additional restroom breaks; (3) allowing sitting for those whose work requires standing and standing for those whose work requires sitting; and (4) allowing breaks as needed to eat and drink.

As explained in the preamble, these accommodations are repeatedly discussed in the PWFA’s legislative history as common sense, low-cost accommodations that most pregnant workers will need.³¹⁴ To increase efficiency and to decrease the time that it takes for workers to receive these accommodations, the Commission has determined that these modifications will in virtually all cases be determined to be reasonable accommodations that do not impose an undue hardship.

As an alternative to providing that these simple, common-sense modifications will virtually always be determined to be reasonable accommodations that do not impose undue hardship, the Commission considered taking the position that such modifications would always be reasonable accommodations and never impose undue hardship. The Commission decided against this approach because some employers may encounter circumstances that would lead to a determination that these modifications are not reasonable accommodations and/or would impose an undue hardship.

The Commission also considered the option of not including information regarding “predictable assessments” in the proposed rule. The Commission determined that providing this information will be helpful to the public because doing so explains to covered entities and employees how the

Commission intends to enforce the PWFA, potentially increases voluntary compliance, and increases certainty for covered entities, which will decrease costs.

The Commission does not anticipate that the proposed rule’s “predictable assessments” section would increase costs for covered entities. The examples given are low- to no-cost accommodations, and under the proposed rule, the employer may still claim that these modifications would impose an undue hardship.

G. Uncertainty in Benefits, Costs, and Net Benefits

The Commission has based its estimates of the costs and benefits of the proposed rule on the best data available to it at the current time. Nevertheless, the Commission recognizes these estimates are somewhat uncertain in several respects.

First, the data used to estimate the cost of providing accommodations as required by the PWFA come entirely from research on the cost of accommodations for individuals with disabilities; the Commission is not aware of any data concerning the cost of accommodations that relate specifically to pregnancy, childbirth, or related medical conditions.

Second, the estimated cost for accommodations is based on the probable number of pregnant workers in the workplace. Due to lack of available data, the estimates do not attempt to account specifically for the cost of accommodations related to childbirth (such as leave for recovery) or related medical conditions. The Commission nevertheless believes the cost of these accommodations will not significantly change its estimates. For example, leave needed for recovery from childbirth is likely to be for a relatively short period of time—usually 6 to 10 weeks—and the PFWA does not require such leave to be paid. Further, according to the Bureau of Labor Statistics, 88 percent of workers have access to unpaid family leave independent of the PFWA, either through the FMLA or otherwise.³¹⁵ With respect to these individuals, any costs attributable specifically to the PFWA for leave related to childbirth would be limited to the short period of time during which such leave is required, but unavailable from those other sources.

H. Conclusion

As detailed above, the estimated annual cost of providing

³¹⁴ See H.R. Rep. 117–27, pt. 1, at 11, 22, 29, 113; *Fighting for Fairness*, supra note 2, at 4 (statement of Rep. Suzanne Bonamici); *Long Over Due*, supra note 2, at 7 (statement of Rep. Jerrold Nadler); 25 (statement of Iris Wilbur, Vice President of Government Affairs and Public Policy, Greater Louisville, Inc.); 83 (statement of Rep. Barbara Lee); 168 Cong. Rec. H10,527 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S7,079 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. H2,324 (daily ed. May 14, 2021) (statement of Rep. Suzanne Bonamici).

³¹⁵ U.S. Bureau of Lab. Stats., *Access to Paid and Unpaid Family Leave in 2018* (Feb. 27, 2019), <https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm>.

to be “in the near future” to qualify as a possible reasonable accommodation.

accommodations required by the proposed rule and underlying statute—but not independently required by a State or local law substantially similar to the PWFA—is estimated to be up to \$18 million for private employers, \$2.4 million for State and local governments, and \$800,000 for the Federal Government. In addition, employers are expected to face one-time costs associated with complying with the rule and underlying statute. These are estimated to be \$300 million for private employers, \$360,000 million for State and local governments, and \$30,000 for the Federal Government.

These figures are almost certainly overestimates of the costs imposed by the rule, in part because some of the accommodations required by the proposed rule and underlying statute are already required under the ADA and Title VII and some employers voluntarily provide accommodations. Due to a lack of data, however, the Commission was unable to account for this overlap in the above analysis.

The Commission has nevertheless determined that the benefits of the proposed rule and underlying statute justify its costs.³¹⁶ The annual costs associated with the main requirement of the rule—to give reasonable accommodations to individuals who need them because of pregnancy, childbirth, or related medical conditions—are not “economically significant” under E.O. 12866. And although the aggregate one-time compliance costs are in excess of \$200 million, and therefore “economically significant,” the estimated cost on a per-establishment basis is very low—\$56.76 and \$170.27, depending on whether or not the State in which the entity is located has a law substantially similar to the PWFA.

The benefits of the proposed rule and underlying statute to workers affected by pregnancy, childbirth, or related

medical conditions, however, are significant, including improved health, improved economic security, and increased equity, human dignity, and fairness. The number of individuals who may experience such benefits is relatively large—the number of workers who will be newly entitled to reasonable accommodations for pregnancy is estimated to be between 240,000 and 710,000 per year. This number does not include the children, family members, and members of society at large who also will potentially enjoy some of the benefits listed above.

The Commission further concludes that the proposed rule is tailored to impose the least burden on society consistent with achieving the regulatory objectives, and that the agency has selected the approach that maximizes net benefits. The range of alternatives available to the Commission was extremely limited. The alternatives that were consistent with the PWFA’s statutory language would not, in the Commission’s opinion, reduce costs on employers.

The Commission invites members of the public to comment on any aspect of this IRIA, and to submit to the Commission any data that would further inform the Commission’s analysis.

Regulatory Flexibility Act and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act (RFA), 5 U.S.C. chapter 6, requires the Commission to evaluate the economic impact of this proposed rule on small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions. The Commission must determine whether the proposed rule would impose a significant economic impact on a substantial number of such small entities.

When an agency issues a rulemaking proposal, the RFA requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.”³¹⁷ Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. For the reasons outlined below, the Chair of the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Small businesses range in size, based on the industry, between 1–1,500 employees;³¹⁸ the PWFA and the proposed rule apply to all employers in the United States with at least 15 employees. Thus, for purposes of the RFA the Commission has determined that the proposed regulation will have an impact on a substantial number of small entities.³¹⁹

However, the Commission has determined that the impact on entities affected by the PWFA and the proposed rule will not be significant. As detailed in the IRIA above, the impact on small entities in States and localities that have laws substantially similar to the PWFA will be limited to a one-time administrative cost of approximately \$56.76.

Small entities that are not already subject to State or local laws substantially similar to the PWFA will face a one-time administrative cost of approximately \$170.27, plus annual costs associated with providing reasonable accommodations consistent with the rule and underlying statute. To calculate the cost of providing such accommodations, the Commission has constructed cost estimates for a range of small business sizes.

TABLE 13—ANNUAL COSTS FOR REASONABLE ACCOMMODATIONS FOR SMALL BUSINESSES BASED ON SIZE

Number of employees	33% Women aged 16–50	4.7% Pregnant in a given year	Needing accommodations: 23% (lower bound estimate)—71% (upper bound estimate)	50.6% Non-zero cost accommodations: lower bound estimate—higher bound estimate (rounded up)	Total expected cost: lower bound estimate—higher bound estimate
15	4.95	0.233	0.054–0.165	1	\$60
50	16.5	0.7755	0.178–0.55	1	60
100	33	1.551	0.357–1.01	1	60

³¹⁶ 76 FR 3821, *supra* note 205.

³¹⁷ 5 U.S.C. 603(a).

³¹⁸ U.S. Small Bus. Admin., *Table of Size Standards* (Mar. 17, 2023), <https://www.sba.gov/document/support-table-size-standards>.

³¹⁹ For example, there are over 1 million businesses with between 20 and 500 employees.

U.S. Census Bureau, *Small Business Week: April 30–May 6, 2023* (April 30, 2023) <https://www.census.gov/newsroom/stories/small-business-week.html>.

TABLE 13—ANNUAL COSTS FOR REASONABLE ACCOMMODATIONS FOR SMALL BUSINESSES BASED ON SIZE—Continued

Number of employees	33% Women aged 16–50	4.7% Pregnant in a given year	Needing accommodations: 23% (lower bound estimate)—71% (upper bound estimate)	50.6% Non-zero cost accommodations: lower bound estimate—higher bound estimate (rounded up)	Total expected cost: lower bound estimate—higher bound estimate
150	49.5	2.3265	0.535–1.652	1	60
200	66	3.102	0.713–2.202	1–2	60–120
250	82.5	3.878	0.892–2.75	1–2	60–120
500	165	7.755	1.78–5.5	1–3	60–180
750	247.5	11.633	2.676–8.259	2–5	120–300
1000	330	15.51	3.567–11.012	2–6	120–360
1250	412.5	19.388	4.459–13.765	3–7	180–420
1500	495	23.265	5.351–16.518	3–9	180–540

Using the amounts for a small entity with 500 employees as an example, the calculation was conducted as follows:

- Based on data outlined in the IRIA above, the Commission estimates that approximately 33 percent, or 165, of these workers are women of reproductive age (aged 16–50 years), and that approximately 4.7 percent of these, or 7.755 workers, will give birth to at least one child during a given year.
- The Commission again adopts 71 percent as its upper-bound estimate and 23 percent as its lower-bound estimate of the percentage of pregnant workers who will need a reasonable accommodation related to pregnancy.
- Thus, the Commission estimates that between 1.78 (23 percent of 7.755) and 5.5 (71 percent of 7.755) employees of a small entity with 500 employees will require annually a reasonable accommodation under the PWFA.
- The Commission further assumes, based on data regarding the average cost of reasonable accommodations for individuals with disabilities presented in the IRIA above, that 50.6 percent of the required accommodations will have a non-zero cost.

• This yields lower- and upper-bound estimates of the number of non-zero cost accommodations of 0.90 (50.6 percent of 1.78) and 2.79 (50.6 percent of 5.5) respectively. Rounding up these numbers, the Commission estimates that a small entity with 500 employees will be required to provide between 1 and 3 additional non-zero cost accommodations per year as a result of the proposed rule and underlying statute. Multiplying by an average cost of \$60 per year for each accommodation, the estimated total cost for accommodations required under the PWFA per small entity with 500 employees is between \$60 and \$180.

To calculate total costs, the cost of compliance is added together with the cost of accommodation. For entities that

are already subject to laws substantially similar to the PWFA, compliance costs are estimated to be \$56.75 in the first year. Since these entities are already required to provide accommodations consistent with the PWFA, they will face no additional costs for accommodations. The total costs faced by these entities are thus estimated to be \$56.75.

For entities that are not already subject to laws substantially similar to the PWFA, the estimated cost of compliance is \$170.27 during the first year. Added to this is the annual cost of providing reasonable accommodations, estimated to be between \$60 (lower bound estimate, for businesses with 15 employees) and \$540 (upper bound estimate, for businesses with 1,500 employees). This yields a total estimated cost per small entity not already subject to a law substantially similar to the PWFA of between \$230.27 and \$710.27 in the first year, and between \$60 and \$540 annually thereafter.

This is not likely to represent a “significant” economic impact for many small entities, if any. Further, the Commission notes that all businesses in the United States with 15 or more employees already must comply with Title VII and the ADA, both of which could, in certain circumstances, require accommodations for workers affected by pregnancy, childbirth, or related medical conditions. Further, Title VII, the ADA, and State laws requiring accommodations for pregnancy apply to all industries; given that, the Commission does not believe that the PWFA will have a greater effect in any industry. The Commission seeks comment regarding its analysis and conclusion that the regulation will not have a significant economic impact on small entities; in particular, the Commission seeks comment regarding

any existing data quantifying impacts on small entities.

Accordingly, the Chair of the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. As addressed above, the Commission invites comment from members of the public who believe there will be a significant impact on small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, requires the EEOC to consider the impact of information collection burdens imposed on the public. The PRA typically requires an agency to provide notice and seek public comments on any “collection of information” contained in a rule.³²⁰

The Commission has determined that there is no new requirement for information collection associated with this proposed rule.

Consequently, this proposed rule does not require review by the Office of Management and Budget under the authority of the PRA.

Executive Order 13132 (Federalism)

The EEOC has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have “federalism implications.” 42 U.S.C. 2000gg(2) provides that the PWFA applies to employers as that term is defined in Title VII. States and local governments are subject to Title VII, including its prohibition on sex discrimination, which includes discrimination based on pregnancy, childbirth, or related medical conditions. 42 U.S.C. 2000gg–4 provides that a State will not be immune under the 11th Amendment to actions brought

³²⁰ See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

under the PWFA in a court of competent jurisdiction and that in any action against a State for a violation of the PWFA, remedies, including remedies both at law and in equity, are available for such violation to the same extent that they are available against any other public or private entity. The proposed rule does not limit or expand these statutory definitions. Additionally, the regulation will not have substantial direct effects “on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

Unfunded Mandates Reform Act of 1995

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that the Commission determine whether a regulation proposes a Federal mandate that may result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in a single year (adjusted annually for inflation). However, 2 U.S.C. 1503 excludes from UMRA’s ambit any provision in a proposed or final regulation that, among other things, enforces constitutional rights of individuals or establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability; thus, UMRA does not apply to the PWFA.³²¹

Plain Language

The Commission has attempted to draft this NPRM in plain language. The Commission invites comment on any aspect of this NPRM that does not meet this standard.

Assessment of Federal Regulations and Policies on Families

The undersigned hereby certifies that the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act of 1999. To the contrary, by providing reasonable accommodation to workers with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent

undue hardship, the proposed rule would have a positive effect on the economic well-being and security of families.

Executive Order 13175 (Indian Tribal Governments)

This rule does not have tribal implications under Executive Order 13175 that require a tribal summary impact statement. The rule would 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. The definition of “covered entity” in the PWFA follows that of Title VII; Title VII exempts “a corporation wholly owned by an Indian tribe.”³²²

Executive Order 12988 (Civil Justice Reform)

This proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

For the Commission:

Charlotte A. Burrows,
Chair.

List of Subjects in 29 CFR Part 1636

Administrative practice and procedure, Equal employment opportunity, Reasonable accommodation, Pregnancy.

For the reasons set forth in the preamble, the EEOC proposes to amend 29 CFR chapter XIV by adding part 1636 to read as follows:

PART 1636—PREGNANT WORKERS FAIRNESS ACT

Sec.

- 1636.1 Purpose.
- 1636.2 Definitions—general.
- 1636.3 Definitions—specific to PWFA.
- 1636.4 Prohibited practices.
- 1636.5 Remedies and enforcement.
- 1636.6 Waiver of State immunity.
- 1636.7 Relationship to other laws.
- 1636.8 Severability.

Appendix A to Part 1636—Interpretive Guidance on the Pregnant Workers Fairness Act.

Authority: 42 U.S.C. 2000gg *et seq.*

§ 1636.1 Purpose.

(a) The purpose of this part is to implement the Pregnant Workers Fairness Act, 42 U.S.C. 2000gg *et seq.*

(b) The PWFA:

(1) Requires a covered entity to provide a reasonable accommodation for a known limitation of a qualified employee or applicant related to pregnancy, childbirth, or related medical conditions, absent undue hardship;

(2) Prohibits a covered entity from requiring a qualified employee or applicant to accept an accommodation other than a reasonable accommodation arrived at through the interactive process;

(3) Prohibits the denial of employment opportunities based on the need of the covered entity to make a reasonable accommodation for the known limitation of a qualified employee or applicant;

(4) Prohibits a covered entity from requiring a qualified employee to take leave if another reasonable accommodation can be provided;

(5) Prohibits a covered entity from taking adverse actions in terms, conditions, or privileges of employment against a qualified employee, applicant, or former employee for requesting or using a reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions;

(6) Prohibits a covered entity from retaliating against an employee, applicant, or former employee for opposing unlawful discrimination under the PWFA or participating in a proceeding under the PWFA;

(7) Prohibits a covered entity from interfering with any individual’s rights under the PWFA; and

(8) Provides remedies for individuals whose rights under the PWFA are violated.

§ 1636.2 Definitions—general.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–4.

(b) *Covered entity* means *Respondent* as defined in section 701(n) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(n) and includes:

(1) *Employer*, which is a person engaged in an industry affecting commerce who has 15 or more employees, as defined in 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b);

(2) *Employing Office*, as defined in section 101 of the Congressional Accountability Act of 1995, 2 U.S.C. 1301, and 3 U.S.C. 411(c);

³²¹ H.R. Report No. 117–27, pt.1, at 41 (containing a report by the Congressional Budget Office stating that the PWFA was not reviewed “for intergovernmental or private-sector mandates” because it falls within the exception to the Unfunded Mandates Reform Act as it “would extend protections against discrimination in the workplace based on sex to employees requesting reasonable accommodation for pregnancy, childbirth, or related medical conditions”).

³²² 42 U.S.C. 2000e(b).

(3) An entity employing a State employee or employing an employee of a State subdivision described in section 304(a) of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16c(a); and

(4) An entity to which section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(a) applies.

(c) *Employee* means:

(1) An employee (including an applicant) as defined in section 701(f) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(f);

(2) A covered employee (including an applicant) as defined in section 101 of the Congressional Accountability Act of 1995, 2 U.S.C. 1301, and an individual described in section 201(d) of that Act, 2 U.S.C. 1311(d);

(3) A covered employee (including an applicant) as defined in 3 U.S.C. 411(c);

(4) A State employee (including an applicant) or an employee or applicant of a State subdivision described in section 304(a) of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16c(a); and

(5) An employee (including an applicant) to which section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(a) applies.

(d) *Person* means “person” as defined by section 701(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(a).

§ 1636.3 Definitions—specific to the PWFA.

(a) *Known limitation* means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or applicant or the representative of the employee or applicant has communicated to the covered entity, whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.

(1) *Known* in terms of limitation means the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the employer.

(2) *Limitation* means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. “Physical or mental condition” is an impediment or problem that may be modest, minor, and/or episodic. The physical or mental condition may also be that an employee or applicant affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy. The definition also includes when the worker is seeking

health care related to pregnancy, childbirth, or a related medical condition itself. A “physical or mental condition” does not need to meet the definition of disability from the Americans with Disabilities Act (42 U.S.C. 12111 *et seq.*).

(b) *Pregnancy, childbirth, or related medical conditions*: “Pregnancy” and “childbirth” include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy; labor; and childbirth (including vaginal and cesarean delivery). “Related medical conditions” are medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth, as applied to the specific employee or applicant in question, including, but not limited to, termination of pregnancy, including via miscarriage, stillbirth, or abortion; infertility; fertility treatment; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstrual cycles; use of birth control; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive, and an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition in order to be eligible for a reasonable accommodation.

(c) *Employee representative* means a family member, friend, health care provider, or other representative of the employee or applicant.

(d) *Communicated to the employer* means an employee or applicant, or a representative of the employee or applicant, has made the request for an accommodation to the covered entity by communicating with a supervisor, manager, someone who has supervisory authority for the employee (or the equivalent for the applicant), or human resources personnel, or by following the steps in the covered entity’s policy to request an accommodation.

(1) The communication may be made orally, in writing, or by another effective means.

(2) A covered entity may not require that the communication be in writing, in any specific format, or on any particular form in order to be considered “communicated to the employer.”

(3) To request a reasonable accommodation, the employee or applicant, or a representative of the employee or applicant, need only communicate to the covered entity that the employee or applicant:

(i) Has a limitation, and

(ii) Needs an adjustment or change at work.

(e) *Consideration of mitigating measures*—

(1) The determination of whether an employee or applicant has a known limitation shall be made without regard to the ameliorative effects of mitigating measures.

(2) The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an employee or applicant has a limitation.

(f) *Qualified employee or applicant* with respect to an employee or applicant with a known limitation under the PWFA means:

(1) An employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position.

(i) With respect to leave as an accommodation, the relevant inquiry is whether the employee is reasonably expected to be able to perform the essential functions, with or without a reasonable accommodation, at the end of the leave, if time off is granted, or if the employee is qualified as set out in paragraph (f)(2) of this section after returning from leave.

(2) Additionally, an employee or applicant shall be considered qualified if they cannot perform one or more essential functions if:

(i) Any inability to perform an essential function is for a temporary period, where “temporary” means lasting for a limited time, not permanent, and may extend beyond “in the near future”;

(ii) The essential function(s) could be performed in the near future, where “in the near future” means the ability to perform the essential function(s) will generally resume within forty weeks of its suspension; and

(iii) The inability to perform the essential function can be reasonably accommodated. This may be

accomplished by temporary suspension of the essential function(s) and the employee performing the remaining functions of their position or, depending on the position, other arrangements, including, but not limited to: the employee performing the remaining functions of their position and other functions assigned by the covered entity; the employee performing the functions of a different job to which the covered entity temporarily transfers or assigns the employee; or the employee being assigned to light duty or modified duty or participating in the covered entity's light or modified duty program.

(g) *Essential functions* mean the fundamental job duties of the employment position the employee or applicant holds or desires. The term "essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for their expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(h) *Reasonable accommodation—generally.* With respect to an employee or applicant with a known limitation under the PWFA, reasonable accommodation includes:

(1) Modifications or adjustments to a job application process that enable an applicant with a known limitation under the PWFA to be considered for the position such applicant desires; or

(2) Modifications or adjustments to the work environment, or to the manner

or circumstances under which the position held or desired is customarily performed, that enable a qualified employee or applicant with a known limitation under the PWFA to perform the essential functions of that position; or

(3) Modifications or adjustments that enable a qualified employee or applicant with a known limitation under the PWFA to enjoy equal benefits and privileges of employment; or

(4) Temporary suspension of essential function(s) and/or modifications or adjustments that permit the temporary suspension of essential function(s).

(5) To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process as explained in paragraph (k) of this section.

(i) *Reasonable accommodation—examples.* Reasonable accommodation may include, but is not limited to:

(1) Making existing facilities used by employees readily accessible to and usable by employees and applicants with known limitations under the PWFA;

(2) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; breaks for use of the restroom, drinking, eating, and/or resting; acquisition or modification of equipment, uniforms, or devices, including devices that assist with lifting or carrying for jobs that involve lifting and/or carrying; modifying the work environment; providing seating for jobs that require standing, or standing for jobs that require sitting; appropriate adjustment or modifications of examinations or policies; permitting the use of paid leave (whether accrued, as part of a short-term disability program, or any other employer benefit) or providing additional unpaid leave for reasons, including, but not limited to, recovery from childbirth, miscarriage, stillbirth, or medical conditions related to pregnancy or childbirth, to attend health care appointments or receive health care treatment related to pregnancy, childbirth, or related medical conditions; placement in the covered entity's light or modified duty program or assignment to light duty or modified work; telework; adjustments to allow an employee or applicant to work without increased pain or increased risk to the employee's or applicant's health or the health of the employee's or applicant's pregnancy due to the employee's or applicant's known limitation; temporarily suspending one or more essential functions of the position; providing reserved parking spaces if the employee is otherwise

entitled to use employer-provided parking; and other similar accommodations for employees or applicants with known limitations.

(3) The reasonable accommodation of leave includes, but is not limited to:

(i) The ability to use paid leave (whether accrued, short-term disability, or another employer benefit) or receive unpaid leave, including, but not limited to, leave during pregnancy; to recover from childbirth, miscarriage, or stillbirth; and to attend health care appointments or receive health care treatments related to pregnancy, childbirth, or related medical conditions;

(ii) The ability to use paid leave (accrued, short-term disability, or another employer benefit) or unpaid leave for a known limitation under the PWFA;

(iii) The ability to choose whether to use paid leave (accrued, short-term disability or another employer benefit) or unpaid leave to the extent that the covered entity allows employees using leave not related to pregnancy, childbirth, or related medical conditions to choose between the use of paid leave (accrued, short-term disability, or another employer benefit) and unpaid leave; and

(iv) A covered entity's concerns about the length, frequency, or unpredictable nature of leave requested as a reasonable accommodation are questions of undue hardship.

(4) The provision of reasonable accommodations related to lactation, including, but not limited to:

(i) Breaks, a space for lactation, and other related modifications as required under the PUMP Act (Pub. L. 117–328, Div. KK, 29 U.S.C. 218d), if not already provided under the PUMP Act;

(ii) Whether the space for lactation is provided under the PUMP Act or paragraph (i)(4)(i) of this section, accommodations related to pumping, such as, but not limited to, ensuring that the area for lactation is in reasonable proximity to the employee's usual work area; that it is regularly cleaned; that it has electricity, appropriate seating, and a surface sufficient to place a breast pump; and that it is in reasonable proximity to a sink, running water, and a refrigerator for storing milk.

(5) The temporary suspension of one or more essential function(s) of the position in question, as defined in paragraph (g) of this section, is a reasonable accommodation if an applicant or employee with a known limitation is unable to perform one or more essential functions with or without a reasonable accommodation

and the conditions in paragraph (f)(2) of this section are met.

(j) *Undue hardship*—

(1) *In general.* *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (j)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered, with no one factor to be dispositive, include:

(i) The nature and net cost of the accommodation needed under the PWFA;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(3) If an employee or applicant with a known limitation under the PWFA meets the definition of "qualified employee" under paragraph (f)(2) of this section and needs one or more essential functions of the relevant position to be temporarily suspended, the covered entity must provide the accommodation unless doing so imposes an undue hardship when considered in light of the factors provided in paragraphs (j)(2)(i) through (v) of this section as well as the following additional factors where they are relevant and with no one factor being dispositive:

(i) The length of time that the employee or applicant will be unable to perform the essential function(s);

(ii) Whether, through the factors listed in paragraph (f)(2)(iii) of this section or otherwise, there is work for the employee or applicant to accomplish;

(iii) The nature of the essential function(s), including its frequency;

(iv) Whether the covered entity has provided other employees or applicants in similar positions who are unable to perform the essential function(s) of their position with temporary suspensions of essential functions;

(v) If necessary, whether there are other employees, temporary employees, or third parties who can perform or be hired to perform the essential function(s); and

(vi) Whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

(4) *Predictable assessments:* Although a covered entity must assess on a case-by-case basis whether a requested modification is a reasonable accommodation that would cause undue hardship, the individualized assessment of whether the modifications listed in paragraphs (j)(4)(i) through (iv) of this section would cause undue hardship will, in virtually all cases, result in a determination that they are reasonable accommodations that will not impose an undue hardship under the PWFA when they are requested as workplace accommodations by an employee or applicant who is pregnant. Given the simple and straightforward nature of these modifications, they will, as a factual matter, virtually always be found to be reasonable accommodations that do not impose significant difficulty or expense (*i.e.*, undue hardship). Therefore, with respect to these modifications, the necessary individualized assessment should be particularly simple and straightforward. It should easily be concluded that the following modifications will virtually always be reasonable accommodations that do not impose an undue hardship:

(i) Allowing an employee or applicant to carry water and drink as needed during the workday;

(ii) Allowing an employee or applicant additional restroom breaks;

(iii) Allowing an employee or applicant whose work requires standing to sit and whose work requires sitting to stand; and

(iv) Allowing an employee or applicant breaks as needed to eat and drink.

(5) A covered entity may not establish that a reasonable accommodation imposes an undue hardship based on a mere assumption or speculation that other employees might seek a reasonable accommodation, or even the same reasonable accommodation, in the future.

(k) *Interactive process* means an informal, interactive process between the covered entity and the employee or applicant seeking an accommodation

under the PWFA. This process should identify the known limitation and the change or adjustment at work that is needed, if either of these are not clear from the request, and potential reasonable accommodations. There are no rigid steps that must be followed.

(l) *Supporting documentation.* (1) A covered entity that decides to seek supporting documentation from a worker who seeks an accommodation under the PWFA is limited to requiring documentation that is reasonable under the circumstances for the covered entity to determine whether to grant the accommodation. The following situations are examples of when requiring supporting documentation is not reasonable under the circumstances:

(i) When the known limitation and need for reasonable accommodation are obvious and the employee confirms the obvious limitation and need for reasonable accommodation through self-attestation;

(ii) When the employee or applicant already has provided the covered entity with sufficient information to substantiate that the employee or applicant has a known limitation and that a change or adjustment at work is needed;

(iii) When the employee or applicant is pregnant and the reasonable accommodation is one of those listed in paragraphs (j)(4)(i) through (iv) of this section and the employee has provided a self-attestation; or

(iv) When the covered entity requires documentation other than self-attestation from the employee or applicant regarding lactation or pumping.

(2) When requiring supporting documentation is reasonable under the circumstances, the covered entity is limited to requiring reasonable documentation. Reasonable documentation means documentation that is sufficient to describe or confirm the physical or mental condition; that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and that a change or adjustment at work is needed.

(3) A covered entity may require that documentation comes from the appropriate health care provider in a particular situation, which may include, but is not limited to, doctors, doulas, midwives, psychologists, nurses, nurse practitioners, physical therapists, lactation consultants, occupational therapists, vocational rehabilitation specialists, therapists, and licensed mental health providers. The covered entity may not require that the employee or applicant seeking the accommodation be examined by a

health care provider selected by the covered entity.

(4) The rules protecting confidential medical information in the Americans with Disabilities Act, 42 U.S.C. 12111 *et seq.*, apply to medical information received by a covered entity under the PWFA.

§ 1636.4 Prohibited practices.

(a) It is an unlawful employment practice for a covered entity not to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee or applicant, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

(1) An unnecessary delay in responding to a reasonable accommodation request may result in a violation of the PWFA, 42 U.S.C. 2000gg–1(1), even if the covered entity eventually provides the reasonable accommodation. In determining whether there has been an unnecessary delay, factors to be considered, with no one factor to be dispositive, include:

- (i) The reason for the delay;
- (ii) The length of the delay;
- (iii) How much the employee or applicant and the covered entity each contributed to the delay;
- (iv) Whether the covered entity was engaged in actions related to the reasonable accommodation request during the delay;
- (v) Whether the accommodation was simple or complex to provide. There are certain accommodations, set forth in § 1636.3(j)(4), that are common and easy to provide. Delay in providing these accommodations will virtually always result in a finding of unnecessary delay; and

(vi) Whether the covered entity offered the employee or applicant an interim reasonable accommodation during the interactive process or while waiting for the covered entity's response. If an interim reasonable accommodation is offered, delay by the covered entity is more likely to be excused. For the purposes of this factor, leave will not be considered an appropriate interim reasonable accommodation if there is another interim reasonable accommodation that would not cause an undue hardship for the covered entity and would allow the employee or applicant to continue to work, unless the employee or applicant selects or requests leave as an interim accommodation.

(2) An employee or applicant with a known limitation under the PWFA is

not required to accept an accommodation. However, if such employee or applicant rejects a reasonable accommodation that is necessary to enable the employee or applicant to perform the essential functions of the position held or desired or to apply for the position, and as a result of that rejection, cannot perform the essential functions of the position or cannot apply, the employee or applicant will not be considered "qualified." In this situation, the covered entity also must consider whether the employee could be "qualified" under the second part of the PWFA's definition, set forth at § 1636.3(f)(2).

(3) A covered entity cannot justify the denial or delay of a reasonable accommodation based on an employee or applicant failing to provide supporting documentation, unless requiring the supporting documentation is reasonable under the circumstances for the covered entity to determine whether to provide the accommodation.

(4) The accommodation should provide the employee or applicant with equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges as are available to the average similarly situated employee without a known limitation. When choosing between accommodations that do not cause an undue hardship, the covered entity must choose an option that provides the employee or applicant equal employment opportunity.

(b) It is unlawful for a covered entity to require a qualified employee or applicant affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in 42 U.S.C. 2000gg(7) and described at § 1636.3(k).

(c) It is unlawful for a covered entity to deny employment opportunities to a qualified employee or applicant if such denial is based on the need or potential need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth or related medical conditions of the qualified employee or applicant.

(d) It is unlawful for a covered entity:

(1) To require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee that does not result in an undue hardship for the covered entity; but

(2) Nothing in this provision limits the provision of leave as a reasonable accommodation if that is the reasonable accommodation requested or selected by the employee, or if it is the only reasonable accommodation that does not cause an undue hardship.

(e) It is unlawful for a covered entity:

(1) To take adverse action in terms, conditions, or privileges of employment against a qualified employee, applicant, or former employee on account of the employee, applicant, or former employee requesting or using a reasonable accommodation to the known limitations related to pregnancy, childbirth, or related medical conditions of the employee, applicant, or former employee.

(2) Nothing in paragraph (e)(1) of this section limits the rights available under 42 U.S.C. 2000gg–2(f) of the PWFA or § 1636.5(f).

§ 1636.5 Remedies and enforcement.

(a) *Employees covered by Title VII of the Civil Rights Act of 1964—*(1) *In general.* The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–4 *et seq.*, to the Commission, the Attorney General, or any person alleging a violation of Title VII of such Act, 42 U.S.C. 2000e *et seq.*, shall be the powers, remedies, and procedures this section provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(A), except as provided in paragraphs (a)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures this section provides to the Commission, the Attorney General, or any person alleging such practice.

(3) *Damages.* The powers, remedies, and procedures provided in section 1977A of the Revised Statutes, 42 U.S.C. 1981a, including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this section provides to the Commission, the Attorney General, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(a)(1)).

(b) *Employees covered by Congressional Accountability Act of 1995—*(1) *In general.* The powers,

remedies, and procedures provided in the Congressional Accountability Act of 1995, 2 U.S.C. 1301 *et seq.*, for the purposes of addressing allegations of violations of section 201(a)(1) of such Act, 2 U.S.C. 1311(a)(1), shall be the powers, remedies, and procedures this section provides to address an allegation of an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(B), except as provided in paragraphs (b)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, for the purposes of addressing allegations of such a violation shall be the powers, remedies, and procedures this section provides to address allegations of such practice.

(3) *Damages.* The powers, remedies, and procedures provided in section 1977A of the Revised Statutes, 42 U.S.C. 1981a, including the limitations contained in subsection (b)(3) of such section 1977A, for purposes of addressing allegations of such a violation, shall be the powers, remedies, and procedures this section provides to address any allegation of such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(a)(1)).

(c) *Employees covered by Chapter 5 of Title 3, United States Code—(1) In general.* The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person alleging a violation of section 411(a)(1) of such title shall be the powers, remedies, and procedures this section provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(C), except as provided in paragraphs (c)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures this section provides to the President, the Commission, the Board, or any person alleging such practice.

(3) *Damages.* The powers, remedies, and procedures provided in section 1977A of the Revised Statutes, 42 U.S.C. 1981a, including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this section provides to the President, the

Commission, the Board, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(a)(1)).

(d) *Employees covered by Government Employee Rights Act of 1991—(1) In general.* The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16b, 2000e–16c, to the Commission or any person alleging a violation of section 302(a)(1) of such Act, 42 U.S.C. 2000e–16b(a)(1), shall be the powers, remedies, and procedures this section provides to the Commission or any person, respectively, alleging an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(D), except as provided in paragraphs (d)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures this section provides to the Commission or any person alleging such practice.

(3) *Damages.* The powers, remedies, and procedures provided in section 1977A of the Revised Statutes, 42 U.S.C. 1981a, including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this section provides to the Commission or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(a)(1)).

(e) *Employees covered by Section 717 of the Civil Rights Act of 1964—(1) In general.* The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16, to the Commission, the Attorney General, the Librarian of Congress, or any person alleging a violation of that section shall be the powers, remedies, and procedures this section provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in 42 U.S.C. 2000gg(3)(E), except as provided in paragraphs (e)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and

procedures this section provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice.

(3) *Damages.* The powers, remedies, and procedures provided in section 1977A of the Revised Statutes, 42 U.S.C. 1981a, including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this section provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(a)(1)).

(f) *Prohibition against retaliation—(1) In general.* No person shall discriminate against any employee, applicant, or former employee because such individual has opposed any act or practice made unlawful by the PWFA or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the PWFA.

(i) An employee, applicant, or former employee need not be a qualified employee, applicant, or former employee with a known limitation to bring an action under this paragraph (f)(1).

(ii) A request for reasonable accommodation for a known limitation under the PWFA constitutes protected activity under this paragraph (f)(1).

(iii) An employee, applicant, or former employee does not actually have to be deterred from exercising or enjoying rights under the PWFA in order for the retaliation to be actionable.

(iv) A covered entity requiring supporting documentation when it is not reasonable under the circumstances for the covered entity to determine whether to provide the accommodation is a violation of this paragraph (f)(1).

(v) When an employee or applicant (or a representative of an employee or applicant) provides sufficient information or documentation to describe or confirm the known limitation and to substantiate the need for a reasonable accommodation, continued efforts by the covered entity to require that the employee or applicant (or the representative of such individual) provide more information or documentation is a violation of this paragraph, unless the covered entity has a good faith belief that the submitted information or documentation is insufficient.

(2) *Prohibition against coercion.* It is unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of, or on

account of such individual having exercised or enjoyed, or because that individual aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the PWFA.

(i) An individual need not meet the definition of a “qualified employee” or have a “known limitation” under the PWFA to bring an action under this paragraph (f)(2).

(ii) A request for reasonable accommodation for a known limitation under the PWFA constitutes protected activity under this paragraph (f)(2).

(iii) An individual does not actually have to be deterred from exercising or enjoying rights under the PWFA for the coercion, intimidation, threats, harassment, or interference to be actionable.

(iv) A covered entity requiring supporting documentation when it is not reasonable under the circumstances for the covered entity to determine whether to provide the accommodation is a violation of this paragraph (f)(2).

(v) When an employee or applicant (or a representative of an employee or applicant) provides sufficient information or documentation to describe or confirm the known limitation and to substantiate the need for a reasonable accommodation, continued efforts by the covered entity to require that the employee or applicant (or a representative of such individual) provide more information or documentation is a violation of this paragraph, unless the covered entity has a good faith belief that the submitted information or documentation is insufficient.

(3) *Remedy.* The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this section regarding retaliation, coercion, interference, or intimidation, threats, or harassment.

(g) *Limitation on monetary damages.* Notwithstanding paragraphs (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3) of this section, if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this section, damages may not be awarded under section 1977A of the Revised Statutes, 42 U.S.C. 1981a, if the covered entity demonstrates good faith efforts, in consultation with the employee or applicant with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify

and make a reasonable accommodation that would provide such employee or applicant with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.

§ 1636.6 Waiver of State immunity.

A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal or State court of competent jurisdiction for a violation of the PWFA. In any action against a State for a violation of the PWFA, remedies (including remedies both at law and in equity) are available for such a violation to the same extent such remedies are available for such a violation in an action against any public or private entity other than a State.

§ 1636.7 Relationship to other laws.

(a) *In general.* (1) The PWFA and this regulation do not invalidate or limit the powers, remedies, and procedures under any Federal law, State law, or the law of any political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions.

(2) The PWFA and this regulation do not require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.

(b) *Rule of construction.* This statute is subject to the applicability to religious employment set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a).

(1) Nothing in this provision limits the rights under the U.S. Constitution of a covered entity.

(2) Nothing in 42 U.S.C. 2000gg–5(b) of the PWFA or this regulation should be interpreted to limit an employee’s, applicant’s, or former employee’s rights under other civil rights statutes.

§ 1636.8 Severability.

(a) If any provision of the PWFA or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the statute and the application of that provision to other persons or circumstances shall not be affected.

(b) If any provision of the regulation that uses the same language as in the statute or the application of that provision to particular persons or circumstances is held invalid or found

to be unconstitutional, the remainder of the regulation and the application of that provision to other persons or circumstances shall not be affected.

(c) If any provision of the regulation that provides additional guidance to carry out the PWFA, including examples of reasonable accommodations, or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision to other persons or circumstances shall not be affected.

Appendix A to Part 1636—Interpretive Guidance on the Pregnant Workers Fairness Act

On December 29, 2022, President Biden signed the Pregnant Workers Fairness Act (PWFA) into law.¹ The PWFA requires a covered entity to provide reasonable accommodations to a qualified employee’s or applicant’s known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the business of the covered entity. 42 U.S.C. 2000gg–3 requires the Equal Employment Opportunity Commission (EEOC or Commission) to promulgate regulations to implement the PWFA.

The PWFA prohibits a covered entity from (1) denying a qualified employee or applicant with a known limitation a reasonable accommodation, absent undue hardship; (2) requiring a qualified employee or applicant to accept an accommodation other than one arrived at through the interactive process; (3) denying an employment opportunity to a qualified employee or applicant if the denial is based on the employer’s need or potential need to make a reasonable accommodation for the known limitation of the employee or applicant; (4) requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists that does not cause an undue hardship; and (5) taking an adverse action in terms, conditions, or privileges of employment against a qualified employee, applicant, or former employee on account of the employee, applicant, or former employee requesting or using a reasonable accommodation for a known limitation. The PWFA also prohibits retaliation against applicants, employees, or former employees for opposing unlawful discrimination, making a charge, testifying, assisting, or participating in any manner in a PWFA investigation, hearing, or proceeding. Finally, the PWFA prohibits coercing, intimidating, threatening, or interfering with any individual related to the exercise or enjoyment of any right, including aiding or encouraging another individual in such exercise or enjoyment, under the statute.

¹ Consolidated Appropriations Act, 2023, Public Law 117–328, Division II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. 2000gg–2000gg–6).

The U.S. Equal Employment Opportunity Commission (“the Commission” or “the EEOC”) is responsible for enforcing the PWFA with respect to employees covered by Title VII of the Civil Rights Act of 1964 and employees covered by the Government Employee Rights Act of 1991 (GERA). Employees covered by section 706 of Title VII may file charges with the EEOC and the EEOC will investigate them using the same process as set out in Title VII. Similarly, employees covered by section 717 of Title VII may file complaints with the relevant Federal agency which will investigate them, and the EEOC will process appeals using the same process as set out in Title VII for Federal employees.

This Interpretive Guidance addresses the major provisions of the PWFA and its regulation and explains the major concepts pertaining to non-discrimination with respect to reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions under the statute. The Interpretive Guidance represents the Commission’s interpretation of the issues addressed within it, and the Commission will be guided by the regulation and the Interpretive Guidance when enforcing the PWFA.

Section 1636.2 Definitions—General

42 U.S.C. 2000gg(3) uses “employee (including an applicant)” in its definition of “employee.” Because the PWFA relies on Title VII for its definition of “employee,” the rule clarifies that the term also includes “former employee,” where relevant.² The regulation, and this appendix use the term “covered entity” and the term “employer” interchangeably. The regulation and this appendix use the term “employee or applicant” and “employee”; where appropriate, “employee” or “employee or applicant” means “employee, applicant, or former employee.”

Section 1636.3 Definitions Specific to PWFA

1636.3(a)(1) Known

Paragraph (1) adopts the definition of “known” based on the PWFA and thus defines it to mean that the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the covered entity.

1636.3(a)(2) Limitation

Paragraph (2) adopts the definition of “limitation” based on the PWFA and thus defines it to mean a physical or mental condition related to, affected by, or arising

out of pregnancy, childbirth, or related medical conditions. The “physical or mental condition” that is the limitation may be a modest, minor, and/or episodic impediment or problem. The definition encompasses when a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy.³ The definition also includes when the worker is seeking health care related to the pregnancy, childbirth, or a related medical condition itself. This is consistent with the ADA which permits reasonable accommodations for obtaining medical treatment⁴ and recognizes that for pregnancy, childbirth, or related medical conditions the proper course of care can include regular appointments and monitoring by a health care professional.⁵

The general principle informing the rule’s definition is that the physical or mental condition (the limitation) required to trigger the obligation to provide a reasonable accommodation under the PWFA does not require a specific level of severity. This is clear from the text of the statute, which does not contain a level of severity, other than stating that the limitation does not need to meet the definition of a “disability” under the ADA.⁶ The lack of a level of severity is also necessary given the need the statute seeks to fill. Workers who can show that their pregnancy-related condition meets the definition of a disability may be eligible to receive an accommodation under the ADA; workers whose limitations do not reach that threshold are ineligible for such accommodations, and the PWFA is intended to cover those workers.⁷ Additionally, the

³ The regulation and the appendix use the term “maintain health or the health of the pregnancy.” This includes avoiding risk to the employee’s or applicant’s health or to the health of their pregnancy.

⁴ EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text after n. 49 (2002), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [hereinafter *Enforcement Guidance on Reasonable Accommodation*].

⁵ See, e.g., Office of Women’s Health, U.S. Dep’t of Health and Human Servs., *Prenatal Care* (last visited July 18, 2023) (stating that during pregnancy usually visits are once a month until week 28, twice a month from weeks 28–36 and once a week from weeks 36 to birth) <https://www.womenshealth.gov/a-z-topics/prenatal-care>; Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 736, *Optimizing Post-Partum Care* (stating the importance of regular post-partum care) (2021) (<https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/05/optimizing-postpartum-care>) & Opinion No. 826, *Protecting and Expanding Medicaid to Improve Women’s Health* (encouraging the expansion of Medicaid to improve post-partum care) (2021) (<https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/06/protecting-and-expanding-medicare-to-improve-womens-health>).

⁶ 42 U.S.C. 2000gg(4).

⁷ 42 U.S.C. 2000gg(4). See, e.g., H.R. Rep. No. 117–27, pt. 1, at 12 (workers whose pregnancy-related impairments do not substantially limit a major life activity and who are not covered by the ADA can be covered by the PWFA); *id.* at 22–23 (accommodations are frequently needed by, and

definition covers situations where a worker seeks an accommodation in order to maintain their health or the health of their pregnancy and avoid more serious consequences and when a worker seeks health care for their pregnancy, childbirth, or related medical conditions.⁸ Practically, allowing for accommodations to maintain health and attend medical appointments also increases the chances that the accommodation is minor and may decrease the need for a more extensive accommodation because the worker may be able to avoid more serious complications.

Because the standard for known limitation in the statute does not include a specific level of severity and accommodations are available for non-severe physical or mental conditions, whether a worker has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions shall be construed broadly to the maximum extent permitted by the PWFA.

Related to, Affected by, or Arising Out of

Whether a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions usually will be obvious. For example, if an employee is pregnant and as a result has pain when standing for long periods of time, the employee’s physical or mental condition (pain when standing for a protracted period) is related to the employee’s pregnancy. An employee who is pregnant and because of the pregnancy cannot lift more than 20 pounds has a physical condition related to pregnancy. An employee who is pregnant and is seeking time off for prenatal health care appointments is attending a medical appointment related to the pregnancy. An employee who requests an accommodation to attend therapy appointments for postpartum

should be provided to, people with healthy pregnancies); *id.* (example of an “uneventful pregnancy” in which a woman needed more bathroom breaks); *id.* at 14–22 (outlining the gaps left by Title VII and the ADA that the PWFA is intended to fill so that pregnant workers can receive reasonable accommodations); *id.* at 56 (noting that “minor limitations” can be covered because they presumably only require minor accommodations).

⁸ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at text above Question 17 (providing reasons for which an employee may receive an accommodation, including to obtain medical treatment and to avoid temporary adverse conditions in the work environment because of the effect on the worker’s health). See, e.g., *Markup of the Paycheck Fairness Act; Pregnant Workers Fairness Act; Workplace Violence Prevention for Health Care and Social Service Workers Act* 54:46 (2021), <https://www.youtube.com/watch?v=p6le2S9sTxS>, at 54:46 (statement of Rep. Kathy E. Manning) (goal of the PWFA is to help pregnant workers “to deliver healthy babies while maintaining jobs”); *id.* at 21:50 (statement of Rep. Robert C. Scott) (“[W]ithout these protections, too many workers are forced to choose between a healthy pregnancy and their paychecks”); *id.* at 1:35 (statement of Rep. Lucy McBath) (“[N]o mother should ever have to choose between the health of themselves and their child or paycheck.”); *id.* at 1:44 (statement of Rep. Suzanne Bonamici) (“[P]regnant workers should not have to choose between a healthy pregnancy and a paycheck.”).

² 42 U.S.C. 2000e(f). Under Title VII, the term “employee” includes former employees. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that including former employees within sec. 704(a) of Title VII’s coverage of “employee” was “consistent with the broader context of Title VII and the primary purpose of sec. 704(a)”; see also EEOC, *Compliance Manual Section 2: Threshold Issues 2–III.A* (2009), <http://www.eeoc.gov/policy/docs/threshold.html#2-III-A>. This appendix uses the term “worker” interchangeably with “employee or applicant.” For purposes of the PWFA, the term “worker” does not apply to independent contractors.

depression has a medical condition related to pregnancy (postpartum depression) and is obtaining health care for the related medical condition. A pregnant employee who is seeking an accommodation to limit exposure to secondhand smoke to protect the health of their pregnancy has a physical or mental condition (trying to maintain the employee's health or the health of their pregnancy or increased sensitivity to secondhand smoke) related to pregnancy. A pregnant worker seeking time off in order to get an amniocentesis is attending a medical appointment related to the pregnancy. An employee who requests leave for IVF treatment for the worker to get pregnant has a related medical condition (difficulty in becoming pregnant or infertility) and is seeking health care related to it. An employee whose pregnancy is causing fatigue has a physical condition (fatigue) related to pregnancy. An employee whose pregnancy is causing back pain has a physical condition (back pain) related to pregnancy. This is not an exhaustive list of physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

The Commission recognizes, however, that some physical or mental conditions or limitations, including some of those in the examples above, may occur even if a person is not pregnant (*e.g.*, depression, hypertension, constraints on lifting). To the extent that a covered entity has reasonable concerns about whether a physical or mental condition or limitation is “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions,” the employer may request information from the employee regarding the connection, using the principles set out in section 1636.3(l) about the interactive process and supporting documentation. For the most part, the Commission anticipates that determining whether a limitation or physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions will be a straightforward determination that can be accomplished through a conversation between the employer and the employee as part of the interactive process and without the need for the employee to obtain documentation or verification, such as documentation from a health care provider. Of course, even if a covered entity concludes that a limitation is not covered by the PWFA, the covered entity should consider whether the limitation constitutes a disability that is covered by the ADA.

There may be situations where a physical or mental condition begins as something that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and, once the pregnancy, childbirth, or related medical condition is over, the limitation remains. If an employer has questions regarding whether the limitation is still related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the employer may use the principles set out in the sections regarding the interactive process and supporting documentation. Additionally, there may be situations where that limitation

qualifies as a disability under the ADA. In those situations, an employer may use the principles set out in the sections on the interactive process and supporting documentation for the ADA.

1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions

The PWFA uses the term “pregnancy, childbirth, or related medical conditions,” which appears in Title VII’s definition of sex.⁹ Because Congress chose to write the PWFA using the same language as Title VII, in the rule the Commission gives the term “pregnancy, childbirth, or related medical conditions” the same meaning under the PWFA as under Title VII.¹⁰

To assist workers and covered entities, the regulation includes a non-exhaustive list of examples of pregnancy, childbirth, or related medical conditions that the Commission has concluded generally fall within the statutory definition. These include conditions that Federal courts and the EEOC have already concluded are part of the definition under Title VII as well as other conditions that are based on the expertise of medical professionals. The list in the regulation for the definition of “pregnancy, childbirth, or related medical conditions” includes current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions.¹¹ The

⁹ 42 U.S.C. 2000e(k).

¹⁰ See, *e.g.*, *Texas Dep’t of Housing & Cmty. Affs. v. Inclusive Cmty. Project*, 576 U.S. 519, 536 (2015) (“If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.”) (omissions in original) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012)); *Bragdon v. Abbott*, 524 U.S. 624, 644–45 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”); *Hall v. U.S. Dep’t of Agric.*, 984 F.3d 825, 840 (9th Cir. 2020) (“Congress is presumed to be aware of an agency’s interpretation of a statute. We most commonly apply that presumption when an agency’s interpretation of a statute has been officially published and consistently followed. If Congress thereafter reenacts the same language, we conclude that it has adopted the agency’s interpretation.”) (citations and internal quotations omitted); Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012) (“[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning.”).

¹¹ EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* I.A. (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues> [hereinafter *Enforcement Guidance on Pregnancy Discrimination*] (“pregnancy, childbirth, or related medical conditions” include current

pregnancy, past pregnancy, potential or intended pregnancy, infertility treatment, use of contraception, lactation, breastfeeding, and the decision to have or not to have an abortion, among other conditions); see, *e.g.*, *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259–60 (11th Cir. 2017) (finding lactation and breastfeeding covered under the PDA, and asserting that “[t]he PDA would be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related physiological process”) (internal citation and quotation omitted); *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 429–30 (5th Cir. 2013) (“[A]s both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of ‘pregnancy, childbirth, or related medical conditions’”); *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that the PDA prohibits an employer from discriminating against a female employee because she has exercised her right to have an abortion); *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005) (stating that the plaintiff “cannot be refused employment on the basis of her potential pregnancy”); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (finding the termination of a pregnant employee because she contemplated having an abortion violated the PDA); *Piraino v. Int’l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (rejecting “surprising claim” by the defendant that no pregnancy discrimination can be shown where the challenged action occurred after the birth of the plaintiff’s baby); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987) (referencing the PDA’s legislative history and noting commentator agreement that “[b]y broadly defining pregnancy discrimination, Congress clearly intended to extend protection beyond the simple fact of an employee’s pregnancy to include ‘related medical conditions’ such as nausea or potential miscarriage”) (citations and internal quotations omitted); *Ducharme v. Crescent City Déjà Vu, L.L.C.*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (finding that “abortion is encompassed within the statutory text prohibiting adverse employment actions ‘because of or on the basis of pregnancy, childbirth, or related medical conditions’”); *Donaldson v. Am. Banco Corp., Inc.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996) (“It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place. The plain language of the statute does not require it, and common sense precludes it.”); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402–03 (N.D. Ill. 1994) (PDA gives women “the right . . . to be financially and legally protected before, during, and after her pregnancy” and stating “[a]s a general matter, a woman’s medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for purposes of the Pregnancy Discrimination Act.”) (internal citations and quotations omitted); *Neesen v. Arona Corp.*, 2010 WL 1731652, at * 7 (N.D. Iowa Apr. 30, 2010) (finding the plaintiff covered by the PDA where the defendant allegedly refused to hire her because she had recently been pregnant and given birth); 29 CFR 1604 app. Questions 34–37 (1979); H.R. Rep. No. 95–1786, at 4 (1978), as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 (“Because the bill applies to all situations in which women are ‘affected by pregnancy, childbirth, and related medical conditions,’ its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.”); EEOC, *Commission Decision on Coverage of Contraception* (2000), <https://www.eeoc.gov/>

Commission emphasizes that the list in the regulation is non-exhaustive, and to receive an accommodation an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition.

However, to be a “related medical condition” as applied to the specific employee or applicant in question, the condition must relate to pregnancy or childbirth. Some of the “related medical conditions” listed in the regulation are conditions that commonly, but not necessarily, relate to pregnancy or childbirth. If a worker has a condition that is listed in the regulation but, in their situation, it does not relate to pregnancy or childbirth, the condition shall not be covered under the PWFA. For example, if a worker has high blood pressure but that medical condition is not related to pregnancy or childbirth, a physical or mental condition related to the worker’s high blood pressure is not eligible for an accommodation under the PWFA. Other civil rights statutes, such as the ADA, separately may entitle the worker to reasonable accommodation. If an employer has questions regarding whether a condition is related to pregnancy or childbirth, the employer may use the principles set out in the sections regarding the interactive process and supporting documentation.

“Related medical conditions” include conditions that existed before pregnancy or childbirth (and for which an individual was perhaps receiving reasonable accommodation under the ADA) but that may be or have been exacerbated by pregnancy or childbirth, such that additional or different accommodations are needed. For example, a worker who was using unpaid leave as an accommodation to attend treatment for anxiety may experience a worsening of anxiety due to pregnancy or childbirth and request an additional accommodation. A worker who received extra breaks to eat or drink due to Type 2 diabetes before pregnancy may need additional accommodations during pregnancy to monitor and manage the diabetes more closely and avoid or minimize adverse health consequences to the worker or their pregnancy. A worker may have high blood pressure that can be managed prior to the pregnancy, but once the worker is pregnant, the high blood pressure poses a risk to the pregnancy and the worker needs bed rest. In these situations, an employee could request an additional accommodation under the ADA or an accommodation under the PWFA.

1636.3(c) Employee’s Representative

Paragraph (c) of this section of the rule defines “employee’s representative” because the known limitation may be communicated to the covered entity by the employee or the employee’s representative. Under the ADA, a representative may also make the request for an accommodation.¹² Thus, the rule uses the

commission-decision-coverage-contraception (“The PDA’s prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman’s use of contraceptives.”).

¹² *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, Question 2.

same definition from the ADA and states that this term encompasses any representative of the employee or applicant, including a family member, friend, health care provider, or other representative.

1636.3(d) Communicated to the Employer

Paragraph (d) of this section of the rule states that the PWFA’s requirement that the known limitation be “communicate[d] to the employer” means to make known to the covered entity either by communicating with a supervisor, manager, someone who has supervisory authority for the employee (or the equivalent for an applicant), or human resources personnel, or by following the covered entity’s policy to request an accommodation. This should not be a difficult task, and the employer should permit an employee or applicant to request an accommodation through multiple avenues and means. Given that many accommodations requested under the PWFA will be straightforward—like additional bathroom breaks or water—the Commission emphasizes the importance of employees being able to obtain accommodations by communicating with the people who assign them daily tasks and whom they would normally consult if they had questions or concerns. Employees should not be made to wait for a reasonable accommodation that is simple and imposes negligible cost, and is often likely temporary, because they asked the wrong supervisor.

Paragraphs (d)(1) and (2) explain that a request for a reasonable accommodation under the PWFA, as with the ADA, does not need to be in writing or use any specific words or phrases. Instead, employees or applicants may request accommodations in conversation or may use another mode of communication to inform the employer.¹³ A covered entity may choose to write a memorandum or letter confirming a request or may ask the employee or applicant to fill out a form or submit the request in written form. However, the covered entity cannot ignore or close the initial request because that initial request is sufficient to place the employer on notice.¹⁴ Additionally, even though it is not required, an employee may choose email or other similar written means to submit a request for an accommodation to ensure clarity and create a record.

Paragraph (d)(3) of this section of the regulation sets out what an employee or applicant must communicate to the employer to request an accommodation under the PWFA. Such a request has two parts. First, the employee or applicant (or their representative) must identify the limitation that is the physical or mental condition and that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Second, the employee or applicant (or their representative) must indicate that they need an adjustment or change at work. As with the ADA, to request an accommodation, an employee or applicant may use plain language and need not mention the PWFA; use the phrases “reasonable accommodation,” “known

¹³ *Id.* at Question 3.

¹⁴ *Id.*

limitation,” “qualified,” “essential function;” use any medical terminology; or use any other specific words or phrases.

Examples

Example 1636.3 #1: A pregnant employee tells her supervisor, “I’m having trouble getting to work at my scheduled starting time because of morning sickness.”

Morning sickness is a physical condition related to pregnancy that impedes a person’s ability to eat and drink and requires access to a bathroom. The employee has identified a change needed at work (change in work schedule). This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #2: An employee who gave birth three months ago tells the person who assigns her work at the employment agency, “I need an hour off once a week for treatments to help with my back problem that started during my pregnancy.”

The back problem is a physical condition related to pregnancy, and the employee has identified a change needed at work (leave for medical appointments). This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #3: An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy.

The employee has a limitation because they have a need or a problem related to maintaining their health or the health of their pregnancy, the employee identified a change needed at work (assistance with lifting), and the employee communicated this information to the employer. This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #4: An employee’s spouse, on the employee’s behalf, requests light duty for the employee because the employee has a lifting restriction related to pregnancy; the employee’s spouse uses the employer’s established process for requesting a reasonable accommodation or light duty for the employee.

The lifting restriction is a physical condition related to the employee’s pregnancy, and the employee’s representative (their spouse) has identified a change needed at work (light duty). This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #5: An employee verbally informs a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is pregnant, but does not complete the employer’s online form for requesting accommodation.

The need to urinate more frequently is a physical condition related to pregnancy, and the employee has identified a change needed at work (additional bathroom breaks). An employee need not use specific words or any specific form or template to make a request for accommodation. This is a request for a reasonable accommodation under the PWFA.

Example 1636.3 #6: An employee tells a supervisor that she needs time off to recover from childbirth.

The need or a problem is related to maintaining the employee’s health after childbirth, and the employee has identified

a change needed at work (time off). This is a request for a reasonable accommodation under the PWFA.¹⁵

1636.3(e) Mitigating Measures

There may be steps that a worker can take to mitigate, or lessen, the effect of a known limitation. Paragraph (e) of this section of the rule explains that, as with the ADA, the ameliorative, or positive, effects of mitigating measures, as that term is defined in the Commission's ADA regulations, shall not be considered when determining if the employee has a limitation under the PWFA. However, again as under the ADA, the detrimental or non-ameliorative effects of mitigating measures, such as negative side effects of medication, the burden of following a particular treatment regimen, and complications that arise from surgery, may be considered when determining if an employee has a limitation under the PWFA.¹⁶

1636.3(f) Qualified Employee or Applicant

An employee or applicant must meet the definition of "qualified" in the PWFA in one of two ways.¹⁷

As with the ADA, the determination of whether an employee with a known limitation is qualified should be based on the capabilities of the employee at the time of the relevant employment decision and should not be based on speculation that the employee may become unable in the future to perform certain tasks, may require leave, or may cause increased health insurance premiums or workers' compensation costs.¹⁸

1636.3(f)(1) The First Part of PWFA's Definition of Qualified Employee or Applicant—With or Without Reasonable Accommodation

Under 42 U.S.C. 2000gg(6), employees are qualified if they can perform the essential functions of their jobs with or without reasonable accommodation, which is the same language as in the ADA and is interpreted accordingly in the rule. "Reasonable" has the same meaning as under the ADA on this topic—an accommodation that "seems reasonable on its face, *i.e.*,

ordinarily or in the run of cases," "feasible," or "plausible."¹⁹ Many workers seeking reasonable accommodations under the PWFA will meet this part of the definition. For example, a pregnant attorney who uses the firm's established telework program to work at home during morning sickness does not need an accommodation to perform the essential functions of the job and therefore is qualified without a reasonable accommodation. A pregnant cashier who needs a stool to perform the job will be qualified with the reasonable accommodation of a stool. A teacher recovering from childbirth who needs additional bathroom breaks will be qualified with a reasonable accommodation that allows such breaks.

Determining "Qualified" for the Reasonable Accommodation of Leave

When determining whether an employee who needs leave²⁰ as a reasonable accommodation meets the definition of "qualified," the relevant inquiry is whether the employee would be able to perform the essential functions of the position, with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated), with the benefit of a period of intermittent leave, after a period of part-time work, or at the end of a period of leave or time off.²¹ Thus, an employee who needs some form of leave to recover from a known limitation caused, for example, by childbirth or a miscarriage, can meet the definition of "qualified" because it is reasonable to conclude that once they return from the period of leave (or during the time they are working if it is intermittent leave) they will be able to perform the essential functions of the job, with or without additional reasonable accommodations or will be qualified under the second part of the PWFA definition that is described in the next subsection. Of course, if an employer can demonstrate that leave would pose an undue hardship, for example, due to the length, frequency, or unpredictable nature of the

time off that was requested, it may lawfully deny the request.²²

1636.3(f)(2) The Second Part of PWFA's Definition of Qualified Employee or Applicant—Temporary Inability to Perform an Essential Function

The PWFA provides that an employee or applicant can meet the definition of "qualified" even if they cannot perform one or more essential functions of the position in question, provided three conditions are met: (1) the inability to perform an essential function(s) is for a temporary period; (2) the essential function(s) could be performed in the near future; and (3) the inability to perform the essential function(s) can be reasonably accommodated.²³

Based on the overall structure and wording of the statute, the second part of the definition of "qualified" is relevant only when an employee or applicant cannot perform one or more essential functions of the job in question because of a known limitation under the PWFA. It is not relevant in any other circumstance. If the employee or applicant can perform the essential functions of the position with or without a reasonable accommodation, the first definition of "qualified" applies (able to do the job with or without a reasonable accommodation). For example, if a pregnant worker requests additional restroom breaks, the question of whether they are qualified is simply whether they can perform the essential functions of their job with the reasonable accommodation of additional restroom breaks, and there is no need to apply the definitions of "temporary" or "in the near future," or to determine whether the inability to perform an essential function can be reasonably accommodated (as no such inability exists).

By contrast, some examples of situations where the second definition may be relevant include: (1) a pregnant construction worker is told by their health care provider to avoid lifting more than 20 pounds during the second through ninth months of pregnancy, an essential function of the worker's job requires lifting more than 20 pounds, and there is not a reasonable accommodation that will allow the worker to perform that function without lifting more than 20 pounds; and (2) a pregnant police officer is unable to perform patrol duties during the third through ninth months of the pregnancy, patrol duties are an essential function of the job, and there is not a reasonable accommodation that will allow the worker to perform the essential functions of the patrol position.

Example 1636.3 #7/Qualified Employee: Launa has been working as a landscaper for two years, and her job regularly involves moving bags of soil that weigh 35–40 pounds.

²² As with the ADA, in determining whether leave under the PWFA causes an undue hardship, an employer may consider leave that the employee has already used under, for example, the FMLA. See *Technical Assistance on Employer-Provided Leave*, *supra* note 15, at Examples 17 and 18. For more information regarding leave as a reasonable accommodation, see *infra* § 1636.3(h) *Particular Matters Regarding Leave as a Reasonable Accommodation*.

²³ 42 U.S.C. 2000gg(6).

¹⁵ See *infra* § 1636.3(h) *Particular Matters Regarding Leave as a Reasonable Accommodation* for a discussion of how requests for leave interact with situations where an employee has a right to leave under an employer's policy or another law; see also EEOC, *Employer-Provided Leave and the Americans with Disabilities Act*, Communication After an Employee Requests Leave (2016), <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act> [hereinafter *Technical Assistance on Employer-Provided Leave*], for an explanation of this interaction and other helpful information about the interaction between the ADA and other laws requiring employers to provide leave to employees.

¹⁶ 29 CFR 1630.2(j)(1)(vi), (j)(4)(ii); see also 29 CFR part 1630 app. 1630.2(j)(1)(vi).

¹⁷ The PWFA does not address prerequisites for a position; thus, whether an employee or applicant is qualified for the position in question is determined based on whether the employee or applicant can perform the essential functions of the position, with or without a reasonable accommodation, or based on the second part of the PWFA's definition of "qualified." 42 U.S.C. 2000gg(6).

¹⁸ 29 CFR part 1630 app. 1630.2(m).

¹⁹ *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002); see, e.g., *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 360 (3d Cir. 2002) (citing the definition from *Barnett*); *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1267 (10th Cir. 2015) (citing the definition from *Barnett*); *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 762 (7th Cir. 2012) (citing the definition from *Barnett*); see also *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at text accompanying nn.8–9 (citing the definition from *Barnett*).

²⁰ Different types of employers use different terms for time away from work, including leave, paid time off (PTO), time off, sick time, vacation, and administrative leave, among others. Throughout the preamble, the regulation, and the appendix, the Commission uses the term "leave" or "time off" and intends those terms to cover leave however it is identified by the specific employer.

²¹ If the employee will not be able to perform all of the essential functions at the end of the leave period, with or without accommodation, the employee may still be qualified under the second part of the PWFA's definition of qualified employee or applicant. 42 U.S.C. 2000gg(6).

Launa becomes pregnant and lets her supervisor know that she has a lifting restriction of 20 pounds because of her pregnancy.

3. Known Limitation: Launa's lifting restriction is a physical condition related to pregnancy; Launa needs a change or adjustment at work; Launa has communicated this information to the employer.

4. Qualified:

a. Launa may be qualified with a reasonable accommodation of a device that helps with lifting.

b. If there is no device or other reasonable accommodation (or the device or other reasonable accommodation is too expensive or otherwise causes undue hardship for the employer) the employer must consider whether Launa meets the second definition of qualified: whether (1) the inability to perform the essential function is temporary, (2) Launa could perform the essential function in the near future, and (3) the inability to perform the essential function can be reasonably accommodated.

If the employer establishes that all possible accommodations that would allow the employee to temporarily suspend one or more essential functions would impose an undue hardship, then the employee will not be qualified under the PWFA's second definition of qualified (because the inability to perform the essential function cannot be reasonably accommodated).²⁴

1636.3(f)(2)(i) Temporary

The rule defines the term "temporary" to mean that the need to suspend one or more essential functions is "lasting for a limited time,"²⁵ not permanent, and may extend beyond "in the near future." As explained below, how long it may take before the essential function can be performed is further limited by the definition of "in the near future."

1636.3(f)(2)(ii) In the Near Future

The rule defines "in the near future" to mean generally forty weeks from the start of the temporary suspension of an essential function. This is based on the time of a full-term pregnancy (forty weeks). In the Commission's view, to define "in the near future" as less than generally forty weeks—i.e., the duration of a full-term pregnancy—would run counter to a central purpose of the PWFA of keeping pregnant workers in the workforce even when pregnancy, childbirth, or related medical conditions necessitate the

reasonable accommodation of temporarily suspending the performance of one or more essential functions of a job.²⁶ Of course, if an accommodation is sought that requires the temporary suspension of an essential function, regardless of the amount of time sought, the employer may raise the undue hardship defense.

The Commission also recognizes there may be physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions for which workers may seek the temporary suspension of an essential function when the worker is not currently pregnant. These conditions include pre-pregnancy limitations such as infertility, and post-pregnancy limitations such as acute cardio-vascular problems that are a consequence of the pregnancy. Although the length of pre- and post-partum physical or mental conditions will vary, the Commission proposes using "generally forty weeks" to measure whether the worker meets the "in the near future" requirement in the second definition of "qualified" in every situation where the reasonable accommodation sought under the PWFA is the temporary suspension of one or more essential functions.

The Commission's decision is based on several factors. First, in the first year after childbirth, severe health conditions, including ones that may require the temporary suspension of an essential function, are common.²⁷ According to a Centers for Disease Control and Prevention (CDC) study, 53% of pregnancy-related deaths occurred from one week to one year after delivery, and 30% occurred one and one half months to one year post-partum.²⁸

²⁶ See H.R. Rep. No. 117–27, pt. 1, at 5 ("When pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy. Ensuring that pregnant workers have access to reasonable accommodations will promote the economic well-being of working mothers and their families and promote healthy pregnancies."); *id.* at 22 ("When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies."); *id.* at 24 ("Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most."); *id.* at 33 ("The PWFA is about ensuring that pregnant workers can stay safe and healthy on the job by being provided reasonable accommodations for pregnancy, childbirth, or related medical conditions The PWFA is one crucial step needed to reduce the disparities pregnant workers face by ensuring that pregnant women, and especially pregnant women of color, can remain safe and healthy at work.").

²⁷ Susan Trost et al., *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017–2019*, Ctrs. for Disease Control & Prevention, U.S. Dep't of Health and Human Servs. (2022), <https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html>.

²⁸ *Id.* More deaths occurred seven to 365 days after delivery than occurred during delivery itself (53.3% v. 21.6%). The leading causes of death were mental health conditions, hemorrhage, cardiac and coronary conditions, infection, thrombotic embolism, and cardiomyopathy. The leading causes of death varied by race and ethnicity. For Black

Likely for similar reasons, thirty-five States and the District of Columbia provide twelve months of comprehensive Medicaid coverage after delivery, rather than sixty days.²⁹ Thus, allowing a worker to meet the second definition of "qualified" if they need an essential function temporarily suspended for generally forty weeks after return to work from childbirth (or for other reasons related to a known limitation) is a reasonable approximation of the period of time needed "in the near future" for conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and therefore is consistent with the purpose of the PWFA. Finally, in the Commission's view, one definition for "in the near future" will allow for simplified administration.

The Commission emphasizes that the definition in this section does not mean that the essential function(s) must always be suspended for forty weeks, or that if an employee seeks the temporary suspension of an essential function(s) for forty weeks it must be automatically granted. The actual length of the temporary suspension of the essential function(s) will depend upon what the employee requires, and the covered entity always has available the defense that it would create an undue hardship. However, the mere fact that the temporary suspension of one or more essential functions is needed for any time period up to and including generally forty weeks will not, on its own, render a worker unqualified under the PWFA.

Further, the Commission recognizes that workers may need an essential function temporarily suspended because of pregnancy; may take leave to recover from childbirth; and, upon returning to work, may need the same essential function or a different one temporarily suspended due to a new or different physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. In keeping with the requirement that the determinations as to whether an individual is qualified under the PWFA should be made based on the situation at hand and the accommodation currently at issue,³⁰ the determination of "in the near future" shall be made when the employee asks for each accommodation that requires the suspension of one or more essential functions. Thus, a

individuals, cardiac and coronary conditions were the leading causes of death; for White individuals and Hispanic individuals, the leading cause was mental health conditions; for Asian individuals, the leading cause of death was hemorrhage. The leading cause of death for Native American individuals was not reported due to small sample size.

²⁹ Centers for Medicare & Medicaid Services, U.S. Dep't of Health and Human Servs., *States that have Expanded Postpartum Coverage*, (last visited July 19, 2023) <https://www.medicare.gov/medicaid/quality-of-care/downloads/image-maternity-care-expansion.png>.

³⁰ See 29 CFR part 1630 app. 1630.1 ("The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. The determination should be based on the capabilities of the individual with the disability at the time of the employment decision, and not be based on speculation that the employee may become unable in the future").

²⁴ If there is no reasonable accommodation that allows the worker to continue to work, absent undue hardship, the employee may be qualified for leave as a reasonable accommodation if leave does not cause an undue hardship.

²⁵ *Temporary*, Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/temporary> ("lasting for a limited time") (last visited June 13, 2023). This definition is consistent with *Robert v. Bd. of Cnty. Comm'rs of Brown Cnty., Kan.*, 691 F.3d 1211, 1218 (10th Cir. 2012) which was cited in the House Report in the discussion of this term. H.R. Rep. No. 117–27, at n.109 (when determining whether a request for leave could be "reasonable" under the ADA, defining "temporary" as that the essential function can be resumed).

worker who is three months pregnant seeking an accommodation of the temporary suspension of an essential function will meet the definition of “qualified” for “in the near future” because the pregnancy will be over in less than forty weeks. When the worker returns from leave after childbirth, if the worker needs an essential function temporarily suspended, they will meet the definition of “qualified” for “in the near future” if they could perform the essential function within forty weeks of the suspension. In other words, for “in the near future,” the forty weeks would restart once the pregnancy is over and the worker returns to work after leave.

In the Commission’s view, restarting the calculation of “generally forty weeks” in the definition of “qualified” for “in the near future” is necessary because it would often be difficult, if not impossible, for a pregnant employee to predict what their limitations (if any) will be after pregnancy. Before childbirth, they may not know whether, and if so, for how long, they will have a known limitation or need an accommodation after giving birth. They also may not know whether the accommodation after childbirth will require the temporary suspension of an essential function, and, if so, for how long. All of these questions may be relevant under the PWFA’s second definition of “qualified.”

Further, a rule that allows a covered entity to combine periods of the temporary suspension of essential function(s) during pregnancy and the post-partum period in order to determine if a worker is “qualified” would raise questions about, for example, whether the requests were close enough in time to be combined and whether the forty weeks should restart if a different essential function needs to be temporarily suspended. Determining where and how those lines should be drawn would require litigation regarding the term “qualified” and create confusion around implementation of the statute.

The Commission notes that leave related to recovery from pregnancy, childbirth, or related medical conditions does not count as time when an essential function is suspended and thus is not relevant for the second prong of the definition of qualified. If an individual needs leave as a reasonable accommodation under the PWFA or, indeed, any reasonable accommodation other than the temporary suspension of an essential function, only the first definition of “qualified” is relevant. In the case of leave, the question would be whether the individual, after returning from the requested period of leave, would be able to perform the essential functions of the position with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated). Furthermore, for some workers, leave to recover from childbirth will not require a reasonable accommodation because they have a right to leave under Federal, State, or local law or as part of an employer policy. Thus, for the purpose of determining whether the employee is

qualified under the second prong of “qualified” regarding the suspension of an essential function, the Commission does not intend for employers or workers to count time on leave for recovery from childbirth.³¹

The Commission does not believe that its definition of “in the near future” will cause excessive difficulties for covered entities because the “generally forty weeks” time period is only to determine if the worker can be considered qualified under this definition. If the temporary suspension of the essential function causes undue hardship or (as explained in the next section) the temporary suspension of the essential function cannot be reasonably accommodated, the employer does not have to provide the reasonable accommodation.

1636.3(f)(2)(iii) Can Be Reasonably Accommodated

To satisfy the PWFA’s second definition of “qualified,” the covered entity must be able to reasonably accommodate the inability to perform one or more essential functions without undue hardship. For some positions, this may mean that one or more essential functions are temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of the job. For other jobs, some of the essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may be assigned other tasks to replace them. In yet other situations, one or more essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them, or the employee may participate in the employer’s light or modified duty program.³² Throughout this process, as with other reasonable accommodation requests, an employer may need to consider more than one alternative to identify a reasonable accommodation that does not pose an undue hardship. Depending on how the temporary

³¹ For additional information on how leave should be addressed under the PWFA, see *supra* With or Without Reasonable Accommodation—Leave and *infra* Particular Matters Regarding Leave as a Reasonable Accommodation.

³² See H.R. Rep. No. 117–27, pt. 1, at 27 (“the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker ‘unqualified. . . there may be a need for a pregnant worker to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able.”) “Light duty” programs, or other programs providing modified duties, can vary depending on the covered entity. EEOC, *Enforcement Guidance: Workers’ Compensation and the ADA*, text above Question 27 (1996), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and-ada> [hereinafter *Enforcement Guidance: Workers’ Compensation*]. In the context of the regulation, the Commission intends “light duty” to include the types of programs included in Questions 27 & 28 of the *Enforcement Guidance on Workers’ Compensation* and any other policy, practice, or system that a covered entity has for accommodating employees, including when one or more essential functions of a position are temporarily excused.

suspension is accomplished, the covered entity may have to prorate or change a performance or production standard so that the accommodation is effective.³³

Example 1636.3 #8: One month into a pregnancy, Akira, a worker in a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of the essential functions of this job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to switch duties with another worker whose job does not require the same exposure but otherwise involves the same functions. There are numerous other tasks that Akira could accomplish while not being exposed to the chemicals.

3. Known limitation: Akira has a need or a problem relating to maintaining the health of her pregnancy, which is a physical condition related to pregnancy; Akira needs a change or adjustment at work; Akira has communicated this information to her employer.

4. Qualified: Akira needs the temporary suspension of an essential function.

a. Akira’s inability to perform the essential function is temporary.

b. Akira could perform the essential functions of her job in the near future because Akira needs an essential function suspended for less than forty weeks.

c. Akira’s inability to perform the essential function may be reasonably accommodated. The employer can suspend the essential function that requires her to work with the chemicals and have her do the remainder of her job. Alternatively, Akira can perform the other tasks that are referenced or switch duties with another worker. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #9: Two months into a pregnancy, Lydia, a delivery driver, is told by her health care provider that she should not lift more than 20 pounds. Lydia routinely has to lift 30–40 pounds as part of the job. She discusses the limitation with her employer. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer’s light duty program, which is used for drivers who have on-the-job injuries.

3. Known limitation: Lydia’s lifting restriction is a physical condition related to pregnancy; she needs a change in work conditions; and she has communicated this information to the employer.

4. Qualified: Lydia needs the temporary suspension of an essential function.

d. Lydia’s inability to perform the essential function is temporary.

e. Lydia could perform the essential functions of her job in the near future because Lydia needs an essential function suspended for less than forty weeks.

f. Lydia’s need to temporarily suspend an essential function of her job may be reasonably accommodated through the existing light duty program. The employer must grant the accommodation (or another

³³ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 19.

reasonable accommodation) absent undue hardship.

1636.3(g) Essential Functions

The rule adopts the Commission's definition of "essential function" contained in the regulations implementing the ADA regulations: "the fundamental job duties of the employment position the individual . . . holds or desires," excluding "the marginal functions of the position."³⁴ Thus, in determining whether something is an essential function, the first consideration is whether employees in the position actually are required to perform the function, and relevant evidence includes both the position description and information from incumbents (including the employee requesting the accommodation) about what they actually do on the job.³⁵

1636.3(h) Reasonable Accommodation—Generally

42 U.S.C. 2000gg(7) states that the term "reasonable accommodation" has the meaning given to it in section 101 of the ADA and shall be construed as it is construed under the ADA and the Commission's regulations implementing the PWFA. As stated in the Appendix to the ADA Regulations, "[t]he obligation to make reasonable accommodation is a form of non-discrimination" and is therefore "best understood as a means by which barriers to the equal employment opportunity [of an employee or applicant with a known limitation under the PWFA] are removed or alleviated."³⁶ A modification or adjustment is reasonable if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible."³⁷ An accommodation also must be effective in meeting the needs of the employee or applicant, meaning it removes a workplace barrier and provides the individual with equal opportunity.³⁸

Under the PWFA, a reasonable accommodation has the same definition as under the ADA.³⁹ Therefore, like the ADA, reasonable accommodations under the PWFA include modifications or adjustments to the job application process that enable a qualified applicant with a known limitation to be considered for the position; modifications or adjustments to the work environment, or to the manner or circumstances under which the position is done to allow a person with a known limitation to perform the essential functions

of the job; and modifications or adjustments that enable an employee with a known limitation to enjoy equal benefits and privileges of employment.⁴⁰ Because the PWFA also provides for reasonable accommodations when a worker temporarily cannot perform one or more essential functions of a position but could do so in the near future, reasonable accommodation under the PWFA also includes modifications or adjustments that allow an employee with a known limitation to temporarily suspend one or more essential functions of the position.

Additions to the Definition of Reasonable Accommodation

Because 42 U.S.C. 2000gg(7) states that "reasonable accommodation" should have the meaning of the term under the ADA and the regulations set forth in for the PWFA, the rule takes the definition of "reasonable accommodation" provided in the regulations implementing the ADA⁴¹ and makes five additions to apply it in the context of the PWFA.

First, the rule replaces references to "individual with a disability" and similar terms with "employee with a known limitation" and similar terms.⁴²

⁴⁰ 29 CFR 1630.2(o)(1)(i)–(iii). The requirement for reasonable accommodations that provide for equal benefits and privileges is shorthand for the requirement that an accommodation should provide the individual with an equal employment opportunity (29 CFR part 1630 app. 1630.9). This requirement stems from the ADA's prohibition on discrimination in "terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). The PWFA prohibits adverse action in the terms, conditions, or privileges of employment against a qualified employee for using or requesting an accommodation and Title VII—which applies to workers affected by pregnancy, childbirth, or related medical conditions—prohibits discrimination in the terms, conditions, and privileges of employment. 42 U.S.C. 2000e–2(a)(1). Based on the text of the PWFA, Title VII, and the requirement under the PWFA that reasonable accommodation has the same definition as in the ADA, the same requirement applies. Thus, a reasonable accommodation under the PWFA includes a change to allow employees affected by pregnancy, childbirth, or related medical conditions. nondiscrimination in the terms, conditions, or privileges of employment or, in shorthand, to enjoy equal benefits and privileges. See also EEOC Compliance Manual Section 613 *Terms, Conditions, and Privileges of Employment*, 613.1(a) (1982) ("terms, conditions, and privileges of employment" are "to be read in the broadest possible terms" and "a distinction is rarely made between terms of employment, conditions of employment, or privileges of employment"), <https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment#:~:text=The%20following%20employment%20practices%20or%20activities%20which%20are,or%20activity%20is%20considered%20in%20its%20broad%20sense%20hereinafter%20Compliance%20Manual%20on%20Terms,Conditions,and%20Privileges%20of%20Employment>.

⁴¹ 29 CFR 1630.2(o).

⁴² The rule also deletes examples of reasonable accommodation that are unlikely to be relevant to the PWFA, i.e., "provision of qualified readers or interpreters." A person covered by the PWFA who is blind or deaf who needs these reasonable accommodations because of their disability may be entitled to them under the ADA. Nothing added or

Second, the rule includes an addition to the ADA's definition of reasonable accommodation that is required by the PWFA. As explained in the discussion of the term qualified employee above, the PWFA provides that the temporary suspension of one or more essential functions is a potential reasonable accommodation by defining "qualified employee" to include an employee who cannot perform one or more essential functions of the position for a temporary period, provided they could do so in the near future, and the inability to perform the essential function(s) can be reasonably accommodated without undue hardship. The rule illustrates the implications, meaning, and application of this requirement.

Third, the rule incorporates certain examples of accommodations long recognized by the EEOC as reasonable accommodations for individuals with disabilities but not explicitly included in the non-exhaustive examples of reasonable accommodation in the ADA regulation. These are discussed below in § 1636.3(i).

Fourth, in addition to noting paid leave (whether accrued, short-term disability, or another type of employer benefit) and unpaid leave as examples of reasonable accommodations, the rule states that either type of leave to recover from childbirth is an example of a potential reasonable accommodation for pregnancy, childbirth, or related medical conditions. This is explained in more detail below.

Finally, the rule provides details about potential reasonable accommodations related to lactation.

Alleviating Increased Pain or Risk to Health Due to the Known Limitation

Under the PWFA and the rule, a worker may seek a reasonable accommodation in order to alleviate increased pain or increased risk to health that is attributable to the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that has been communicated to the employer (the known limitation).⁴³ When dealing with requests for accommodation concerning the alleviation of increased pain or increased risk to health associated with a known limitation, the goal is to provide an accommodation that allows the worker to alleviate the identified increase in pain or risk to health.

Example 1636.3 #10: Celia is a factory worker whose job requires her to move boxes that weigh 50 pounds regularly. Prior to her pregnancy, Celia occasionally felt pain in her knee when she walked for extended periods of time. After returning to work after having a cesarean section, Celia's health care

deleted from the PWFA's list of reasonable accommodations is intended to alter the ADA's standards. Nor does the exclusion of these reasonable accommodations mean that they could not be required under the PWFA in appropriate circumstances, such as when pregnancy exacerbates a pre-existing medical condition.

⁴³ Depending on the facts of the case, the accommodation sought will allow the employee to apply for the position, to perform the essential functions of the job, to enjoy equal benefits and privileges of employment, or allow the temporary suspension of an essential function of the job.

³⁴ 29 CFR 1630.2(n).

³⁵ 29 CFR 1630.2(n); 29 CFR part 1630 app. 1630.2(n).

³⁶ 29 CFR part 1630 app. 1630.9.

³⁷ See *supra* note 19.

³⁸ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 9 and 29 CFR part 1630 app. 1630.9 (providing that a reasonable accommodation "should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.").

³⁹ 42 U.S.C. 2000gg(7).

provider says she should limit the tasks that require moving boxes to no more than 30 pounds for three months because heavier lifting could increase the risk to her health and recovery. Celia can seek an accommodation that would help her lift between 30 and 50 pounds because it is needed for her known limitation related to childbirth. However, the PWFA would not require the employer to provide an accommodation regarding Celia's knee pain because that situation is not attributable to Celia's known limitation, unless there is evidence that the pain in walking was exacerbated by Celia's pregnancy, childbirth, or related medical conditions. The employer may have accommodation responsibilities regarding Celia's knee pain under the ADA.

Example 1636.3 #11: Lucille has opioid use disorder that she controls with medication. After giving birth, she experiences postpartum depression. As a result, she is put on an additional medication that she must take with food, and she starts therapy with a new provider. Under the PWFA, Lucille requests that she be allowed to take breaks to eat when she needs to take her medication and that she be allowed to use intermittent leave to attend her therapy appointments. Under the PWFA, the employer is required to provide the requested accommodations (or other reasonable ones) absent undue hardship. The employer does not have to provide an accommodation for Lucille's underlying opioid use disorder under the PWFA, although it may have accommodation responsibilities under the ADA.

Example 1636.3 #12: Jackie's position at a fabrication plant involves working with certain chemicals, which Jackie thinks is the reason she has a nagging cough and chapped skin on her hands. Once she becomes pregnant, Jackie seeks the accommodation of a temporary suspension of an essential function of working with the chemicals because the chemicals create an increased risk to her pregnancy. The employer provides the accommodation. After Jackie gives birth and returns to work, she no longer has any known limitations. Thus, she can be assigned to work with the chemicals again even if she would rather not do that work, because the PWFA only requires an employer to provide an accommodation that is needed due to the known limitation related to pregnancy, childbirth, or related medical conditions. Jackie's employer may also have accommodation responsibilities under the ADA.

Example 1636.3 #13: Margaret is a retail worker who is pregnant. Because of her pregnancy, Margaret feels pain in her back and legs when she has to move stacks of clothing from one area to the other, which is one of the essential functions of her position. She can still manage to move the clothes, but, because of the pain, she requests a cart to use when she is moving the garments. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation), absent undue hardship, because doing so accommodates Margaret's limitation arising out of her pregnancy. If Margaret also has wrist pain that is not caused or exacerbated by the pregnancy, Margaret's employer is under no

obligation under the PWFA to provide an accommodation for the wrist pain because it is not related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. However, the employer may have accommodation responsibilities regarding Margaret's wrist pain under the ADA.

Particular Matters Regarding Leave as a Reasonable Accommodation

The Commission has long recognized the use of all forms of paid and unpaid leave as a potential reasonable accommodation under the ADA, including for part-time schedules.⁴⁴ Given Congress' extensive use of ADA terms and provisions in the PWFA—including specifically the definition of "reasonable accommodation"—the Commission proposes to include these potential reasonable accommodations in this proposal's definition of reasonable accommodation.

Leave, including intermittent leave, may be a reasonable accommodation even if the covered entity does not offer it as an employee benefit.⁴⁵ If an employee requests leave as an accommodation or if there is no other reasonable accommodation that does not cause an undue hardship, the covered entity must consider providing leave as a reasonable accommodation under the PWFA, even if the employee is not eligible for leave under the employer's leave policy or the employee has exhausted the leave the covered entity provides as a benefit (including leave exhausted under a workers' compensation program, the FMLA, or similar State or local laws).⁴⁶

The rule also provides that leave to recover from childbirth, miscarriage, stillbirth, or other related conditions is a potential reasonable accommodation (absent undue hardship).⁴⁷ The rule further explains that workers protected by the PWFA must be permitted to choose whether to use paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to choose between these various types of leave.⁴⁸ However, as under

the ADA, an employer is not required to provide additional paid leave under the PWFA beyond the amount to which the employee is otherwise entitled.

The Commission recognizes that there may be situations where an employer accommodates a pregnant employee with a stool or additional breaks or temporarily suspends one or more essential functions under the PWFA, and then the employee requests leave to recover from childbirth. In these situations, the covered entity should consider the request for the reasonable accommodation of leave to recover from childbirth in the same manner that it would any other request for leave as a reasonable accommodation. This requires first considering whether the employee will be able to perform the essential functions of the position with or without a reasonable accommodation after the period of leave, or, if not, whether, after the period of leave, the employee will meet the second definition of "qualified" under the PWFA.

Under the ADA regulations, a reasonable accommodation cannot excuse an employee from complying with valid production standards that are applied uniformly to all employees.⁴⁹ However, for example, when the reasonable accommodation is leave, the employee may not be able to meet a production standard during the period of leave or, depending on the length of the leave, meet that standard for a defined period of time (e.g., the production standard measures production in one year and the employee was on leave for four months). Thus, if the reasonable accommodation is leave, the production standard may need to be prorated to account for the reduced amount of time the employee worked.⁵⁰ For example, if a call center employee with a known limitation requests and is granted two hours of leave in the afternoon for rest, the employee's required number of calls may need to be reduced proportionately, as could the employee's pay. Alternatively, the accommodation could allow for the employee to make up the time at a different time during the day so that the employee's production standards and pay would not be reduced.

As under the ADA, an employee with a known limitation who is granted leave as a reasonable accommodation under the PWFA is entitled to return to their same position unless the employer demonstrates that holding open the position would impose an undue hardship.⁵¹ Likewise, an employer must continue an employee's health insurance benefits during their leave period

related medical conditions to do so may be a violation of Title VII as well.

⁴⁹ *Enforcement Guidance on Reasonable Accommodation*, supra note 4, at text accompanying n.14.

⁵⁰ *Id.* at Question 19.

⁵¹ See *id.* at Question 18. As under the ADA, if an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue their leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

⁴⁴ See 29 CFR 1630.2(o)(2)(ii); 29 CFR part 1630 app. 1630.2(o); *Enforcement Guidance on Reasonable Accommodation*, supra note 4, at text accompanying nn.48–49.

⁴⁵ See *Technical Assistance on Employer-Provided Leave*, supra note 15, at text above Example 4.

⁴⁶ *Id.* Of course, if an employee has a right to leave under the FMLA, an employer policy, or a State or local law, the employee is entitled to leave regardless of whether they request leave as a reasonable accommodation. An employee who needs leave beyond what they are entitled to under those laws or policies will need to request leave as a reasonable accommodation.

⁴⁷ H.R. Rep. No. 117–27, pt. 1, at 29 (noting that "leave is one possible accommodation under the PWFA, including time off to recover from delivery").

⁴⁸ A failure to allow a worker affected by pregnancy, childbirth, or related medical conditions to use paid or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or

to the extent that it does so for other employees in a similar leave status. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (*i.e.*, the employee can perform the essential functions of the position with or without reasonable accommodation or if the employee meets the PWFA's second definition of qualified).⁵²

Under the PWFA, an employer may deny a reasonable accommodation if it causes an undue hardship—a significant difficulty or expense. Thus, if an employer can demonstrate that the leave requested as a reasonable accommodation poses an undue hardship—for example, because of its length, frequency, or unpredictable nature, or because of another factor—it may lawfully deny the requested leave under the PWFA.

Ensuring That Workers Are Not Penalized for Using Reasonable Accommodations

Covered entities making reasonable accommodations must ensure that their ordinary workplace policies or practices do not operate to penalize employees for utilizing such accommodations. For example, when a reasonable accommodation involves a pause in work—such as a break, a part-time or other reduced work schedule, or leave—an employee cannot be penalized for failing to perform work during such a non-work period. Similarly, policies that monitor workers for time on task (whether through automated means or otherwise) and penalize them for being off task may need to be modified to avoid imposing penalties for non-work periods that the employee was granted as a reasonable accommodation. Likewise, if an accommodation under the PWFA involves the temporary suspension of an essential function of the position, a covered entity may not penalize an employee for not performing the essential function that has been temporarily suspended.

Penalizing an employee in these situations would be retaliation for the employee's use of a reasonable accommodation to which they are entitled under the law.⁵³ It would also render the accommodation ineffective, thus making the covered entity liable for failing to provide a reasonable accommodation.⁵⁴ The Commission seeks comment on whether there are other situations where this may apply and whether examples would be helpful to illustrate this point.

Personal Use

The obligation to provide reasonable accommodation under the PWFA, like the ADA, does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a known limitation. However, adjustments or modifications that might otherwise be considered personal may be required as reasonable accommodations “where such items are specifically designed

or required to meet job-related rather than personal needs.”⁵⁵

For example, if a warehouse employee is pregnant and is having difficulty sleeping, the PWFA would not require as a reasonable accommodation for the employer to provide a pregnancy pillow and a white noise machine to help with sleeping because they are strictly for an employee's personal use. However, allowing the employee some flexibility in start times for the workday may be a reasonable accommodation because it modifies an employment-related policy. In a different context, if the employee who is having trouble sleeping works at a job that involves sleeping between shifts on-site, such as a job as a firefighter, sailor, emergency responder, health care worker, or truck driver, a pregnancy pillow may be a reasonable accommodation because the employee is having a difficult time sleeping because of the pregnancy, the employer is providing the place and items necessary for sleeping, and the employee needs a modification of the items and place.

All Services and Programs

Under the PWFA, as under the ADA, the obligation to make reasonable accommodation applies to all services and programs and to all non-work facilities provided or maintained by an employer for use by its employees so that employees or applicants with known limitations can enjoy equal benefits and privileges of employment.⁵⁶ Accordingly, the obligation to provide reasonable accommodation, barring undue hardship, includes providing access to employer-sponsored placement or counseling services, such as employee assistance programs, and to employer-provided cafeterias, lounges, gymnasiums, auditoriums, transportation, and to similar facilities, services, or programs.⁵⁷

Interim Reasonable Accommodation

Providing an interim reasonable accommodation is a best practice under the PWFA in certain circumstances.⁵⁸ An employee may have an urgent need for a reasonable accommodation due to the nature or sudden onset of a known limitation under the PWFA. For example, a pregnant employee may experience vaginal bleeding, which may indicate a more serious problem. Upon discovering the bleeding, the employee may ask for immediate leave to go see their health care provider. The employee then may need additional leave, telework, rest breaks, or a later start time, beginning immediately. In this situation, a covered entity, as a best practice, should consider providing an

interim reasonable accommodation that meets the employee's needs while the interactive process is conducted. Similarly, an employee recovering from childbirth may ask for the reasonable accommodation of more frequent or longer bathroom breaks, and the covered entity should consider meeting that need, as an interim reasonable accommodation, before the conclusion of the interactive process. Covered entities that do not provide interim reasonable accommodations are reminded that an unnecessary delay in the interactive process or providing a reasonable accommodation may lead to liability under 42 U.S.C. 2000gg–1(1) even if the reasonable accommodation is eventually granted, as explained in detail in § 1636.4(a) of the regulation.

1636.3(i) Reasonable Accommodation—Examples

The definition of “reasonable accommodation” in the PWFA rule incorporates certain accommodations long recognized by the EEOC as reasonable accommodations but not explicitly included in the non-exhaustive examples of reasonable accommodations in the ADA regulation. The Commission notes that an employee or applicant may need more than one of these accommodations at the same time or as a pregnancy progresses.

- **Frequent breaks.** The EEOC has long construed the ADA to require additional breaks as a reasonable accommodation, absent undue hardship.⁵⁹ For example, a pregnant employee might need more frequent breaks due to shortness of breath; an employee recovering from childbirth might need more frequent restroom breaks or breaks due to fatigue because of recovery from childbirth; or an employee who is lactating might need more frequent breaks for water or food.⁶⁰

- **Sitting/Standing.** The Commission has recognized the provision of seating for jobs that require standing and standing for those that require sitting as a potential reasonable accommodation under the ADA.⁶¹ Reasonable accommodation of these needs might include, but is not limited to, policy modifications and the provision of equipment, such as seating, a sit/stand desk, or anti-fatigue floor matting, among other possibilities.

- **Schedule changes, part-time work, and paid and unpaid leave.** The Appendix to the ADA Regulations explains that permitting the use of paid leave (whether accrued, as part of a short-term disability program, or as part

⁵⁹ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 22; *see also* H. R. Rep. 117–27, pt. 1, at 22; 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.).

⁶⁰ Breaks may be paid or unpaid depending on the employer's normal policies and other applicable laws. Breaks may exceed the number that an employer normally provides because reasonable accommodations may require an employer to alter its policies, barring undue hardship.

⁶¹ *See Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at General Principles, Example B; *see also* H.R. Rep. No. 117–27, pt. 1, at 11, 22, 29.

⁵² *Id.* at Question 21.

⁵³ *Id.* at Question 19; *see also* 2000gg–1(5), 2000gg–2(f) and the accompanying regulations.

⁵⁴ *Id.* at Question 19.

⁵⁵ 29 CFR part 1630 app. 1630.9.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The same is true under the ADA. EEOC, *Final Report on Best Practices for Employment of People with Disabilities in the State Government* II.B.1 (2005), <http://www.eeoc.gov/laws/guidance/final-report-best-practices-employment-people-disabilities-state-government> [hereinafter *Best Practices State Government*] (noting that “[t]emporary accommodations may enable a worker who has made a request for reasonable accommodation under the ADA to continue working while a final determination of whether to grant or deny the accommodation is being made”).

of any other employee benefit) or providing additional unpaid leave is a potential reasonable accommodation under the ADA.⁶² Additionally, the Appendix recognizes that leave for medical treatment can be a reasonable accommodation.⁶³ By way of example, an employee could need a schedule change to attend a round of IVF appointments to get pregnant; a part-time schedule to address fatigue during pregnancy; or additional unpaid leave for recovery from childbirth, medical treatment, post-partum treatment or recuperation related to a cesarean section, episiotomy, infection, depression, thyroiditis, or preeclampsia.

- **Telework.** Telework or “work from home” has been recognized by the EEOC as a potential reasonable accommodation.⁶⁴ Telework could be used to accommodate, for example, a period of bed rest or a mobility impairment.

- **Parking.** Providing reserved parking spaces if the employee is otherwise entitled to use employer-provided parking may be reasonable accommodation to assist a worker who is experiencing fatigue or limited mobility because of pregnancy, childbirth, or related medical conditions.

- **Light duty.** Assignment to light duty or placement in a light duty program has been recognized by the EEOC as a potential reasonable accommodation under the ADA, even if the employer’s light duty positions are normally reserved for those injured on-the-job and the person with a disability seeking a light duty position does not have a disability stemming from an on-the-job injury.⁶⁵

- **Making existing facilities accessible or modifying the work environment.**⁶⁶ Examples of reasonable accommodations might include allowing access to an elevator not normally used by employees; moving the employee’s workspace closer to a bathroom; providing a fan to regulate temperature; or moving a pregnant or lactating employee to a different workspace to avoid exposure to chemical fumes. As noted in the regulation, this also may include modifications of the work environment to allow an employee to pump breast milk at work.⁶⁷

- **Job restructuring.**⁶⁸ Job restructuring might involve, for example, removing a marginal function that required a pregnant employee to climb a ladder or occasionally retrieve boxes from a supply closet.

- **Temporarily suspending one or more essential functions.** For some positions, this may mean that one or more essential functions are temporarily suspended, and the employee continues to perform the remaining functions of the job. For others, the essential function(s) will be temporarily suspended, and the employee may be assigned other tasks. For others, the essential function(s) will be temporarily suspended, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them. For yet others, the essential function(s) will be temporarily suspended, and the employee will participate in the employer’s light or modified duty program.

- **Acquiring or modifying equipment, uniforms, or devices.**⁶⁹ Examples of reasonable accommodations might include providing uniforms and equipment, including safety equipment, that account for changes in body size during and after pregnancy, including during lactation; providing devices to assist with mobility, lifting, carrying, reaching, and bending; or providing an ergonomic keyboard to accommodate pregnancy-related hand swelling or tendonitis.

- **Adjusting or modifying examinations or policies.**⁷⁰ Examples of reasonable accommodations include allowing workers with a known limitation to postpone an examination that requires physical exertion. Adjustments to policies also could include increasing the time or frequency of breaks to eat or drink or to use the restroom.

Examples of Types of Reasonable Accommodations

Example 1636.3 #14/Telework: Gabriela, a billing specialist in a doctor’s office,

Nursing Mothers Act (PUMP Act) (Pub. L. 117–328 Division KK). The law extended coverage of the Fair Labor Standards Act’s (FLSA) protections for nursing employees to apply to most workers. The FLSA provides most workers with the right to break time and a place to pump breast milk at work. 29 U.S.C. 218d; U.S. Dep’t of Lab., Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work (Jan. 2023), <https://www.dol.gov/agencies/whd/pump-at-work.2023>, <https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers>. Employees who are not covered by the PUMP Act or employees who seek to pump longer than one year may seek reasonable accommodations regarding pumping under the PWFA. Further, employees who are covered by the PUMP Act may seek additional related accommodations, such as access to a sink, a refrigerator, and electricity. See, e.g., U.S. Dep’t of Lab., *Notice on Reasonable Break Time for Nursing Mothers*, 75 FR 80073, 80075–76 (Dec. 21, 2010) (discussing space requirements and noting factors such as the location of the area for pumping compared to the employee’s workspace, the availability of a sink and running water, the location of a refrigerator to store milk, and electricity may affect the amount break time needed). The PUMP Act is enforced by the Department of Labor, not the EEOC.

⁶⁸ 29 CFR 1630.2 (o)(2)(ii).

⁶⁹ *Id.*

⁷⁰ *Id.*

experiences nausea and vomiting beginning in her first trimester of pregnancy. Her doctor believes the nausea and vomiting will pass within a couple of months. Because the nausea makes commuting extremely difficult, Gabriela makes a verbal request to her manager stating she has nausea and vomiting due to her pregnancy and requests that she be permitted to work from home for the next two months so that she can avoid the difficulty of commuting. The billing work can be done from her home or in the office.

4. **Known limitation:** Gabriela’s nausea and vomiting is a physical condition related to pregnancy; Gabriela needs an adjustment or change at work; Gabriela has communicated the information to the employer.

5. **Qualified:** Gabriela can do the billing work with the reasonable accommodation of telework.

6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #15/Temporary Suspension of an Essential Function: Nisha, a nurse assistant working in a large elder care facility, is advised in the fourth month of pregnancy to stop lifting more than 25 pounds for the rest of the pregnancy. One of the essential functions of the job is to assist patients in dressing and bathing, and moving them from or to their beds, tasks that typically require lifting more than 25 pounds. Nisha sends an email to human resources asking that she not be required to lift more than 25 pounds for the remainder of her pregnancy and requesting a place in the established light duty program under which workers who are hurt on the job take on different duties while coworkers take on their temporarily suspended duties.

4. **Known limitation:** Nisha’s lifting restriction is a physical condition related to pregnancy; Nisha needs an adjustment or change at work; Nisha has communicated that information to the employer.

5. **Qualified:** Nisha is asking for the suspension of an essential function. The suspension is temporary, and Nisha could perform the essential functions of the job “in the near future” (generally within forty weeks). It appears that the inability to perform the function can be reasonably accommodated through its temporary suspension and Nisha’s placement in the established light duty program.

6. The employer must grant the reasonable accommodation of temporarily suspending the essential function, or another reasonable accommodation, absent undue hardship. As part of the temporary suspension, the employer may assign Nisha to the light duty program.

Example 1636.3 #16: Same facts as above but the employer establishes the light duty program is limited to 10 slots and that all 10 slots are filled for the next 6 months. In these circumstances, the employer must consider other possible reasonable accommodations, such as the temporary suspension of an essential function without assigning Nisha to the light duty program, or job restructuring outside of the established light duty program. If such accommodations cannot be provided without undue hardship, then the employer must consider a temporary reassignment to a

⁶² 29 CFR part 1630 app. 1630.2(o); see also *Technical Assistance on Employer-Provided Leave*, *supra* note 15. Additionally, an employer prohibiting a worker from using accrued leave for pregnancy-related reasons or while allowing other workers to use leave for similar reasons may also violate Title VII.

⁶³ 29 CFR part 1630 app. 1630.2(o).

⁶⁴ See, e.g., *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 34.

⁶⁵ EEOC, *Enforcement Guidance: Workers’ Compensation*, *supra* note 32, at Question 28; see also 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.) (“What are other types of reasonable accommodations that pregnant workers may request? Light duty is a common example.”); *id.* at S7,049 (statement of Sen. Patty Murray) (noting that workers need accommodations because “their doctors say they need to avoid heavy lifting”); H.R. Rep. 117–27, pt. 1, at 14–17 (discussing *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015), a case involving light duty for pregnant workers).

⁶⁶ 29 CFR 1630.2(o)(1)(ii); (o)(2)(i).

⁶⁷ On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for

vacant position for which Nisha is qualified, with or without reasonable accommodation. For example, if the employer has a vacant position that does not require lifting patients which Nisha could perform with or without a reasonable accommodation, the employer must offer her the temporary reassignment as a reasonable accommodation, absent undue hardship.

Example 1636.3 #17/Assistance with Performing an Essential Function: Mei, a warehouse worker, requests via her employer's online accommodation process that a dolly be provided to assist her in moving items that are bulky to accommodate her post-cesarean section medical restrictions for three months.

4. Known Limitation: Mei's need for assistance in moving bulky items is a physical condition related to childbirth; Mei needs an adjustment or change at work; Mei has communicated this information to the employer.

5. Qualified: Mei could perform the essential functions of her position with the reasonable accommodation of a dolly.

6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #18/Appropriate Uniform and Safety Gear: Ava, a pregnant police officer, asks their union representative for help getting a larger size uniform and larger size bullet proof vest in order to cover their growing pregnancy. The union representative asks management for an appropriately sized uniform and vest for Ava.

4. Known Limitation: Ava's inability to wear the standard uniform and safety gear is a physical condition related to pregnancy; Ava needs an adjustment or change at work; Ava's representative has communicated this information to the employer.

5. Qualified: Ava is qualified with the reasonable accommodation of appropriate gear.

6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #19/Temporary Suspension of Essential Function(s): Darina, a pregnant police officer in the third month of pregnancy, talks to human resources about being taken off of patrol and put on light duty for the remainder of her pregnancy to avoid physical altercations such as subduing suspects that may harm her pregnancy. The department has an established light duty program that it uses for officers with injuries that occurred on the job.

4. Known Limitation: Darina has a need or a problem related to maintaining the health of her pregnancy; Darina needs an adjustment or change at work; Darina has communicated this information to the employer.

5. Qualified: The suspension of the essential functions of patrol duties is temporary and could end "in the near future" (within generally forty weeks) And it appears that the temporary suspension of the essential function can be accommodated through the light duty program.

6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship. In

determining if there is an undue hardship, the employer cannot rely on the fact that this type of modification is normally reserved for those with on-the-job injuries. The fact that the employer provides this type of modification for other employees points to this not being an undue hardship.

Example 1636.3 #20/Temporary Suspension of Essential Function(s): Rory works in a fulfillment center where she is usually assigned to a line where she has to move packages that weigh 20 pounds. After returning from work after giving birth, Rory has a lifting restriction of 10 pounds due to sciatica during her pregnancy. The restriction is for 12 weeks. The employer does not have an established light duty program. There are other lines in the warehouse that do not require lifting more than 10 pounds and some of the packages on Rory's usual line weigh less than 10 pounds.

4. Known Limitation: Rory has a known limitation related to pregnancy, childbirth, or a related medical condition.

5. Qualified: The suspension of the essential function of lifting packages that weigh up to 20 pounds is temporary and Rory could be able to perform the essential function in the near future. It appears that the temporary suspension of the essential function could be accommodated by temporarily suspending the requirement that Rory lift more than 10 pounds or by assigning her to a different line.

6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #21/Unpaid Leave: Tallah, a newly hired cashier at a small bookstore, has a miscarriage in the third month of pregnancy and asks a supervisor for ten days of leave to recover. As a new employee, Tallah has only earned 2 days of paid leave. The employer is not covered by the FMLA and does not have a company policy regarding the provision of unpaid leave, but Tallah is covered by the PWFA.

4. Known limitation: Tallah's need to recover from the miscarriage is a physical or mental condition related to pregnancy or arising out of a medical condition related to pregnancy; Tallah needs an adjustment or change at work; Tallah has communicated this information to the employer.

5. Qualified: After the reasonable accommodation of leave, Tallah will be able to do the essential functions of the position with or without accommodation.

6. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example 1636.3 #22/Unpaid Leave for Prenatal Appointments: Margot started working at a retail store shortly after she became pregnant. She has an uncomplicated pregnancy. Because she has not worked at the store very long, she has earned very little leave and is not covered by the FMLA. In her fifth month of pregnancy, she asks her supervisor for the reasonable accommodation of unpaid time off beyond the leave she has earned to attend her regularly scheduled prenatal appointments.

4. Known limitation: Margot's need to attend health care appointments is a need or

a problem related to maintaining her health or the health of her pregnancy; Margot needs an adjustment or change at work; Margot has communicated the information to the employer.

5. Qualified: Margot can do her job with the reasonable accommodation of leave to attend health care appointments.

6. The employer must grant the accommodation of unpaid time off (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #23/Unpaid Leave for Recovery from Childbirth: Sofia, a custodian, is pregnant and will need six to eight weeks of leave to recover from childbirth. Sofia is nervous about asking for leave so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy but no policy for longer periods of leave. Sofia does not qualify for FMLA leave.

4. Known limitation: Sofia's need to recover from childbirth is a physical condition; Sofia needs an adjustment or change at work; Sofia's representative has communicated this information to the employer.

5. Qualified: After the reasonable accommodation of leave, Sofia will be able to do the essential functions of the position.

6. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #24/Unpaid Leave for Medical Appointments: Taylor, a newly hired member of the waitstaff, requests time off to attend therapy appointments for postpartum depression. As a new employee, Taylor has not yet accrued sick or personal leave and is not covered by the FMLA. Taylor asks her manager if there is some way that she can take time off.

4. Known limitation: Taylor's postpartum depression is a medical condition related to pregnancy, and she is seeking health care; Taylor needs an adjustment or change at work; Taylor has communicated this information to the employer.

5. Qualified: Taylor can do the essential functions of the job with a reasonable accommodation of time off to attend the therapy appointments.

6. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example 1636.3 #25/Unpaid Leave or Schedule Change: Claudine is six months pregnant and needs to have regular check-ups. The clinic where Claudine gets her health care is an hour drive away, and they frequently get backed up and she has to wait for her appointment. Depending on the time of day, between commuting to the appointment, waiting for the appointment, and seeing her provider, Claudine may miss all or most of an assigned day at work. Claudine is not covered by the FMLA and does not have any sick leave left. Claudine asks human resources for a reasonable accommodation such as time off or changes in scheduling so she can attend her medical appointments.

4. Known limitation: Claudine needs health care related to her pregnancy;

Claudine needs an adjustment or change at work; Claudine has communicated that information to the employer.

5. Qualified: Claudine can do the essential functions of the job with a reasonable accommodation of time off or a schedule change to attend medical appointments.

6. The employer must grant the accommodation of time off or a schedule change (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #26/Telework: Raim, a social worker, is in the seventh month of pregnancy and is very fatigued as a result. She asks her supervisor if she can telework and see clients virtually so she can rest between appointments.

4. Known limitation: Raim's fatigue is a physical condition related to pregnancy; Raim needs an adjustment or change at work; Raim has communicated that information to the employer.

5. Qualified: Assuming the appointments can be conducted virtually, Raim can perform the essential functions of her job with the reasonable accommodation of working virtually. If there are certain appointments that must be done in person, the reasonable accommodation could be a few days of telework a week and then other accommodations that would give Raim time to rest, such as assigning Raim in-person appointments at times when traffic will be light so that they are easy to get to or setting up Raim's assignments so that on the days when she has in-person appointments she has breaks between them. Or the reasonable accommodation could be the temporary suspension of the essential function of in-person appointments.

6. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #27/Temporary Workspace/Possible Temporary Suspension of an Essential Function: Brooke, a pregnant research assistant in her first trimester of pregnancy, asks the lead researcher on the project for a temporary workspace that would allow her to work in a well-ventilated area because her work involves hazardous chemicals that her health care provider has told her to avoid. She also points out that there are several research projects she can work on that do not involve exposure to hazardous chemicals.

4. Known limitation: Brooke's need to avoid the chemicals is a physical or mental condition related to maintaining the health of her pregnancy; Brooke needs a change or adjustment at work; Brooke has communicated this information to the employer.

5. Qualified: If working with hazardous chemicals is an essential function of the job, Brooke may be able to perform that function with the accommodation of a well-ventilated work area. If providing a well-ventilated work area would be an undue hardship, Brooke could still be qualified with the temporary suspension of the essential function of working with the hazardous chemicals because Brooke's inability to work with hazardous chemicals is temporary, and Brooke could perform the essential functions in the near future (within generally forty

weeks). And it appears that her need to avoid exposure to hazardous chemicals could also be accommodated by allowing her to focus on the other research projects.

6. The employer must provide an accommodation such as a well-ventilated space or another reasonable one, absent undue hardship. If the employer cannot accommodate Brooke in a way that allows Brooke to continue to perform the essential functions of the position, the employer must consider alternative reasonable accommodations, including temporarily suspending one or more essential function(s), absent undue hardship.

Example 1636.3 #28/Temporary Transfer to Different Location: Katherine, a budget analyst who has cancer, is also pregnant, which creates complications for her treatment. She asks the manager for a temporary transfer to an office in a larger city that has a medical center that can address her medical needs due to the combination of cancer and pregnancy.

1. Known limitation: Katherine has a need or problem related to maintaining her health or the health of her pregnancy; Katherine needs a change or adjustment at work; Katherine has communicated that information to the employer.

2. Qualified: Katherine is able to do the essential functions of her position with the reasonable accommodation of a temporary transfer to a different location.

3. As under the ADA, a PWFA reasonable accommodation can include a workplace change to facilitate medical treatment, including accommodations such as leave, a schedule change, or a temporary transfer to a different work location needed in order to obtain treatment. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #29/Pumping Breast Milk: Salma gave birth thirteen months ago and wants to be able to pump breast milk at work. Salma works at an employment agency that sends her to different jobs for a day or week at a time. Salma asks the person at the agency who makes her assignments to only assign her to employers who will allow her to take a break to pump breast milk at work.

1. Known limitation: Salma's need to express breast milk is a physical condition related to lactation which is a related medical condition; Salma needs a change or adjustment at work; Salma has communicated this information to the covered entity.

2. Qualified: Salma is able to perform the functions of the jobs to which she is assigned with the reasonable accommodation of being assigned to workplaces that will allow her to pump at work.

3. The agency must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example 1636.3 #30/Additional Breaks: Afefa, a pregnant customer service agent, requests two additional 10-minute rest breaks and additional bathroom breaks as needed during the workday. The employer determines that these breaks would not pose an undue hardship and grants the request. Because of the additional breaks, Afefa responds to three fewer calls during a shift.

Afefa's supervisor should evaluate her performance taking into account her productivity while on duty, excluding breaks. Penalizing an employee for failing to meet production standards due to receipt of additional breaks as a reasonable accommodation would render the additional breaks an ineffective accommodation. It also may constitute retaliation for use of a reasonable accommodation. However, if there is evidence that Afefa's lower production was due not to the additional breaks, but rather to misconduct (for example, if she has frequent and unexcused absences to make or receive personal phone calls) or other performance issues, the employer may consider the lower production levels consistent with the employer's production and performance standards.

1636.3(j) Undue Hardship

The PWFA at 42 U.S.C. 2000gg(7) uses the definition of "undue hardship" from section 101 of the ADA. The PWFA provides that the term shall be construed under the PWFA as it is under the ADA and as set forth in these regulations. The rule, at (j)(1) of this paragraph, reiterates the definition of undue hardship provided in the ADA regulations, which explains that undue hardship means significant difficulty or expense incurred by a covered entity. The rule then, at (j)(2) of this paragraph, outlines some factors to be considered when determining if undue hardship exists.⁷¹

Consistent with the ADA, a covered entity that claims that a reasonable accommodation will cause an undue hardship must consider whether there are other reasonable accommodations it can provide, absent undue hardship.⁷² Additionally, if the employer can only provide a part of the reasonable accommodation absent undue hardship—for example, the employer can provide six weeks of leave absent undue hardship but the eight weeks that the employee is seeking would cause undue hardship—the employer must provide the reasonable accommodation up to the point of creating an undue hardship. Thus, in the example, the employer would have to provide the six weeks of leave and then consider if there are other reasonable accommodations it could provide that would not cause an undue hardship.

Example 1636.3 #31/Undue Hardship: Patricia, a convenience store clerk, requests that she be allowed to go from working full-time to part-time for the last 3 months of her pregnancy due to extreme fatigue. The store assigns two clerks per shift, and if Patricia's hours are reduced, the other clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Based on these facts, the employer likely can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce Patricia's hours. The employer, however, should

⁷¹ 29 CFR 1630.2(p).

⁷² *Enforcement Guidance on Reasonable Accommodations*, *supra* note 4, at text after n.116.

explore whether any other reasonable accommodation will assist Patricia without causing undue hardship, such as providing a stool and allowing rest breaks throughout the shift.

Example 1636.3 #32/Undue Hardship: Shirin, a dental hygienist who is undergoing IVF treatments, is fatigued and needs to attend medical appointments near her house every other day. She asks her supervisor if she can telework for the next 3 months. Full-time telework may be an undue hardship for the employer because Shirin's essential functions include treating patients at the dental office. However, the employer must consider other reasonable accommodations, such as part-time telework while Shirin can perform the billing functions of her job, a schedule that would allow Shirin breaks between patients, part-time work, or a reduced schedule.

An employer's claim that the accommodation a worker seeks would cause a safety risk to co-workers or clients will be assessed under the PWFA's undue hardship standard. For example, consider a pregnant worker in a busy fulfillment center that has narrow aisles between the shelves of products. The worker asks for the reasonable accommodation of a cart to use while they are walking through the aisles filling orders. The employer's claim that the aisles are too narrow and its concern for the safety of other workers being bumped by the cart would be a defense based on undue hardship, specifically § 1636.3(j)(2)(v) ("the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."). As with other requested reasonable accommodations, if a particular reasonable accommodation causes an undue hardship because of safety, the employer must consider if there are other reasonable accommodations that would not do so. Importantly, claims by employers that workers create a safety risk merely by being pregnant (as opposed to a safety risk that stems from a pregnancy-related limitation) should be addressed under Title VII's bona fide occupational qualification (BFOQ) standard and not under the PWFA.⁷³

1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function

To address that under the PWFA an employer may have to accommodate an employee's temporary inability to perform an essential function, the rule adds additional

factors that may be considered when determining if the temporary suspension of an essential function causes an undue hardship. These additional factors include consideration of the length of time that the employee or applicant will be unable to perform the essential function(s); whether, through the methods listed in § 1636.3(f)(2)(iii) (describing potential reasonable accommodations related to the temporary suspension of essential functions) or otherwise, there is work for the employee or applicant to accomplish; the nature of the essential function, including its frequency; whether the covered entity has provided other employees or applicants in similar positions who are unable to perform essential function(s) of their positions with temporary suspensions of those functions and other duties; if necessary, whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

As with other reasonable accommodations, if the covered entity can establish that accommodating a worker's temporary suspension of an essential function(s) would impose an undue hardship if extended beyond a certain period of time, the covered entity would only be required to provide that accommodation for the period of time that it does not impose an undue hardship. For example, consider the situation where an employee seeks to have an essential function suspended for six months. The employer can go without the function being done for four months, but after that, it will be an undue hardship. The employer must accommodate the worker's inability to perform the essential function for the four months and then consider whether there are other reasonable accommodations that it can provide, absent undue hardship.

1636.3(j)(4) Undue Hardship—Predictable Assessments

The rule adds to the definition of "undue hardship" a paragraph titled "predictable assessments." The Commission anticipates that many accommodations sought under the PWFA will be for modest or minor changes in the workplace for limitations that will be temporary. Without the accommodation, a pregnant worker may quit their job or risk their health, thereby frustrating the purpose of the Act. Thus, in the regulation, the Commission identifies a limited number of simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by an employee due to pregnancy.

Under the ADA, the Commission has determined that certain conditions will, in virtually all cases, result in a determination of coverage as disabilities.⁷⁴ In a similar manner, the Commission seeks to improve

how quickly employees will be able to receive certain simple, common accommodations for pregnancy under the PWFA and to reduce litigation. The identification of certain modifications as "predictable assessments" does not alter the definition of undue hardship or deprive a covered entity of the opportunity to bring forward facts to demonstrate a proposed accommodation imposes an undue hardship for its business under its own particular circumstances. Instead, it explains that in virtually all cases a limited number of simple modifications are reasonable accommodations that do not impose undue hardship when requested by an employee due to pregnancy.

These modifications are: (1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, and (4) allowing an employee breaks, as needed, to eat and drink.⁷⁵

The rule includes this addition after reviewing the information provided by legislators and congressional witnesses that these changes are regularly requested by pregnant workers and that in practice these modifications are virtually always reasonable accommodations that do not impose an undue hardship.⁷⁶ Additionally, certain State laws that are analogous to the PWFA single out these modifications as ones that cannot be challenged as an undue hardship or where

⁷⁵ The first and fourth categories of predictable accommodations are related but separate. The first category of accommodations addresses a worker's ability to carry water on the worker's person to where the worker carries out job duties, facilitating ready access to water without requiring the worker to take a break to access and drink it. The Commission recognizes that there may be work locations where, unlike the presence of water in most (if not all) work locations, the presence of food or non-water beverages could contribute to an undue hardship due to safety or other issues, such that a worker must take a break from the location in which the worker performs her duties in order to access and consume those items. The fourth category of accommodations addresses a worker's ability to take additional, short breaks in performing work (either at the worker's work location or a break location) to eat and drink (including beverages which are not water).

⁷⁶ See H.R. Rep. 117–27, pt. 1, at 11, 22, 29, 113; *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*, Joint Hearing Before the Subcomm. on Civ. Rts. and Hum. Servs. & the Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Lab., 117th Cong. 4 (2021) (statement of Rep. Suzanne Bonamici); *Long Over Due: Exploring the Pregnant Workers Fairness Act* (H.R. 2694), Hearing Before the Subcomm. on Civ. Rts. & Hum. Servs. of the H. Comm. on Educ. and Lab., 116th Cong. 7 (2019) [hereinafter *Long Over Due*] (statement of Rep. Jerrold Nadler); 25 (statement of Iris Wilbur, Vice President of Government Affairs and Public Policy, Greater Louisville, Inc.); 83 (statement of Rep. Barbara Lee); 168 Cong. Rec. H10,527 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S7,079 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. H2,324 (daily ed. May 14, 2021) (statement of Rep. Suzanne Bonamici).

⁷³ See, e.g., *UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women); *Everts v. Sushi Brokers LLC*, 247 F. Supp. 3d 1075, 1082–83 (D. Ariz. 2017) (relying on *Johnson Controls* and denying BFOQ in a case regarding a pregnant worker as a restaurant server noting that "[u]nlike cases involving prisoners and dangers to customers where a BFOQ defense may be colorable, the present situation is exactly the type of case that Title VII guards against"); *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201, 1214 (W.D. Mo. 2014) (relying on *Johnson Controls* and denying a BFOQ allegedly in place for the "privacy" and "safety" of women workers); *Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I(B)(1)(c).

⁷⁴ See 29 CFR 1630.2(j)(3). There, as here, the Commission did not supplant or alter the individualized inquiry required by the statute but provided common examples to illustrate its application in frequently occurring circumstances.

different rules regarding documentation may apply.⁷⁷

Finally, the Commission emphasizes that adoption of the predictable assessments provision does not alter the meaning of the terms “reasonable accommodation” or “undue hardship.” Likewise, it does not change the requirement that, as under the regulation implementing the ADA, employers must conduct an individualized assessment when determining whether a modification is a reasonable accommodation that will impose an undue hardship. Instead, the paragraph informs covered entities that for these specific and simple modifications, in virtually all cases, the Commission expects that individualized assessments will result in a finding that the modification is a reasonable accommodation that does not impose an undue hardship.

Examples Regarding Predictable Assessments

Example 1636.3 #33/Predictable Assessments: Amara, a quality inspector for a manufacturing company, experiences painful swelling in her legs, ankles, and feet during the final three months of her pregnancy. Her job requires standing for long periods of time. Amara asks the person who assigns her daily work for a stool so that she can sit while she performs her job. Amara’s swelling in her legs and ankles is a physical condition related to pregnancy. Amara’s request is for a modification that will virtually always be a reasonable accommodation that does not impose an undue hardship. The employer argues that it has never provided a stool to any other worker who complained of difficulty standing but points to nothing that suggests that this modification is not reasonable or that it would impose an undue hardship in this particular case on the operation of the employer’s business. The request must be granted.

Example 1636.3 #34/Predictable Assessments: Jazmin, a pregnant teacher who typically is only able to use the bathroom when her class is at lunch, requests additional bathroom breaks during her 6th month of pregnancy. Additional bathroom breaks are one of the modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship. The employer argues that finding an adult to watch over the teacher’s class when she needs to take a bathroom break imposes an undue hardship, but Jazmin points out that there are several teachers with nearby classrooms, some classrooms have aides, and there is an administrative assistant who works in the front office, and that with a few minutes’ notice, one of them would be able to either stand in the hallway between classes to allow

Jazmin a trip to the bathroom or, in the case of the administrative assistant, sit in the teacher’s classroom for a few minutes several times a day. The employer has not established that providing Jazmin with additional bathroom breaks imposes an undue hardship.

Example 1636.3 #35/Predictable Assessments: Addison, a clerk responsible for receiving and filing construction plans for development proposals, needs to maintain a regular intake of water throughout the day to maintain a healthy pregnancy. They ask their manager if an exception can be made to the office policy prohibiting liquids at workstations. The ability to access water during the day is one of the modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship. Here, although the manager decides against allowing Addison to bring water into their workstation, he proposes that a table be placed just outside the workstation where water can be easily accessed and gives permission for Addison to access this water as needed. The employer has satisfied its obligation to provide reasonable accommodation.

1636.3(j)(5) Undue Hardship—Cannot Be Demonstrated by Assumption or Speculation

Lastly, the rule provides that a covered entity cannot demonstrate that a reasonable accommodation imposes an undue hardship based on an assumption or speculation that other employees might seek a reasonable accommodation—even the same reasonable accommodation—or the same employee might seek another reasonable accommodation in the future.⁷⁸ Relatedly, a covered entity that receives numerous requests for the same or similar accommodation at the same time (for example, parking spaces closer to the factory) cannot deny all of them simply because processing the volume of current or anticipated requests is, or would be, burdensome or because it cannot grant all of them as requested. Rather, the covered entity must evaluate and provide reasonable accommodations unless or until doing so imposes an undue hardship. The covered entity may point to past and cumulative costs or burden of accommodations that have already been granted to other employees when claiming the hardship posed by another request for the same or similar accommodation.

1636.3(k) Interactive Process

General Definition and Additions

The PWFA at 42 U.S.C. 2000gg(7) refers to the definitions from the ADA that apply to the PWFA and states that this includes the “interactive process,” a term from the ADA, and how it “will typically be used to determine an appropriate reasonable accommodation.” The rule largely adopts the explanation of the interactive process in the regulations implementing the ADA so that the interactive process under the PWFA generally mirrors the same process under the

ADA.⁷⁹ The rule also notes that there are no rigid steps that must be followed when engaging in the interactive process under the PWFA. The regulation makes the following adjustments to the definition of interactive process from the ADA in order to apply it to the PWFA.

First, the definition replaces references to “individual with disability” and similar terms with “employee with known limitations” and similar terms.

Second, the rule does not include the words “precise limitations resulting from the disability” from the ADA’s explanation of “interactive process.” As a result, the second sentence is: “This process should identify the known limitations and potential reasonable accommodations that could overcome those limitations.” Under the ADA, the interactive process may begin with the individual identifying the “precise limitations” of the disability as well as identifying potential reasonable accommodations that could overcome those limitations.⁸⁰ It is not necessary under the PWFA that the “precise limitation” be identified because the statute makes clear that an individual is entitled to an accommodation if the “limitation” is known.

Step-by-Step Process

The Appendix to the ADA Regulations provides an example of the steps in a reasonable accommodation process and, for ease of reference, the Commission includes it below with minor changes reflecting the PWFA’s requirement to provide reasonable accommodations for known limitations.⁸¹ A covered entity may use these steps and its established ADA-related processes to address requests for reasonable accommodations for workers under PWFA. As with the ADA, a covered entity should respond expeditiously to a request for reasonable accommodation and act promptly to provide the reasonable accommodation.⁸²

When an employee with a known limitation has requested a reasonable accommodation regarding the performance of the job, the covered entity, using a problem-solving approach, should:

a. Analyze the particular job involved and determine its purpose and essential functions;

b. Consult with the employee with a known limitation to ascertain what kind of accommodation is necessary given the known limitation;

c. In consultation with the employee with the known limitation, identify potential accommodations and assess the effectiveness each would have in enabling the employee to perform the essential functions of the position. If the employee’s limitation means that they are temporarily unable to perform one or more essential functions of the position, the parties must also consider

⁷⁷ See Wash. Rev. Code 43.10.005(1)(d) (prohibiting the undue hardship defense if the accommodation is frequent, longer, or flexible restroom breaks; modifying a no food or drink policy; providing seating or allowing employee to sit more frequently if the job requires standing; and certain lifting restrictions); Mass. Gen. Laws ch. 151B(4)(1E)(c) (limiting medical documentation if the accommodation is more frequent restroom, food, or water breaks, and certain lifting restrictions).

⁷⁸ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at n.113.

⁷⁹ 29 CFR 1630.2(o)(3).

⁸⁰ *Id.*

⁸¹ 29 CFR part 1630 app. 1630.9.

⁸² *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 10. Following the steps laid out for the interactive process is not a defense to liability if the employer fails to provide a reasonable accommodation that it could have provided absent undue hardship.

whether suspending the performance of one or more essential functions may be a part of the reasonable accommodation if the known limitation is temporary in nature and the employee could perform the essential function(s) in the near future (within generally forty weeks); and

d. Consider the preference of the employee to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the covered entity.⁸³

Steps (b)–(d) outlined above can be adapted and applied to requests for reasonable accommodations related to the application process and to benefits and privileges of employment. In those situations, in step (c), the consideration should be how to enable the applicant with a known limitation to be considered for the position in question or how to provide an employee with a known limitation with the ability to enjoy equal benefits and privileges of employment.

In many instances, the appropriate reasonable accommodation may be obvious to either or both the employer and the employee with the known limitation, such that it may not be necessary to proceed in this step-by-step fashion. Although covered entities are cautioned that under 42 U.S.C. 2000gg–1(2) and § 1636.4(b) they cannot unilaterally require a worker with a limitation to accept a specific accommodation, the step-by-step approach may not be necessary when, for example, a pregnant worker requests certain modifications such as allowing the employee to drink water regularly during the workday, additional restroom breaks, modifications in policies regarding sitting or standing, or modifications in policies regarding eating or drinking. These requested modifications will virtually always be found to be reasonable accommodations that do not impose an undue hardship and are therefore unlikely to require significant discussion in the interactive process, and there may be other accommodations that are equally easy to provide. However, in some instances, neither the employee or applicant requesting the accommodation, nor the covered entity, may be able to readily identify an appropriate accommodation. For example, an applicant needing an accommodation may not know enough about the equipment used by the covered entity or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the covered entity may not know enough about the employee's known limitation and its effect on the performance of the job to suggest an appropriate accommodation. In these situations, the steps above may be helpful. In addition, parties may consult outside resources such as State or local entities, non-profit organizations, or the Job Accommodation Network (JAN) for ideas regarding potential reasonable accommodations.⁸⁴

⁸³ See 29 CFR part 1630 app. 1630.9.

⁸⁴ The Job Accommodation Network (JAN) provides free assistance regarding workplace accommodation issues. See generally Job Accommodation Network, <https://askjan.org/> (last visited July 28, 2023).

Failure To Engage in Interactive Process

Failing to engage in the interactive process, in and of itself, is not a violation of the PWFA just as it is not a violation of the ADA. However, a covered entity's failure to initiate or participate in the interactive process with the employee or applicant after receiving a request for reasonable accommodation could result in liability if the employee or applicant does not receive a reasonable accommodation even though one is available that would not have posed an undue hardship.⁸⁵ Relatedly, an employee's unilateral withdrawal from or refusal to participate in the interactive process can constitute sufficient grounds for denying the reasonable accommodation.

1636.3(l) Supporting Documentation

In determining when and what types of documentation a covered entity may request of an employee or applicant to support their request for a reasonable accommodation, the Commission is guided by existing rules under the ADA, differences between the relevant statutory provisions of the ADA and the PWFA, and the recognition that accommodations under the PWFA may be small, temporary modifications that may not always lend themselves to medical documentation.

First, and most importantly, a covered entity is not required to seek supporting documentation from a worker who seeks an accommodation under the PWFA. For example, under the ADA, an employer may simply discuss with the employee or applicant the nature of the limitation and the need for an accommodation;⁸⁶ the same is true under the PWFA, and this approach is entirely consistent with the PWFA's emphasis on the importance of the interactive process as described in § 1636.3(k).

Additionally, the Commission notes that pregnant workers may experience limitations and, therefore, require accommodations, before they have had any medical appointments. For example, some workers may experience morning sickness and nausea early in their pregnancies and need accommodations such as later start times, breaks, or telework.

The Commission further recognizes that it may be difficult for a pregnant employee to obtain an immediate appointment with a health care provider early in a pregnancy. For example, according to one study, almost a quarter of women did not receive prenatal care during their first trimester, and 12% of births take place in counties with limited or no access to maternity care.⁸⁷ Further, even

⁸⁵ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 10.

⁸⁶ *Id.* at Question 6.

⁸⁷ Medical care often is not available or immediately obtained early in a pregnancy. See, e.g., Joyce A. Martin et al., Ctrs. for Disease Control, *Births in the United States, 2019* 2 (2020), <https://www.cdc.gov/nchs/data/databriefs/db387-H.pdf> (indicating that in 2019, almost 23% of women who gave birth did not receive prenatal care during the first trimester); Christina Brigance et al., March of Dimes, *Nowhere to Go: Maternity Care Deserts Across the U.S.* 4 (2022), <https://www.marchofdimes.org/research/maternity-care-deserts-report.aspx> (reporting that approximately 12

for those who have access to medical care, known limitations may develop between scheduled medical appointments, such that requiring documentation in those situations would increase the cost to the worker and may require them to take additional leave in order to obtain the documentation. Therefore, consistent with the purposes of the PWFA, the Commission encourages employers who choose to require documentation, when that is permitted under this regulation, to grant interim accommodations as a best practice if an employee indicates that they have tried to obtain documentation but there is a delay in obtaining it, and the documentation will be provided at a later date. For example, if a pregnant employee requests an accommodation for a pregnancy-related limitation in lifting, which may involve the temporary suspension of an essential function, but the employee will not be able to provide a note from a health care practitioner for several weeks, the employer should consider providing an interim reasonable accommodation.⁸⁸

If a covered entity decides to require supporting documentation, it is only permitted to do so under the rule if it is reasonable to require documentation under the circumstances for the covered entity to determine whether to grant the accommodation. When requiring documentation is reasonable, the employer is also limited to requiring documentation that itself is reasonable. The preamble, rule, and appendix set out examples of when it would not be reasonable for the employer to require documentation. The rule also defines “reasonable documentation” as documentation that describes or confirms (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason.

As explained below, and set forth at § 1636.4(a)(3), an employer may not defend the denial of an accommodation under 42 U.S.C. 2000gg–1(1) based on the lack of documentation if its request for documentation does not comport with the rule. In these situations, the worker will have met the requirements of § 1636.3(d)(3), and the employer will have sufficient information

percent of births in the United States occur in counties with limited or no access to maternity care); American Pregnancy Association, *Your First Prenatal Visit*, <https://americanpregnancy.org/healthy-pregnancy/planning/first-prenatal-visit/> (last visited Apr. 3, 2023) (stating that the first prenatal visit for individuals who did not meet with their health care provider pre-pregnancy is generally around 8 weeks after their last menstrual period); University of Utah Health, *Pregnancy—First Trimester, Weeks 1–13*, <https://healthcare.utah.edu/womenshealth/pregnancy-birth/1st-trimester> (last visited Apr. 3, 2023) (stating that doctors recommend scheduling the first obstetric appointment between the 8th and 10th week of pregnancy); Boston Medical Center, *Newly Pregnant?*, <https://www.bmc.org/newly-pregnant> (last visited Apr. 3, 2023) (stating that the first prenatal appointment will be scheduled between the 8th and 12th weeks of pregnancy).

⁸⁸ See *Best Practices State Government*, *supra* note 58. See also *infra* discussion on Interim Reasonable Accommodations.

regarding the known limitation and the need for accommodation. Further, requests for documentation that violate the rule may be a violation of the prohibition on retaliation and coercion in 42 U.S.C. 2000gg–2(f), as set forth in §§ 1636.5(f)(1)(iv), (v) and (f)(2)(iv), (v) because they may deter workers from seeking accommodations.

1636.3(l)(1) Reasonable To Require Documentation Under the Circumstances

Under the rule, a covered entity may require documentation only if it is reasonable to do so under the circumstances for the covered entity to decide whether to grant the accommodation. The regulation provides several examples of when it would not be reasonable for the employer to require documentation.

First, it is not reasonable for the employer to require documentation when both the limitation and the need for reasonable accommodation are obvious.⁸⁹ For example, when an obviously pregnant⁹⁰ worker states or confirms they are pregnant and asks for a different size uniform or related safety gear, both the limitation and the need for the accommodation are obvious, and “known” under the statute, and the employer may not require supporting documentation. If the pregnancy is obvious, and the worker states or confirms that they are pregnant, but the limitation related to the pregnancy or parameters of a potential accommodation are not, the employer may only request documentation relevant to the accommodation. For example, if a worker who is obviously pregnant, states or confirms that they are pregnant, and asks to avoid lifting heavy objects, it may be reasonable for the employer to request documentation about the limitation such as the extent of the lifting restriction and its expected duration, but not about the pregnancy itself. Similarly, if an obviously pregnant employee requests the reasonable accommodation of leave related to childbirth and recovery and states or confirms that they are pregnant it may be reasonable for the employer to require documentation regarding the amount of time the worker anticipates needing to recover from childbirth, but not reasonable to require documentation of the pregnancy itself.

Second, when the employee or applicant has already provided the employer with sufficient information to substantiate that the worker has a known limitation and needs a change or adjustment at work, it is not reasonable for the employer to require documentation. If a worker has already provided documentation stating that because

of their recent cesarean section, they should not lift over 20 pounds for two months, the employer may not require further documentation during those two months because the employee has already provided the employer with sufficient information to substantiate that they have a limitation and need a change at work.

A third example of when it is not reasonable for an employer to require documentation is when a worker at any time during their pregnancy states or confirms that they are pregnant and seeks one of the following accommodations: (1) carrying water and drinking, as needed; (2) taking additional restroom breaks; (3) sitting, for those whose work requires standing, and standing, for those whose work requires sitting; and (4) breaks, as needed, to eat and drink. It is not reasonable to require documentation, beyond self-attestation, when a worker is pregnant and seeks one of the four listed modifications because these are a small set of commonly sought accommodations that are widely known to be needed during an uncomplicated pregnancy and where documentation would not be easily obtainable or necessary. As noted above, particularly early in pregnancy, employees and applicants are less likely to have sought or been able to obtain an appointment with a health care provider for their pregnancy. Further, they may not be able to obtain an appointment with a health care provider repeatedly on short notice for every limitation, as each becomes apparent. The Commission notes that this position is consistent with the overarching goal of the PWFA to assist workers affected by pregnancy to remain on the job by providing them with simple accommodations quickly.

A fourth example of when it is not reasonable to require documentation is when the limitation for which an accommodation is needed involves lactation. Usually, beginning around or shortly after birth, lactation occurs. As the initiation of lactation around birth is nearly universal, the Commission considers the fact of breastfeeding obvious, such that it will not be reasonable for an employer to require documentation regarding lactation or pumping. Pragmatically, the Commission notes that health care providers may not be able to provide documentation regarding whether a worker is pumping, nor the types of accommodations needed in order to pump breast milk.⁹¹ Of course, not all workers can or choose to breastfeed; those who do elect to breastfeed do so for widely varying lengths of time. Although the rule states that it is generally not reasonable for an employer to require supporting documentation for lactation or pumping, an employer will not violate the rule simply by asking the employee whether they require an appropriate place to express breastmilk while at a worksite. Employee confirmation—or a simple request to pump at work—is sufficient confirmation.

If the request for supporting documentation was not reasonable under the

circumstances for the covered entity to determine whether to grant the accommodation, a covered entity cannot defend the denial of an accommodation based on the lack of documentation provided by the worker, as set forth in § 1636.4(a)(3). Further, § 1636.5(f) states that it could violate the retaliation and coercion provisions of the PWFA if a covered entity requires the submission of supporting documentation that is not reasonable under the circumstances to determine whether to grant the accommodation because, for example, (1) both the limitation and the need for reasonable accommodation are obvious; (2) the employee or applicant already has provided the employer with sufficient information to substantiate that the individual has a known limitation and needs a change or adjustment at work; (3) a pregnant worker is seeking one of the modifications listed at 1636.3(j)(4); or (4) the accommodation requested involves lactation.

Example 1636.3 #36/Documentation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Cora, a production worker who is 8 months pregnant, requests additional bathroom breaks, and the employer applies the policy to her, refusing to provide the accommodation until she submits medical documentation. Cora therefore makes a medical appointment that she does not need and brings in documentation to establish that she is pregnant and has a physical condition that requires additional bathroom breaks. The employer grants the requested accommodation shortly before Cora gives birth. Despite the fact that the accommodation was granted, this employer may have violated the PWFA, 42 U.S.C. 2000gg–1(a) and/or 2000gg–2(f).

Example 1636.3 #37/Documentation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Fourteen months after giving birth, Alex wants to continue to pump breastmilk at work, explains that to her supervisor, and asks, as a reasonable accommodation, for breaks to pump and that the room that is provided have a chair, a table, and access to electricity and running water. Alex’s employer refuses to provide the accommodations unless Alex provides supporting documentation from her health care provider. Alex cannot provide the information, so she stops pumping. The employer cannot use the lack of documentation as a defense to the denial of the accommodation because documentation was not reasonable under the circumstances for the employer to determine whether to grant to accommodation, as set forth in § 1636.4(a)(3).

1636.3(l)(2) Reasonable Documentation

When it is reasonable to require documentation under the circumstances for the covered entity to determine whether to grant the accommodation, the covered entity is permitted to require reasonable documentation, including from a health care provider. The rule defines “reasonable documentation” as documentation that

⁸⁹ This is similar to the ADA under which requesting documentation when the disability and the need for the accommodation are obvious or otherwise already known would violate the prohibition on disability-related inquiries without a business justification. *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*, Question 5 (2000), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees> [hereinafter *Enforcement Guidance on Disability-Related Inquiries*].

⁹⁰ Early or initial physical indications of pregnancy may not be sufficient to make it obvious to an employer that an employee is pregnant.

⁹¹ See *supra* note 67, for discussion of the PUMP Act and the types of accommodations that may be requested with regard to pumping.

describes or confirms: (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason. For example, if an employee asks for leave as a reasonable accommodation to attend therapy appointments due to anxiety early in the employee's pregnancy, the employer could, but is not required to, ask for documentation confirming that there is a physical or mental condition that is related to, affected by, or arising out of pregnancy, and information about how frequent and long the leave would need to be.

Adopting the longstanding approach under the ADA, § 1636.4(f)(1)(v) and (f)(2)(v) explain that if an employee or applicant provides documentation that is sufficient, continued efforts by the covered entity to require that the individual provide more documentation could be a violation of the PWFA's prohibitions on retaliation and coercion. However, if a covered entity requests additional information based on a good faith belief that the documentation the employee submitted is insufficient, it would not be liable for retaliation or coercion.⁹²

1636.3(l)(3) Appropriate Health Care Provider To Provide Documentation

If the covered entity meets the requirements laid out above to request documentation and does so, the covered entity may request documentation from an appropriate health care provider in the particular situation. An appropriate provider may vary depending on the situation; paragraph (l)(3) contains a non-exhaustive list of possible health care providers that is based on the non-exhaustive list for the ADA.⁹³

The Commission does not believe that it will be practical or necessary for a covered entity to request or require that an employee be examined by a health care provider of the covered entity's choosing based on the PWFA's lower threshold for requiring reasonable accommodations, the temporary duration of PWFA accommodations, and the minimal nature of at least some of the most common reasonable accommodations associated with general limitations of pregnancy, childbirth, or related medical conditions.

1636.3(l)(4) Confidentiality

The PWFA does not include a provision specifically requiring covered entities to maintain the confidentiality of medical information obtained in support of accommodation requests under the PWFA. However, applicants, employees, and former employees covered by the PWFA also are covered by the ADA.⁹⁴ Under the ADA, covered entities are required to keep medical documentation of applicants, employees, and

former employees confidential, with limited exceptions.⁹⁵ These ADA rules on keeping medical information confidential apply to all medical information, including medical information voluntarily provided as part of the reasonable accommodation process, and, therefore, include medical information obtained under the PWFA. Moreover, as explained in § 1636.5(f), an employer's intentional disclosure of medical information obtained through PWFA's reasonable accommodation process may violate the PWFA's prohibition on retaliation and/or coercion.

Section 1636.4 Prohibited Practices

42 U.S.C. 2000gg–1 sets out five possible violations involving the provision of reasonable accommodations.

1636.4(a) Failing To Provide Reasonable Accommodation

42 U.S.C. 2000gg–1(1) prohibits a covered entity from failing to make a reasonable accommodation for a qualified employee or applicant with a known limitation unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. This provision of the PWFA uses the same language as the ADA, and the rule likewise uses the language from the corresponding ADA regulation, replacing references to “individual with a disability” and similar terms with “employee with a known limitation” and similar terms.⁹⁶ Because 42 U.S.C. 2000gg–1(1) uses the same operative language as the ADA, the Commission proposes interpreting it in a similar manner.

This section is violated when a covered entity denies a reasonable accommodation to a qualified employee or applicant with a known limitation, absent undue hardship. As under the ADA, however, a covered entity does not violate 42 U.S.C. 2000gg–1(1) merely by refusing to engage in the interactive process; for a violation, there also must have been a reasonable accommodation that the employer could have provided absent undue hardship.

1636.4(a)(1) Unnecessary Delay in Responding to a Request for a Reasonable Accommodation

Given that pregnancy-related limitations are frequently temporary, a delay in providing an accommodation may mean that the period necessitating the accommodation could pass without action simply because of the delay.⁹⁷ As with the ADA, an

unnecessary delay in responding to a request for a reasonable accommodation may result in a violation of the PWFA if the delay results in a failure to provide a reasonable accommodation.⁹⁸ This can be true even if the reasonable accommodation is eventually provided, when the delay was unnecessary.

The factors set out in § 1636.4(a)(1) include the same factors that are used when determining if a delay in the provision of a reasonable accommodation violates the ADA,⁹⁹ and the regulation adds two new factors. First, in determining whether a delay in providing a reasonable accommodation was unnecessary, the question of whether providing the accommodation was simple or complex is a factor to be considered. There are certain modifications, set forth in § 1636.3(j)(4), that will virtually always be found to be reasonable accommodations that do not impose an undue hardship: (1) allowing a pregnant employee to carry and drink water, as needed; (2) allowing a pregnant employee additional restroom breaks; (3) allowing a pregnant employee whose work requires standing to sit and whose work requires sitting to stand; and (4) allowing a pregnant employee breaks to eat and drink, as needed. If there is a delay in providing these accommodations, it will virtually always be found to be unnecessary because of the presumption that these modifications will be reasonable accommodations that do not impose an undue hardship. Second, another factor to be considered when determining if a delay in providing a reasonable accommodation was unnecessary is whether the covered entity offered the employee or applicant an interim reasonable accommodation during the interactive process or while waiting for the covered entity's response. The provision of such an interim accommodation will decrease the likelihood that an unnecessary delay will be found. Under this factor, leave is not considered an appropriate interim reasonable accommodation if there is another interim reasonable accommodation that would not cause an undue hardship and would allow the employee to continue working, unless the employee selects or requests leave as an interim reasonable accommodation.¹⁰⁰

1636.4(a)(2) Employee or Applicant Declining a Reasonable Accommodation

The rule provides, as in the ADA, that if an employee declines a reasonable accommodation, and without it the employee cannot perform one or more essential functions of the position, then the employee will no longer be considered qualified.¹⁰¹ However, because the PWFA allows for the temporary suspension of one or more essential functions in certain circumstances, an employer must also consider whether one or more essential functions can be temporarily suspended pursuant to the PWFA before a determination is made

⁹² *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at n.33; *Enforcement Guidance on Disability-Related Inquiries*, *supra* note 89, at Question 11.

⁹³ See *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 6.

⁹⁴ See 42 U.S.C. 12111(5)(a) & 4 (ADA); 42 U.S.C. 2000gg(1)(B)(i) & (3)(A).

⁹⁵ 29 CFR 1630.14(b) & (c); *Enforcement Guidance on Disability-Related Inquiries*, *supra* note 89, at text accompanying nn.9–10; EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, at text accompanying n.6 (1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>.

⁹⁶ 42 U.S.C. 12112(b)(5)(A); 29 CFR 1630.9(a).

⁹⁷ See, e.g., *Long Over Due*, *supra* note 76, at 96 (statement of Rep. Suzanne Bonamici) (praising the PWFA because it would allow pregnant workers to get accommodations without waiting months or years; 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert Casey, Jr.) (noting that “pregnant workers need immediate relief to remain healthy and on the job”).

⁹⁸ *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at Question 10, n.38.

⁹⁹ *Id.*

¹⁰⁰ The restriction on using leave as an interim accommodation is based on 42 U.S.C. 2000gg–1(4).

¹⁰¹ See 29 CFR 1630.9(d).

pursuant to this section that the employee is not qualified.

1636.4(a)(3) Covered Entity Denying a Reasonable Accommodation Due to Lack of Supporting Documentation

If the request for documentation was not reasonable under the circumstances for the covered entity to determine whether to grant the accommodation, a covered entity cannot defend the denial of an accommodation based on the lack of documentation provided by the worker.

1636.4(a)(4) Choosing Among Possible Accommodations

Similar to the ADA, if there is more than one effective accommodation, the employee's or applicant's preference should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between potential reasonable accommodations and may choose, for example, the less expensive accommodation or the accommodation that is easier for it to provide, or generally the accommodation that imposes the least hardship.¹⁰² In the situation where the employer is choosing between reasonable accommodations and does not provide the accommodation that is the worker's preferred accommodation, the employer does not have to show that it is an undue hardship to provide the worker's preferred accommodation.

A covered entity's "ultimate discretion" to choose a reasonable accommodation is limited by certain other considerations. First, the accommodation must provide the individual with a known limitation with an equal employment opportunity, meaning an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a known limitation.¹⁰³ Thus, if there is more than one accommodation that does not impose an undue hardship, but one of them does not

provide the employee with an equal employment opportunity, the employer must choose the one that provides the worker with equal employment opportunity.¹⁰⁴ Depending on the facts, selecting the accommodation that does not provide equal opportunity could violate 42 U.S.C. 2000gg–1(1), 2000gg–1(5) or 2000gg–2(f).¹⁰⁵

Second, 42 U.S.C. 2000gg–1(2) prohibits a covered entity from requiring a qualified employee or applicant affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than a reasonable accommodation arrived at through the interactive process. Third, 42 U.S.C. 2000gg–1(4) prohibits a covered entity from requiring a qualified employee with a known limitation to take leave if there is a reasonable accommodation that will allow the employee to continue to work, absent undue hardship. Fourth, 42 U.S.C. 2000gg–1(5) prohibits a covered entity that is, for example, selecting from an array of accommodations, all of which are effective and do not impose an undue hardship, from picking one that results in the covered entity taking adverse action in terms, conditions, or privileges of employment of the employee or applicant. Fifth, 42 U.S.C. 2000gg–2(f) prohibits retaliation and coercion by covered entities.

Example 1636.4 #38/Failing to Provide an Accommodation: Yasmin's job requires her to travel to meet with clients. Because of her pregnancy, she is not able to travel for three months. She asks that she be allowed to conduct her client meetings via video conferencing. Although this accommodation would allow her to perform her essential job functions and does not impose an undue hardship, her employer reassigns her to smaller, local accounts. Being assigned only to these accounts limits Yasmin's ability to compete for promotions and bonuses as she had in the past.

This could be a violation of 42 U.S.C. 2000gg–1(1), because Yasmin is denied an equal opportunity to compete for promotions and is thus denied a reasonable accommodation. The employer's actions could also violate 42 U.S.C. 2000gg–1(5) and 42 U.S.C. 2000gg–2(f), or Title VII's prohibition against pregnancy discrimination.

1636.4(b) Requiring Employee or Applicant To Accept an Accommodation

42 U.S.C. 2000gg–1(2) prohibits a covered entity from requiring an employee or applicant to accept an accommodation other than any reasonable accommodation arrived at through the interactive process. This provision responds to concerns that some employers may unilaterally curtail what a pregnant worker can do in the mistaken belief that the worker needs some type of help.¹⁰⁶ Pursuant to this provision in the

PWFA and the rule, a covered entity cannot force an employee or applicant to accept an accommodation such as light duty or a temporary transfer, or delay of an examination that is part of the application process, without engaging in the interactive process, even if the covered entity's motivation is concern for the applicant's or employee's health or pregnancy.

42 U.S.C. 2000gg–1(2) does not require that the employee or applicant have a limitation, known or not; thus, a violation of 42 U.S.C. 2000gg–1(2) could occur if a covered entity notices that an employee or applicant is pregnant and decides, without engaging in the interactive process with the employee or applicant, that the employee or applicant needs a particular accommodation, and unilaterally requires the employee or applicant to accept that accommodation, even though the employee or applicant has not requested it and can perform the essential functions of the job without it. For example, this provision could be violated if an employment agency, without discussing the situation with the candidate, decided that a candidate recovering from a miscarriage needed an accommodation in the form of not being sent to certain jobs that the agency viewed as too physical, or if an employer decided to excuse a pregnant worker from overtime as an accommodation, without discussing it with them.¹⁰⁷

Additionally, a violation could occur if a covered entity receives a request for a reasonable accommodation and unilaterally imposes an accommodation that was not requested without engaging in the interactive process.

Example 1636.4 #39: Kia, a restaurant server, is pregnant. She asks for additional breaks during her shifts as her pregnancy progresses because she feels tired, and her feet are swelling. Her employer, without engaging in the interactive process with Kia, directs Kia to take host shifts for the remainder of her pregnancy, because she can sit for long periods during the shift. The employer has violated 42 U.S.C. 2000gg–1(2) and § 1636.4(b) of the rule, because it required Kia to accept an accommodation other than one arrived at through the interactive process, even if Kia's earnings did not decrease and her terms, conditions, and privileges of employment were not harmed.

www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities (describing situations in which employers incorrectly assume based on stereotypes that workers with caregiving responsibilities need a change to their workload or work environment); *see also* *UAW v. Johnson Controls*, 499 U.S. 187 (1991) (striking down employer's fetal protection policy that limited the opportunities of women); *Long Over Due*, *supra* note 76, at 192 (written answers of Dina Bakst, Co-Founder & Co-President, A Better Balance) (explaining that employers have been known to unilaterally cut a worker's hours or stop a worker from working late in an attempt to "help" the employee or because the employer felt sorry for the worker, even though an employee did not ask for such accommodation and did not need it).

¹⁰⁷ These actions also could violate Title VII's prohibition of disparate treatment based on sex. *See Enforcement Guidance on Pregnancy Discrimination*, *supra* note 11, at I.B.1.

¹⁰² 29 CFR part 1630 app. 1630.9.

¹⁰³ 29 CFR part 1630 app. 1630.9 (providing that a reasonable accommodation "should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability."); 29 CFR part 1630 app. 1630.2(o) (explaining that reassignment should be to a position with equivalent pay, status, etc., if possible); *see also* *Enforcement Guidance on Reasonable Accommodation*, *supra* note 4, at text following n.80 ("However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee."); *Cf.* EEOC, *Compliance Manual on Religious Discrimination*, 12–IV.3 (2021) (stating that in the context of a religious accommodation, an accommodation would not be reasonable "if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.") <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> [hereinafter *Religious Discrimination Compliance Manual*].

¹⁰⁴ *Enforcement Guidance on Reasonable Accommodations*, *supra* note 4, Question 9 Example B.

¹⁰⁵ Depending on the facts, this could be a violation of Title VII's prohibition on sex discrimination as well.

¹⁰⁶ *Cf.* EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* II.A.3 (2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities>.

The Commission recognizes that the relief in this situation may be limited to requiring the employer to engage in the interactive process with the employee.

By contrast, if the host shift does not provide Kia with equal terms, conditions, and privileges of employment (e.g., Kia's wages decrease or Kia no longer can earn tips), the covered entity also may have violated 42 U.S.C. 2000gg-1(1) (requiring reasonable accommodation absent undue hardship); 42 U.S.C. 2000gg-1(5) (prohibiting adverse action in terms, benefits, or privileges of employment); or 42 U.S.C. 2000gg-2(f) (prohibiting retaliation and coercion) (implemented in the rule at § 1636.4(a), (e) and § 1636.5(f)).

Finally, this provision also could be violated if a covered entity has a rule that requires all pregnant workers to stop a certain function—such as traveling—automatically, without any evidence that the particular worker is unable to perform that function.

1636.4(c) Denying Opportunities

42 U.S.C. 2000gg-1(3) prohibits a covered entity from denying employment opportunities to a qualified employee or applicant with a known limitation if the denial is based on the need of the covered entity to make reasonable accommodations to the known limitations of the employee or applicant. Thus, an employee's or applicant's known limitation and need for a reasonable accommodation cannot be part of the covered entity's decision regarding hiring, discharge, promotion, or other employment decisions, unless the reasonable accommodation would impose an undue hardship on the covered entity. This provision in the PWFA uses language similar to that of the ADA, and the rule likewise uses the language similar to the corresponding ADA regulation.¹⁰⁸ Additionally, the rule includes situations where the covered entity's decision is based on the future possibility that a reasonable accommodation will be needed, i.e., 42 U.S.C. 2000gg-1(3) prohibits a covered entity from making a decision based on its belief that an individual may need a reasonable accommodation in the future even if the individual has not asked for one. Thus, under the rule, this prohibition would include situations where a covered entity refuses to hire a pregnant applicant because the covered entity believes that the applicant will need leave to recover from childbirth, even if the covered entity does not know the exact amount of leave the applicant will require, or the applicant has not mentioned the need for leave as a reasonable accommodation to the covered entity. The Commission proposes this addition to ensure that workers are protected in situations where the employer's actions are based on avoiding the provision of a reasonable accommodation, even if one is not requested.

1636.4(d) Requiring Employee to Take Leave

Sometimes, when employees notify their employers that they are pregnant, employers place them on leave or direct them to use leave.¹⁰⁹ Workers on unpaid leave risk their

economic security, and workers who use their leave—whether paid or unpaid—prior to giving birth may not have leave when they need it to recover from childbirth.¹¹⁰

42 U.S.C. 2000gg-1(4) seeks to limit this practice. Under this provision, a covered entity may not require a qualified employee with a known limitation to take leave, whether paid or unpaid, if another reasonable accommodation can be provided, absent undue hardship. In other words, under the PWFA, an employee cannot be forced to take leave if another reasonable accommodation can be provided that would not impose an undue hardship and would allow the employee to continue to work.

Of course, this limitation does not prohibit the provision of leave as a reasonable accommodation if leave is the reasonable accommodation requested or selected by the employee, or if it is the only reasonable accommodation that does not cause an undue hardship. As explained above in the preamble's discussion of § 1636.3(h) and (i), both paid leave (accrued, short-term disability, or another employer benefit) and unpaid leave are potential reasonable accommodations under the PWFA. 42 U.S.C. 2000gg-1(4) and the rule merely prohibits an employer from requiring an employee to take leave if there is another reasonable accommodation that would not impose an undue hardship and would allow the employee to remain on the job.

1636.4(e) Adverse Action on Account of Requesting or Using a Reasonable Accommodation

The PWFA contains overlapping provisions that protect workers seeking or using reasonable accommodations. Importantly, nothing in the PWFA limits which provision a worker may use to protect their rights.

One of these provisions is 42 U.S.C. 2000gg-1(5), which prohibits a covered entity from “tak[ing] adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to pregnancy, childbirth, or related medical conditions of the employee.” 42 U.S.C. 2000gg-1(5) only applies to situations involving a qualified employee who asks for or uses a reasonable accommodation. The protections provided by 42 U.S.C. 2000gg-1(5) are likely to have significant overlap with 42 U.S.C. 2000gg-2(f), which prohibits retaliation. As explained in the discussion of 42 U.S.C. 2000gg-2(f) (§ 1636.5(f)), however, the PWFA's anti-retaliation provisions apply to a broader group of employees and actions than 42 U.S.C. 2000gg-1(5) does.

The term “take adverse action” in 42 U.S.C. 2000gg-1(5) is not taken from Title VII or the ADA. From the context of this provision and the basic dictionary definitions of the terms, this prohibits an employer from

taking a harmful action against an employee.¹¹¹

“Terms, conditions, or privileges of employment” is a term from Title VII, and the EEOC has interpreted it to encompass a wide range of activities or practices that occur in the workplace including, but not limited to, discriminatory work environment or atmosphere; duration of work (such as the length of an employment contract, hours of work, or attendance); work rules; job assignments and duties; and job advancement (such as training, support, and performance evaluations).¹¹² In addition, for the purposes of 42 U.S.C. 2000gg-1(5), “terms, conditions, and privileges of employment” can include hiring, discharge, or compensation.¹¹³

Thus, this provision may be violated when, for example, a covered entity grants a reasonable accommodation but then penalizes the employee.

Example 1636.4 #40: Nava took leave to recover from childbirth as a reasonable accommodation under the PWFA, and, as a result, failed to meet the sales quota for that quarter, which led to a negative performance appraisal. The negative appraisal could be a violation of 42 U.S.C. 2000gg-1(5) because Nava received it due to the use of a reasonable accommodation.

Also, an employer may violate this provision if there is more than one accommodation that does not impose an undue hardship, and the employer, after the interactive process, chooses the accommodation that causes an adverse action with respect to the terms, conditions, or privileges of employment, despite the existence of an alternative accommodation that would not do so.

Example 1636.4 #41: Ivy asks for additional bathroom breaks during work because of pregnancy, including during overtime shifts. After talking to Ivy, rather than providing the breaks during overtime, Ivy's supervisor decides Ivy should simply not work overtime, because during the overtime shift there are fewer employees, and the supervisor does not want to bother figuring out coverage for Ivy, although it would not be an undue hardship to do so. As a result, Ivy is not assigned overtime and loses earnings.

This conduct could violate 42 U.S.C. 2000gg-1(5) in two ways. First, Ivy's request for a reasonable accommodation led to an adverse action in terms, conditions, or privileges of employment. Second, Ivy's use of the accommodation of not working overtime led to a reduction in pay, i.e., an adverse action in terms, conditions, or

¹¹¹ *Adverse*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/adverse> (“hostile,” “unfavorable” and “harmful.”) (last visited June 13, 2023).

¹¹² 42 U.S.C. 2000e-2(a)(1); *Compliance Manual on Terms, Conditions, and Privileges of Employment*, supra note 40, at 613.1(a) (stating that the language is to be read in the broadest possible terms and providing a list of examples).

¹¹³ The PWFA's use of the phrase “terms, conditions, and privileges of employment” includes hiring, discharge, and compensation, which are also included within the scope of Title VII. 42 U.S.C. 2000e-2(a)(1).

¹⁰⁸ 42 U.S.C. 12112(b)(5)(B); 29 CFR 1630.9(b).

¹⁰⁹ H.R. Rep. No. 117–27, pt. 1, at 24.

¹¹⁰ *Long Over Due*, supra note 76, at 81 (statement of Rep. Jahana Hayes) (explaining that she kept working while pregnant in order to save her leave for after childbirth).

privileges of Ivy's employment, and there was an alternative accommodation (assigning coverage for Ivy as needed) that would not have done so.

Example 1636.4 #42: Leyla asks for telework due to morning sickness. Through the interactive process, it is determined that both telework and a later schedule combined with an hour rest break in the afternoon would allow Leyla to perform the essential functions of her job and would not impose an undue hardship. Although Leyla prefers telework, the employer would rather Leyla be in the office. It would not be a violation of 42 U.S.C. 2000gg–1(5) to offer Leyla the schedule change/rest break instead of telework as a reasonable accommodation.

The facts set out in examples 40 and 41 could also violate 42 U.S.C. 2000gg–1(1) and 2000gg–2(f).

As stated at the beginning of this section, the PWFA has overlapping protections for workers who request or use reasonable accommodations. The Commission emphasizes that qualified employees with known limitations may bring actions under any of these provisions.

Section 1636.5 Remedies and Enforcement

In crafting the PWFA remedies and enforcement section, Congress recognized the advisability of using the existing mechanisms in place for redress of other forms of employment discrimination. Thus, the enforcement and remedies sections of the PWFA mirror those of the statutes that provide its definitions of covered entity and employee (Title VII, GERA, and the Congressional Accountability Act).

1636.5(f) Prohibition Against Retaliation

The anti-retaliation provisions of the PWFA should be interpreted broadly, like those of Title VII and the ADA, to effectuate Congress's broad remedial purpose in enacting these laws.¹¹⁴ The protections of these provisions extend beyond qualified employees and applicants with known limitations and cover activity that may not yet have occurred, such as a circumstance in which a covered entity threatens an employee or applicant with termination if they file a charge or requires an employee or applicant to sign an agreement that prohibits such individual from filing a charge with the EEOC.¹¹⁵

¹¹⁴ EEOC, *Enforcement Guidance on Retaliation and Related Issues* II.A, A.1 (2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues> [hereinafter *Enforcement Guidance on Retaliation*] (describing the broad protection of the participation clause); *id.* at A.2, A.2.a (describing the broad protection of the opposition clause).

¹¹⁵ EEOC, *Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes* II (1997), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-non-waivable-employee-rights-under-eeoc-enforced-statutes> (“[P]romises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy. Agreements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.”).

1636.5(f)(1) Prohibition Against Retaliation

The regulation reiterates the statutory prohibition against retaliation from 42 U.S.C. 2000gg–2(f)(1), which uses the same language as Title VII and the ADA.¹¹⁶ Thus, the types of conduct prohibited and the standard for determining what constitutes retaliatory conduct under the PWFA are the same as they are under Title VII. Accordingly, this provision prohibits discrimination against individuals who engage in protected activity, which includes “‘participating’ in an EEO process or ‘opposing’ discrimination.”¹¹⁷ Title VII’s anti-retaliation provision is broad and protects an individual from conduct, whether related to employment or not, that a reasonable person would have found “‘materially adverse,’” meaning that the action “‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’”¹¹⁸ The same interpretation applies to the PWFA’s anti-retaliation provision.¹¹⁹

The rule contains five other provisions based on the statutory language and established anti-retaliation concepts under Title VII and the ADA.

First, like Title VII and the ADA, the rule protects employees, applicants, and former employees because 42 U.S.C. 2000gg–2(f)(1) protects “employees,” not “qualified employees with a known limitation.” Therefore, the rule states that an employee, applicant, or former employee need not establish that they have a known limitation or are qualified under the PWFA to bring a claim under 42 U.S.C. 2000gg–2(f)(1).¹²⁰ Second, the rule explains that, consistent with the ADA and Title VII, a request for a reasonable accommodation under the PWFA constitutes protected activity, and therefore retaliation for such a request is prohibited.¹²¹ Third, the rule provides that an employee, applicant, or former employee does not have to actually be deterred from exercising or enjoying rights under this section for the retaliation to be actionable.¹²² Fourth, as

¹¹⁶ 42 U.S.C. 2000e–3(a); 42 U.S.C. 12203(a).

¹¹⁷ *Enforcement Guidance on Retaliation*, *supra* note 114, at II.A; *see also id.* at II.A.1–A.2 (describing protected activity under Title VII’s anti-retaliation clause).

¹¹⁸ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal citations and quotations omitted).

¹¹⁹ All retaliatory conduct under Title VII (and the ADA), including retaliation that takes the form of harassment, is evaluated under the legal standard for retaliation. *See Enforcement Guidance on Retaliation*, *supra* note 114, at II.B.3.

¹²⁰ *See Enforcement Guidance on Retaliation*, *supra* note 114, at III (recognizing that under the ADA, individuals need not establish that they are covered under the statute’s substantive discrimination provisions in order to be protected against retaliation); *id.* at II.A.3; *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that Title VII protects former employees from retaliation).

¹²¹ *Enforcement Guidance on Retaliation*, *supra* note 114, at II.A.2.e and Example 10.

¹²² *Id.* at II.B.1, B.2 (stating that the retaliation “‘standard can be satisfied even if the individual was not in fact deterred’” and that “[i]f the employer’s action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it falls short of its goal”).

explained in the discussion of the documentation that can be required in support of a request for reasonable accommodation, the rule notes that it may violate this section for a covered entity to require documentation when it is not reasonable under the circumstances to determine whether to provide the accommodation. Finally, the rule explains that when an employee or applicant provides sufficient documentation to describe the relevant limitation and need for accommodation, continued efforts on the covered entity’s part to obtain documentation violates the retaliation prohibition unless the covered entity has a good faith belief that the submitted documentation is insufficient.

1636.5(f)(2) Prohibition Against Coercion

The PWFA’s anti-coercion provision uses the same language as the ADA’s interference provision, with one minor variation in the title of the section.¹²³ Similar to the ADA, the scope of the PWFA coercion provision is broader than the anti-retaliation provision; it reaches those instances “‘when conduct does not meet the ‘materially adverse’ standard required for retaliation.’”¹²⁴

The rule follows the language of 42 U.S.C. 2000gg–2(f)(2) and protects “individuals,” not “qualified employees with a known limitation under the PWFA.” Thus, the rule specifies that, consistent with the ADA’s interference provisions, the individual need not be an employee, applicant, or former employee and need not establish that they have a known limitation or that they are qualified (as those terms are defined in the PWFA) to bring a claim for coercion under the PWFA.¹²⁵

The purpose of this provision is to ensure that workers are free to avail themselves of the protections of the statute. Thus, consistent with the ADA regulations for the same provision, the rule adds “harass” to the list of prohibitions, as harassment may be a method to coerce a worker into not availing themselves of their PWFA rights.¹²⁶ The rule also states that an individual does not, in fact, have to be deterred from exercising or enjoying rights under this section for the coercion to be actionable.¹²⁷

The rule contains three examples of actions that could be violations. First, the rule states that it prohibits coercion, intimidation, threats, harassment, or interference because an individual, including an employee, applicant, or former employee, has asked for a reasonable accommodation under the PWFA.

Second, the rule provides that coercion could include situations in which the

¹²³ The ADA uses the term “Interference, coercion, or intimidation” to preface the prohibition against interference (42 U.S.C. 12203(b)), whereas the PWFA uses “Prohibition against coercion.” The language of the prohibitions is otherwise identical.

¹²⁴ *Enforcement Guidance on Retaliation*, *supra* note 114, at III.

¹²⁵ *Id.*

¹²⁶ 29 CFR 1630.12(b).

¹²⁷ *Enforcement Guidance on Retaliation*, *supra* note 114, at II.B.1–B.2 (noting that actions can be challenged as retaliatory even if the person was not deterred from engaging in protected activity).

covered entity requires documentation in support of a request for reasonable accommodation when it is not reasonable under the circumstances to determine whether to provide the accommodation.

Third, the rule states that a covered entity that has sufficient information regarding the known limitation and the need for reasonable accommodation but continues to require additional information or documentation violates the anti-coercion provision unless the covered entity has a good faith belief that the documentation is insufficient.

Some other examples of coercion include:

- coercing an individual to relinquish or forgo an accommodation to which they are otherwise entitled;
- intimidating an applicant from requesting an accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- issuing a policy or requirement that purports to limit an employee's or applicant's rights to invoke PWFA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
- interfering with a former employee's right to file a PWFA lawsuit against a former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because they assisted a coworker in requesting a reasonable accommodation.¹²⁸

Examples of Retaliation and/or Coercion

Actions that the courts or the Commission have previously determined may qualify as retaliation or coercion under Title VII or the ADA may qualify under the PWFA as well. Depending on the facts, a covered entity's retaliatory action for activity protected under the PWFA may violate 42 U.S.C. 2000gg-1(5), 2000gg-2(f)(1) and/or 2000gg-2(f)(2), as implemented by §§ 1636.4(e) and 1636.5(f). The following examples would likely violate 42 U.S.C. 2000gg-2(f) and may also violate 42 U.S.C. 2000gg-1(5).

Example 1636.5 #43: Perrin requests a stool due to pregnancy. Lucy, Perrin's supervisor, denies Perrin's request. The corporate human resources department instructs Lucy to grant the request because there is no undue hardship. Angry about being overruled, Lucy thereafter gives Perrin an unjustified poor performance rating and denies Perrin's request to attend training that Lucy approves for Perrin's coworkers.

Example 1636.5 #44: Marisol files an EEOC charge after Cyrus, her supervisor, refused to provide her with the reasonable accommodation of help with lifting after her cesarean section. Marisol also alleges that after she asked for the accommodation, Cyrus asked two coworkers to conduct surveillance on Marisol, including watching her at work, noting with whom she associated in the workplace, suggesting to other employees that they should avoid her, and reporting her breaks to Cyrus.

Example 1636.5 #45: Mara provides her employer with a note from her health care

provider explaining that she is pregnant, has morning sickness, and needs to start work later on certain days. Mara's supervisor requires that Mara confirm the pregnancy through an ultrasound, even though the employer already has sufficient information regarding Mara's pregnancy.

Example 1636.5 #46: During an interview at an employment agency, Arden tells the human resources staffer, Stanley, that Arden is dealing with complications from their recent childbirth and may need time off for doctor's appointments during their first few weeks at work. Stanley counsels Arden that needing leave so soon after starting will be a "black mark" on their application.

Example 1636.5 #47: Merritt, a client of an employment agency, is discharged from an employer after requesting an accommodation under the PWFA. The employment agency refuses to refer Merritt to other employers, telling Merritt that they only refer workers who will not cause any trouble.

Example 1636.5 #48: Jessie, a factory union steward, ensures that workers know about their rights under the PWFA and encourages workers with known limitations to ask for reasonable accommodations. Jessie helps employees navigate the reasonable accommodation process and provides suggestions of possible reasonable accommodations. Factory supervisors are annoyed at the number of PWFA reasonable accommodation requests and write up Jessie for petty safety violations and other actions that had not been worthy of discipline before.

Example 1636.5 #49: While she was pregnant, Laila requested and received the reasonable accommodation of a temporary suspension of the essential function of moving heavy boxes and placement in the light duty program. After giving birth, Laila tells her employer that she has decided to resign and stay home for a year. Her employer responds by saying that if Laila follows through and resigns now, the employer will have no choice but to give her a negative reference because Laila demanded an accommodation but did not have the loyalty to come back after having her baby.

Example 1636.5 #50: Robbie, a retail worker, is visibly pregnant and would like to sit while working at the cash register. Robbie explains the situation to the manager, who requires Robbie to produce a signed doctor's note saying that Robbie is pregnant and needs to sit. Because Robbie is obviously pregnant, has confirmed the pregnancy, and requests one of the simple modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship, the covered entity is not permitted to require additional medical documentation.

Protection of Confidential Medical Information

As explained in the discussion of § 1636.3(l) *Documentation*, the established ADA rules requiring covered entities to keep medical information of applicants, employees, and former employees confidential apply to medical information obtained in connection with a reasonable

accommodation request under the PWFA.¹²⁹ Medical information obtained by the employer in the process of a worker seeking a reasonable accommodation under the PWFA must be protected as set out in the ADA and failing to do so would violate the ADA. For example, the fact that someone is pregnant or has recently been pregnant, is medical information about that person, as is the fact that they have a medical condition related to pregnancy or childbirth. Thus, disclosing that someone is pregnant, has recently been pregnant, or has a related medical condition violates the ADA, unless an exception applies, as does disclosing that someone is receiving or has requested an accommodation under the PWFA or has limitations for which they requested or are receiving a reasonable accommodation under the PWFA (because revealing this information discloses that the person is pregnant, has recently been pregnant, or has a related medical condition).¹³⁰

In addition, releasing medical information, threatening to release medical information, or requiring an employee or applicant to share their medical information with individuals who have no role in processing a request for reasonable accommodation may violate the PWFA's retaliation and coercion provisions.¹³¹

Section 1636.7 Relationship to Other Laws

The PWFA at 42 U.S.C. 2000gg-5 and this section of the regulation address the PWFA's relationship to other Federal, State, and local laws.

1636.7(a) Relationship to Other Laws Generally

42 U.S.C. 2000gg-5(a)(1) addresses the relationship of the PWFA to other Federal, State, and local laws governing protections for individuals affected by pregnancy, childbirth, or related medical conditions and makes clear that the PWFA does not limit the rights of individuals affected by pregnancy, childbirth, or related medical conditions under a Federal, State, or local law that provides greater or equal protection. It is equally true that Federal, State, or local laws that provide less protection for individuals affected by pregnancy, childbirth, or related medical conditions than the PWFA do not limit the rights provided by the PWFA. The regulation reiterates the statutory provision addressing the relationship of the PWFA to other Federal, State, and local laws governing protections for individuals affected by pregnancy, childbirth, or related medical conditions.

Thirty States and five localities have laws that provide accommodations for pregnant

¹²⁹ *Enforcement Guidance on Disability-Related Inquiries*, supra note 89, at text accompanying n.9; EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, at text accompanying n.6 and nn.23-25 (1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>.

¹³⁰ 29 CFR 1630.14(c); *Enforcement Guidance on Disability-Related Inquiries*, supra note 89, at A.

¹³¹ See § 1636.5(f)(1) and (2).

¹²⁸ *Id.* at III.

workers.¹³² Federal laws, including, but not limited to, Title VII, the ADA, the FMLA, the Rehabilitation Act, and the PUMP Act, also provide protections for certain workers affected by pregnancy, childbirth, or related medical conditions.¹³³ All of the protections regarding discrimination based on pregnancy, childbirth, or related medical conditions in these laws are unaffected by the PWFA. Additionally, if there are greater protections in other laws, those would apply. For example, the State of Washington's Healthy Starts Act provides that certain accommodations, including lifting restrictions of 17 pounds or more, cannot be the subject of an undue hardship analysis.¹³⁴ If a worker in Washington is seeking a lifting restriction as a reasonable accommodation for a pregnancy-related reason under the Healthy Starts Act, an employer in Washington cannot argue that a lifting restriction of 20 pounds is an undue hardship, even though that defense could be raised if the claim were brought under the PWFA.

Furthermore, employees and applicants may bring claims under multiple State or Federal laws. Thus, a pregnant applicant denied a position because they are pregnant and will need leave for recovery from childbirth may bring a claim under both Title VII for sex discrimination and the PWFA for the denial of an employment opportunity based on the applicant's need for an accommodation. Similarly, a worker with postpartum depression who, for that reason, is denied an equal employment opportunity may bring a claim under both the PWFA and the ADA, and possibly Title VII.

Under Title VII, employees affected by pregnancy, childbirth, or related medical conditions may be able to receive accommodations if they can identify a comparator "similar in their ability or inability to work."¹³⁵ Under the PWFA, employees affected by pregnancy, childbirth, or related medical conditions will be able to seek reasonable accommodations whether or not other employees have those accommodations and whether or not the affected employees are similar in their ability or inability to work as employees not so affected. Additionally, if the covered entity offers a neutral reason or policy to explain why employees affected by pregnancy, childbirth or related medical conditions cannot access a specific benefit, the

employee with a known limitation under the PWFA still may ask for a waiver of that policy as a reasonable accommodation. Under the PWFA, the employer must grant the waiver, or another reasonable accommodation, absent undue hardship. If, for example, an employer denies a pregnant worker's request to join its light duty program as a reasonable accommodation, arguing that the program is for workers with on-the-job injuries, it may be difficult for the employer to prove that allowing the worker with a known limitation under the PWFA to use that program is an undue hardship. Finally, employers in this situation should remember that if there are others to whom the benefit is extended, the *Young v. United Parcel Serv., Inc.*, Court stated that "[the employer's] reason [for refusing to accommodate a pregnant employee] normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates."¹³⁶ Thus, if the undue hardship defense of the employer under the PWFA is based solely on cost or convenience, that defense could, under certain fact patterns, lead to liability under Title VII.

42 U.S.C. 2000gg-5(a)(2) makes clear that an employer-sponsored health plan is not required under the PWFA to pay for or cover any item, procedure, or treatment and that the PWFA does not affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement. For example, nothing in the PWFA requires or forbids an employer to pay for health insurance benefits for an abortion.

1636.7(b) Rule of Construction

42 U.S.C. 2000gg-5(b) provides a "[r]ule of construction"¹³⁷ stating that the law is "subject to the applicability to religious employment" set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a). The relevant portion of section 702(a) provides that "[Title VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."¹³⁸

As with assertions of section 702(a) in Title VII matters, when 42 U.S.C. 2000gg-5(b) is asserted by a respondent employer, the

Commission will consider the application of the provision on a case-by-case basis.¹³⁹

Section 1636.8 Severability

Following Congress's rule for the statute, in places where the regulation uses the same language as the statute, if any of those identical regulatory provisions, or the application of those provisions to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision of the regulation to other persons or circumstances shall not be affected. For example, if § 1636.4(b) of the regulation is held to be invalid or unconstitutional, it is the intent of the Commission that the remainder of the regulation shall not be affected.

In other places, where the regulation provides additional guidance to carry out the PWFA, including examples of reasonable accommodations, following Congress's intent regarding the severability of the provisions of the statute, it is the Commission's intent that if any of those regulatory provisions or the application of those provisions to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision of the regulation to other persons or circumstances shall not be affected. For example, if § 1636.3(j)(4) is held to be invalid or unconstitutional, it is the Commission's intent that the remainder of the regulation shall not be affected.

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¹³⁹ The EEOC's procedures ensure that employers have an opportunity to raise religious defenses and that any religious defense to a charge of discrimination is carefully considered. See *Religious Discrimination Compliance Manual*, *supra* note 103, at 12-1(C)(3) (discussing the "nuanced balancing" required and instructing investigators to "take great care"); 29 CFR 1601 *et seq.* (setting out the EEOC's charge procedures). The EEOC recognizes employers' valid religious defenses and dismisses charges at the administrative stage accordingly. See *Newsome v. EEOC*, 301 F.3d 227, 229-230 (5th Cir. 2002) (*per curiam*) (EEOC dismissed a charge where the employer offered evidence it fell under the religious organization exemption). The EEOC has no authority to impose penalties on private employers, see *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 363 (1977); thus, if the EEOC rejects a private employer's asserted religious defense, the EEOC cannot force the employer to resolve the charge or pay any type of damages. To obtain any type of relief if the EEOC is unsuccessful at obtaining voluntary compliance, the EEOC would have to bring a case in Federal court, where the validity of the employer's religious defense would be determined.

¹³² U.S. Dep't of Lab., *Employment Protections for Workers Who Are Pregnant or Nursing*, <https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections> (last visited Apr. 4, 2023).

¹³³ For an explanation of the interaction between the FMLA and the ADA, see 29 CFR 825.702.

¹³⁴ Wash. Rev. Code 43.10.005(1)(d).

¹³⁵ 42 U.S.C. 2000e(k).

¹³⁶ *Young*, 575 U.S. at 229.

¹³⁷ 42 U.S.C. 2000gg-5(b) (heading).

¹³⁸ The PWFA makes no mention of section 703(e)(2) of the Civil Rights Act of 1964, which provides a second statutory exemption for religious educational institutions in certain circumstances.



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7 CFR Part 354

User Fees for Agricultural Quarantine and Inspection Services; Proposed Rules

DEPARTMENT OF AGRICULTURE**Animal and Plant Health Inspection Service****7 CFR Part 354****[Docket No. APHIS–2022–0023]****RIN 0579–AE71****User Fees for Agricultural Quarantine and Inspection Services****AGENCY:** Animal and Plant Health Inspection Service, USDA.**ACTION:** Proposed rule.

SUMMARY: We are proposing to update and amend the user fee regulations associated with the agricultural quarantine and inspection (AQI) program. Specifically, we propose to adjust the fees for certain AQI services that are provided in connection with certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international passengers arriving at ports in the customs territory of the United States; adjust the caps on prepaid fees associated with commercial trucks and commercial railroad cars; remove certain fee exemptions that are no longer justifiable based upon pathway analyses of risk; and restructure the treatment monitoring fee. We would also revise requirements pertaining to remittances and statements. Specifically, we would require monthly rather than quarterly remittances for the commercial aircraft fee, international air passenger fee, and international cruise passenger fee to make our revenue stream more stable, clarify our requirements, and provide for electronic payments and statements. We would also include in the regulations information on agents responsible for ensuring compliance with paying the user fees and the requirement for entities to notify APHIS in the event they have a change in personnel responsible for fee payments. These proposed changes are necessary to recover the costs of the current level of AQI activity, to account for actual and projected increases in the cost of doing business, to increase fee payer accountability, and to more accurately align fees with the costs associated with each fee service.

DATES: We will consider all comments that we receive on or before October 10, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to www.regulations.gov. Enter APHIS–2022–0023 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–2022–0023, 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 *Regulations.gov* 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: Mr. George Balady, Senior Regulatory Policy Specialist, PPQ, APHIS, 4700 River Road Unit 36, Riverdale, MD 20737; (301) 851–2338; aqi.user.fees@usda.gov.

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Legal Authority and Overview of Program Activities**Background**

Section 2509(a) of the Food, Agriculture, Conservation, and Trade (FACT) Act of 1990 (21 U.S.C. 136a) authorizes the Animal and Plant Health Inspection Service (APHIS) to prescribe and collect user fees for agricultural quarantine and inspection (AQI) services. Congress amended the FACT Act on April 4, 1996, and May 13, 2002.

The FACT Act, as amended, authorizes APHIS to collect user fees for AQI services provided in connection with the arrival, at a port in the customs territory of the United States, of certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international passengers. According to the FACT Act, as amended, these user fees should be “sufficient” “to cover the cost of”:

- Providing AQI services “in connection with the arrival at a port in the customs territory of the United States” of the conveyances and the passengers listed above;
- Providing “preclearance or preinspection at a site outside the customs territory of the United States” to the conveyances and the passengers listed above; and

Administering 21 U.S.C. 136a, concerning the “collection of fees for inspection services.”

In addition, the FACT Act, as amended, contains the following requirements:

- The amount of the fees shall be “commensurate with the costs of [AQI] services with respect to the class of persons or entities paying the fees.”
- The cost of AQI services “with respect to passengers as a class” shall “include the cost of related inspections of the aircraft or other vehicle.”

The user fees for the AQI activities described above are contained in 7 CFR 354.3, “User fees for certain international services.” APHIS’ regulations regarding user fees relating to imports and exports, as well as overtime services, are found in 7 CFR part 354.

AQI services funded by these user fees and covered in the regulations in part 354 include inspections of arriving commercial maritime vessels, commercial trucks, commercial railroad

cars, commercial aircraft, international air passengers, and international sea (cruise) passengers; as well as monitoring phytosanitary treatment and treatment-related activities. Services related to conveyances and cargo include issuance of import permits, review of manifests and other documentation, as well as inspections of the cargo, conveyances, and packaging material for prohibited imports and contaminants, pests, or invasive species. Passenger services include prescreening and inspection of passenger baggage and personal belongings for prohibited agricultural imports. We also charge a user fee for monitoring prescribed treatments that are performed on some agricultural goods as a condition of entry or when a pest of quarantine significance (*i.e.*, a plant pest that should not be allowed to be introduced into or disseminated within the United States) is detected during a port-of-entry inspection.

APHIS and the Department of Homeland Security's (DHS) U.S. Customs and Border Protection (CBP) work together to carry out these AQI program activities and thereby protect U.S. agriculture and natural resources by intercepting foreign animal and plant pests and diseases (such as African swine fever or ASF, foot and mouth disease, exotic fruit flies, and *Ralstonia* race 3 biovar 2) before they can enter the country. APHIS and CBP perform different functions that complement each other. For example, CBP's AQI activities include inspecting passengers, passenger baggage, personal belongings, conveyances, shipments, and monitoring regulatory compliance at United States ports of entry; CBP also preclears passengers at certain ports of departure outside the United States. APHIS performs pest identification for shipments across all modes (air cargo, maritime cargo, truck cargo, etc.), inspection of plants for planting shipments, and monitoring of phytosanitary treatments and related activities. CBP's agricultural inspection and safeguarding activities generate the majority of AQI costs covered by the fees, approximately 70 percent of program costs per year. Pursuant to § 354.3, APHIS collects AQI user fees for commercial railroad cars, commercial aircraft, international air and cruise (sea) passengers, and treatment monitoring directly. Also pursuant to § 354.3, CBP collects AQI user fees for commercial vessels, commercial trucks, and commercial truck transponders on APHIS' behalf, and then transfers the funds to APHIS. APHIS periodically transfers that portion of the funds

allocated for CBP in accordance with § 421 of the Homeland Security Act of 2002 (6 U.S.C. 231 and the Memorandum of Agreement effectuating the transfer of functions.¹)

Inspection of commercial aircraft and their passengers account for the preponderance of fees remitted. In fiscal year (FY) 2017 to FY 2019, commercial aircraft collections averaged over 23 percent of total collections annually, or nearly \$188M. Also, from FY 2017 to FY 2019, commercial aircraft passenger collections averaged over 61 percent of total collections annually, or nearly \$486M. Collections from the air sector (commercial aircraft and commercial air passenger) are a combined annual average of over 85 percent of total AQI collections. If this rule is adopted as proposed, APHIS estimates that by FY 2028 the combined air sector would account for approximately 68 percent of total collections, assuming future arrivals match average arrivals for FY 2017 through FY 2019. (For this reason, we propose a change in air collections to be monthly rather than quarterly, as discussed below.)

Need for the Proposed Rule

In a final rule published in the **Federal Register** on October 29, 2015 (80 FR 66748–66779, Docket No. APHIS–2013–0021),² we updated and amended the user fee regulations in § 354.3 to improve AQI service cost recovery and to more accurately align fees with the costs associated with each fee service. Significant changes included the following:

- Adding new fee categories for international cruise passengers and monitoring of phytosanitary treatments;
- Adjusting existing fees charged for certain agricultural quarantine and inspection services that are provided in connection with certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air passengers arriving at ports in the customs territory of the United States; and
- Adjusting the user fee cap associated with commercial trucks and adjusting or removing the user fee cap associated with commercial railroad cars.

For FYs 2017 through 2019, the AQI program ran an average deficit of over \$166 million annually. For a number of reasons, as discussed below, the fees

established in the 2015 rulemaking, which were based on cost data from FY 2010 through FY 2012, no longer reflect actual program costs. This proposed rule uses cost data from FY 2017 through FY 2019 because these years reflect costs from the most recent period of normal (pre-pandemic) operations, and most closely approximate the costs in a return to normal operations (post-pandemic) AQI program environment.

For the 2015 rulemaking, APHIS used an Activity-Based Costing (ABC) Model to analyze the costs associated with the program. ABC is a cost accounting method used to calculate the total costs of a service or product. It differs from Financial Accounting, which is the preparation of financial reports for stakeholders or users who are interested in the financial position of an agency or program. ABC translates costs from “what we pay for” to “what we do.” This process entails assigning both direct and indirect costs to an activity (such as managing the import permitting process), associating those activities with outputs (such as a Maritime Cargo Inspection), and using the cost of outputs to calculate fee levels (such as the Commercial Vessel Fee) for specific user classes.

In developing this proposed rule, we re-examined the ABC Model cost allocations to ensure costs accurately reflect workload. We ensured that all costs flow through the model, that the relationships between objects in the model were accurate, and that the allocation of costs followed standard cost accounting methodologies. The re-examination also revealed that the 2015 model is not forward looking; that is, it does not factor in costs required to address new program and staffing needs. Emerging issues that are not accounted for in the 2015 model include the need for additional inspection resources at ports of entry to mitigate emerging risks,³ such as ASF at airports, the expanding demand for treatment monitoring services, such as monitoring

³ For example, on July 28, 2021, the Dominican Republic informed APHIS that samples obtained from swine in the country had tested positive for ASF, a highly contagious disease of wild and domestic swine that can spread rapidly in swine populations with extremely high rates of morbidity and mortality. Subsequently, on September 20 of that year, the Chief Veterinary Officer in Haiti reported a positive case of ASF to the World Organization for Animal Health (WOAH). Because of Hispaniola's proximity to Puerto Rico and the U.S. Virgin Islands, and the frequency of trade in pork and pork products between Hispaniola and these territories, APHIS enhanced monitoring and surveillance activities for ASF in Puerto Rico and the U.S. Virgin Islands as a result of these detections, and submitted a dossier to WOAH to finalize a new ASF protection zone in Puerto Rico and the U.S. Virgin Islands.

¹ The Memorandum of Agreement can be viewed on the APHIS website at <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/import-information/moa>.

² To view the final rule, go to www.regulations.gov and enter APHIS–2013–0021 in the Search field.

the restacking of cargo in overloaded cargo containers, and capital planning. In developing the model for this proposed rule, the 2023 full-time equivalent (FTE) model, APHIS incorporated cost objects for additional staffing to address these workload increases, and additional program costs related to capital planning; New and upgraded facilities, new equipment, and outreach. This proposed rule would adjust AQI user fees to reflect the updates and additions to the cost model including updated cost data, changes in cost allocation methodology, additional personnel to address emerging risks, and capital planning costs.

Further, due to its retrospective nature, ABC modeling fails to account adequately for inflation unless inflation factors are applied to it. For example, the 2015 rulemaking used source data from FY 2010 through FY 2012 adjusted to FY 2016 dollars [80 FR 66753]; however, no adjustment was made for inflation beyond the beginning of FY 2016 (October 2015). As a result, the 2015 fee rates using FY 2016 dollars are still in effect after 7 years (FY 2023), meaning, as of September 2022 (the end of FY 2022 for APHIS), the fees are approximately 24.79 percent⁴ below the levels necessary to meet today's costs based on inflation alone. As discussed in the regulatory impact analysis (RIA) accompanying this proposed rule,⁵ we determined that costs would be more accurately recovered if the ABC Model cost data were adjusted for inflation based on the Chained Consumer Price Index for all Urban Consumers (C-CPI-U).

Our ability to recover the full costs of administering the AQI program has also been limited by exemptions and fee caps. Under the existing regulations, commercial aircraft with 64 or fewer seats meeting certain conditions have been exempted from the fees listed in § 354.3(e), and barges operating between the United States and Canada meeting certain conditions have been exempted from those listed in § 354.3(b). The original basis for both of these exemptions, as discussed in earlier rulemakings, was that they posed little or no sanitary/phytosanitary risk, and therefore did not require inspection and would not incur costs to the program (see 58 FR 14305–14307, Docket No. 92–088–2⁶ and 75 FR 10634–10644, Docket

No. APHIS–2006–0096⁷). However, recent findings from two APHIS pathway analyses (“Pathway Analysis for Commercial Aircraft with 64 or Fewer Seats” and “Pathway Analysis for Barges from Canada”),⁸ indicate that today commercial aircraft with 64 or fewer seats do serve as a pathway for the introduction of quarantine pests, and that barges from Canada that meet the current user fee exemption do not pose less of a phytosanitary risk than barges travelling from other countries or other vessel types travelling from Canada. The analyses accordingly conclude that both such aircrafts and such barges merit inspection that incurs AQI program costs. We discuss the analyses at greater length later in this document, under the headings “Commercial Aircraft” and “Commercial Vessels.”

Fee caps for commercial trucks and railroad car user fees have also limited our ability to cover costs. Under current § 354.3(c)(3)(i) and (d)(3)(i), respectively, operators of commercial trucks and commercial railroad cars have the option to prepay AQI user fees for a calendar year. A prepayment equivalent to 40 times an individual crossing allows a commercial truck to make an unlimited number of crossings in a calendar year. For commercial railroad cars, the prepayment amount for unlimited crossings in a calendar year is capped at 20 times the fee for an individual crossing. We have determined that these prepayment multiples should be increased, as they are no longer sufficient to recover program costs and fail to account for increased usage of transponders and prepayment options.⁹ This determination is discussed at length below, under the section heading labeled “Commercial Trucks.”

Without adequate funding, the AQI program is likely to fail to keep pace with growing demand and become less effective, leading to more frequent and severe agricultural pest and disease outbreaks in the United States. Such outbreaks can be costly. To cite one example, APHIS has spent more than \$1.3 billion on the eradication and quarantine of wood, tree, and forest

pests such as Asian Longhorn Beetle, Emerald Ash Borer, and Spotted Lantern Fly to protect U.S. forests and the U.S. forest products industry valued at more than \$350 billion in manufacturing production annually.¹⁰ Additionally, such outbreaks may cause declines in U.S. domestic production of agricultural products (according to the Census of Agriculture 2017, the market value of U.S. agricultural products sold was \$388.5 billion¹¹) and harm natural resources. Trading partners may question the sanitary/phytosanitary integrity of U.S. agricultural products, which would either reduce the demand for or value of U.S. agricultural exports, which were valued at \$196.4 billion in fiscal year 2022.¹² Further, inadequate funding would prevent the AQI program from being able to adapt to meet emerging program needs as discussed above, resulting in additional challenges in effectively clearing cargo and passengers and mitigating the risk of costly pest and disease outbreaks impacting U.S. agricultural production and exports, and natural resources. The AQI program makes the safe importation of agricultural commodities possible. Such imports accounted for \$194.0 billion in economic activity in FY 2021.¹³

We are therefore proposing to update and amend the user fee regulations to align the fees with the current needs of the AQI program. Specifically, we propose to adjust the fees for certain AQI services that are provided in connection with certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air and sea passengers arriving at ports in the customs territory of the United States; adjust prepaid fee caps associated with commercial trucks and commercial railroad cars; remove certain fee exemptions that are no longer justifiable; and restructure the treatment monitoring fee. We would also revise the payment sections in order to recover the full cost of providing these AQI services, commensurate with the class of persons or entities paying the fees.

Updates to the ABC Model and Cost Calculations

In updating our cost modeling, APHIS contracted in 2021 with the accounting

⁴ https://www.bls.gov/data/inflation_calculator.htm using the period October 2015 to September 2022.

⁵ To view these and other supporting documents, go to www.regulations.gov and enter APHIS–2022–0023 in the Search field.

⁶ FR–1993–03–17.pdf (govinfo.gov), published in the *Federal Register* on May 24, 1995.

⁷ To view the rule, the supporting documents, and the comments we received, go to www.regulations.gov and enter APHIS–2006–0096 in the Search field.

⁸ These analyses are available with this proposed rule. See footnote 5 for instructions on how to view these and other supporting documents on Regulations.gov.

⁹ See supporting document “Analysis of AQI User Fees: Truck Transponder and Prepaid Railroad Car Multiples Using Fee Collections and Arrival Data.” See footnote 5 for instructions on how to view this and other supporting documents on Regulations.gov.

¹⁰ <https://www.afandpa.org/statistics-resources/our-economic-impact>.

¹¹ https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf, pg. 17.

¹² <https://www.ers.usda.gov/webdocs/outlooks/105919/aes-123.pdf?v=5132.7>.

¹³ *Ibid*.

firm Grant Thornton¹⁴ to review the data and the methodology in the ABC Model. Grant Thornton's assessment of the APHIS AQI model included a thorough review of every cost object, driver, assignment, and value. APHIS prepared two different versions of the ABC Model, using APHIS and CBP data sources, and Grant Thornton compared them. One version of the model used the cost allocation methodology from the 2015 rulemaking (direct trace and number of/workload), and the second used the proposed cost allocation methodology (direct trace, number of/workload, full-time equivalent (FTE) hours) for comparison purposes. The intent was to identify and resolve any inconsistencies between versions and compare the impact of the two different methodologies on cost allocation, as discussed further below.

As a result of its review, Grant Thornton recommended options to more accurately allocate costs based on the activity and the output.¹⁵ In the 2015 rulemaking, APHIS used two methods for allocating costs: Direct trace, which directly assigns costs to outputs; and "number of" (or workload), which allocated costs based upon the number of inspection units (a passenger, a vessel, an aircraft, etc.). Grant Thornton recommended that APHIS add a third allocation method for allocating certain costs: FTE hours spent conducting an output (*i.e.*, such as an inspection). As noted above, APHIS prepared two versions of the model for each of the three base years—one using the methodology from the 2015 rulemaking (direct trace and number of/workload) and one using the proposed methodology (direct trace, number of/workload, FTE hours) for comparison purposes. As part of the comparison, Grant Thornton reviewed the underlying CBP FTE allocation methodology and provided recommended changes for CBP support activities (supervision, data entry, etc.) that should be allocated across the direct AQI activities. APHIS reviewed and accepted the recommendations and incorporated those changes into a new FTE data source file and the AQI cost models. Concurring with Grant

Thornton's recommendation, APHIS is employing the model with the new methodology (direct trace, number of/workload, FTE hours) for this rulemaking.

Several agencies charge user fees under a variety of authorities, and use different methodologies to meet their statutory mandates. For example, CBP's Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) fees are set as prescribed by statute with adjustments for inflation.¹⁶ The U.S. Patent and Trademark Office uses an activity-based costing methodology.¹⁷ Federal Maritime Commission uses a costing methodology under the Independent Offices Appropriation Act of 1952 (31 U.S.C. 9701) in accordance with OMB Circular A-76, Performance of Commercial Activities (revised May 29, 2003).¹⁸ USDA's Agricultural Marketing Service develops fees through a series of equations set by rulemaking,²⁰ and a notice-based process for updating the components of the equations.²² Accordingly, when an Agency is not fulfilling a ministerial function to prescribe user fees in a certain manner (as is the case with CBP), there are a variety of methodologies currently in use throughout the Federal government to compute the fees, and the most pertinent consideration is which methodology is most appropriate for a particular Agency's purposes. In this regard, we consider the proposed three-part methodology to have a distinct advantage over the previous two-part methodology with respect to the allocation of costs in non-equivalent outputs. As previously mentioned, direct trace allocation assigns costs directly to an output or outputs, and "number of"/workload allocation assigns costs based on the number of inspection units. "Number of"/workload allocation is optimal for equivalent outputs. For example, a pest identification is equivalent across all pathways: The workload to perform a taxonomic pest identification in the air passenger environment is equivalent to

the workload to perform a taxonomic pest identification in maritime, truck, rail, or air cargo environments. However, the "number of"/workload method is less useful for non-equivalent outputs such as the inspection of an air passenger and their luggage compared to the inspection of a maritime vessel and its associated cargo. While both are considered individual inspection events, they are decidedly not equivalent in terms of workload. The use of FTE hours, that is, the number of hours spent producing outputs, is the optimal cost allocation method for non-equivalent outputs. To continue the air passenger/commercial vessel comparison, assigning costs using the FTE hours spent inspecting in the air passenger environment compared to the number of FTE hours spent inspecting in the commercial vessel and maritime cargo environments provides a much more accurate means of measuring the workload required for these two non-equivalent outputs than does the previous methodology. Following the model validation task, Grant Thornton found that the APHIS (direct trace, number of/workload, FTE hours) cost models use the preferred allocation scheme for equivalent outputs and non-equivalent outputs as appropriate.

A second proposed update to the ABC Model and cost calculation is to change the manner in which we calculate costs to account for inflation. The proposed rule would apply the C-CPI-U to prior years' (FY 2017–FY 2019) costs into rulemaking year dollars before calculating the base fees. We would also apply a projected C-CPI-U to set the overall fee schedule. In prior rulemaking to adjust AQI user fees, APHIS has used the Office of Management and Budget (OMB) economic assumptions for inflation. These assumptions incorporate the Consumer Price Index for all Urban Consumers (CPI-U). APHIS selected the

C-CPI-U as the basis for inflation adjustments for AQI user fees because it accounts for consumer substitution taking place between CPI item categories.²³ Typically, the C-CPI-U does not increase by as much as an index that was based on fixed purchase patterns, such as the CPI-U. APHIS therefore determined that the C-CPI-U would be fairer in fee setting for AQI user fees than the CPI-U. The Bureau of Labor Statistics has comprehensive

¹⁶ <https://www.govinfo.gov/content/pkg/FR-2007-01-26/pdf/07-335.pdf>.

¹⁷ <https://www.govinfo.gov/content/pkg/FR-2017-11-01/pdf/2017-23878.pdf>.

¹⁸ <https://www.uspto.gov/sites/default/files/documents/Activity%20Based%20Information%20and%20Patent%20Fee%20Unit%20Expense%20Methodology.docx>.

¹⁹ <https://downloads.regulations.gov/FMC-2023-0009-0001/content.pdf>.

²⁰ <https://downloads.regulations.gov/AMS-LPS-13-0050-0001/content.pdf>.

²¹ <https://downloads.regulations.gov/AMS-LPS-13-0050-0004/content.pdf>.

²² https://downloads.regulations.gov/AMS-FRDOC_0001-2337/content.pdf.

¹⁴ Since completion of the assessment, Grant Thornton's government division has moved to Guidehouse Federal. However, to reflect the firm's name at the time the assessment was completed, we use the name "Grant Thornton" throughout this document when referring to the work.

¹⁵ See supporting document "Grant Thornton United States Department of Agriculture Animal and Plant Health Inspection Service Services to Validate Agency's Activity-Based Cost Model for AQI User Fees: Recommendations Report." See footnote 5 for instructions on how to view this and other supporting documents on [Regulations.gov](https://www.regulations.gov).

²³ See supporting document "Projected Fees for Agricultural Quarantine Inspections, FY2024–2028." See footnote 5 for instructions on how to view this and other supporting documents on [Regulations.gov](https://www.regulations.gov).

information about the C–CPI–U on their website.²⁴

Third, the fee calculations in this proposed rule would also be forward-looking in that they would account for costs not previously considered. We now face new sanitary and phytosanitary threats that require APHIS and CBP to take on additional safeguarding measures and activities not previously accounted for in our assessment of staffing needs. We have been forced to commit resources to cover high priority risks, at the cost of necessary investments including mission critical infrastructure, IT system modernization, and methods

innovation. Emerging high-priority program areas include the following:

- Additional inspection resources at airports to mitigate ASF risk.
- Additional inspection resources at international mail and express courier establishments experiencing eCommerce-driven trade growth.
- New seed sampling and testing workload at ports of entry and plant inspection stations.
- Expanding demand for treatment-monitoring-related services, such as monitoring the restacking of cargo in overloaded cargo containers.

Both houses of Congress have indicated interest in different aspects of

the AQI program and AQI user fees in their respective reports that accompany Agriculture Appropriations legislation. The House of Representatives has focused on AQI program resources (personnel, facilities, etc.) and funding.^{25 26 27} The Senate has focused more on policy: Re-evaluating the per-enclosure basis for the treatment monitoring fee, and reevaluating the exemption for certain small aircraft with 64 or fewer seats.^{28 29 30}

As illustrated in tables 1 and 2 below, even under current workload demands, the AQI program is understaffed by 1,978 personnel.

TABLE 1—CBP STAFFING

Pathway/conveyance	Total FTEs as of FY 2019	Additional FTEs required	Total projected FY 2028 FTE
CBP FTEs:			
Air Passengers	1,324	341	1,665
Commercial Aircraft	819	438	1,257
Commercial Vessel	356	247	603
Commercial Truck	155	258	413
Commercial Rail	33	74	107
Cruise Vessel Passenger	22	6	28
Other (Non-Fee Areas)	362	70	432
Totals	3,071	1,434	4,505

TABLE 2—APHIS STAFFING

Pathway/conveyance	Total FTEs as of FY 2019	Additional FTEs required	Total projected FY 2028 FTE
APHIS FTEs:			
Commercial Aircraft	392	200	592
Commercial Vessel	208	91	299
Air Passengers	193	93	286
Commercial Truck	153	62	215
Treatments	57	55	112
Commercial Rail	34	14	48
Cruise Vessel Passenger	6	4	10
Other (AQI Non-Fee Areas)	43	25	68
Totals	1,086	544	1,630

The AQI program would need to spend an estimated additional \$331 million per year to fully staff at the level required to meet current workload. Because the existing ABC Model does not factor in the additional cost to increase staffing to meet this workload demand, we do not currently have the means to recover those costs. Under this proposed rule, these costs would be factored into our cost model and fee calculations.

From an operational perspective, there is a limit to the number of frontline personnel the AQI program can feasibly recruit, hire, and train within 1 year. The current vacancy rate for APHIS agriculture specialist positions is 13.2 percent, and for CBP positions it is 3.14 percent. The proposed fee schedule covers a 5-year period during which we implement the fee changes incrementally to account for the fact that it will take us 5 years to

achieve full staffing and incorporates the projected inflation adjustment mentioned above. This phased approach tightly links fees to actual costs rather than charging for unrealized full staffing up front.

The proposed rule would also account for capital planning costs not currently factored into the existing ABC Model. In developing the fees for this proposed rule, we would treat capital planning as a recurring cost category and build it

²⁴ <https://www.bls.gov/cpi/additional-resources/chained-cpi.htm>.

²⁵ <https://www.congress.gov/116/crpt/hrpt446/CRPT-116hrpt446.pdf>.

²⁶ <https://www.congress.gov/117/crpt/hrpt82/CRPT-117hrpt82.pdf>.

²⁷ <https://www.congress.gov/117/crpt/hrpt396/CRPT-117hrpt396.pdf>.

²⁸ <https://www.congress.gov/117/crpt/srpt34/CRPT-117srpt34.pdf>.

²⁹ <https://www.congress.gov/116/crpt/srpt110/CRPT-116srpt110.pdf>.

³⁰ <https://www.gpo.gov/fdsys/pkg/CRPT-115srpt259/pdf/CRPT-115srpt259.pdf>.

into the model. We would also create a separate, dedicated capital expenditure account. This approach to capital planning aligns with guidance for Federal agencies from OMB in the Capital Programming Guide, Circular A-11³¹ (2021), and the U.S. Government Accountability Office (GAO) Executive Guide (1998).³² Congress recognizes the need for these types of investments. As recently as 2021, the House Agriculture, Rural Development, Food and Drug Administration Committee reported that “The Committee recognizes that there may be a need to update APHIS physical facilities, staff capabilities, and processes due to the increased volume of agricultural imports” (H.R. 117–82). By incorporating these planned costs, APHIS can better adapt to meet increased volumes of imports and changes in phytosanitary risk, and facilitate trade with enhanced automation, improved levels of service and compliance assistance.

For a full description of the model and how we applied it when calculating AQI costs and fees, please see the documents in the supporting documents folder on *Regulations.gov*, which we are making available along with this proposed rule.³³ APHIS has included APHIS and CBP input costs in the model as well as comprehensive rollup reports for both fee and non-fee outputs as supplemental documents to this rulemaking.

Court Ruling on Reserve Surcharge

On June 21, 2022, the United States Court of Appeals for the District of Columbia Circuit issued a decision in *Air Transport Association of America v. United States Department of Agriculture*, 37 F.4th 667 (D.C. Cir. 2022). In that case, plaintiffs contested aspects of the 2015 rulemaking which set AQI user fees. The D.C. Circuit primarily affirmed the 2015 rulemaking in the face of plaintiffs’ challenges. The court, however, found in favor of plaintiffs on one count: That collection

of a reserve surcharge violates the FACT Act of 1990, as amended. On September 15, 2022, upon remand, the district court issued an amended final judgment vacating the 2015 final rule only insofar as it authorized the collection of a surcharge in order to maintain a reserve account.

The D.C. Circuit opinion in the *Air Transport Association of America* case has informed this rulemaking. First, APHIS recalculated its AQI user fees so that the fees would not include a reserve surcharge component. On November 1, 2022, APHIS issued a Stakeholder Registry notice³⁴ that administratively lowered the fees effective on December 1, 2022, to comport with the Court’s ruling, and on March 17, 2023, APHIS published a final administrative rule in the **Federal Register** (88 FR 16371–16372, Docket No. APHIS–2013–0021) adjusting the four fees that were affected by these recalculations: Those covering inspection services for trucks making individual crossings and using transponders, for international air passengers, and for international cruise vessel passengers. Those adjusted fees are listed under the heading “Current Fees” in table 3 below, along with the other fees that did not require adjustment. Moreover, it is these fee rates, rather than the rates as set forth in the 2015 final rule, that served as the baseline for APHIS’ calculations in the supporting documents for this proposed rule.

Second, there is no reserve component in the fee rates in this proposed rule. The fee rates in this proposed rule are set at levels intended only to result in fee collections that cover the cost of providing agricultural quarantine and inspection services and the costs of administering the program, and personnel and capital planning cost components have been added to the cost model. Adding these cost components to the model ensures that the program can be fully staffed in future years and

ensures that future-looking capital costs can be offset as they are actualized, without recourse to use of a general-purpose reserve to pay for these costs.

Third, historically, the reserve surcharge helped to cover service costs between the period of service delivery and quarterly AQI user fee collections. Under the current regulations, payments are made on a quarterly basis into AQI user fee accounts for commercial aircraft and international airline and cruise passengers, with monies not remitted to APHIS until 1 month after the end of the quarter in which they are collected. Since the fiscal year fourth quarter fees are not due, and therefore not received, until after the fiscal year is over, we are not able to use those funds to pay for providing AQI services for those activities in the fiscal year in which they are earned. Without the reserve surcharge, APHIS must shorten the time frame between service delivery and fee collection to avoid periods of insufficient funding for program operations. Also under the current regulations, APHIS collects fees for railroad cars 60 days after the close of the month; APHIS proposes adjusting this remittance schedule to be consistent with the fees mentioned above. These proposed changes are reflected in the payment and billing sections for these fee types and are discussed individually below.

Proposed User Fee Amounts and Justifications

Using the data and methodology discussed above, we calculated the proposed fees shown below in table 3. We explain each fee service activity in greater detail in the following paragraphs. If these proposed fees become effective, we would continue to monitor the costs of AQI services and our collections and would undertake rulemaking to adjust the fees if we determine we are not appropriately recovering costs.

TABLE 3—PROPOSED FEES

Fee service activity	Current	Proposed (in US\$)				
		January 1, 2024	October 1, 2024	October 1, 2025	October 1, 2026	October 1, 2027
Commercial Vessel (per vessel arrival)	\$825.00	3,219.29	3,302.23	3,386.20	3,471.18	3,557.18

³¹ <https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf>.

³² Executive Guide: Leading Practices in Capital Decision-Making (Superseded by AIMD–99–32) U.S. GAO.

³³ See supporting documents “AQI User Fee Input Costs and Cost Allocation Summary” and the data files ending in “. . . Rollup Report.” The AQI User Fee Input Costs and Cost Allocation Summary can be viewed on *Regulations.gov*. See footnote 5 for

instructions on how to view the supporting documents on *Regulations.gov*. Due to the size of the files, the rollup reports are available on the APHIS website at <https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-fee-types/aqi-user-fee-reports>. The rollup reports must be downloaded before viewing.

³⁴ https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2022/aqi-user-fees-response.

³⁵ Commercial Truck (per truck arrival) fees have been rounded down to the next \$0.05 (five-cent) increment to facilitate operations at the border. This rounding does not impact calculation of the transponder fee.

³⁶ One annual payment for unlimited crossings within a calendar year.

TABLE 3—PROPOSED FEES—Continued

Fee service activity	Current	Proposed (in US\$)				
		January 1, 2024	October 1, 2024	October 1, 2025	October 1, 2026	October 1, 2027
Commercial Truck (per truck arrival) ³⁵	7.29	11.40	12.40	13.45	14.50	15.55
Commercial Truck (Transponder) ³⁶	291.60	686.40	746.40	808.20	870.60	935.40
Commercial Rail (per railroad car arrival)	2.00	5.81	6.51	7.23	7.97	8.72
Commercial Aircraft (per aircraft arrival)	225.00	288.41	309.00	330.07	351.64	373.68
Air Passenger (per passenger arrival)	3.83	4.29	4.44	4.60	4.76	4.93
Cruise Vessel Passenger (per passenger arrival)	1.68	1.20	1.25	1.29	1.34	1.39
Treatments (per hour)	237.00 (per treatment) ..	232.97	253.19	273.90	295.12	316.83

In the sections that follow, we summarize the regulatory changes we propose. Where we address specific AQI activities, we generally describe the relevant activities, state the current fee, state the new fee, and explain the basis for the new fee. The intent of the proposed provisions is to bring the AQI program closer to full cost recovery, and more accurately assign costs to different user classes as required under the FACT Act of 1990, as amended.

Proposed Regulatory Changes

Revisions to Regulatory Definitions

In this proposed rule, we would revise some existing definitions and add some new ones to § 354.3(a).

The regulations currently define *commercial railroad car* as a railroad car used or capable of being used for transporting property for compensation or hire. We propose to revise the definition to read as any carrying vehicle, measured from coupler to coupler and designed to operate on railroad tracks, other than a locomotive or a caboose. This proposed revision would align APHIS' definition with that of CBP's in 19 CFR 24.22(d). This alignment is necessary because CBP is the responsible party for auditing fee remittances; therefore, we believe it is also appropriate to align our definition with CBP's definition for consistency of application of the regulations. Aligning our regulatory definitions with CBP's regulatory definitions simplifies understanding in the port environment for stakeholders and enhances operations between the two agencies, such as conducting audits.

The existing regulations in § 354.3(a) define *commercial truck* as a self-propelled vehicle, designed and used for transporting property for compensation or hire and that empty trucks and truck cabs without trailers fitting this description are included. We are proposing to define the term as any self-propelled vehicle, including an empty vehicle or a truck cab without a trailer, which is designed and used for

the transportation of commercial merchandise or for the transportation of non-commercial merchandise on a for-hire basis. The proposed revision to the definition would align it with the definition in the CBP regulations in 19 CFR 24.22(c)(1). CBP collects the commercial truck fee on behalf of APHIS; therefore, we believe it is also appropriate to align our definition with theirs for consistency of application of the regulations.

The existing regulations define *Customs* as the Bureau of Customs and Border Protection, U.S. Department of Homeland Security. We propose to replace that definition with a definition for *Customs and Border Protection (CBP)*, which would be defined as U.S. Customs and Border Protection, U.S. Department of Homeland Security. This proposed change reflects current usage.

We propose to add a definition of *passenger* to read “a natural person for whom transportation is provided, including infants, whether a separate ticket or travel document is issued for the infant or toddler, or the infant or toddler occupies a seat, or the infant or toddler is held or carried by another passenger.” This proposed definition would clarify that APHIS' understanding of what constitutes a passenger aligns with that of CBP in paragraph (g)(1)(v) of 19 CFR 24.22.

We are proposing to add definitions of *reconditioning* and *restacking*. We would define *reconditioning* as the removal or alteration of packaging associated with commercial cargo. We would define *restacking* as the redistribution of commercial cargo within or removal from a shipping container or other conveyance. Both of these are activities that we monitor in connection with AQI treatment services. As explained later in this document, we have not been charging for these services, but under this proposed rule, we would begin doing so.

Commercial Vessels

Pursuant to the current regulations in § 354.3(b), the AQI program inspects,

with some exceptions that are discussed below, commercial vessels of 100 net tons or more arriving at ports of entry into the customs territory of the United States. Inspecting commercial maritime vessels involves the following activities: Reviewing manifests and documentation accompanying incoming cargo; determining entry status; targeting higher-risk cargo for inspection or clearance; inspecting cargo, cargo containers, wood packaging material, and packing materials for plant pests and contaminants; and determining regulatory compliance. In the maritime cargo environment, the AQI program also: Inspects the vessel's stores; inspects vessels for contaminants; identifies pests and invasive species found during inspection; monitors the storage and removal of regulated international garbage from the vessel to ensure consistency with all regulatory requirements; and safeguards shipments pending Plant Protection and Quarantine (PPQ) determination for treatment or final disposition. The current fee for these inspection services, as listed in § 354.3(b)(1), is \$825 per arrival at a U.S. port.

Over 65 percent of the cargo that arrives in the United States arrives by commercial vessel. The current revenues generated by the existing fee of \$825 per arrival fall well short of recovering the costs we incur in providing and administering the associated inspection services. As indicated in the RIA accompanying this proposed rule, APHIS estimates a \$130 million per year loss if the fee is not adjusted in year one.

Under this proposed rule, the user fee per arrival, as listed in § 354.3(b)(1), would increase to \$3,219.29 in FY 2024 (beginning in Quarter 2), \$3,302.23 in FY 2025, \$3,386.20 in FY 2026, \$3,471.18 in FY 2027, and \$3,557.18 in FY 2028. See table 3 above for the effective dates for each fee adjustment. After FY 2028, the fee would remain at FY 2028 levels for future years pending additional rulemaking. We intend to initiate a separate rulemaking to

propose to allow for notice-based adjustments to the fees.

The proposed new fees adjust for the significant increase in ship cargo capacity since our prior rulemaking, which has increased the workload required to inspect each vessel. According to the U.S. Department of Agriculture (USDA) Agricultural Marketing Service,³⁷ while the global container vessel fleet expanded by just 6.7 percent from 2011 through 2020, total cargo capacity of the global fleet expanded by more than 63 percent. This time period marshaled in the age of the megaship (a ship with a capacity of 18,000 20-foot containers, also known as 20-foot equivalent units (TEUs)). These megaships allowed more containers to be moved per voyage than before, increasing economies of scale and reducing the number of ships serving some trade lanes.³⁸ The advent and adoption of megaships disrupted the industry and AQI revenue, as our current fees are tied to the number of ship arrivals, not the workload required to inspect and clear them. As the maritime industry shifted to greater carrying capacity, fewer ships arrived than APHIS predicted, but individual ships took much longer to inspect. The 2014 proposed rule had assumed average vessel arrivals of approximately 125,000 for FY 2014 through FY 2016, but the actual vessel arrivals were only around 54,000 for each of those 3 years. Much larger ships displaced smaller ships, which reduced costs to trade, but increased the AQI program's cost to inspect each vessel and the cargo it carried. The proposed adjusted fees, which would be listed in § 354.3(b)(1), reflect a change in the allocation of certain costs within the model from using the number of ship arrivals per year to the workload (FTE hours) it takes to inspect the average ship and its cargo—a more accurate reflection of our actual costs. Without the adjusted fees, we would not have adequate resources to provide the necessary level of AQI services for inspection of commercial vessels, potentially resulting in bottlenecks in the clearance of maritime cargo.

The proposed vessel fee in FY 2024 is more than four times the current fee. However, considering the greater cargo capacity per ship (increased workload), inflation since FY 2010–FY 2012 (prior rule source data), and the need for additional personnel to inspect and clear cargo in a timely manner, APHIS

believes the data justify this increase. Two main factors contributed to the increase in the commercial vessel fee: First, increase in workload per vessel; second, the change from number of arrivals to FTE hours as the allocation criterion for certain costs. The 2015 rule used cost and arrival data from FY 2010 through FY 2012. At that time, the average container vessel arriving into the United States carried 1,903 twenty-foot equivalent units (TEUs). This rulemaking uses cost and arrival data from FY 2017 through FY 2019; during this period, the average arriving container vessel now carried 2,710 TEUs, a 42.4 percent increase versus the 2015 rulemaking. This increased workload per vessel increased the per vessel costs to the AQI program. In addition, in the 2015 rulemaking, certain costs were allocated using number of arrivals as the allocation criterion for certain costs; the number of vessel arrivals (approximately 108,000 per year in FY 2010–FY 2012) was relatively small (0.03 percent) compared to total arrival numbers (approximately 325 million arrivals per year between FY 2010 and FY 2012 including all conveyances and passenger). This rulemaking uses frontline AQI FTE hours—a more accurate measure for assigning costs for non-equivalent outputs (inspecting one passenger versus inspecting a commercial vessel and its cargo are not equivalent)—to allocate these costs. At full implementation, there will be approximately 575,000 frontline AQI FTE hours assigned to the commercial vessel and maritime cargo functions out of over 4 million total frontline AQI FTE hours or over 14 percent. The change to frontline AQI FTE hours changes the cost allocation for certain costs to commercial vessels from approximately 0.03 percent to over 14 percent.

The current version of § 354.3(b)(2) exempts certain vessels from AQI user fees. These include passenger vessels that depart from and return to U.S. ports without docking at any foreign ports, as well as certain barges, tugboats, and vessels used in government service. Currently, paragraph (b)(2)(vi) states that certain barges traveling solely between the United States and Canada meeting certain conditions are exempted from AQI user fees. Barges eligible for the exemption are those barges: That travel solely between the United States and Canada; that do not carry cargo originating from countries other than the United States or Canada; that do not carry plants or plant products; that do not carry animals or animal products; and that do not carry

soil or quarry products from areas in Canada listed in 7 CFR 319.77–3 as being infested with gypsy moth. Based on the pathway analysis that we conducted, we are proposing to eliminate this exemption. As discussed in our pathway analysis, we determined that barges entering the United States from Canada pose a phytosanitary risk similar to barges entering the United States from origins other than Canada and to other types of vessels entering from Canada. Barges from origins other than Canada and other types of vessels from Canada are not exempt from AQI user fees. Other vessels from Canada are required to pay user fees even when travelling the same routes and carrying the same cargo as exempt barges. APHIS promulgated the exemption for barges from Canada meeting certain conditions in 2010 (75 FR 10634) stating: “we [APHIS] do recognize that barges traveling solely between the United States and Canada are operating in a lower-risk environment: A limited range of waterways between and around the U.S./Canada border such as the Puget Sound and the Great Lakes, which means that such barges present a much lower risk of carrying cargo or hitchhiking pests from a third country.” In APHIS’ recent analysis, we found that nearly 1,500 barges arrive from Canada annually requiring manifest review, review of documents, and physical inspection as necessary, which incur costs on the part of the AQI program. Moreover, part of the original premise that barges from Canada travel in limited waterways is no longer true, with certain barges from Canada arriving into 49 United States ports of entry as far south as Charleston, South Carolina on the east coast, and Oakland, California on the west coast. For additional information, please see the document titled “Pathway Analysis for Barges from Canada,” which we are making available along with this proposed rule.³⁹ Because barges from Canada do not pose less of a phytosanitary risk than those other vessel types, the proposed rule would eliminate the exemption for barges. To be clear, the AQI program does currently conduct inspections of barges arriving from Canada and the cargo they carry, and therefore incurs costs to the program. Removal of the exemption allows the AQI program to recover these barge-related costs.

Finally, the commercial vessel fee would also not apply to commercial cruise (passenger) vessels that carry

³⁷ <https://agtransport.usda.gov/stories/s/pjaw-nxa9/>.

³⁸ <https://agtransport.usda.gov/stories/s/Ocean-Container-Fleet-Dashboard/pjaw-nxa9/>.

³⁹ See footnote 5 for instructions on how to view this and other supporting documents on [Regulations.gov](https://www.regulations.gov).

passengers paying the international passenger fees under paragraph (f) of § 354.3 because the cost of inspecting the entirety of the vessel is included in the international cruise passenger fee, and cruise vessels almost never carry commercial cargo. That broad exemption would replace the existing limited exemption in paragraph (b)(2)(i) of § 354.3 for certain foreign passenger vessels. In this respect, the treatment of commercial vessels is distinct from that of international aircraft carrying passengers, which are not exempt from the commercial aircraft user fee. It is routine for commercial aircraft to carry passengers (and associated baggage) and cargo, but cruise vessels almost never carry commercial cargo.

Commercial Trucks

We inspect commercial trucks at land ports in the customs territory of the United States arriving from Mexico and Canada. Inspecting commercial trucks involves the following activities: Reviewing manifests and documentation accompanying incoming cargo; determining entry status; targeting higher risk cargo for inspection or clearance; inspecting cargo, cargo containers, wood packaging material, and packing materials for plant pests and contaminants; and determining regulatory compliance. In the commercial truck environment, the AQI program also: Inspects trucks for contaminants; identifies pests and invasive species found during inspection; ensures consistency with all regulatory requirements; and safeguards shipments pending PPQ determination for treatment or final disposition.

AQI user fees for inspection of commercial trucks entering the customs territory of the United States are listed in § 354.3(c)(1). The current operational fee is \$7.29 per truck arrival (see footnote 35 for further elaboration), with an option, under paragraph (c)(3), to prepay an amount (currently \$290.61) 40 times the single-arrival fee to obtain a transponder that will cover all arrivals of a commercial truck during a calendar year.

For context regarding the transponder option, there are only two fee classes that allow for remittance of an annual fee, commercial trucks and commercial railroad cars. (As we discuss below, the option for commercial railroad cars is effectively unused and we are seeking public comment on whether to eliminate it.) In both instances the means of conveyance are crossing land borders using routes (whether roads or rails) that are heavily traversed. This is especially true of commercial trucks,

where there are approximately 11 million crossings per year.

Currently, there is not infrastructure in place at land borders to allow for real-time fee collection (similar to automated toll collection systems used throughout the United States), although that is a long-term goal. Accordingly, annual remittance is used as an option to reduce border congestion and to keep border operations manageable.

We currently incentivize annual payments by placing a cap on the annual fee for truck crossings; crossings beyond the cap are effectively free. This incentivization makes sense because the alternative, in which CBP personnel must collect the commercial truck fee 11 million times annually, is operationally untenable. However, if we were to make this same practice broadly applicable across modes, it would undermine full cost recovery.

We are proposing to add a sentence to paragraph (c)(1) stating that the AQI user fee would apply to all commercial trucks, regardless of what they are carrying, including empty trucks and truck cabs. This addition is already codified under the current definition of *commercial truck*, but the existing regulations in paragraph (c)(1) do not state the requirement explicitly; this revision clarifies application of the fee. Empty trucks and truck cabs need to be inspected because they may pose a phytosanitary risk due to hitchhiking pests and contaminants from past shipments.

Strictly following the 2023 FTE model, the user fee per arrival, as listed in proposed paragraph (c)(1), would increase to \$11.44 in FY 2024, \$12.44 in FY 2025, \$13.47 in FY 2026, \$14.51 in FY 2027, and \$15.59 in FY 2028; however, at CBP's request, we are rounding these fees down to the next \$0.05 (five-cent) increment to facilitate operations at the border. CBP has indicated that making change at the penny level for single-payer trucks would have a negative impact on wait times at the land border. Therefore, the fees under proposed paragraph (c)(1) would increase to \$11.40 in FY 2024, \$12.40 in FY 2025, \$13.45 in FY 2026, \$14.50 in FY 2027, and \$15.55 in FY 2028. The corresponding prepaid (transponder) user fees would be set at an amount 60 times the unrounded fee rates for each arrival, as discussed further below, and would rise to \$686.40, \$746.40, \$808.20, \$870.60, and \$935.40, respectively. As shown in the RIA accompanying this proposed rule, APHIS estimates an aggregate \$67.5 million loss per year if the per-arrival and prepaid user fees are not adjusted in year one.

In the past 10 years, agricultural cargo arriving by truck has increased by 90.6 percent, from 21.7 billion kilograms to 41.32 billion kilograms. In addition, APHIS conducted an analysis showing that the volume of freight per truck has increased from 7.6 tons per truck in 2010 (beginning of the 2015 final rule's source data) to 8.5 tons per truck in 2019 (end of this rulemaking's source data); moreover, this increase continues, with the average arriving truck carrying 10.4 tons of freight in 2021.⁴⁰ We must increase staff on the truck pathway to address this increase in volume.

Analysis of collections data cross-referenced with truck arrival data shows a consistent average of 90 crossings per transponder per year from 2013 through 2021. However, to incentivize use of annual transponders, APHIS proposes to set the AQI truck transponder fee at 60 times the per arrival fee, an increase from 40 times the per arrival fee used to calculate the current transponder fee. This has no impact on CBP truck transponder fees.

The proposed truck fee at full implementation (FY 2028) is more than double the current fee; however, the volume of cargo per truck has increased from an average of 7.6 tons per truck (FY 2010–FY 2012) to over 8.5 tons per truck (FY 2017–FY 2019). Considering the increased cargo volume per truck, increased agricultural risk per truck, additional personnel to ensure more expedient border clearance, and inflation since the FY 2010–FY 2012 source data period for the 2015 final rule, APHIS believes the data justify this increase. Under the proposed rule, by FY 2028, the associated prepaid transponder fee will more than triple; however, the average truck transponder crosses the border more than 90 times in a calendar year. To incentivize the purchase of transponders, which facilitate border-crossing procedures, while limiting the impact of the fee increase on trucking companies, APHIS is proposing to set the truck transponder fee multiple at 60 times the unrounded per arrival fee. Again, APHIS believes the underlying transponder usage data justifies this increase.

We are proposing an additional amendment to clarify that prepayments for purchases of transponders may be made at any time during a calendar year. The proposed rule would not provide, however, for prorating of the prepayment cost or allowing credit for individual crossings made prior to

⁴⁰ See supporting documents: Changes in the Carrying Capacity of Containerized Maritime and Land Border Transport Over Time: A Brief Analysis.

prepayment, if the operator of the commercial truck elects to prepay during a calendar year. This proposed change would better align our prepayment requirements with those of CBP.⁴¹ As noted earlier, provisions for prepayment for truck transponders are currently contained in paragraph (c)(3) of the regulations. In those existing regulations, paragraph (c)(2) is reserved. In this proposed rule, the prepayment requirements described above would be moved to proposed (c)(2), and paragraph (c)(3) would be eliminated.

Commercial Railroad Cars

The AQI program inspects commercial railroad cars (cargo) arriving at land ports in the customs territory of the United States from Mexico and Canada. Inspecting railroad cars involves the following activities: Reviewing manifests and documentation accompanying incoming cargo; determining entry status; targeting higher risk cargo for inspection or clearance; inspecting cargo, cargo containers, wood packaging material, and packing materials for plant pests and contaminants; and determining regulatory compliance. In the rail cargo environment, the AQI program also: Inspects railroad cars for contaminants; identifies pests and invasive species found during inspection; monitors the storage and removal of regulated international garbage from the railroad car to ensure consistency with all regulatory requirements; and safeguards shipments pending PPQ determination for treatment or final disposition.

Fees for inspection of loaded commercial railroad cars arriving at land ports in the United States are listed in current § 354.3(d)(1). The current fee is \$2 per loaded railroad car arrival, with an option to prepay an amount 20 times the single-arrival fee for all arrivals of a commercial railroad car during a calendar year.

Under this proposed rule, the user fee per arrival, as listed in proposed paragraph (d)(1)(i), would increase to \$5.81 in FY 2024, \$6.51 in FY 2025, \$7.23 in FY 2026, \$7.97 in FY 2027, and \$8.72 in FY 2028. The corresponding prepaid user fees, which would be set at an amount 48 times the AQI user fee for each arrival, would rise to \$278.88, \$312.48, \$347.04, \$382.56, and \$418.56, respectively.

Based upon analysis of collections and arrival data,⁴² the average railroad

car arrives 48.32 times per year. A prepaid multiple of 48 brings us significantly closer to full cost recovery than the present multiple of 20 times the per arrival fee. As shown in the RIA accompanying this proposed rule, APHIS estimates a \$13.5 million loss annually if the commercial railroad car user fees are not adjusted in year one.

The commercial railroad car fee will more than quadruple by full implementation in FY 2028 from its current level. The main reason for this is what falls under the regulatory definition of a railroad car [19 CFR 24.22(d)(1)] is now much larger than what the current inspection fee is designed to cover. The current fees are designed to cover inspection costs for a railroad car that is essentially a single box on wheels. The typical railroad car in use today, however, consists of a multi-unit chassis with double stacked containers on wheels. Cargo in general arriving into the United States by rail has increased nearly 15 percent since the FY 2010–FY 2012 period (source data 2015 final rule). Moreover, agricultural cargo arriving by rail has increased over 20 percent since 2010, from over 15 billion kilograms to over 18 billion kilograms in 2021. We must increase staff on the rail pathway to address these changes in trade on our land borders (see Tables 1 and 2 above). Considering the aforementioned increase in rail cargo volume and the steeper increase in agricultural rail cargo volume, the necessary addition of personnel to ensure more expedient border clearance, and inflation since the FY 2010–FY 2012 source data period for the 2015 final rule, APHIS believes the data justify this increase.

As noted above, the existing regulations in § 354.3(d)(1) refer to AQI fees for inspection of loaded commercial railroad cars. In addition to the fee changes, we are proposing to amend § 354.3(d)(1) to remove the references therein to loaded cars. CBP inspects all commercial railroad cars, loaded and unloaded; however, APHIS does not collect AQI user fees for unloaded rail cars under the current regulations. However, both loaded and unloaded cars and rail-bound containers can harbor hitchhiking pests, and can transit through multiple countries with disparate pest risk profiles in terms of possible hitchhiking pests. For this reason, both the exterior and interior of

unloaded railroad cars and unloaded rail-bound containers need to be inspected because they, too, may pose a phytosanitary risk due to hitchhiking pests and contaminants from past shipments. In order to recover the costs of conducting these inspections, we propose to make unloaded railroad cars subject to AQI user fees.

Current paragraph (d)(3) contains prepayment requirements for a calendar year for railroad companies choosing that option. We are proposing to amend that paragraph, as we did paragraph (c)(2), to provide for purchases made during a calendar year. The amendment would better align the rule with language in CBP regulations in 19 CFR 24.22. As is the case for commercial trucks, no credit would be given towards the annual prepayment for single payer crossings made earlier in the calendar year, nor would the annual prepayment amount be prorated.

While the current regulations include a prepaid option for commercial railroad cars, very few railroad companies use the prepay option. Based on this, APHIS is considering eliminating the prepaid option to simplify the regulations. APHIS originally developed the prepaid railroad car option to reflect a similar option available for railroad companies paying CBP COBRA fees. Recent consultation with CBP and discussions with APHIS' own Financial Management Division reveal that in any given year very few, if any, railroad operators do actually exercise this option. APHIS invites comments on the possibility of eliminating the prepaid railroad car option.

Statement, remittance, and compliance requirements for AQI user fees for commercial railroad cars are located in current paragraphs (d)(4) through (6) of § 354.3. Under current paragraph (d)(4), the Association of American Railroads (AAR) and the National Railroad Passenger Corporation (AMTRAK) must submit monthly written statements by mail to APHIS listing the number of loaded commercial railroad cars entering the United States during the relevant period, the number of those cars pulled by each railroad company and the total monthly AQI user fee due from each railroad company.

We would revise paragraph (d)(4) to provide for submission of remittance not only by AAR and AMTRAK, as is the case in the current regulations, but by individual railroad companies as well. This proposed revision would more closely align our requirements pertaining to railroad car user fees with those of CBP [19 CFR 24.22(d) *et seq.*].

⁴¹ <https://dtops.cbp.dhs.gov/main/help/HelpfulInfo2FAQs.jsp> section "About Decals, Transponders, and Single Crossing Fees".

⁴² See supporting document "Analysis of AQI User Fees: Truck Transponder and Prepaid Railroad Car Multiples Using Fee Collections and Arrival

Data". See footnote 5 for instructions on how to view the supporting documents on *Regulations.gov*. Please note that because our analysis reviews FY 2017–2019 data, which precedes the court opinion referred to above, it assesses usage when the truck crossing fee was \$7.55, rather than the current \$7.29.

CBP cites: “The Association of American Railroads (AAR), the National Railroad Passenger Corporation (AMTRAK), and any railroad company preferring to act individually, must file monthly statements. . . .” Current APHIS regulations omit “any railroad company preferring to act individually”. This revision corrects this oversight.

We are also proposing some updates to statement, remittance, and compliance procedures in paragraphs (d)(4) through (6). We are proposing to replace the words “statement” and “remittance” in the rule with the words “remittance worksheet” and “payments” to clarify what is required in plain language. The document that would be submitted along with a payment would be the “remittance worksheet” rather than a monthly statement, which is the current practice. The remittance worksheet would capture the same data previously submitted on the monthly statements but is a standardized worksheet produced by APHIS’ Financial Management Division. Changing to the remittance worksheet would standardize the documentation we receive from entities within a user class as well as standardize documentation across all user classes, which would simplify APHIS recordkeeping and payer compliance. For example, entities currently submit this data in a variety of formats. Some even submit more information than is necessary. Having the ability to complete a worksheet would focus their efforts on only the required information. This would also make the process easier for APHIS, because we would look at incoming data on the same type of incoming document each time rather than being required to hunt through various entity formats to find and record the information we need. We are making the worksheet available as a supporting document for this proposed rule. We would also remove outdated mailing addresses, and provide a link (<https://www.aphis.usda.gov/aphis/ourfocus/planthealth/ppq-program-overview/ppq-cbp-aqi-user-fees-contacts>) to information on submitting remittance worksheets, and payments, both electronically and by mail, and for entities submitting online, provide an email address for submission.

To make collections for railroad cars consistent with the proposed changes to international air passenger, commercial aircraft, and international cruise passenger fees, APHIS proposes changing the remittance deadline for railroad cars to 90 days after the close of a calendar month. Under this proposed rule, railroads would remit

their payments to APHIS on a monthly basis (12 times per year) which is the same as the current requirement; however, railroads would have 90 days to reconcile their books for each month versus the current 60-day period after the close of the month. For example, remittance of fees collected in January of a given year would occur at the end of April of that year (90 days after the close of January); remittance of fees for February of a given year would occur at the end of May of that year; remittance of fees for October of a given year would occur at the end of January of the following year, etc. Regular and predictable remittance of user fee collections helps with the financial management of the AQI account and with trend prediction for future operation planning. The proposed changes to these paragraphs would both clarify and streamline the procedures and update them to improve APHIS business practices.

Further, to increase accountability and establish individual responsibility for complying with our payment and remittance worksheet requirements, we would require that the AAR, AMTRAK, and any railroad company acting individually for making AQI user fee payments designate an agent or responsible person, who would have that responsibility. We would also specify the duties of that responsible person in paragraph (d)(6), which we would divide into two subparagraphs. Proposed paragraph (d)(6)(i) would contain the existing provisions of paragraph (d)(6), without the outdated addresses. Proposed paragraph (d)(6)(ii) would state that the agent or other responsible person for a payment remains the agent or responsible person until the railroad company notifies APHIS of a transfer of responsibility. Before such a transfer could take place, the agent or responsible person would first have to contact APHIS to initiate the transfer. Once APHIS acknowledges the transfer, the new agent or responsible person would assume all responsibilities for ensuring compliance with the requirements of 7 CFR part 354. This proposed requirement would ensure seamless continuity of individual responsibility for compliance in the event of personnel changes on the part of a regulated party, and facilitates APHIS’ ability to resolve issues quickly, thereby improving efficiency and customer service.

Commercial Aircraft

APHIS inspects international commercial aircraft arriving at airports in the customs territory of the United States. These inspections cover

commercial aircraft capable of carrying cargo and passengers, regardless of whether cargo or passengers are on a particular flight. Inspecting commercial aircraft involves the following activities: Reviewing manifests and documentation accompanying incoming cargo; determining entry status; targeting higher risk cargo for inspection or clearance; inspecting cargo, international mail, expedited courier packages, cargo containers, wood packaging material, and packing materials for plant pests and contaminants; and determining regulatory compliance. In the commercial aircraft environment, the AQI program also: Inspects the aircraft hold and exterior for contaminants and pests; identifies pests and invasive species found during inspection; ensures consistency with all regulatory requirements; and safeguards shipments pending PPQ determination for treatment or final disposition. As discussed below, there is a separate international air passenger fee, which covers, among other things, inspection of the aircraft passenger cabin.

Fees for inspection of commercial aircraft are listed in § 354.3(e)(1). The current fee is \$225 per arrival. Under this proposed rule, the user fee per arrival, as listed in proposed paragraph (e)(1), would increase to \$288.41 in FY 2024, \$309.00 in FY 2025, \$330.07 in FY 2026, \$351.64 in FY 2027, and \$373.68 in FY 2028.

Commercial aircraft carry less than 1 percent by volume of commercial cargo arriving in the United States. However, commercial air cargo is high-risk, highly perishable, and includes time-sensitive express courier shipments, and it accounts for an estimated 43 percent of total AQI cargo inspection costs. These costs are driven in part by the intensive effort required to inspect numerous small packages and highly perishable commodities, which are more likely to be transported via aircraft than by another type of conveyance. As with other conveyances and shipping containers, the aircraft themselves pose a significant risk from potential hitchhiking pests. From 2014 to 2020, the increase in agricultural cargo imports coincided with a tripling in the growth of worldwide mail and express courier shipment volumes, growing from 43 billion to 131 billion parcels—a 27 percent year-on-year increase. Industry analysts predict another doubling in worldwide parcel volume by 2026.⁴³

⁴³ <https://www.statista.com/chart/10922/parcel-shipping-volume-and-parcel-spend-in-selected-countries/>.

The proposed adjusted fees would fund full staffing to inspect these aircraft and their cargo at airport facilities throughout the country, at all arrival times. The proposed aircraft fee for FY 2028 is approximately 1.6 times the current fee. This cost increase under the terms of the proposed rule reflects the additional staffing to meet our current and anticipated needs in the air cargo environment. The wide geographic range (over 320 airport facilities throughout the United States receive foreign cargo), stakeholders' need for rapid processing times, and around-the-clock service requests make servicing the air cargo environment one of the most demanding AQI functions. When coupled with inflation since the FY 2010–FY 2012 source data period for the 2015 final rule, APHIS believes the data justify this increase.

In addition to the proposed fee changes, we are proposing to remove paragraph (e)(2)(iv), which exempts from AQI user fees certain passenger aircraft with 64 or fewer seats. As noted above, the pathway analysis we conducted demonstrates that this exemption is no longer justified. Results of the pathway analysis indicated that aircraft with 64 or fewer seats had many opportunities for exposure to hitchhiker pests, as well as many opportunities to expose pests to a large variety of environments in the United States. Because of the high number of flights and flight routes by aircraft with 64 or fewer seats, relative to those with 65 seats and above, and given the similar numbers in origins and destinations between the two types of aircraft, we concluded that commercial passenger aircraft with 64 or fewer seats serve as a pathway for the introduction of quarantine pests to the United States and propose eliminating the exemption.⁴⁴

APHIS decided not to propose a new tiered structure for the commercial aircraft fee based upon aircraft size or seat number. This is because, as noted in the pathway analysis, the phytosanitary risk posed by a particular aircraft is based upon a variety of factors, including the country of origin, countries transited, type and volume of cargo, country of origin of the cargo, and environmental conditions at point of origin and final destination.

The number of seats in the aircraft thus has little bearing on phytosanitary risk as it pertains to the aircraft fee. (Indeed, inspection of seats on an aircraft is a cost component factored

into the international air passenger fee, not the commercial aircraft fee.) There is, moreover, not a single consideration that differentiates aircraft into “high risk” and “low risk” categories. Moreover, a fee tiered to account for all these factors would require excessive administration to run properly and become cost-prohibitive and impracticable. Instead, APHIS is proposing a single aircraft fee that is based on the average cost to inspect and clear commercial aircraft and their cargo, regardless of the number of seats on the plane. APHIS invites specific comment on whether the aircraft fee could be structured differently from our proposed structure, as well as evidence in support these alternate structures.

We are proposing to revise paragraphs (e)(3) and (4), which pertain to remittances and compliance for AQI user fees for commercial aircraft, in a manner corresponding with the revisions to paragraphs (d)(4) through (6), *i.e.*, by changing the terminology to refer to “remittance worksheets” and “payments” rather than “statements” and “remittances,” removing outdated addresses, providing updated information links and options for making electronic payments and submissions of remittance worksheets, and adding requirements pertaining to the air carrier’s agent or responsible person for overseeing compliance. These changes would parallel those in paragraph (d) described above. We would also remove the requirement currently in paragraph (e)(3)(ii)(B), which requires the person submitting payment to provide his or her taxpayer identification number (TIN). APHIS collects the TIN for enforcement and debt collection when the stakeholder establishes a payment account with APHIS; therefore, this personally identifiable information is not necessary for submission of individual remittances. APHIS also proposes removing current paragraphs (e)(3)(ii)(D) and (e)(3)(ii)(E). APHIS no longer uses ports of entry at which inspections occurred or number of arrivals at each port for fee collection purposes.

Proposed changes to paragraph (e)(3) also include decreasing the period for payment of the fees and submission of remittance reports from quarterly to monthly. Under this proposed rule, airlines would remit their payments to APHIS on a monthly basis (12 times per year) versus the current quarterly basis (four times per year). They would have 90 days to reconcile their books for each month versus the current 31-day period after the close of the quarter. For example, remittance of fees collected in January of a given year would occur at

the end of April of that year (90 days after the close of January); remittance of fees for February of a given year would occur at the end of May of that year; remittance of fees for October of a given year would occur at the end of January of the following year, etc.

The AQI account balance changes daily as customers remit their user fees, as the APHIS program obligates funds, as refund requests are processed, as account recoveries are received, as funds are transferred to CBP, and as other account adjustments are made. A regular and predictable remittance of user fee collections helps with the financial management of the account and trend prediction for future operation planning. To illustrate, from FY 2017 to FY 2019, commercial aircraft collections averaged over 23 percent of total collections, or nearly \$188 million. Also, from FY 2017 to FY 2019, commercial aircraft passenger collections averaged over 61 percent of total collections, or nearly \$486 million. Collections from the air sector (commercial aircraft and commercial air passenger) are a combined annual average of over 85 percent of total AQI collections. Under this rule as proposed, APHIS estimates that by FY 2028 the combined air sector would account for approximately 68 percent of total collections assuming future arrivals match average arrivals for FY2017 through FY2019. Because of the large proportion of collections from the air sector, the current quarterly remittance schedule for airlines results in significant fluctuations in the account balance, making such financial management and planning challenging throughout the fiscal year. For example, airlines remit large sums 1 month after the close of each quarter, and APHIS transfers funds to CBP every other month. At certain times of the year, the quarterly remittance schedule and bi-monthly transfers lead to a low balance in the account, which may lead to a needed delay in transferring funds to CBP or APHIS operations until collections are received. During the pandemic, this trend was mitigated by appropriated supplemental funds. A monthly remittance schedule would smooth the revenue stream, which would lead to a more regular and predictable account balance. This, in turn, would allow for better financial management and trend predictions to promote the program’s ability to achieve its mission efficiently and effectively. Finally, we note that, under 21 U.S.C. 136a(a)(3), APHIS has broad authority to set remittance schedules as it deems fit.

⁴⁴ See footnote 5 for instructions on how to view this and other supporting documents on *Regulations.gov*.

International Passengers Arriving at Airports and Seaports

Millions of travelers arrive at U.S. airports and seaports from international destinations daily. Inspecting international air passengers includes pre-arrival analysis of incoming passengers and screening arriving air passengers for agricultural products by the AQI Program; inspection of passenger baggage using CBP agriculture canines and specialized non-intrusive inspection equipment; inspecting the interior of the passenger cabin and baggage compartments of the aircraft; monitoring the storage and removal of regulated international garbage from the aircraft to ensure consistency with all regulatory requirements; safeguarding and appropriately disposing of any seized or abandoned prohibited agricultural products; and identifying and mitigating pests found on prohibited agricultural products or in passenger cabins brought into the country via international travel.

Inspecting a cruise vessel and its passengers includes pre-arrival analysis of incoming passengers; screening arriving sea passengers for agricultural products by CBP Agriculture Specialists and CBP Officers; inspection of passenger baggage using CBP agriculture canines and specialized non-intrusive inspection equipment; inspection of the vessel itself to ensure that contaminants, prohibited articles, or invasive pests are not present; inspecting the ship's stores to ensure that prohibited items are not present or are properly safeguarded; and monitoring the storage and removal of regulated international garbage from the vessel to ensure consistency with all existing regulatory requirements. The costs of inspecting the cruise ships themselves are covered by the sea passenger fee because the entirety of a cruise vessel is passenger-related. APHIS added the sea passenger AQI user fee in the 2015 final rule.

The current AQI user fee for inspection of commercial air passengers is \$3.83 per arrival. Under this proposed rule, the user fee per arrival, as listed in proposed § 354.3(f)(1), would increase to \$4.29 in FY 2024, \$4.44 in FY 2025, \$4.60 in FY 2026, \$4.76 in FY 2027, and \$4.93 in FY 2028.

Over the past decade, air and sea passenger volumes have each grown on average by over 50 percent (air by 54.6 percent and cruise by 51.65 percent), but the number of frontline employees (inspectors) actually decreased over this period. Looking specifically at frontline employee workload, there were 62,000 passengers per frontline employee in 2010. By 2019 there were 98,000

passengers per frontline employee, a 58 percent increase in workload per employee. While we experienced a decrease due to the COVID-19 pandemic, international passenger volumes are projected to recover in 2024 and grow 3.5 percent annually, further increasing frontline employee workload. In a static cost and wage environment, collections of passenger fees increase with increasing passenger arrivals, and increased collections would result in additional funds for hiring additional personnel and purchasing additional equipment to cover workload; however, underlying Federal employee wages and equipment costs have increased while the fee has remained static. For example, from 2015 to 2023, a GS-12 Step 5 (typical CBP Agriculture Specialist inspector) salary at two of the largest airports, John F. Kennedy International Airport in New York and Los Angeles International Airport in California, increased more than 22 percent, and equipment and other costs as measured by inflation (CPI-U) have increased over 28 percent from December 2015 to April 2023 while the fee itself remained static.

In addition to enabling us to recover the costs of our current program activities, the proposed fee change would increase the presence of CBP AQI canine teams from the current 189 AQI canine units to a total of 281 AQI canine units to improve the detection of prohibited products that could harbor ASF, which has become a disease of particular concern due to recent outbreaks in the western hemisphere, as well as other sanitary and phytosanitary risks in passenger baggage. Congress authorized up to \$220 million per year for additional positions, but it did not fund the authorization.⁴⁵ APHIS estimates a shortfall of \$28.9 million per year if the air passenger fee is not adjusted.

The commercial cruise vessel passenger fee is the only fee that will decrease relative to the current fee. The cruise ship passenger fee is currently \$1.68 per arrival. As listed in proposed § 354.3(f)(1), the fee would decrease to \$1.20 in FY 2024, \$1.25 in FY 2025, \$1.29 in FY 2026, \$1.34 in FY 2027, and \$1.39 in FY 2028. The change in the cruise passenger fee owes mainly to the change in allocation criteria from number of inspection events (passengers) to FTE hours. Between FY 2017 and FY 2019, there was an average of 15.6 million cruise passenger arrivals out of a total of 287.6 million total arrivals (all commercial passengers,

pedestrians, commercial conveyances, and privately owned vehicles) or 5.42 percent; however, 22 FTEs out of 3,071 total FTEs or 0.72 percent of CBP AQI personnel inspected cruise passengers. Using FTE hours as the allocation criterion for certain costs resulted in 0.72 percent of those costs allocating to cruise passenger clearance rather than 5.42 percent using number of passengers (workload).

We have added several proposed clarifications in paragraph (f) related to applicability, payment, and handling of international passenger user fees collected and remitted for trips not taken. In proposed paragraph (f)(1), we have added language to clarify that infants, traveling with or without documents, whether in assigned seats or held in an adult passenger's lap, are subject to AQI user fees, as they are subject to the same inspection as other passengers. This harmonizes APHIS regulations with CBP regulations in 19 CFR 24.22(g), and their definition of passenger. As noted above, we are also proposing to add a definition of *passenger* to help clarify these requirements. In proposed changes to paragraphs (f)(5) and (6), we have shortened the period for payment of international passenger fees and submission of remittance reports from quarterly to monthly, in order to recover the costs of inspecting international passengers in a timely manner as discussed above. As discussed above in relation to paragraph (e), operators would have 90 days to reconcile their books for each month. Airlines and cruise lines would remit passenger fees to APHIS on a monthly basis (12 times per year) versus the current quarterly basis (four times per year), and would have 90 days to reconcile their books for each month versus the current 31-day period after the close of the quarter. For example, remittance of fees collected in January of a given year would occur at the end of April of that year (90 days after the close of January); remittance of fees for February of a given year would occur at the end of May of that year; remittance of fees for October of a given year would occur at the end of January of the following year, etc.

We are proposing to add new paragraphs (f)(5)(v) and (vi), which would cover the handling of international passenger AQI user fees collected and remitted for trips not taken. Proposed paragraph (f)(5)(v) would clarify that APHIS' policy is that the entity issuing the ticket or travel document (e.g., air or sea carriers, travel agents, tour wholesalers, or other entities) has a responsibility to make refunds of the international passenger

⁴⁵ <https://www.govinfo.gov/content/pkg/CRPT-116s rpt94/html/CRPT-116s rpt94.htm>.

AQI user fees in the original form of payment to the purchaser for trips not taken. Proposed paragraph (f)(5)(vi) describes the process for requesting a credit from APHIS for international passenger AQI user fees collected and remitted prior to refunding a ticket purchaser for an international passenger AQI user fee for a trip that was not taken. In such cases, the ticket issuing entity would have to submit a revised remittance worksheet.⁴⁶ In keeping with other proposed changes to remittance timeframes, the revised remittance worksheet would be completed and filed for each month during which the ticket or travel document-issuing entity certifies that there was a decrease in the number of passengers and international passenger AQI user fees collected, using the same procedure described in § 354.3(f)(5)(iv) of this proposed rule.

AQI Treatment Monitoring

AQI treatments are performed on some agricultural goods as a condition of entry, and others are performed when an actionable pest (*i.e.*, a plant pest that should not be allowed to be introduced into or disseminated within the United States) is detected during a port-of-entry inspection. The objective of these AQI treatments is to ensure that agricultural goods and commodities entering the United States are free from viable plant pests and noxious weeds that would pose a risk to the health of U.S. domestic agriculture and natural resources. AQI treatment methods include fumigation, cold treatment, irradiation, and heat treatment. APHIS activities related to the application of AQI treatments include personnel determining the appropriate treatment schedule, monitoring the treatment to ensure it takes place in the prescribed manner, and determining whether the treatment was successful. These AQI services focus on ensuring the effectiveness of a given treatment, regardless of its methodology. While AQI treatments are usually provided by private entities who charge the importer for their services, from time-to-time APHIS will provide the treatment, especially for propagative materials. We also develop new methods of treatments. These methods increase the effectiveness of treating agricultural goods and reduce the risk of dangerous pests entering the United States.

The 2015 final rule established user fees to cover the costs of these activities as listed currently in § 354.3(h). Prior to that rulemaking, these costs were allocated to the conveyance fees;

however, a U.S. Government Accountability Office report⁴⁷ recommended that treatment monitoring be made a stand-alone fee to improve the efficiency of AQI user fees. In recent years, the Senate has included language in reports accompanying Agriculture Appropriations legislation to reevaluate assessing AQI treatment monitoring fees on a per-enclosure basis.^{48 49 50}

APHIS has reevaluated the per-enclosure basis and is proposing an hourly rate instead. We are proposing this change for two reasons. First, the work of treatment monitoring is clocked in and clocked out by an employee devoted solely to monitoring that particular treatment, which results in distinct “blocks” of treatment oversight. This lends itself to an hourly rate because there is an actual computation of the amount of time worked on a distinct unit without diversion; we can say a specific employee oversaw a specific treatment for 2 hours.

Conveyance and cargo inspection do not lend themselves as readily to an hourly rate. For example, in the commercial vessel environment, cargo is routinely offloaded into a joint holding area, and inspected en masse, while a separate team inspects the actual vessel. Likewise, for commercial aircraft, one employee may make rounds to inspect the exterior of recently arrived aircraft for hitchhiking insects while another employee inspects offloaded cargo from multiple aircraft in a holding area and another employee inspects the cargo hold. In those instances, CBP will provide the number of vessels or aircraft inspected, and the collective workforce hours it took to inspect, but there is not a distinct record of time worked on any one vessel or aircraft, and disaggregating the total time worked in order to arrive at that figure is unfeasible. Instead, we total the costs associated with providing inspections annually, and divide by the number of arrivals. This results in an average amount worked, and the fee is pegged against that average.

The second reason, which we discuss below, is that there can be a significant variance in the amount of time needed to oversee a particular treatment. An in-transit cold treatment may be verified in less than 15 minutes, whereas some fumigation treatments must be

administered over multiple days. These differing requirements for treatment oversight lead us to believe that an hourly treatment fee would help ensure that parties are treated equitably when assessing treatment monitoring fees.

Under the current regulations in paragraph (h)(1), treatment monitoring fees are assessed on a per-treatment basis, *e.g.*, per fumigation, cold treatment, etc. For example, a fumigation conducted under a single tarp is a single treatment, regardless of the volume under the tarp or the number of consignments subjected to the treatment under the tarp at one time, and it is subject to one treatment monitoring fee. If, however, a single consignment is split into multiple separate enclosures due to volume, treatment monitoring fees will be assessed for the treatments conducted in each enclosure, even if those treatments occurred simultaneously and a single Plant Health Safeguarding Specialist (PHSS) monitored them. In some cases, therefore, a per treatment approach may not accurately account for the time and effort required to perform these treatment monitoring services.

Additionally, the per-treatment approach lacks flexibility. Trade needs drive treatment activities, and these needs are not the same at all ports of entry. For example, in the northeast, trade primarily consists of large volumes of single commodity cargo, which has led to large scale treatment enclosures and fewer monitoring events (and thus fewer occurrences of the fee). In contrast, South Florida ports-of-entry have more cargo diversity, resulting in small-scale treatment enclosures and more monitoring events (and thus more occurrences of the fee).

Since 2018, the Senate has requested that APHIS evaluate alternatives to assessing treatment monitoring fees on a per-treatment basis: The Senate Committee on Appropriations⁵¹ noted that assessing AQI treatment monitoring fees on a per-enclosure or per-treatment basis imposes disproportionate impacts on industry and user groups at certain key ports of entry, including ports along the southeast United States. The Senate Committee on Appropriations encouraged USDA to continue conducting a study that specifically outlines the actual costs of treatments, examines the disproportionate impact the fee has on airports and seaports in different regions of the United States,

⁴⁷ <https://www.gao.gov/products/gao-13-268>.

⁴⁸ <https://www.congress.gov/117/crpt/srpt34/CRPT-117srpt34.pdf>.

⁴⁹ <https://www.congress.gov/116/crpt/srpt110/CRPT-116srpt110.pdf>.

⁵⁰ APHIS is exploring several options for AQI user fees after FY2028 including a new rulemaking to adjust the fee schedule and a rule implementing a notice-based process for inflation adjustments for those periods between fee adjustment rulemakings.

⁵¹ 2018: <https://www.govinfo.gov/content/pkg/CRPT-115srpt259/pdf/CRPT-115srpt259.pdf>. 2019: <https://www.congress.gov/116/crpt/srpt110/CRPT-116srpt110.pdf>. 2021: <https://www.congress.gov/117/crpt/srpt34/CRPT-117srpt34.pdf>.

⁴⁶ <https://www.aphis.usda.gov/mrpb/userfees/aqi-account-credit-req.xlsx>.

and evaluates alternative and equitable funding mechanisms.

APHIS has holistically evaluated issues associated with treatment monitoring. First, we have determined that there are often significant differences in the amount of time and workload necessary to monitor certain treatments. For example, in-transit container cold treatments require considerably less time to monitor than a tarpaulin-less container fumigation.

Second, we have determined that the only difference in current actualized program costs between treatments monitored during regular business hours and those performed on overtime is the rate of pay to the PHSS(s) conducting the treatment monitoring. For example, APHIS assumes the average treatment monitoring event is conducted by a GS-11 step 5 (mid-career journeyman level). If one takes the average GS-11 step 5 rate of pay across all locality pay rates,⁵² weighted by the number of Federal employees in a given locality,⁵³ in 2022 dollars, that weighted average is \$37.52 per hour. Similarly, the average weighted overtime rate for Monday through Saturday and holidays is \$45.21 per hour and for Sundays \$75.05 per hour. The additional cost to the AQI program for treatment monitoring during overtime on Mondays through Saturdays and holidays is \$7.68 per hour, and on Sundays that difference is \$37.52 per hour (numbers may appear off due to rounding).⁵⁴ These cost differences have then been added to the proposed base treatment monitoring hourly rate, and then adjusted for projected inflation. Tables 4 and 5 of this document reflect these calculations.

Finally, APHIS has assessed the role of the party responsible for paying the user fee associated with treatment monitoring. In cases in which a third-party treatment provider provides the treatment, APHIS has determined that the responsible party should be the treatment provider. In cases in which APHIS is the treatment provider, APHIS has determined that the responsible party should be the importer.

Based on the foregoing, the proposed rule would restructure the treatment monitoring fee to better address the

concerns of stakeholders, increase program flexibility, and more accurately assign costs. Specifically, we would revise § 354.3(h), which lists the treatment monitoring fees and related requirements, including those pertaining to remittances, statements, and collections, to change the structure of the fees from a per-treatment basis to an hourly basis and to update those other requirements.

Change From a per-Treatment Basis to an Hourly Basis

With treatments fees assessed on an hourly rate (in quarter-hour increments, rounded up to the next quarter-hour) instead of per-treatment, the responsible party requesting and receiving treatment monitoring services would only be charged for the total time the employee spends monitoring the treatments. The hourly rate (as opposed to the per-treatment rate) would more accurately reflect the time spent and costs incurred for any APHIS treatment monitoring service and, therefore, would be fairer and more transparent. The impact of changing from a per-treatment basis to an hourly basis on an individual treatment provider will depend upon several factors, including number of simultaneous treatment monitoring events and duration of treatments.

To illustrate the impact of the change from per-treatment to hourly, consider two common treatment types: In-transit container cold treatments and tarp-less container fumigations. The average in-transit container cold treatment requires less than 15 minutes of monitoring, but the average tarp-less container fumigation requires over 2½ hours (2 hours and 30 minutes) of monitoring. Under the current fee schedule, the treatment monitoring fee for both of those treatments during regular business hours is \$237, regardless of the amount of time or effort spent monitoring a treatment. Under the proposed hourly scheme at full implementation (FY 2028, Table 4), the in-transit container cold treatment would cost \$79.21 (assumes 15 minutes; 0.25 hours × \$316.83/hour), and the tarp-less container fumigation would cost \$792.08 (assumes 2½ hours; 2.5 hours × \$316.83/hour).

Additional benefits of our proposed hourly rate structure include the following:

- Multiple treatments could be monitored by a single PPQ employee in a given hour (per local labor agreements), incentivizing efficient operations;
- The fee could be implemented in 15-minute increments, incentivizing treatment provider investments in

automation of treatment application; and

- Premium service rates would simplify treatment monitoring services provided on reimbursable overtime: One premium rate for Monday through Saturday and holidays, and a second premium service rate for Sunday.

Applying the Treatment Monitoring Fee to All Treatment Types and Treatment-Related Activities

The range of treatment related activities subject to the proposed fee would include phytosanitary treatments under 7 CFR part 305 and in the USDA APHIS Treatment Manual,⁵⁵ as well as to the treatment-preparatory activities of restacking and reconditioning, which are discussed earlier in this document under the heading “Definitions” and below. The current regulations allow the fee to be applied to all phytosanitary treatments. However, as a matter of current Agency practice, since the 2015 rulemaking, APHIS has only applied the treatment monitoring fee to fumigations and cold treatments, and we have not been recovering the costs of monitoring other treatment types. Moreover, we have not been collecting fees for monitoring activities such as restacking and reconditioning. For a treatment to be effective, the commodity must meet certain conditions such as sufficient space above, below, and between commodity stacks for the movement of air, as well as packaging which does not interfere with the treatment. If these conditions do not exist at the time of arrival, APHIS must monitor and safeguard restacking and reconditioning procedures that will satisfy these conditions and make it possible to treat the commodity. The time necessary to restack and recondition ranges from an hour to multiple days depending upon the condition of the commodity at the time of arrival, the type of commodity, the treatment to be performed, etc. The practice of not collecting fees for reconditioning and restacking has prevented us from recovering any of the costs to APHIS in monitoring these activities. As noted earlier, we would also add definitions of *reconditioning* and *restacking* to § 354.3(a). We are proposing to add new paragraphs (h)(1)(i)(A) through (D), which would describe the activities for which the treatment monitoring fees are assessed.

The proposed treatment monitoring user fee rates, as listed in proposed paragraph (h)(1)(i), are listed in table 4.

⁵⁵ Treatment schedules will migrate to the Agriculture Commodity Import Requirements (ACIR) Database in the future: <https://www.aphis.usda.gov/aphis/resources/acir>.

⁵² <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2022/2022-general-schedule-pay-rates.xls>.

⁵³ <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/major-work-locations-of-the-executive-branch.pdf>.

⁵⁴ See supporting document “AQI Treatment Monitoring User Fee: Change to an Hourly Rate, and Incorporate Reimbursable Overtime.” See footnote 5 for instructions on how to view this and other supporting documents on [Regulations.gov](https://www.regulations.gov).

The fees are assessed per employee, per hour conducting the service.

TABLE 4—TREATMENT MONITORING FEES (HOURLY RATE)—REGULAR TIME

Beginning on	FY1/1/2024 FY2024	FY10/1/2024 FY2025	FY10/1/2025 FY2026	FY10/1/2026 FY2027	FY10/1/2027 FY2028
Treatment monitoring and related services performed during regular business hours					
Regular Time Hourly Rate	\$232.97	\$253.19	\$273.90	\$295.12	\$316.83
Quarter Hour Rate	58.24	63.30	68.48	73.78	79.21

Applying Overtime to Treatment Monitoring Performed Outside of Regular Business Hours

Proposed paragraph (h)(2) would clarify that overtime rates, rather than the regular hourly rates, would apply for treatment monitoring activities conducted outside of normal business

hours. The paragraph would further state that the treatment services overtime hourly rate would be applied identically to reimbursable overtime and that overtime services would incur a minimum charge of 2 hours, unless performed on the employee's regular tour of duty and performed in direct

continuation of the regular tour of duty or begun within an hour of the regular tour of duty. Overtime hourly rates for activities conducted on Mondays through Saturdays and holidays and Premium hourly rates for activities conducted on Sundays would be listed separately in a table in paragraph (h)(2).

TABLE 5—TREATMENT MONITORING FEES (HOURLY RATE) —OVERTIME

Beginning on	FY1/1/2024 FY2024	FY10/1/2024 FY2025	FY10/1/2025 FY2026	FY10/1/2026 FY2027	FY10/1/2027 FY2028
Treatment monitoring and related services performed outside of regular business hours Monday through Saturday and Holidays					
Mon–Sat, Holiday Overtime Hourly Rate	\$240.89	\$261.36	\$282.32	\$303.93	\$326.04
Quarter Hour Rate	60.22	65.34	70.58	75.98	81.51
Treatment monitoring and related services performed on Sundays					
Sunday Premium Hourly Rate	272.27	294.34	317.62	342.26	368.40
Quarter Hour Rate	68.07	73.58	79.41	85.57	92.10

Changes to Treatment Monitoring Fee Designation of Responsible Parties and Remittance Procedures

Current paragraphs (h)(2), (3), (4), and (i), contain provisions for collection of treatment user fees, remittance and statement procedures, payment methods, and liability. The existing regulations in (h)(2) and (3) specify that private entities that provide AQI treatment services to importers are responsible for collecting the AQI treatment user fee from the importer for whom the service is provided and for holding those fees separately in a trust for the United States by the entity collecting such fees. Paragraphs (h)(4) and (i) contain provisions pertaining to remittance and statement procedures and payment methods that are outdated, as discussed earlier in relation to commercial railroad cars and commercial aircraft fees. Paragraph (j) lists hourly and overtime rates for certain treatment monitoring services pertaining to solid wood packing material.

Since implementation of the treatment fees, APHIS has received feedback from stakeholders regarding

challenges with the structure of the fee collection and payment process. Some stakeholders expressed the view that because the Agency did not provide an invoice for services delivered, tracking APHIS-delivered services fell entirely on the AQI treatment provider, which added burden and cost. Another concern was that the requirement to set up a separate trust account for user fees added cost and burden to business operations compared to typical invoice and billing practices. In addition, the Agency had to develop procedures to pursue compliance and enforcement actions when funds were collected and held in trust, compared to more typical, and efficient, billing and debt collection procedures.

We are therefore proposing a new approach to collection, billing, and payment, which we discuss in detail in the paragraphs that follow. This approach would reduce cost and burden on treatment providers by reducing the need to create new business procedures to monitor, collect, and pay treatment monitoring fees to APHIS, while simplifying the Agency's procedures to address payment non-compliance.

The existing regulations in paragraph (h)(3)(i) state that in cases in which APHIS is not providing the AQI treatment and collecting the associated fee, AQI user fees collected from importers pursuant to paragraph (h) shall be held in trust for the United States by the person collecting such fees, by any person holding such fees, or by the person who is ultimately responsible for remittance of such fees to APHIS. We are proposing to clarify responsibility for payment by revising paragraphs (h)(3) and (4). For treatments carried out by third party treatment providers and monitored by APHIS, APHIS would collect the fees from the treatment providers either at the time of service or as described below in the discussion of the billing process. For treatments conducted by APHIS, APHIS would collect the AQI treatment fee at the time the treatment is applied directly from the person receiving the services, which, in that case, would be the importer or their agent. Because APHIS would issue a bill to all service providers who have credit accounts in good standing, or would collect payment at the time of service, service

providers would no longer be required to establish a trust fund account.

Proposed paragraph (h)(5) would describe the billing process. User fees for treatment monitoring would be due at the time-of-service delivery, unless the treatment provider has established an acceptable credit history and opened a customer account with APHIS, in which case they can be billed by APHIS for services provided. Proposed paragraph (h)(6) would provide the same updated link for payment information provided in proposed paragraphs (d) and (e).

The existing regulations in § 354.3 do not specify consequences for late payment or nonpayment of AQI treatment monitoring user fees. We propose to add new paragraphs (i)(1) to (5) to explain the consequences of and procedures for nonpayment or late payment of treatment monitoring user fees, including debt collection.^{56 57} Consequences for nonpayment or late payment under proposed paragraph (i) include denial of AQI services, seizure and disposal of cargo, assessment of late fees and fees for dishonored debt, and reporting by APHIS of delinquent debt to credit reporting agencies. Procedures for debt collection, which would be carried out by the USDA and the Department of the Treasury on behalf of the USDA, are contained in proposed paragraph (i)(5).

Collectively, proposed paragraphs (h) and (i) would reduce cost and burden on treatment providers by reducing the need to create new business procedures to hold fees in trust, while codifying and streamlining the Agency's procedures to address payment non-compliance. The changes would also update addresses and provisions pertaining to payment methods in a manner consistent with the updates to the corresponding requirements for commercial railroad cars and aircraft.

Technical Amendments

We are proposing to remove current paragraph (j), which lists hourly and overtime charges for certain treatment monitoring services pertaining to solid wood packing material. Prior to the adoption of International Standards for

Phytosanitary Measures (ISPM) 15⁵⁸ in 2002, APHIS had specific regulations in 7 CFR 319.40–5(g) and (h) regarding solid wood packing material and merchandise from the Peoples Republic of China, including Hong Kong, with § 319.40–5(h) referring to the fees in § 354.3(j). Adoption of ISPM 15 made § 319.40–5(g) and (h) obsolete, and APHIS removed them in 2005. Though APHIS did not also remove § 354.3(j) from the regulations at that time, it, too, has become obsolete because there are no other sections of APHIS' regulations pointing to or relying upon § 354.3(j).

Records Retention

To improve monitoring, compliance, and enforcement of this regulation, we are proposing to add a new paragraph (j), which would contain retention requirements for records related to AQI user fees. Proposed paragraph (j)(1) would provide that entities responsible for collecting and paying the fees and their agents would be responsible for maintaining all records required under § 354.3, as well as legible copies of contracts and other agreements made between responsible persons and their agents. Under proposed paragraph (j)(2), all parties responsible for collecting and paying the fees would have to maintain sufficient documentation for APHIS, CBP, and authorized representatives to verify the accuracy of the fee collections and remittance worksheets. Such information would have to be made available for inspection upon APHIS and CBP's demand. Such documentation would be required to be maintained in the United States for a period of 5 years from the date of fee calculation. Each entity covered by this proposed requirement would have to provide to APHIS and CBP the name, address, and telephone number of a responsible officer who is able to verify any statements or records required to be filed or maintained under this section and to promptly notify APHIS and CBP of any changes in the identifying information previously submitted. Currently, CBP conducts GAO yellow book standard audits of the commercial aircraft fee and international air passenger fee on APHIS' and CBP's behalf. APHIS seeks to expand this arrangement to include audits of the AQI program's commercial railroad car fee and international cruise passenger fee.

Severability

Finally, we are proposing to add a new § 354.3(k), "Severability," to address the possibility that this rule, or

portions of this rule, may be challenged in litigation. It is APHIS' intent that the individual sections of this rule be severable from each other, and that if any sections or portions of the regulations are stayed or invalidated, the validity of the remainder of the sections shall not be affected and shall continue to be operative.

Executive Orders 12866 and 13563, and Regulatory Flexibility Act

This proposed rule has been determined to be significant under section 3(f)(1) of Executive Order 12866, "Regulatory Planning and Review," as amended by Executive Order 14094, "Modernizing Regulatory Review," and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this proposed rule. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, "Improving Regulation and Regulatory Review," 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 provides an initial regulatory flexibility analysis that examines the potential economic effects of this proposed rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the *Regulations.gov* website (see **ADDRESSES** above for instructions for accessing *Regulations.gov*).

We do not have sufficient information to certify that this proposed rule will not have significant economic impact on a substantial number of small entities. We have therefore included an Initial Regulatory Flexibility Analysis exploring the impacts on small entities. We invite comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this proposed rule.

The Food, Agriculture, Conservation and Trade (FACT) Act of 1990 (as amended) [21 U.S.C. 136a] authorizes the Secretary of Agriculture to prescribe and collect fees sufficient to cover the

⁵⁶ Current paragraph (g) in § 354.3 of the regulations covers export certification user fees. Current paragraph (i) in § 354.3 contains requirements related to payment methods for those export certification user fees only. This proposed rule does not address any of those requirements. We are proposing, however, to consolidate the export certification user fee requirements presently found in paragraph (i) and move them to in § 354.3(g)(6). This proposed editorial change would make the regulations clearer and easier to use.

⁵⁷ This change will not affect export certification user fees.

⁵⁸ <https://www.fao.org/3/mb160e/mb160e.pdf>.

cost of providing agricultural quarantine and inspection services in connection with the arrival at a port in the customs territory of the United States, or the preclearance or pre-inspection at a site outside the customs territory of the United States, of an international passenger, commercial vessel, commercial aircraft, commercial truck, or railroad car, and to cover the cost of administering the AQI program. The United States Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS) Plant Protection and Quarantine (PPQ) is responsible for developing and setting the Agricultural Quarantine and Inspection (AQI) user fee schedule, and related regulatory policy. Periodically, APHIS updates the schedule of rates paid by users via the rulemaking process. Due to a variety of factors, the current AQI fee schedule results in insufficient collections to achieve full cost recovery.

APHIS is proposing a number of revisions to the regulations that govern the oversight of phytosanitary treatments, user fee rates, and related regulatory requirements for maritime vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international passengers on airlines and cruise ships. The proposed revisions would incorporate adjustments to the cost model that is used to calculate the fees.

This proposed rule would also eliminate an exemption from the commercial aircraft fee that currently applies to commercial aircraft with 64 or fewer seats that meet certain regulatory requirements; eliminate an exemption from the commercial vessel fee that currently applies to commercial barges operating between Canada and the United States that meet certain regulatory requirements; increase the "per arrival" multiple used to calculate the fee for a multiple-use transponder for commercial trucks; as well as increase the "per arrival" multiple used to calculate the prepaid railroad car fee and apply the fee to all arriving railroad cars.

This proposed rule also restructures the treatment monitoring fee from a "per treatment" basis to a three-tier, per employee, hourly rate system; applies the treatment monitoring fee to all approved phytosanitary treatments; incorporates associated actions, such as monitoring restacking and

reconditioning, into the fee; and incorporates monitoring destructions and other phytosanitary mitigation measures, such as seed grinding and steam cleaning, into the fee. The proposed rule would also implement a billing process for the treatment monitoring fee and move responsibility for paying the fee from the importer of record to the party applying the treatment.

This proposed rule would also update remittance procedures to facilitate timely submission of fees. Finally, we have made editorial revisions throughout the proposed rule in order to clarify intent in the regulations.

The AQI Program implements a continuum of exclusion strategies and activities that mitigate the plant and animal health risks associated with the spread of pests and diseases due to global trade, international travel, or the smuggling of prohibited agricultural and related products. The personnel and support to carry out an effective import and pest exclusion program begins before and continues after the port-of-entry where inspections often take place. APHIS uses an ABC Model to calculate the individual user fees. First, costs are allocated to a series of activities. Next, the costs assigned to those activities are allocated to the fee areas based on the level of effort associated with each fee area. For example, the costs associated with the cargo inspection activity (which include the costs of providing the service, as well as the administrative and overhead costs associated with providing the service) are allocated to the commercial vessel, truck, railroad car, and aircraft fees, based on the level of effort in each of those fee areas. This cost allocation approach avoids cross-subsidization (e.g., cargo inspection costs do not get assigned to passengers or treatment users).

When the cost of providing AQI services and the fees paid to fund these services do not align, adjustments are a necessary step in reaching the goal of full cost recovery. Services in the AQI program must be provided, but when the user fee is not covering the costs, the user of the service is not bearing the true cost of providing the service. This proposed rule would benefit the public by continuing to ensure that the fees received from users for providing necessary AQI services align with the

expenditures associated with providing those services.

AQI services protect American agriculture and natural resources. The spread of invasive species harms domestic agricultural producers and damages the natural environment. Imported freight constitutes a major phytosanitary risk. The wide diversity of origins and commodities present multiple opportunities for pests to infest a product or wood packing material. AQI services are provided to mitigate such phytosanitary risks. To ensure that the expenditures on AQI services and the fees applied to those services align, adjustments to the fees are necessary. Those most likely to be impacted should this proposed rule be finalized are international air and sea passengers, businesses within the truck, rail, sea, and air transportation sectors, and providers of treatment services. While users of AQI services do incur costs in the form of user fees, these user fees help the government to recover the costs of providing AQI services. However, the associated revenues do not currently align with the costs of providing these AQI services and administering the AQI program.

Individual importers or passengers may experience some financial burden from the establishment of or increase in user fees (or relief if a fee is reduced), but the AQI services are already being provided and thus are already counted as government costs. The revenue from user fees for services provided are intended to cover the expenditures for those services, a concept known as transfer payments. Examples of transfer payments include fees paid to government agencies for services provided by the agency. Federal regulations with transfer payments are assumed to have a one-to-one effect, balancing benefits and costs.⁵⁹ The benefits and costs, as well as the annualized transfer payments are summarized in table A.

⁵⁹ Transfer payments are noted by the Office of Management and Budget to include "Fees to government agencies for goods or services provided by the agency (monetary transfers from fee payers to the government—the goods and services are already counted as government costs and including them as private costs would entail double counting)." Federal regulations with transfer payments are assumed to have a one-to-one effect on benefits and costs. See: Regulatory Impact Analysis: A Primer, page 8. https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

TABLE A—ACCOUNTING STATEMENT OF COSTS, BENEFITS, AND TRANSFERS ASSOCIATED WITH THE RULE

Benefits		
Non-Quantified Benefits	The proposed rule would better align AQI expenditures and revenues by class. Transfer payments balance the costs and benefits of the program.	
Costs		
Non-Quantified Costs	Realigned AQI user fees are intended to cover the costs of providing AQI services. User fees transfer the cost of those services from the government to the users.	
Transfers		
Annualized Transfers by user class ^{1 2}	7% discount rate	3% discount rate
Air Passengers	\$471,200,000	\$472,500,000
Commercial Aircraft	290,200,000	291,700,000
Commercial Rail	25,730,000	25,920,000
Commercial Truck ³	113,500,000	114,100,000
Commercial Vessel	186,100,000	186,400,000
Cruise Vessel Passenger	20,120,000	20,170,000
Treatments (\$/Hr.)	14,430,000	14,520,000
Total ⁴	1,121,280,000	1,125,310,000

¹ Annualized value of transfers from 2024 through 2028; discounted at 7 and 3 percent, 2022 dollars.

² Estimates of user fee collections (transfers) based on individual fee levels for each year of the 5-year implementation schedule (see table B) multiplied by an estimate of the activity level in each fee category. This activity level estimate is based on the average number of each category of arrivals from FY 2017–2019, the 3 years for which clean data are available.

³ This estimate is based on truck arrivals from FY 2017–2019. To account for the change in both the fee level and transponder cap, the estimate uses a distribution of one million single payer crossings and 125,000 transponders.

⁴ Totals may not sum due to rounding.

The proposed fee schedule would better reflect the costs of AQI services provided to commercial cargo vessels,

commercial trucks, commercial cargo railroad cars, commercial aircraft, and international air and sea passengers

arriving at U.S. ports; and it would more accurately assign costs to treatment monitoring activities (table B).

TABLE B—CURRENT AND PROPOSED AQI USER FEE RATES

[Dollars]

Fee area	Current fee	Proposed fees				
		2024	2025	2026	2027	2028
Air Passenger	3.83	4.29	4.44	4.60	4.76	4.93
Commercial Aircraft	225.00	288.41	309.00	330.07	351.64	373.68
Commercial Cargo Vessel	825.00	3,219.29	3,302.23	3,386.20	3,471.18	3,557.18
Commercial Truck	7.29	11.40	12.40	13.45	14.50	15.55
Commercial Cargo Railroad Car	2.00	5.81	6.51	7.23	7.97	8.72
Cruise Vessel Passenger	1.68	1.20	1.25	1.29	1.34	1.39
Treatment:						
(per treatment)	237.00					
(per hour)		232.97	253.19	273.90	295.12	316.83

Air Passengers

The air passenger fee would increase from \$3.83 to \$4.93 by 2028. The total fee increase of \$1.10 would be approximately a 28.7 percent increase from current fees, but only a 0.1 percent increase in the average price of an international round-trip airfare. Limitations in the amount and nature of data available to the agency make it difficult to develop specific conclusions

as to how small fee changes will affect international air travel overall. However, any change in international air travel due to a change of less than one dollar in the price of international airfare is likely to be small.

Commercial Aircraft

The commercial aircraft fee would increase from \$225 to \$373.68 per arrival by 2028. This increase of \$148.68

would be approximately a 66 percent increase from the current fees. Between 2013 and 2019 the volume of imports into the United States by air increased by eight percent (82 million kg) and the value increased by 57 percent in constant dollars. Even after the 66 percent increase, the commercial aircraft fee is still the equivalent of 0.05 percent of the value of goods being imported by air. In terms of the cargo

alone, the 2028 commercial aircraft fee rate under this proposal would represent approximately \$0.069 in dollars-per-kilogram imported by air generally. In addition, the commercial aircraft user fee constitutes a small portion of the expenses associated with commercial aircraft. And moreover, most international arrivals have passenger airfares as a primary revenue source. Even with the commercial aircraft fee increasing by \$148.68 by 2028, the commercial aircraft user fee would be the equivalent to approximately 5 minutes of operating costs for aircraft.⁶⁰ Limitations in the amount and nature of data available to the agency make it difficult to develop specific conclusions as to how such a fee change will affect international arrivals of commercial aircraft overall. However, the increase in the AQI commercial aircraft fee is likely to have a limited impact on aircraft operators.

Small Aircraft Exemption

The commercial aircraft user fee is not currently applied to the international arrivals of certain commercial aircraft with 64 or fewer seats. Commercial aircraft with 64 or fewer seats comprised approximately 10 percent of arriving international flights from 2016 to 2018. This proposed rule would result in the removal of this exemption.

The commercial aircraft fee is based on the average cost of clearing commercial aircraft and their cargo. The cost associated with any specific aircraft, whether small or large, also depends on a variety of other factors because the phytosanitary risk posed by a particular aircraft is based upon the country of origin, countries transited, type and volume of cargo, country of origin of the cargo, and environmental conditions at point of origin and final destination. These costs are not currently borne by all operators of commercial aircraft with fewer than 65 seats arriving internationally.

Domestic flights are not subject to the commercial aircraft fee. For most operators of small commercial aircraft, domestic flights are the greatest portion of their operations and associated revenue. The removal of the exemption would only apply to international arrivals of aircraft with fewer than 65 seats. Approximately 7 percent of the flights of the top 5 small aircraft operators, and less than 5 percent of the

flights of the top 10 operators, are international arrivals. Because we do not have explicit data on the per-flight revenue, profit margins, and competitive landscape affecting international arrivals of commercial aircraft with 64 or fewer seats, we cannot make specific conclusions as to how the collection of this user fee will affect individual businesses. We are inviting the public to provide data relevant to these and other questions concerning the operation of commercial aircraft with fewer than 65 seats arriving internationally. We also invite public comment on other matters related to the removal of this exemption.

Commercial Cargo Vessel

The commercial cargo vessel fee would increase from \$825 to \$3,557.18 by 2028. The proposed fee better accounts for the level of effort it takes to inspect the average ship and its cargo and reflects the expanded capacity of modern container ships. Even with the commercial vessel fee increasing by 331 percent to \$3,557.18 by 2028, the user fee would still represent a fraction of the value of goods being imported by vessel generally (0.02 percent). The proposed commercial vessel fee rate in 2028 dollars-per-kilogram for vessel cargo generally would be less than \$0.0006. The proposed commercial vessel fee remains very small relative to other vessel operating expenses. It is equivalent to approximately 2 percent of a single day's fuel consumption for a moderately sized container ship. Limitations in the amount and nature of data available to the agency make it difficult to develop specific conclusions as to how the proposed fee changes will affect international arrivals of commercial cargo vessels overall. However, the proposed change to the commercial vessel fee seems likely to have a limited impact on the operations of commercial vessels.

Canadian Barge Exemption

From 2016 through 2018, an annual average of 1,405 commercial barges arrived from Canada into the United States, most of which are exempt from the current commercial vessel AQI fee. Vessel companies and ports facilitating the movement of currently exempted barge shipments from Canada and the United States would be affected if the exemption were removed. APHIS has concluded that barges from Canada that meet the user fee exemption do not pose less of a phytosanitary risk than barges travelling from other countries or other vessel types travelling from Canada. At the 2028 rate, the commercial cargo vessel fee would be approximately

\$0.001 per kilogram (kg) imported by barge. Because we do not have explicit data on international barge traffic revenue, profit margins, and the competitive landscape affecting arrivals of currently-exempt barges from Canada, we cannot make specific conclusions as to how the collection of this user fee will affect individual businesses. We are inviting the public to provide data relevant to these and other questions concerning the operation of currently-exempt barges from Canada. We also invite public comment on other matters related to the removal of this exemption, or on the proposed rule generally.

Commercial Truck

The commercial truck fee would increase from \$7.29 to \$15.55⁶¹ by 2028, an increase of \$8.26 per truck arrival. Between 2013 and 2019 imports into the United States by truck increased by 397 million kg. Even after a 114 percent increase, the user fee of \$15.55 proposed in 2028 for a commercial truck entering the U.S. would be the equivalent of 0.034 percent of the average value of goods imported by truck. The proposed fee in 2028 in dollars-per-kilogram for truck cargo generally would be approximately \$0.0014. In addition, this user fee would be the equivalent of the operating expenditures of a truck transporting goods about nine miles. Limitations in the amount and nature of data available to the agency make it difficult to develop specific conclusions as to how these proposed fee changes will affect international arrivals of commercial trucks overall. However, the impact of this proposed fee on the operations of commercial trucks seems likely to be limited.

Commercial Cargo Railroad Car

The commercial cargo railroad car fee would increase from \$2 to \$8.72 per arriving railroad car by 2028, a total increase of \$6.72. Between 2013 and 2019, imports into the United States by rail remained relatively constant, but technology improvements have allowed for a reduction in the number of railroad cars assessed the commercial railroad car fee. Even after a total increase of approximately 337 percent, the commercial cargo railroad car fee would still be the equivalent of approximately 0.029 percent of the value of goods being imported on by railroad car. The

⁶⁰ Federal Aviation Administration. Economic Values for Investment and Regulatory Decisions—Chapter 4: Aircraft Operating Costs. March 2021 Update. Retrieved on June 8, 2022, from https://www.faa.gov/sites/faa.gov/files/regulations_policies/policy_guidance/benefit_cost/econ-value-section-4-op-costs.pdf.

⁶¹ \$15.59 rounded down to the nearest \$0.05 (five-cent) increment. At CBP's request, we rounded down to the next \$0.05 (five-cent) increment to facilitate operations at the border. CBP has indicated that making change at the penny level for single-payer trucks would have a negative impact on wait times at the land border.

proposed fee in 2028 in dollars-per-kilogram for commercial railroad cars generally would have been approximately \$0.0004. Limitations in the amount and nature of data available to the agency make it difficult to develop specific conclusions as to how these proposed fee changes will affect international commercial cargo railroad arrivals overall. However, the proposed change to this fee seems likely to have a limited impact on commercial cargo rail operations.

Cruise Vessel Passenger

The cruise vessel passenger fee would decline by 31 percent initially, and still be 21 percent lower than the current fee by 2028, an overall decline of \$0.29 per passenger arrival. Limitations in the amount and nature of data available to the agency make it difficult to develop specific conclusions as to how small fee changes will affect international cruise passenger arrivals overall. However, a decrease of \$0.29 in the fee represents less than a 0.02 percent decrease in the cost of a 7-day cruise.

Treatment Monitoring

APHIS monitors phytosanitary treatments to ensure that they are conducted as prescribed. Shifting the treatment monitoring fee to an hourly basis would reduce the cost of treatment monitoring for many treatment providers. Multiple treatments can often be monitored by a single PPQ employee in a given hour, and the proposed hourly fee can be implemented in 15-minute increments. The impact of shifting to an hourly fee would vary from user to user, as the cost would depend on the amount of time spent monitoring treatments rather than on the number of treatment enclosures. It is, however, likely that impacts from the proposed changes would be lower under an hourly fee than they would be under the current per-treatment fee. Providers of some treatment services are not currently subject to the treatment monitoring fee and would be impacted by the proposed rule. Because we do not have explicit data on those providers affected by the proposed changes, we cannot make specific conclusions as to how the collection of this user fee will affect individual businesses. We are inviting the public to provide data relevant to these and other questions concerning treatment operations.

APHIS estimates the total annualized cost of the paperwork and recordkeeping associated with this proposed rule to be \$104,039. Reporting and recordkeeping requirements associated with the proposed rule are

discussed in the rule under the heading “Paperwork Reduction Act.”

While the Small Business Administration has set small-entity standards for the transportation sectors, the size data do not distinguish between transportation firms that operate internationally and those firms that only operate within the United States. Most businesses that would be affected by the rule are likely to be small. This RIA and initial regulatory flexibility analysis addresses possible effects of the proposed rule on small-entity stakeholders and their operations.

We recognize we may not have all relevant information concerning economic impacts at this time. Therefore, we invite the public to comment on the proposed rule and provide any additional relevant information. We also invite public comments on alternatives that may achieve the objective of this proposed rule.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, “Civil Justice Reform.” If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Executive Order 13175

This proposed rule 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 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.

APHIS has determined that this proposed rule, if finalized, does not have substantial direct effects on one or more Tribes; however, APHIS continues to seek opportunities to engage Tribal nations and their communities on new rulemaking. Accordingly, on July 18, 2022, APHIS held an initial listening session for Tribal nations regarding the provisions of the rule. No comments or concerns were received regarding that listening session. However, should a

Tribe request consultation, APHIS will collaborate with the Office of Tribal Relations to ensure meaningful consultation occurs. APHIS is committed to full compliance with the provisions of Executive Order 13175.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Written comments and recommendations for the proposed information collection should be sent within 60 days of publication of this document 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. Please send a copy of your comments to: (1) Docket No. APHIS–2022–0023, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW, Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

The processes involving the agricultural quarantine and inspection user fees and changes proposed in this document involve information collection, reporting, and recordkeeping requirements in the form of paper, electronic submissions, and information systems. In conjunction with the proposed changes to provide for cost recovery for services, we have considered each proposed change and their impact(s) on these burdens. These changes concern adjusting fee amounts, adjusting caps on certain prepaid fees, removing exemptions, changing certain fees from flat to hourly rates, updating requirements for fee remittances and statement, and providing electronic payments and statement options.

User fee information collection activities are reported in information collection 0579–0055. This proposed rule will add additional respondents to activities related to preparation and submission of monthly statement submissions for commercial railroad cars and commercial aircraft, and user fees for international air and cruise passengers. There is also one new information collection activity that formalizes new recordkeeping and record retention requirements. The new

recordkeeping burden is associated with applications for credit accounts and requests for services; collection of user fees in connection with the arrival and inspection of commercial vessels, railroad cars, commercial aircraft, trucks, and international air and cruise passengers; collection of user fees for conducting and monitoring treatments; and issuing and use of electronic transponders.

Changes prescribed in this proposed rule may increase or decrease burden on respondents and affect one or multiple fee categories.

a. Commence Charging for Empty Railroad Cars.

(1) We will start charging for empty railroad cars. The changes in burdens here would be two-fold: (a) We will need to identify the burden involved with existing companies paying for loaded railroad cars to also identify how many empty railroad cars they will now be paying for and (b) possible burdens involved with any railroad company who is in the business of only moving empty railroad cars.

(2) Our current burden assumption includes 5 minutes per railroad company to submit user fees for their railroad cars. We assume if we commence charging for empty railroad cars, there would be an overall increase in burden of 5 percent in that time will be spent determining how many empty railroad cars each of the current railroad companies remitting the fees must spend to identify how many empty cars they would then be remitting for. A 5 percent increase in the 5-minute time value is 0.25 minutes or 15 seconds.

(3) In addition, we assume there is one railroad company whose business is only moving empty railroad cars, and that company would be required to start paying user fees for their empty cars. With railroad companies remitting fees monthly, we assume this railroad company would have the new burden of remitting fees 12 times per year. These assumptions on the impact on the burdens of the Federal Government commencing charging for empty railroad cars increases the overall estimated burden on the public by 2 hours.

b. Removal of the Exemption for Barges. Currently barges are eligible for exemption if they travel solely between the United States and Canada; that do not carry cargo originating from countries other than the United States or Canada; that do not carry plants or plant products; that do not carry animals or animal products; and that do not carry soil or quarry products from areas in Canada listed in 7 CFR 319.77–3 as being infested with gypsy moth. As

discussed above, we are proposing to eliminate this exemption. Department of Transportation Statistics identify 76 barge companies operating between the United States and Canada. We make the assumption barge companies move once a month, so the increase in burden is 912 occurrences. Our current burden assumption includes less than 1 minute per barge company to submit user fees in addition to their U.S. Customs and Border Protection fee. The overall impact of this change would be an increase of less than 1 hour.

c. Commercial Vessel Fee Exemption for Commercial Cruise (Passenger) Vessels That Carry Passengers Paying the International Passenger Fees. The commercial vessel fee would not apply to commercial cruise (passenger) vessels that carry passengers paying the international passenger fees under paragraph (f) of § 354.3, because the cost of inspecting the entirety of the vessel is included in the international cruise passenger fee, and cruise vessels do not generally carry commercial cargo. In October 2022, we estimated there will be 29,009 cruise vessels trips that would be subject to paying the vessel fee over a 6-year period. This yields about 4,834 cruise vessels trips per year. $[29,009/6 = 4,834]$. Applying an estimate that cruise ships run 12 times a year, we obtain the number of impacted commercial cruise (passenger) vessels to be 403 per year. $[4,834/12 = 403]$ and the number of paying cruise vessel companies to be 14. Our current burden assumption includes less than 1 minute per commercial cruise (passenger) vessel company to submit user fees in addition to their U.S. Customs and Border Protection fee. The overall impact of this change would be a decrease of less than 1 hour.

d. Commence Charging for Empty Trucks and Truck Cabs. We are proposing to add a sentence to paragraph (c)(1) of § 354.3 stating that the AQI user fee would apply to all commercial trucks, regardless of what they are carrying, including empty trucks and truck cabs. Because many truck haul freight in one direction across the U.S. border, and because there may be additional movements of empty trucks and truck cabs, we estimate there are 1,521,600 empty truck and truck cab entries per year which could have an increased burden of less than 1 minute each. These entries are a mix of both single payer entries and annual pass owner entries. The overall impact of this change would be an increase of 1,268 respondent hours per year.

e. Commercial Railroad Companies' Use of Remittance Worksheets. As

discussed above, we are planning to use remittance worksheets for the respondents to submit along with payments. This is designed to simplify the data elements respondents report. We assume this change will cut the time it takes for 27 railroad companies to remit their payments by a third. 27 commercial railroad companies remitting 12 times a year is 324 submissions per year. We assume it ordinarily takes about 5 minutes per submission, so with a reduction of this amount by one third, we estimate the overall impact of this change would be decrease of 9 respondent hours per year.

f. Commercial Railroad Companies' Requirement to Complete Transfers of Responsibility. Proposed paragraph (d)(6)(ii) of § 354.3 would state that the agent or other responsible person for a payment remains the agent or responsible person unless a transfer of responsibility is approved by APHIS. Before such a transfer could take place, the agent or responsible person would first have to contact APHIS to initiate the transfer. Once APHIS approves the transfer, the new agent or responsible person would assume all responsibilities for ensuring compliance with the requirements of part 354. We estimate 12 commercial railroad companies may need to exert time and effort to do so, which would create a new burden for them. We estimate each action will take 10 minutes leading to an overall impact of this new requirement to be an increase in two respondent hours per year. We estimate each action will take 10 minutes leading to an overall impact of this new requirement to be an increase in 2 respondent hours per year.

g. Removal of Aircraft Exemption with 64 or Fewer Seats. The proposed removal of paragraph (e)(2)(iv) of § 354.3, which exempts from AQI user fees certain passenger aircraft with 64 or fewer seats will create a new burden for those aircraft. Of an estimated 331 airlines with arriving international flights into the U.S. we estimate 19 percent of these airlines fall into this exemption category or 63 airlines. $[331 * 19\% = 63]$ With airlines being required to remit fees four times per year, this leads to an estimated 252 possible new burden actions. Our current burden assumption includes 5 minutes per submission, so the overall impact of the removal of this exemption on respondents would be an increase of 21 respondent hours per year.

h. Commercial Airlines' Use of Remittance Worksheets. As discussed above, we are planning to use remittance worksheets for the respondents to submit along with

payments. This is designed to simplify the data elements respondents report. We assume this change will cut the time it takes for 331 airlines to remit their payments by a third. 331 airlines remitting 4 times a year is 1324 submissions per year. We assume it ordinarily takes about 10 minutes per airline submission, so with a reduction of this amount by one third, we estimate the overall impact of this change would be decrease of 74 respondent hours per year.

i. Change in Commercial Airlines' Fee Remittances to Monthly rather than Quarterly. Proposed changes to paragraph (e)(3) of § 354.3 include decreasing the period for payment of the fees and submission of remittance reports from quarterly to monthly. This would triple the current burden on these respondents; however, it is important to note burden (h) above will also have an impact on commercial airlines' burden. Using an estimated $331 \text{ airlines} \times 3$ (a tripling of their current submission frequency) = 993 new occurrences. These occurrences will take 6.67 minutes [$\frac{2}{3}$ of the normal 10 minutes submission time assumption used as a starting point for burden (h)]/60 minutes—an overall impact of this change to be an increase of 110 respondent hours per year.

j. Commercial Airlines to Make Refunds of AQI International Airline Passenger Fees to Ticket Purchasers when Passengers Do Not Ultimately Take Their Journey. The ticket issuing entity would have to submit a revised remittance worksheet showing the number of passengers who traveled and those passengers that did not ultimately travel who received user fee reimbursements. In keeping with other proposed changes to remittance timeframes, the revised remittance worksheet would be completed and filed for each month during which the ticket issuing entity certifies that there was an increase or decrease in the number of passengers and AQI fees collected, using the procedure described in § 354.3(f)(5)(iv) of this proposed rule. This represents an increase in respondent burden hours. We estimate this would affect one third of the 331 airlines. $331 \text{ airlines} \times 12 \text{ remittances per year per airline} = 3972 \text{ occurrences}$. $3972 \text{ occurrences} / 3 \text{ impacted} = 1324 \text{ occurrences with increased burdens}$. $1324 \text{ occurrences with increased burdens} \times 3 \text{ minutes} / 60 \text{ minutes per hour} = \text{an estimated increase of } 66 \text{ respondent burden hours per year}$.

k. Proposed Commencing of Charging the Phytosanitary Treatment User Fees Under 7 CFR part 305 and in the USDA, APHIS Treatment Manual and

Treatment Preparatory Activities of Restacking and Reconditioning. We are proposing to add new paragraphs (h)(1)(ii)(A) through (D) to § 354.3, which would describe the activities for which the treatment monitoring fees are assessed. Charging for these activities will cause an increased burden for these respondents. We estimate there will be about 1,654 additional irradiation treatments and 1,190 heat treatments. $1,654 + 1,190 = 2,844 \text{ new chargeable treatments}$. $2,844 \times \text{an estimated } 5 \text{ minutes per treatment} = \text{an estimated increase of } 237 \text{ respondent burden hours per year}$.

l. New Billing Process for Treatment Monitoring. Above we have proposed a new billing process in paragraph (h)(5) of § 354.3 which would describe the billing process. User fees for treatment monitoring would be due at the time-of-service delivery, unless the treatment provider has established an acceptable credit history and opened a customer account with APHIS, in which case they can be billed by APHIS for services provided. There are about 50 treatment facilities of which we estimate about half would want to be billed. One half of 50 treatment facilities = 25 facilities who would want to be billed. Timed trials show the application for an account takes approximately 8.4 minutes to complete. $25 \times 8.4 \text{ minutes} = 3.5 \text{ hours new burden during the initial year half of the treatment facilities would decide to open accounts}$. The assumptions made and this approach are considered reasonable.

m. Consequences for Late Payment or Nonpayment of AQI Treatment Monitoring User Fees. The existing regulations in § 354.3 do not specify consequences for late payment or nonpayment of AQI treatment monitoring user fees. To remedy that omission, we propose to add new paragraphs (i)(1) to (5) to § 354.3 to explain the consequences of and procedures for nonpayment or late payment of treatment monitoring user fees, including debt collection. We estimate six treatment facilities will incur an increased time burden of 20 minutes each for a total estimated increase in respondent burden of 2 hours.

n. Reduction in the Need to Create New Business Procedures to Hold Fees in Trust. Above, we propose in paragraphs (h) and (i) of § 354.3 to reduce cost and burden on treatment providers by reducing the need to create new business procedures to hold fees in trust, while codifying and streamlining the Agency's procedures to address payment non-compliance. We estimate

this will save 50 treatment facilities 4.75 hours per year for a total of 237 reduction in respondent burden hours each year.

o. Records Retention Requirements. To improve monitoring, compliance, and enforcement of this regulation, we are proposing to add a new paragraph (j) to § 354.3, which would contain retention requirements for records related to AQI user fees. Proposed paragraph (j)(1) would state that entities responsible for collecting and paying the fees and their agents would be responsible for maintaining all records required under § 354.3, as well as legible copies of contracts and other agreements made between responsible persons and their agents. Under proposed paragraph (j)(2), all parties responsible for collecting and paying the fees would have to maintain sufficient documentation for APHIS, CBP, and authorized representatives to verify the accuracy of the fee collections and remittance worksheets. Such information would have to be made available for inspection upon APHIS and CBP's demand. Such documentation would be required to be maintained in the United States for a period of 5 years from the date of fee calculation. Each entity covered by this proposed requirement would have to provide to APHIS and CBP the name, address, and telephone number of a responsible officer who is able to verify any statements or records required to be filed or maintained under this section and to promptly notify APHIS and CBP of any changes in the identifying information previously submitted. We estimate there to be approximately 500 entities affected by this requirement. At 1 minute per entity for records retention, we estimate the increase in respondent burden to be about 8 hours.

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the new activities and the additional burden associated with this proposed rule have been submitted to OMB as a new information collection for approval. If a final rule is published, this information collection request will be scheduled for merger into 0579-0055.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed reporting and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed

information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as 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).

Estimate of burden: The public burden for this collection of information is estimated to average 0.001 hours per response.

Respondents: Individuals and private and commercial importers or exporters of agricultural plants and animals or their products.

Estimated annual number of respondents: 35,374.

Estimated annual number of responses per respondent: 43.

Estimated annual number of responses: 1,535,575.

Estimated total annual burden on respondents: 2,172 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

A copy of the information collection may be viewed on the *Regulations.gov* website or in our reading room. (A link to *Regulations.gov* and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this proposed rule.) Copies can also be obtained from Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851-2483. APHIS will respond to any information collection review-related comments in the final rule. All comments will also become a matter of public record.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. APHIS is working with U.S. Customs and Border Protection to explore options for further improving, streamlining, and automating user fee payment in the field, especially trucks and maritime "real time" payment procedures, and transponders. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mr. Joseph Moxey,

APHIS' Paperwork Reduction Act Coordinator, at (301) 851-2483.

List of Subjects in 7 CFR Part 354

Animal diseases, Exports, Government employees, Imports, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Travel and transportation expenses.

Accordingly, APHIS is proposing to amend 7 CFR part 354 as follows:

PART 354—OVERTIME SERVICES RELATING TO IMPORTS AND EXPORTS; AND USER FEES

■ 1. The authority citation for part 354 continues to read as follows:

Authority: 7 U.S.C. 7701-7772, 7781-7786, and 8301-8317; 21 U.S.C. 136 and 136a; 49 U.S.C. 80503; 7 CFR 2.22, 2.80, and 371.3.

■ 2. Revise § 354.3 to read as follows:

§ 354.3 User fees for certain international services.

(a) *Definitions.* Whenever in this section the following terms are used, unless the context otherwise requires, they shall be construed, respectively, to mean:

APHIS. The Animal and Plant Health Inspection Service of the United States Department of Agriculture (USDA).

Arrival. Arrival at a port of entry, as listed in 19 CFR 101.3, in the customs territory of the United States or at any place serviced by any such port of entry.

Barge. A non-self-propelled commercial vessel that transports cargo that is not contained in shipping containers. This does not include integrated tug barge combinations.

Calendar year. The period from January 1 to December 31, inclusive, of any particular year.

Certificate. Any certificate issued by or on behalf of APHIS describing the condition of a shipment of plants or plant products for export, including but not limited to Phytosanitary Certificate (PPQ Form 577), Export Certificate for Processed Plant Products (PPQ Form 578), and Phytosanitary Certificate for Reexport (PPQ Form 579).

Commercial aircraft. Any aircraft used to transport persons or property for compensation or hire.

Commercial purpose. The intention of receiving compensation or making a gain or profit.

Commercial railroad car. Any carrying vehicle, measured from coupler to coupler and designed to operate on railroad tracks, other than a locomotive or a cabooses.

Commercial shipment. A shipment for gain or profit.

Commercial truck. Any self-propelled vehicle, including an empty vehicle or a truck cab without a trailer, which is designed and used for the transportation of commercial merchandise or for the transportation of non-commercial merchandise on a for-hire basis.

Commercial vessel. Any watercraft or other contrivance used or capable of being used as a means of transportation on water to transport property for compensation or hire, with the exception of any aircraft or ferry.

Customs and Border Protection (CBP). U.S. Customs and Border Protection, U.S. Department of Homeland Security.

Customs territory of the United States. The 50 States, the District of Columbia, and Puerto Rico.

Designated State or county inspector. A State or county plant regulatory official designated by the Secretary of Agriculture to inspect and certify to shippers and other interested parties as to the phytosanitary condition of plant products inspected under the Plant Protection Act (7 U.S.C. 7701 *et seq.*).

Passenger. A natural person for whom transportation is provided, including infants, whether a separate ticket or travel document is issued for the infant, or the infant or toddler occupies a seat, or the infant or toddler is held or carried by another passenger.

Person. An individual, corporation, partnership, trust, association, or any other public or private entity, or any officer, employee, or agent thereof.

Reconditioning. The removal or alteration of packaging associated with commercial cargo.

Restacking. The redistribution of commercial cargo within or removal from a shipping container or other conveyance.

(b) *Fee for inspection of commercial vessels of 100 net tons or more.* (1) Except as provided in paragraph (b)(2) of this section, the master, licensed deck officer, or purser of any commercial vessel which is subject to inspection under part 330 of this chapter or 9 CFR chapter I, subchapter D, and which is either required to make entry at the customs house under 19 CFR 4.3 or is a U.S.-flag vessel proceeding coastwise under 19 CFR 4.85, shall, upon arrival, proceed to CBP and pay an agricultural quarantine and inspection (AQI) user fee. The base AQI user fee for each arrival is shown in table 1. The fee will be paid for each arrival regardless of the number of arrivals taking place in the course of a single voyage.

TABLE 1 TO PARAGRAPH (b)(1)—FEE FOR INSPECTION OF COMMERCIAL VESSELS OF 100 NET TONS OR MORE

Effective date	Amount
Beginning January 1, 2024	\$3,219.29
October 1, 2024	3,302.23
October 1, 2025	3,386.20
October 1, 2026	3,471.18
October 1, 2027	3,557.18

(2) The following categories of commercial vessels are exempt from paying an AQI user fee:

(i) Commercial cruise vessels carrying passengers paying fees under paragraph (f) of this section;

(ii) Any vessel which, at the time of arrival, is being used solely as a tugboat;

(iii) Vessels used exclusively in the governmental service of the United States or a foreign government, including any agency or political subdivision of the United States or a foreign government, so long as the vessel is not carrying persons or merchandise for commercial purposes;

(iv) Vessels arriving in distress or to take on fuel, sea stores, or ship's stores;

(v) Tugboats towing vessels on the Great Lakes; and

(vi) Vessels returning to the United States after traveling to Canada solely to take on fuel.

(c) *Fee for inspection of commercial trucks*—(1) *On-arrival payment*. Upon arrival at a CBP port of entry, the driver or other person in charge of a commercial truck that is subject to inspection under part 330 of this chapter or under 9 CFR, chapter I, subchapter D, must tender the AQI user fees to CBP, unless they have been prepaid as provided for in paragraph (c)(2) of this section. APHIS strongly encourages electronic remittance of fees. The fee applies to all commercial trucks, regardless of what they are carrying, as well as empty trucks and truck cabs (see table 2).

TABLE 2 TO PARAGRAPH (c)(1)—FEE FOR INSPECTION OF COMMERCIAL TRUCKS

Effective date	Amount (per arrival) ¹	Amount (prepaid annual fees) ²
Beginning January 1, 2024	\$11.40	\$686.40
October 1, 2024	12.40	746.40
October 1, 2025	13.45	808.20
October 1, 2026	14.50	870.60
October 1, 2027	15.55	935.40

¹ Rounded down to the next \$0.05 (five-cent) increment to facilitate border operations.

² Prepaid fees are set at 60 times the unrounded fee rates: \$11.44, \$12.44, \$13.47, \$14.51, \$15.59.

(2) *Prepayment*. (i) The owner, their agent, or person in charge of a commercial vehicle may at any time prepay the commercial truck AQI fee as defined in paragraph (c)(1) of this section for all arrivals of that vehicle during a calendar year or any remaining portion of a calendar year. The prepayment transponder fee is set at 60 times the unrounded per arrival fee. Prepayment of the AQI fee must be made in accordance with the procedures and payment methods set forth in 19 CFR 24.22. The following information must be provided, together with the prepayment amount for each arrival:

(A) Vehicle make, model, and model year;

(B) Vehicle Identification Number (VIN);

(C) License numbers issued by State, Province, or country; and

(D) Owner's name and address.

(ii) Purchases of transponders may be made at any time during a calendar year; APHIS will not prorate for the portion of the calendar year already elapsed, nor refund single-crossing fees already paid.

(d) *Fee for inspection of commercial railroad cars*—(1) *General requirement*. Except as provided in paragraph (d)(2) of this section, an AQI user fee will be charged for each commercial railroad car (loaded or empty) which is subject to inspection under part 330 of this chapter or under 9 CFR chapter I, subchapter D, upon each arrival, as indicated in table 3. The railroad company receiving a railroad car in

interchange at a port of entry or, barring interchange, the company moving a car in line haul service into the customs territory of the United States, will be responsible for payment of the fee. Payment of the fee must be made in accordance with the procedures set forth in paragraph (d)(3) or (4) of this section. For purposes of this paragraph, the term “railroad car” means any carrying vehicle, measured from coupler to coupler and designed to operate on railroad tracks. If the AQI user fee is prepaid for all arrivals of a commercial railroad car during a calendar year or any remaining portion of a calendar year, the AQI user fee is an amount 48.32 times the AQI user fee for each arrival.

TABLE 3 TO PARAGRAPH (d)(1)—FEE FOR INSPECTION OF COMMERCIAL RAILROAD CARS

Effective date	Amount (per arrival)	Amount (prepaid)
Beginning January 1, 2024	\$5.81	\$278.88
October 1, 2024	6.51	312.48
October 1, 2025	7.23	347.04
October 1, 2026	7.97	382.56
October 1, 2027	8.72	418.56

(2) *Exemptions*. The following categories of commercial railroad cars are exempt from paying an AQI user fee:

(i) Any commercial railroad car that is part of a train whose journey originates and terminates in Canada, if:

(A) The commercial railroad car is part of the train when the train departs Canada; and

(B) No passengers board or disembark from the commercial railroad car, and no cargo is loaded or unloaded from the commercial railroad car, while the train is within the United States.

(ii) Any commercial railroad car that is part of a train whose journey originates and terminates in the United States, if:

(A) The commercial railroad car is part of the train when the train departs the United States; and

(B) No passengers board or disembark from the commercial railroad car, and no cargo is loaded or unloaded from the commercial railroad car, while the train is within any country other than the United States; and

(iii) Locomotives and cabooses.

(3) *Prepayment.* The owner, agent, or person in charge of a railroad company may at any time prepay the commercial railroad car AQI fee as defined in paragraph (d)(1) of this section for all arrivals of that railroad car during a calendar year or any remaining portion of a calendar. This payment must be remitted in accordance with paragraph (d)(4)(iii) of this section.

(4) *Remittance worksheet procedures.* The Association of American Railroads (AAR), the National Railroad Passenger Corporation (AMTRAK), and railroad companies acting individually shall file monthly Remittance Worksheets with USDA, APHIS, FMD, within 90 days after the end of each calendar month. Each remittance worksheet shall indicate:

(i) The number of commercial railroad cars entering the customs territory of the United States during the relevant period by railroad company;

(ii) The total monthly AQI user fees due from each railroad company; and

(iii) In the case of prepayments to cover all annual arrivals of certain railroad car(s) in accordance with paragraph (d)(3) of this section; include the number of railroad cars being prepaid for, railroad car number(s) covered by the prepayment and the calendar year to which the prepayment applies.

(iv) Railroad companies may include the remittance worksheet with their mailed payment as directed in this paragraph (d)(4). For all other payment types, the companies must email the remittance worksheet to ABSHelpline@usda.gov. Individual railroad companies must submit a remittance worksheet for periods with no fees collected. Detailed remittance instructions are located at <https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees>. Questions and correspondence may be directed to ABSHelpline@usda.gov or (612) 336-3400 (fax) or (877) 777-2128 (phone).

[usda.gov](mailto:ABSHelpline@usda.gov) or (612) 336-3400 (fax) or (877) 777-2128 (phone).

(5) *Payment procedures.* (i) If the railroad company intends to pay monthly, the owner, agent or person in charge of an individual railroad company shall pay the AQI user fees calculated by the Association of American Railroads (AAR), the National Railroad Passenger Corporation (AMTRAK), or the individual railroad company itself within 60 days after the end of each calendar month in which commercial railroad cars entered the customs territory of the United States.

(ii) If the owner, agent or person in charge of an individual railroad company intends to prepay for railroad car(s) for the entire calendar year, as specified in paragraph (d)(3) of this section, prepayment may be made at any time during a calendar year; APHIS will not prorate for the portion of the calendar year already elapsed, nor refund or credit per arrival fees already paid.

(iii) Remittance worksheets as described in paragraph (d)(4) of this section, are required to accompany all payments. Detailed payment instructions are located at <https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees>. Questions and correspondence may be sent to ABSHelpline@usda.gov, fax (612) 336-3400 or phone (877) 777-2128.

(6) *Compliance.* (i) AAR, AMTRAK, and each railroad company responsible for making AQI user fee payments must allow APHIS, CBP, and authorized representatives to verify the accuracy of AQI user fees collected and remitted and otherwise determine compliance with 21 U.S.C. 136a and this paragraph (d). The AAR, AMTRAK, and each railroad company responsible for making AQI user fee payments must advise the USDA, APHIS, FMD of the name, address, and telephone number of an agent or other responsible person who is authorized to verify AQI user fee calculations, collections, and remittance worksheets, payments, as well as any changes in the identifying information submitted.

(ii) The agent or other responsible person for a payment remains the agent or responsible person until the railroad company notifies APHIS of a transfer of responsibility. The agent or responsible person must contact APHIS to initiate any transfer by contacting ABSHelpline@usda.gov. The new agent or responsible person assumes all responsibilities for ensuring compliance for meeting the requirements of this part.

(e)(1) *Fee for inspection of commercial aircraft.* Except as provided

in paragraph (e)(2) of this section, an AQI user fee will be charged for each commercial aircraft which is arriving, or which has arrived and is proceeding from one United States airport to another under a CBP "Permit to Proceed," as specified in 19 CFR 122.81 through 122.85, or an "Agricultural Clearance or Safeguard Order" (PPQ Form 250), used pursuant to § 330.400 of this chapter and 9 CFR 94.5, and which is subject to inspection under part 330 of this chapter or 9 CFR chapter I, subchapter D. Each carrier or their agent is responsible for paying the AQI user fee. The AQI user fee for each arrival is shown in table 4:

TABLE 4 TO PARAGRAPH (e)(1)—FEE FOR INSPECTION OF COMMERCIAL AIRCRAFT

Effective date	Amount
Beginning January 1, 2024	\$288.41
October 1, 2024	309.00
October 1, 2025	330.07
October 1, 2026	351.64
October 1, 2027	373.68

(2) *Exemptions.* The following categories of commercial aircraft are exempt from paying an AQI user fee:

(i) [Reserved]

(ii) Any aircraft used exclusively in the governmental services of the United States or a foreign government, including any Agency or political subdivision of the United States or a foreign government, as long as the aircraft is not carrying persons or merchandise for commercial purposes;

(iii) Any aircraft making an emergency or forced landing when the original destination of the aircraft was a foreign port;

(iv) Any aircraft moving from the U.S. Virgin Islands to Puerto Rico; and

(v) Any aircraft making an in-transit stop at a port of entry, during which the aircraft does not proceed through any portion of the Federal clearance process, such as inspection or clearance by APHIS or CBP, no cargo is removed from or placed on the aircraft, no passengers get on or off the aircraft, no crew members get on or off the aircraft, no food is placed on the aircraft, and no garbage is removed from the aircraft.

(3) *Remittance worksheet and payment procedures.* (i) The carrier or their agent must pay the appropriate fees for receipt no later than 90 days after the close of the month in which the aircraft arrivals occurred. APHIS strongly encourages electronic payment of fees. To set up electronic payment refer to our detailed instructions at <https://www.aphis.usda.gov/mrpbs/>

[userfees/aqi-payment-types.pdf](#) or for further information relative to electronic remittance, contact ABSHelpline@usda.gov. In the event electronic remission is impractical, a check or money order can be mailed to the Agency lock box following detailed payment instructions at <https://www.aphis.usda.gov/mrpbbs/userfees/aqi-payment-types.pdf>. Questions and correspondence may be directed to ABSHelpline@usda.gov or to (612) 336-3400 (fax) or (877) 777-2128 (phone). For payment information, refer to our detailed payment instructions at <https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-user-fees>. Late payments will be subject to interest, penalty, and a charge to cover the cost of processing and handling a delinquent claim as provided in the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3717).

(ii) The carrier or their agent must provide a remittance worksheet each month stating the fees that are due for the month. Carriers or their agents must include a hard copy of the remittance worksheet with any mailed payment. For all other payment types, including for months with no fees collected, the carriers must email the remittance worksheet to ABSHelpline@usda.gov.

(iii) The remittance worksheet is a written statement that must include the following information:

(A) Name and address of the person making the payment;

(B) Calendar month covered by the payment;

(C) Amount being paid, or a remittance worksheet stating that no fees were collected.

(iv) All fee payments required under this section must be made in U.S. dollars. For all payment types accepted, please visit <https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees>.

(4) *Compliance.* Each carrier subject to this section must allow APHIS, CBP, and authorized representatives to verify the accuracy of the AQI user fees paid and to otherwise determine compliance in accordance with paragraph (e) of this section and 21 U.S.C. 136a. Each carrier must advise USDA, APHIS, FMD, FOB of the name, address, and telephone number of an agent or responsible person who is authorized to verify AQI user fee calculations, payments, and remittance worksheets as well as any changes in the identifying information submitted. The agent or responsible person for a payment remains the agent or responsible person until the carrier notifies APHIS of a transfer of

responsibility. The carrier or their agent or responsible person must contact APHIS at <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/ppq-program-overview/ppq-cbp-aqi-user-fees-contacts> to initiate any transfer. The new agent or responsible person assumes all responsibilities for ensuring compliance for meeting the requirements of this part.

(5) *Limitations on charges.* (i) Airlines will not be charged reimbursable overtime for inspection of aircraft if the aircraft is subject to the AQI user fee for arriving aircraft as prescribed by this section.

(ii) Airlines will not be charged reimbursable overtime for inspection of cargo from an aircraft if:

(A) The aircraft is subject to the AQI user fee for arriving aircraft as prescribed by this section; and

(B) The cargo is inspected between 8 a.m. and 4:30 p.m., Monday through Friday; or

(C) The cargo is inspected concurrently with the aircraft.

(f)(1) *Fee for inspection of international passengers.* Except as specified in paragraph (f)(2) of this section, each passenger aboard a commercial aircraft or cruise ship who is subject to inspection under part 330 of this chapter or 9 CFR, chapter I, subchapter D, upon arrival from a place outside of the customs territory of the United States, must pay an AQI user fee. The fee covers one individual arriving into a port of entry within the customs territory of the United States from a foreign port. Each air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document for transportation into the customs territory of the United States is responsible for collecting from the passenger the applicable fee specified in this section, including the fee applicable to any infants or toddlers traveling without a separate ticket or travel document, whether in assigned seats or held in an adult passenger's lap. In the event that the air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document does not collect the AQI user fee when tickets are sold, the air carrier or cruise line must collect the user fee that is applicable at the time of departure from the passenger upon departure. The AQI user fee will apply to tickets purchased beginning January 1, 2024. The fees are shown in tables 5 and 6:

TABLE 5 TO PARAGRAPH (f)(1)—INTERNATIONAL AIR PASSENGER

Effective date	Amount
Beginning January 1, 2024	\$4.29
October 1, 2024	4.44
October 1, 2025	4.60
October 1, 2026	4.76
October 1, 2027	4.93

TABLE 6 TO PARAGRAPH (f)(1)—INTERNATIONAL CRUISE (SEA) PASSENGER

Effective date	Amount
Beginning January 1, 2024	\$1.20
October 1, 2024	1.25
October 1, 2025	1.29
October 1, 2026	1.34
October 1, 2027	1.39

(2) *Exemptions.* The following categories of passengers are exempt from paying an AQI user fee:

(i) Crew members onboard for purposes related to the operation of the vessel;

(ii) Crew members who are on duty on a commercial aircraft;

(iii) Airline employees, including “deadheading” crew members, who are traveling on official airline business;

(iv) Diplomats, except for U.S. diplomats, who can show that their names appear on the accreditation listing maintained by the U.S. Department of State. In lieu of the accreditation listing, an individual diplomat may present appropriate proof of diplomatic status to include possession of a diplomatic passport or visa, or diplomatic identification card issued by a foreign government;

(v) Passengers departing and returning to the United States without having touched a foreign port or place;

(vi) Passengers arriving on any commercial aircraft used exclusively in the governmental service of the United States or a foreign government, including any agency or political subdivision of the United States or a foreign government, so long as the aircraft is not carrying persons or merchandise for commercial purposes. Passengers on commercial aircraft under contract to the U.S. Department of Defense (DOD) are exempted if they have been precleared abroad under the joint DOD/APHIS Military Inspection Program;

(vii) Passengers arriving on an aircraft due to an emergency or forced landing when the original destination of the aircraft was a foreign port;

(viii) Passengers transiting the United States and not subject to inspection; and

(ix) Passengers moving from the U.S. Virgin Islands to Puerto Rico.

(3) *Circumstances of user fee collections.* AQI user fees shall be collected under the following circumstances:

(i) When through tickets or travel documents are issued indicating travel to the customs territory of the United States that originates in any foreign country; and

(ii) When passengers arrive in the customs territory of the United States in transit from a foreign country and are inspected by APHIS or CBP.

(4) *Responsibility for collection of fees.* (i) Any air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document on or after May 13, 1991, is responsible for collecting the AQI user fee from all passengers transported into the customs territory of the United States to whom the AQI user fee applies.

(A) Tickets or travel documents must be marked by the person who collects the AQI user fee to indicate that the required AQI user fee has been collected from the passenger.

(B) If the AQI user fee applies to a passenger departing from the United States and if the passenger's tickets or travel documents were issued on or after May 13, 1991, but do not reflect collection of the AQI user fee at the time of issuance, then the carrier transporting the passenger from the United States must collect the AQI user fee upon departure.

(C) Unless refunded pursuant to paragraph (f)(5)(v) of this section, AQI user fees collected from international passengers pursuant to this paragraph (f) shall be held in trust for the United States by the person collecting such fees, by any person holding such fees, or by the person who is ultimately responsible for remittance of such fees to APHIS. AQI user fees collected from international passengers shall be accounted for separately and shall be regarded as trust funds held by the person possessing such fees as agents, for the beneficial interest of the United States. All such user fees held by any person shall be property in which the person holds only a possessory interest and not an equitable interest. As compensation for collecting, handling, and remitting the AQI user fees for international passengers, the person holding such user fees shall be entitled to any interest or other investment return earned on the user fees between the time of collection and the time the user fees are due to be remitted to APHIS under this section. Nothing in this section shall affect APHIS' right to collect interest for late remittance.

(5) *Remittance and payment procedures.* (i) The air or sea carrier,

travel agent, tour wholesaler, or other party issuing a ticket or travel document or their own non-carrier related tickets or travel documents, must remit collections of AQI user fees from the passengers to APHIS.

(ii) The air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document must remit the passengers' fees to APHIS no later than 90 days after the close of the calendar month in which the ticket issuer collected the AQI user fees from the passengers. Late payments will be subject to interest, penalties, and a charge to cover the cost of processing and handling a delinquent claim as provided in the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3717).

(iii) All fee payments required under this section must be made in U.S. dollars. For payment types accepted please visit <https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees>. APHIS strongly encourages electronic remittance of fees. To set up electronic remittance refer to our detailed payment instructions at <https://www.aphis.usda.gov/mrpbs/userfees/aqi-payment-types> or for further information relative to electronic remittance, contact ABSHelpline@usda.gov. In the event electronic remission is impractical, a check or money order can be mailed to the Agency lock box following detailed payment instructions at <https://www.aphis.usda.gov/mrpbe/userfees/aqi-payment-types>. Questions and correspondence may be sent to ABSHelpline@usda.gov or fax (612) 336-3400 or (877) 777-2128. For payment information, refer to our detailed payment instructions at <https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees/aqi-user-fees>.

(iv) The air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document must provide a remittance worksheet each month stating the passenger fees that are due for the month or stating that no payments are due. The air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document must include the remittance worksheet with their mailed payment. For all other payment types, they must email the remittance worksheet separately to ABSHelpline@usda.gov. The remittance worksheet is a written statement that must include the following information:

(A) Name and address of the person remitting payment;

(B) Calendar month covered by the payment; and

(C) Amount collected and remitted.

(v) It is the ticket or travel document-issuing entity's (e.g., air or sea carrier, travel agent, tour wholesaler, or other party) responsibility to make refunds of international passenger AQI user fees to the purchaser for trips not taken. The air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document must refund the purchaser in the exact form of payment that the purchaser originally used, and the entity may not issue vouchers, other forms of credit, or other forms of refund different from the purchaser's original form of payment.

(vi) If an air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document collected and remitted to APHIS the international passenger AQI user fees prior to refunding the purchaser in accordance with paragraph (f)(5)(v) of this section, it may request that APHIS credit its account in the net amount refunded to the purchaser. APHIS will apply the credit against remittances due in future months until the credit is expended. To request such a credit, the ticket or travel document-issuing entity must submit a revised remittance worksheet indicating the revised number of passengers and international passenger AQI user fees amount collected. The revised remittance worksheet must be completed and filed for each month during which the ticket or travel document-issuing entity certifies that there was a decrease in the number of passengers and international passenger AQI user fees collected, using the procedure described in paragraph (f)(5)(iv) of this section.

(6) *Notification.* Carriers contracting with U.S.-based tour wholesalers are responsible for notifying the USDA, APHIS, FMD, FOB at <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/ppq-program-overview/ppq-cbp-aqi-user-fees-contacts> of all journeys contracted, the number of spaces contracted for, and the name, address, and taxpayer identification number of the United States-based tour wholesaler, within 90 days after the close of the calendar month in which such a journey occurred; *except that*, carriers are not required to make notification if tickets, marked to show collection of the AQI user fee, are issued for the individual contracted spaces.

(7) *Compliance.* Each carrier, travel agent, U.S.-based tour wholesaler, or other entity subject to this section must allow APHIS, CBP, and authorized representatives to verify the accuracy of the AQI user fees collected and remitted and to otherwise determine compliance with 21 U.S.C. 136a and this paragraph

(f) Each carrier, travel agent, U.S.-based tour wholesaler, or other entity must advise USDA, APHIS, FMD, at <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/ppq-program-overview/ppq-cbp-aqi-user-fees-contacts> of the name, address, and telephone number of a responsible officer who is authorized to verify AQI user fee calculations, payments, and remittance worksheets, as well as any changes in the identifying information submitted. The responsible person for a payment remains the responsible person until the air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document notifies APHIS of a transfer of responsibility. The responsible person must contact APHIS to initiate any transfer. The new responsible person assumes all responsibilities for ensuring

compliance for meeting the requirements of this part.

(8) *Limitation on charges.* Airlines and cruise lines will not be charged reimbursable overtime for passenger inspection services required for any aircraft or cruise ship on which a passenger arrived who has paid the international passenger AQI user fee for that flight or cruise.

(g) *Fees for export certification of plants and plant products.* (1) For each certificate issued by APHIS personnel, the recipient must pay the applicable AQI user fee at the time and place the certificate is issued.

(2) When the work necessary for the issuance of a certificate is performed by APHIS personnel on a Sunday or holiday, or at any other time outside the regular tour of duty of the APHIS personnel issuing the certificate, in addition to the applicable user fee, the

recipient must pay the applicable overtime rate in accordance with § 354.1.

(3)(i) Each exporter who receives a certificate issued on behalf of APHIS by a designated State or county inspector must pay an administrative user fee, as shown in table 7. The administrative fee can be remitted by the exporter directly to APHIS through the Phytosanitary Certificate Issuance and Tracking System (PCIT), provided that the exporter has a PCIT account and submits the application for the export certificate through the PCIT. If the PCIT is not used, the State or county issuing the certificate is responsible for collecting the fee and remitting it monthly to the U.S. Bank, United States Department of Agriculture, APHIS, AQI, P.O. Box 979043, St. Louis, MO 63197–9000.

TABLE 7 TO PARAGRAPH (g)(3)(i)—ADMINISTRATIVE USER FEE

Effective dates	Amount per shipment	
	PCIT used	PCIT not used
October 1, 2009, through September 30, 2010	\$3	\$6
October 1, 2010, through September 30, 2011	6	12
Beginning October 1, 2011	6	12

(ii) The AQI user fees for an export or reexport certificate for a commercial shipment are shown in table 8.

TABLE 8 TO PARAGRAPH (g)(3)(ii)—EXPORT OR REEXPORT CERTIFICATE FOR COMMERCIAL SHIPMENT

Effective dates	Amount per shipment
October 1, 2009, through September 30, 2010	\$77
October 1, 2010, through September 30, 2011	104
Beginning October 1, 2011	106

(iii) The AQI user fees for an export or reexport certificate for a low-value commercial shipment are shown in table 9. A commercial shipment is a low-value commercial shipment if the

items being shipped are identical to those identified on the certificate; the shipment is accompanied by an invoice which states that the items being shipped are worth less than \$1,250; and

the shipper requests that the user fee charged be based on the low value of the shipment.

TABLE 9 TO PARAGRAPH (g)(3)(iii)—EXPORT OR REEXPORT CERTIFICATE FOR LOW-VALUE COMMERCIAL SHIPMENT

Effective dates	Amount per shipment
October 1, 2009, through September 30, 2010	\$42
October 1, 2010, through September 30, 2011	60
Beginning October 1, 2011	61

(iv) The AQI user fees for an export or reexport certificate for a

noncommercial shipment are shown in table 10.

TABLE 10 TO PARAGRAPH (g)(3)(iv)—EXPORT OR REEXPORT CERTIFICATE FOR NONCOMMERCIAL SHIPMENT

Effective dates	Amount per shipment
October 1, 2009, through September 30, 2010	\$42
October 1, 2010, through September 30, 2011	60
Beginning October 1, 2011	61

(v) The AQI user fees for replacing any certificate are shown in table 11.

TABLE 11 TO PARAGRAPH (g)(3)(v)—REPLACEMENT FEE

Effective dates	Amount per certificate
October 1, 2009, through September 30, 2010	\$11
October 1, 2010, through September 30, 2011	15
Beginning October 1, 2011	15

(4) If a designated State inspector issues a certificate, the State where the certificate is issued may charge for inspection services provided in that State.

(5) Any State which wishes to charge a fee for services it provides to issue certificates must establish fees in accordance with one of the following guidelines:

(i) *Calculation of a “cost-per-certificate” fee.* The State must:

(A) Estimate the annual number of certificates to be issued;

(B) Determine the total cost of issuing certificates by adding together delivery,³ support,⁴ and administrative costs; and

(C) Divide the cost of issuing certificates by the estimated number of certificates to be issued to obtain a “raw” fee. The State may round the “raw” fee up to the nearest quarter, if necessary for ease of calculation, collection, or billing; or

(ii) *Calculation of a “cost-per-hour” fee.* The State must:

(A) Estimate the annual number of hours taken to issue certificates by adding together delivery,⁶ support,⁷ and administrative⁸ hours;

(B) Determine the total cost of issuing certificates by adding together delivery,³ support,⁴ and administrative costs; and

(C) Divide the cost of issuing certificates by the estimated number of hours taken to issue certificates to obtain a “cost-per-hour” fee. The State may round the “cost-per-hour” fee up to the nearest quarter, if necessary for ease of calculation, collection, or billing.

(6) For payment of any of the AQI user fees required in this paragraph (g), we will accept personal checks for amounts less than \$100, and checks drawn on commercial accounts, cashier’s checks, certified checks, traveler’s checks, and money orders for any amount. All payments must be for the exact amount due.

(h)(1) *Fee for conducting and monitoring treatments.* (i) User fees for all treatment-and treatment-related AQI

services listed in paragraphs (h)(1)(ii)(A) through (D) of this section, will be calculated at the hourly rate listed in table 12 for each employee required to perform the service during regular business hours. Each treatment provider conducting a treatment application required for entry into the United States, or other monitored activity such as restacking or reconditioning required for treatment application, is responsible for collecting from the importer, their broker or agent the applicable fee specified in this section. In instances in which APHIS is the treatment provider, the importer is responsible paying the fee directly to APHIS. Multiple phytosanitary treatments and treatment-related activities may be conducted during the same time period and covered by a single hourly rate subject to local government, union agreements, environmental standards, and other applicable regulations, rules, and ordinances.

TABLE 12 TO PARAGRAPH (h)(1)(i)—FEE FOR CONDUCTING AND MONITORING TREATMENTS

User fee	January 1, 2024	October 1, 2024	October 1, 2025	October 1, 2026	October 1, 2027
Hourly rate (per employee):					

³ Delivery costs are costs such as employee salary and benefits, transportation, per diem, travel, purchase of specialized equipment, and user fee costs associated with maintaining field offices. Delivery hours are similar hours taken by inspectors, including travel time, inspection time, and time taken to complete paperwork.

⁴ Support costs are costs at supervisory levels which are similar to delivery costs, and user fee costs such as training, automated data processing, public affairs, enforcement, legal services, communications, postage, budget and accounting services, and payroll, purchasing, billing, and collecting services. Support hours are similar hours taken at supervisory levels, as well as hours taken in training, automated data processing, enforcement, legal services, communication,

budgeting and accounting, payroll purchasing, billing, and collecting.

⁵ Administrative costs are costs incurred as a direct result of collecting and monitoring Federal phytosanitary certificates. Administrative hours are hours taken as a direct result of collecting and monitoring Federal phytosanitary certificates.

⁶ Delivery costs are costs such as employee salary and benefits, transportation, per diem, travel, purchase of specialized equipment, and user fee costs associated with maintaining field offices. Delivery hours are similar hours taken by inspectors, including travel time, inspection time, and time taken to complete paperwork.

⁷ Support costs are costs at supervisory levels which are similar to delivery costs, and user fee

costs such as training, automated data processing, public affairs, enforcement, legal services, communications, postage, budget and accounting services, and payroll, purchasing, billing, and collecting services. Support hours are similar hours taken at supervisory levels, as well as hours taken in training, automated data processing, enforcement, legal services, communication, budgeting and accounting, payroll purchasing, billing, and collecting.

⁸ Administrative costs are costs incurred as a direct result of collecting and monitoring Federal phytosanitary certificates. Administrative hours are hours taken as a direct result of collecting and monitoring Federal phytosanitary certificates.

TABLE 12 TO PARAGRAPH (h)(1)(i)—FEE FOR CONDUCTING AND MONITORING TREATMENTS—Continued

User fee	January 1, 2024	October 1, 2024	October 1, 2025	October 1, 2026	October 1, 2027
Per hour	\$232.97	\$253.19	\$273.90	\$295.12	\$316.83
Per quarter hour	58.24	63.30	68.48	73.78	79.21
Per service minimum fee	58.24	63.30	68.48	73.78	79.21

(ii) APHIS will charge user fees for all treatment-and treatment-related AQI services:

(A) Conducting or monitoring phytosanitary treatments in accordance with part 305 of this chapter and the USDA APHIS Treatment Manual (https://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/treatment.pdf) including but not limited to approved fumigation, irradiation, heat, cold, and mechanical treatment types.

(B) Conducting or monitoring the restacking of shipments in preparation for phytosanitary treatments in accordance with this section.

(C) Conducting or monitoring the reconditioning of shipments in preparation for phytosanitary treatments in accordance with this section.

(D) Conducting or monitoring the aeration of shipments after the completion of phytosanitary treatments in accordance with this section.

(2) *When do I pay an additional amount for employee(s) working overtime?* You must pay an additional amount if you need an APHIS employee to work on a Sunday, on a holiday, or at any time outside the normal tour of duty of that employee. Instead of paying the hourly rate user fee, you pay the premium rate listed in table 13 for each

employee needed to get the work done. The treatment services overtime hourly rate will be applied identically to reimbursable overtime (rules pertaining to commuted travel time, minimum call-outs, etc., in § 354.1). Overtime services will incur a minimum charge of 2 hours, unless performed on the employee's regular workday and performed in direct continuation of the regular workday or begun within an hour of the regular workday. When the 2-hour minimum applies, you may need to pay commuted travel time. (See § 354.1(a)(2) for specific information about commuted travel time.)

TABLE 13 TO PARAGRAPH (h)(2)—FEE FOR CONDUCTING AND MONITORING TREATMENTS OUTSIDE THE EMPLOYEE'S NORMAL TOUR OF DUTY, MONDAY THROUGH SATURDAY AND HOLIDAYS; AND PREMIUM RATES FOR CONDUCTING AND MONITORING TREATMENTS ON SUNDAY

Overtime rates (outside the employee's normal tour of duty)	Reimbursable overtime and premium rate user fee				
	January 1, 2024	October 1, 2024	October 1, 2025	October 1, 2026	October 1, 2027
Overtime hourly rate Monday through Saturday and holidays:					
Per hour:	\$240.89	\$261.36	\$282.32	\$303.93	\$326.04
Per quarter hour:	60.22	65.34	70.58	75.98	81.51
Premium hourly rate for Sundays:					
Per hour:	272.27	294.34	317.62	342.26	368.40
Per quarter hour:	68.07	73.58	79.41	85.57	92.10

(3) *Who must pay APHIS treatment monitoring hourly user fees?* Any treatment provider or importer for whom a service is provided related to treatment conducting or monitoring as specified in paragraphs (h)(1)(ii)(A) through (D) of this section is liable for payment of fees as prescribed in paragraph (h)(4) of this section.

(4) *Collection of fees.* (i) The owner, agent, or person in charge of private entities that provide AQI treatment services to importers must collect the AQI treatment services hourly user fee and remit them to APHIS.

(ii) When APHIS conducts treatments, APHIS will collect the AQI treatment fee applicable at the time the treatment is applied from the person receiving the services.

(5) *When are APHIS treatment monitoring user fees due?* User fees specified in paragraph (h)(1)(i) of this section must be paid when service is provided (for example when APHIS monitors a treatment at a facility). If APHIS determines that the user has established an acceptable credit history,

the owner, agent, or person in charge may request to pay when billed.

(6) *What payment methods are acceptable?* All fee payments required under this section must be made in U.S. dollars. For payment types accepted please visit <https://www.aphis.usda.gov/aphis/ourfocus/business-services/aqi-user-fees>.

(i) *Consequences for nonpayment or late payment of user fees—(1) Unpaid debt.* In cases of delinquent debts, the government is required to charge and collect interest, penalties, and costs. See 31 U.S.C. 3717(a) (interest); 3717(e)(1) (costs); and 3717(e)(2) (penalties). If any person for whom the service is provided fails to pay when due any debt to APHIS, including any user fee due under chapter I or chapter III of this title, then:

(i) *Subsequent user fee payments.* Payment must be made for subsequent user fees before the service is provided if:

(A) For unbilled fees, the user fee is unpaid 60 days after the date the

pertinent regulatory provision indicates payment is due;

(B) For billed fees, the user fee is unpaid 60 days after date of bill;

(C) The person for whom the service is provided or the person requesting the service has not paid the late payment penalty charges, interest charges, or charges for the cost of processing and handling the delinquent bill on any delinquent APHIS user fee; or

(D) Payment has been dishonored.

(ii) *Resolution of difference between estimate and actual.* APHIS will estimate the user fee to be paid; any difference between the estimate and the actual amount owed to APHIS will be resolved as soon as reasonably possible following the delivery of the service, with APHIS returning any excess to the payor or billing the payor for the additional amount due.

(iii) *Prepayment form.* The prepayment must be in guaranteed form of payment, such as money order or certified check. Prepayment in guaranteed form will continue until the debtor pays the delinquent debt.

(iv) *Denied service.* Service will be denied until the debt is paid if:

(A) For unbilled fees, the user fee is unpaid 90 days after date the pertinent regulatory provision indicates payment is due;

(B) For billed fees, the user fee is unpaid 90 days after date of bill;

(C) The person for whom the service is provided or the person requesting the service has not paid the late payment penalty charges, interest charges, or charges for the cost of processing and handling the delinquent bill on any delinquent APHIS user fee; or

(D) Payment has been dishonored.

(2) *Unpaid debt during service.* If APHIS is in the process of providing a service for which an APHIS user fee is due, and the user has not paid the fee within the time required, or if the payment offered by the user is inadequate or unacceptable, then APHIS will take the following action: If regulated articles in quarantine at a treatment facility cannot be released from quarantine, APHIS may seize and dispose of them, as determined by the Administrator, and may recover all expenses of handling the articles from persons liable for user fees under paragraph (h)(1)(i) of this section as outlined in paragraphs (h)(6)(i) through (iv) of this section. If regulated articles can be released from quarantine, the articles will be released and any unpaid debt will be handled as outlined in paragraph (h)(6)(i) of this section.

(3) *Late payments.* If for unbilled user fees, the user fees are unpaid 30 days after the date the pertinent regulatory provisions indicates payment is due, or if billed, are unpaid 30 days after the date of the bill, APHIS will impose late payment penalty charges, interest charges, and charges for the cost of processing and handling the delinquent bill in accordance with 31 U.S.C. 3717.

(4) *Dishonored payment.* User fees paid with dishonored forms of payment, such as a check returned for insufficient

funds, will be subject to interest and penalty charges in accordance with 31 U.S.C. 3717. Administrative charges will be assessed at \$20.00 per dishonored payment to be paid in addition to the original amount owed. Payment must be in guaranteed form, such as a money order or certified check.

(5) *Debt collection management.* In accordance with applicable debt collection law, the following provisions apply:

(i) *Taxpayer identification number.* APHIS will collect a taxpayer identification number from all persons, other than Federal agencies, who are liable for a user fee.

(ii) *Offset.* APHIS takes appropriate action to collect debts through offset under applicable law, including by notifying the Department of the Treasury of debts that are over 120 days delinquent for the purposes of offset through the Treasury Offset Program. Through the Treasury Offset Program, the Department of the Treasury will offset eligible Federal and State payments to satisfy the debt to APHIS.

(iii) *Cross-servicing.* APHIS will transfer debts that are over 120 days delinquent to the Department of the Treasury's Cross-Servicing program. Through the Cross-Servicing program, the Department of the Treasury will collect debts on behalf of APHIS. Exceptions may be made for debts that meet certain requirements, for example, debts that are already at a collection agency or in payment plans.

(6) *Report delinquent debt.* APHIS will report all unpaid debts to credit reporting bureaus.

(j) *Recordkeeping and record retention.* (1) Entities responsible for paying AQI user fees and their agents are required to establish, keep, and make available to APHIS the following records:

(i) Records and reports required under this section, including remittance worksheets, if applicable; and

(ii) Legible copies of contracts (including amendments to contracts) between the responsible entity or their agents and agents that conduct activities subject to this part for the responsible entity, and copies of documents relating to agreements made without a written contract.

(2) Responsible entities or their agents must maintain sufficient documentation for APHIS, CBP, and representatives to verify the accuracy of the fee collections and, if applicable, remittance worksheets. Such information must be made available for inspection upon APHIS and CBP's demand. Such documentation shall be maintained in the United States for a period of 5 years from the date of fee calculation, unless a longer retention period is determined to be needed by the Administrator. Each such affected entity shall provide to APHIS and CBP the name, address, and telephone number of a responsible officer who is able to verify any statements or records required to be filed or maintained under this section and shall promptly notify APHIS and CBP of any changes in the identifying information previously submitted.

(k) *Severability.* The sections of part 354 are separate and severable from one another. If any section or portion therein is stayed or determined to be invalid, or the applicability of any section to any person or entity is held invalid, it is the APHIS' intention that the validity of the remainder of those parts shall not be affected, with the remaining sections to continue in effect.

Done in Washington, DC, this 2nd day of August 2023.

Jennifer Moffitt,

Undersecretary, Marketing and Regulatory Programs, USDA.

[FR Doc. 2023-17045 Filed 8-10-23; 8:45 am]

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Final 2023–24 Frameworks for Migratory Bird
Hunting Regulations; Final Rule

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 20**

[Docket No. FWS-HQ-MB-2022-0090;
FF09M31000-234-FXMB1231099BPP0]

RIN 1018-BF64

Migratory Bird Hunting; Final 2023–24 Frameworks for Migratory Bird Hunting Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service or we) is establishing the final frameworks from which States may select season dates, limits, and other options for the 2023–24 migratory game bird hunting season. We annually prescribe outside limits (which we call “frameworks”) within which States may select hunting seasons. Frameworks specify the outside dates, season lengths, shooting hours, bag and possession limits, and areas where migratory game bird hunting may occur. These frameworks are necessary to allow State selections of seasons and limits and to allow harvest at levels compatible with migratory game bird population status and habitat conditions. Migratory game bird hunting seasons provide opportunities for recreation and sustenance, and aid Federal, State, and Tribal governments in the management of migratory game birds.

DATES: This rule takes effect on August 11, 2023.

ADDRESSES: States should send their season selections to: Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, MS: MB, 5275 Leesburg Pike, Falls Church, VA 22041–3803. You may inspect comments received on the migratory bird hunting regulations at <https://www.regulations.gov> at Docket No. FWS-HQ-MB-2022-0090. You may obtain copies of referenced reports from the street address above, or from the Division of Migratory Bird Management’s website at <https://www.fws.gov/migratorybirds/>, or at <https://www.regulations.gov> at Docket No. FWS-HQ-MB-2022-0090.

FOR FURTHER INFORMATION CONTACT: Jerome Ford, U.S. Fish and Wildlife Service, Department of the Interior, (703) 358–2606. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access

telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:**Process for Establishing Annual Migratory Game Bird Hunting Regulations**

The process for promulgating annual regulations for the hunting of migratory game birds involves the publication of a series of proposed and final rulemaking documents. We provided a detailed overview of the current process in the August 3, 2017, **Federal Register** (82 FR 36308). This final rule is the third in a series of proposed and final rules that establish regulations for the 2023–24 migratory game bird-hunting season in title 50 of the Code of Federal Regulations (CFR).

On November 3, 2022, we published in the **Federal Register** (87 FR 66247) a proposal to amend 50 CFR part 20. The proposal provided a background and overview of the migratory bird hunting regulations process and addressed the establishment of seasons, limits, and other regulations for hunting migratory game birds under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K. Major steps in the 2023–24 regulatory cycle relating to open public meetings and **Federal Register** notifications were illustrated in the diagram at the end of the November 3, 2022, proposed rule. For this regulatory cycle, we combined elements of the document that is described in the diagram as Supplemental Proposals with the document that is described as Proposed Season Frameworks.

Further, in the November 3, 2022, proposed rule we explained that all sections of subsequent documents that are part of this rulemaking action would be organized under numbered headings, which were set forth in that document (see 87 FR 66247). This document refers only to numbered items requiring attention and omits those items not requiring attention. Therefore, the numbered items are discontinuous, and the list appears to be incomplete.

We provided the meeting dates and locations for the Service Regulations Committee (SRC) on our website at <https://www.fws.gov/event/us-fish-and-wildlife-service-migratory-bird-regulations-committee-meeting> and Flyway Council meetings on Flyway calendars posted on our website at <https://www.fws.gov/partner/migratory-bird-program-administrative-flyways>. The November 3, 2022, proposed rule provided detailed information on the

proposed 2023–24 regulatory schedule. The SRC conducted an open meeting with the Flyway Council Consultants on April 19, 2022, to discuss preliminary issues for the 2023–24 regulations, and on October 12–13, 2022, to review information on the current status of migratory game birds and develop recommendations for the 2023–24 regulations for these species.

On January 30, 2023, we published in the **Federal Register** (88 FR 6054) the proposed regulatory frameworks for the 2023–24 migratory game bird hunting season. We have considered all pertinent comments received, which includes comments submitted in response to our November 3 and January 30 proposed rulemaking documents and comments from the October SRC meeting. This document establishes final regulatory frameworks for the 2023–24 migratory game bird hunting season and includes no substantive changes from the January 30, 2023, proposed rule. We will publish State season selections in the **Federal Register** as amendments to §§ 20.101 through 20.107 and 20.109 of title 50 CFR part 20.

Population Status and Harvest

Each year, we publish reports that provide detailed information on the status and harvest of certain migratory game bird species. These reports are available at the address indicated under **FOR FURTHER INFORMATION CONTACT** or from our website at <https://www.fws.gov/library/collections/population-status>, <https://www.fws.gov/library/collections/migratory-bird-hunting-activity-and-harvest-reports>, and <https://www.fws.gov/project/adaptive-harvest-management>.

We used the following annual reports published in August 2022 in the development of these regulatory frameworks for the 2023–24 migratory game bird hunting season:

- Adaptive Harvest Management, 2023 Hunting Season;
- American Woodcock Population Status, 2022;
- Band-tailed Pigeon Population Status, 2022;
- Migratory Bird Hunting Activity and Harvest During the 2020–21 and 2021–22 Hunting Seasons;
- Mourning Dove Population Status, 2022;
- Status and Harvests of Sandhill Cranes, Mid-continent, Rocky Mountain, Lower Colorado River Valley and Eastern Populations, 2022; and
- Waterfowl Population Status, 2022.

Our long-term objectives continue to include providing opportunities to harvest portions of certain migratory

game bird populations and to limit harvests to levels compatible with each population's ability to maintain healthy, viable numbers. Migratory game bird hunting seasons provide opportunities for recreation and sustenance, and aid Federal, State, and Tribal governments in the management of migratory game birds. Having taken into account the zones of temperature and the distribution, abundance, economic value, breeding habits, and times and lines of flight of migratory birds, we conclude that the hunting seasons provided for herein are compatible with the current status of migratory bird populations and long-term population goals. Additionally, we are obligated to, and do, give serious consideration to all information received during the public comment period.

Review of Public Comments and Flyway Council Recommendations

The preliminary proposed rulemaking, which appeared in the November 3, 2022, **Federal Register**, opened the public comment period for migratory game bird hunting regulations and described the proposed regulatory alternatives for the 2023–24 duck hunting season. Comments and recommendations are summarized below and numbered in the order set forth in the November 3, 2022, proposed rule (see 87 FR 66247).

We received recommendations from all four Flyway Councils at the April and September SRC meetings; all recommendations are from the September meeting unless otherwise noted. Some recommendations supported continuation of last year's frameworks. Due to the comprehensive nature of the annual review of the frameworks performed by the Councils, support for continuation of last year's frameworks is assumed for items for which no recommendations were received. Council recommendations for changes in the frameworks are summarized below. As explained earlier in this document, we have included only the numbered items pertaining to issues for which we received recommendations. Consequently, the issues do not follow in successive numerical order.

General

Written Comments: Several commenters protested the entire migratory bird hunting regulations process and the killing of all migratory birds and questioned the status and habitat data on which the migratory bird hunting regulations are based. A few commenters were concerned that highly pathogenic avian influenza (HPAI) and

windmills were causing avian mortality that was not being accounted for in our monitoring program. Another comment discussed potential conflicts between harvesting wild rice and teal hunting.

Service Response: As we indicated above under Population Status and Harvest, our long-term objectives continue to include providing opportunities to harvest portions of certain migratory game bird populations and to limit harvests to levels compatible with each population's ability to maintain healthy, viable numbers. Sustaining migratory bird populations and ensuring a variety of sustainable uses, including harvest, is consistent with the guiding principles by which migratory birds are to be managed under the conventions between the United States and several foreign nations for the protection and management of these birds. We have taken into account available information and considered public comments and continue to conclude that the hunting seasons provided for herein are compatible with the current status of migratory bird populations and long-term population goals. In regard to the regulations process, the Flyway Council system of migratory bird management has been a longstanding example of State–Federal cooperative management since its establishment in 1952 in the regulation development process and bird population and habitat monitoring. However, as always, we continue to seek new ways to streamline and improve the process and ensure adequate conservation of the resource.

In addition, we are working with partners to monitor HPAI and windmill mortality of migratory birds, and we anticipate that our current monitoring programs will detect any significant changes to migratory game bird populations. Also, many windmills are sited in areas away from most waterfowl habitat (as the wetland grounds and prairie potholes are generally not stable surfaces for large windmills), and with many waterfowl being active during the day they can avoid windmills. As for HPAI, the Service currently chairs “The Interagency Steering Committee for Avian Influenza Surveillance in Wild Migratory Birds,” which has increased avian influenza surveillance of wild birds across the country. To ensure effective surveillance, we are coordinating with partners so that there can be early detection, rapid communications, quick and accurate laboratory diagnosis, relay of diagnostic findings back to the field, to decision makers, and the public, as well as implementation of prevention and management actions where necessary.

Finally, we have facilitated meetings to understand the potential conflict between harvesting wild rice and teal hunting. These activities are not mutually exclusive, and based on the facilitated meetings held we remain optimistic that those discussions will result in local solutions that minimize potential conflicts.

1. Ducks

A. General Harvest Strategy

Council Recommendations: The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended adoption of the liberal regulatory alternative for their respective flyways.

Service Response: As we stated in the November 3, 2022, proposed rule, we intend to continue use of Adaptive Harvest Management (AHM) to help determine appropriate duck-hunting regulations for the 2023–24 season. AHM is a tool that permits sound resource decisions in the face of uncertain regulatory impacts and provides a mechanism for reducing that uncertainty over time. We use an AHM protocol (decision framework) to evaluate four regulatory alternatives, each with a different expected harvest level, and choose the optimal regulation for duck hunting for the Mississippi, Central, and Pacific Flyways based on the status and demographics of mallards and in the Atlantic Flyway based on the status and demographics of a suite of four species (eastern waterfowl) (see below, and the earlier referenced report “Adaptive Harvest Management, 2023 Hunting Season” for more details). We have specific AHM protocols that guide appropriate bag limits and season lengths for species of special concern, including black ducks, scaup, pintails, and eastern mallards, within the general duck season. These protocols use the same outside season dates and lengths as those regulatory alternatives for the 2023–24 general duck season.

For the 2023–24 hunting season, we will continue to use independent optimizations to determine the appropriate regulatory alternative for mallard stocks in the Mississippi, Central, and Pacific Flyways and for eastern waterfowl in the Atlantic Flyway. This means that we will develop regulations for mid-continent mallards, western mallards, and eastern waterfowl independently based on the breeding stock(s) that contribute primarily to each Flyway. We detailed implementation of AHM protocols for mid-continent and western mallards in the July 24, 2008, **Federal Register** (73 FR 43290), and for eastern waterfowl in

the September 21, 2018, **Federal Register** (83 FR 47868).

Atlantic Flyway

For the Atlantic Flyway, we set duck-hunting regulations based on the status and demographics of a suite of four duck species (eastern waterfowl) in eastern Canada and the Atlantic Flyway States: green-winged teal, common goldeneye, ring-necked duck, and wood duck. For purposes of the assessment, eastern waterfowl stocks are those breeding in eastern Canada and Maine (Federal Waterfowl Breeding Population and Habitat Survey (WBPHS) fixed-wing surveys in strata 51–53, 56, and 62–70, and helicopter plot surveys in strata 51–52, 63–64, 66–68, and 70–72) and in Atlantic Flyway States from New Hampshire south to Virginia (Atlantic Flyway Breeding Waterfowl Survey, AFBWS). Abundance estimates for green-winged teal, ring-necked ducks, and goldeneyes are derived annually by integrating fixed-wing and helicopter survey data from eastern Canada and Maine (WBPHS strata 51–53, 56, and 62–72). Counts of green-winged teal, ring-necked ducks, and goldeneyes in the AFBWS are negligible and therefore excluded from population estimates for those species. Abundance estimates for wood ducks in the Atlantic Flyway (Maine south to Florida) are estimated by integrating data from the AFBWS and the North American Breeding Bird Survey. Counts of wood ducks from the WBPHS are negligible and therefore excluded from population estimates.

For the 2023–24 hunting season, we evaluated alternative harvest regulations for eastern waterfowl using: (1) A management objective of 98 percent of maximum long-term sustainable harvest for eastern waterfowl; (2) the 2023–24 regulatory alternatives; and (3) current stock-specific population models and associated weights. Based on the liberal regulatory alternative selected for the 2022–23 duck hunting season and the 2022 survey estimates of 0.32 million American green-winged teal, 1 million wood ducks, 0.64 million ring-necked ducks, and 0.71 million goldeneyes, the optimal regulation for the Atlantic Flyway is the liberal alternative. Therefore, we concur with the recommendation of the Atlantic Flyway Council regarding selection of the liberal regulatory alternative as described in the November 3, 2022, proposed rule for the 2023–24 season (87 FR 66247).

Mississippi and Central Flyways

For the Mississippi and Central Flyways, we set duck-hunting regulations based on the status and

demographics of mid-continent mallards and habitat conditions (pond numbers in Prairie Canada and the United States). For purposes of the assessment, mid-continent mallards are those breeding in central North America (Federal WBPHS strata 13–18, 20–50, and 75–77) and in Michigan, Minnesota, and Wisconsin (State surveys).

For the 2023–24 hunting season, we evaluated alternative harvest regulations for mid-continent mallards using: (1) A management objective of maximum long-term sustainable harvest; (2) the 2023–24 regulatory alternatives; and (3) the current population model. Based on a liberal regulatory alternative selected for the 2022–23 hunting season and the 2022 survey estimates of 7.16 million mid-continent mallards and 5.45 million total ponds observed in Prairie Canada and the United States, the optimal choice for the 2023–24 hunting season in the Mississippi and Central Flyways is the liberal regulatory alternative. Therefore, we concur with the recommendations of the Mississippi and Central Flyway Councils regarding selection of the liberal regulatory alternative as described in the November 3, 2022, proposed rule for the 2023–24 season (87 FR 66247).

Pacific Flyway

For the Pacific Flyway, we set duck-hunting regulations based on the status and demographics of western mallards. For purposes of the assessment, western mallards consist of two substocks and are those breeding in Alaska and Yukon Territory (Federal WBPHS strata 1–12) and those breeding in the southern Pacific Flyway including California, Oregon, Washington, and British Columbia (State and Provincial surveys) combined.

For the 2023–24 hunting season, we evaluated alternative harvest regulations for western mallards using: (1) A management objective of maximum long-term sustainable harvest; (2) the 2023–24 regulatory alternatives; and (3) the current population model. Based on a liberal regulatory alternative selected for the 2022–23 hunting season and the 2022 survey estimates of 1.04 million western mallards in Alaska (0.61 million) and the southern Pacific Flyway (0.43 million), the optimal regulation for the Pacific Flyway is the liberal alternative. Therefore, we concur with the recommendation of the Pacific Flyway Council regarding selection of the liberal regulatory alternative as described in the November 3, 2022, proposed rule for the 2023–24 season (87 FR 66247).

B. Regulatory Alternatives

Council Recommendations: At the April SRC meeting, the Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended that AHM regulatory alternatives for duck hunting during the 2023–24 season remain the same as those used in the previous season.

Service Response: Consistent with Flyway Council recommendations, the AHM regulatory alternatives proposed for the Atlantic, Mississippi, Central, and Pacific Flyways in the November 3, 2022, proposed rule (87 FR 66247) will be used for the 2023–24 hunting season (see accompanying table at the end of that document for specific information). The AHM regulatory alternatives consist only of the maximum season lengths, framework dates, and bag limits for total ducks and mallards. Restrictions for certain species within these frameworks that are not covered by existing harvest strategies will be addressed elsewhere in these frameworks. For those species with specific harvest strategies (pintails, black ducks, scaup, and eastern mallards), those strategies will again be used for the 2023–24 hunting season.

D. Special Seasons/Species Management

i. Early Teal Seasons

The special early teal season guidelines (see 79 FR 51402, August 28, 2014; p. 51403) indicate that a 16-day special early (September) teal season with a 6-teal daily bag limit is appropriate for States in the Atlantic, Mississippi, and Central Flyways if the Federal WBPHS (traditional survey area; strata 1–18, 20–50, and 75–77) estimate is greater than 4.7 million blue-winged teal. The 2022 survey estimate was 6.49 million blue-winged teal, indicating a 16-day special early teal season with a 6-teal daily bag limit is warranted.

ii. Early Teal-Wood Duck Seasons

In Florida, Kentucky, and Tennessee, in lieu of a special early teal season, a 5-consecutive-day teal-wood duck season may be selected in September. The daily bag limit may not exceed six teal and wood ducks in the aggregate, of which no more than two may be wood ducks. In addition, a 4-consecutive-day special early teal-only season may be selected in September either immediately before or immediately after the 5-consecutive-day teal-wood duck season. The daily bag limit is six teal.

iii. Black Ducks

Council Recommendations: The Atlantic and Mississippi Flyway Councils recommended continued use

of the AHM protocol for black ducks and adoption of the moderate regulatory alternative for their respective flyways. The flyway-specific regulations consist of a daily bag limit of two black ducks and a season length of 60 days.

Service Response: The Service, the Atlantic and Mississippi Flyway Councils, and Canada adopted an international AHM protocol for black ducks in 2012 (77 FR 49868, August 17, 2012) whereby we set black duck hunting regulations for the Atlantic and Mississippi Flyways (and Canada) based on the status and demographics of these birds. The AHM protocol clarifies country-specific target harvest levels and reduces conflicts over regulatory policies.

For the 2023–24 hunting season, we evaluated country-specific alternative harvest regulations using: (1) A management objective of 98 percent of maximum long-term sustainable harvest; (2) country-specific regulatory alternatives; and (3) current population models and associated weights. Based on the moderate regulatory alternative selected for the 2022–23 hunting season and the 2022 survey estimates of 0.57 million breeding black ducks and 0.52 million breeding mallards (Federal WBPBS strata 51, 52, 63, 64, 66, 67, 68, 70, 71, and 72; core survey area), the optimal regulation for the Atlantic and Mississippi Flyways is the moderate alternative (and the liberal alternative in Canada). Therefore, we concur with the recommendations of the Atlantic and Mississippi Flyway Councils.

iv. Canvasbacks

Council Recommendations: The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended adoption of the liberal regulatory alternative for their respective flyways. The flyway-specific regulations consist of a daily bag limit of two canvasbacks and a season length of 60 days in the Atlantic and Mississippi Flyways, 74 days in the Central Flyway, and 107 days in the Pacific Flyway.

Service Response: As we discussed in the March 28, 2016, **Federal Register** (81 FR 17302), the canvasback harvest strategy that we had relied on until 2015 was not viable under our new regulatory process because it required biological information that was not yet available at the time a decision on season structure needed to be made. We do not yet have a new harvest strategy to propose for use in guiding canvasback harvest management in the future. However, we have worked with technical staff of the four Flyway Councils to develop a decision framework (hereafter, decision support tool) that relies on the best

biological information available to develop recommendations for annual canvasback harvest regulations. The decision support tool uses available information (1994–2014) on canvasback breeding population size in Alaska and north-central North America (Federal WBPBS traditional survey area; strata 1–18, 20–50, and 75–77), growth rate, survival, and harvest, and a population model to evaluate alternative harvest regulations based on a management objective of maximum long-term sustainable harvest. The decision support tool calls for a closed season when the population is below 460,000, a 1-bird daily bag limit when the population is between 460,000 and 480,000, and a 2-bird daily bag limit when the population is greater than 480,000. Based on the 2022 survey estimate of 585,000 canvasbacks, we concur with the recommendations of the four Flyway Councils regarding selection of the liberal regulatory alternative for the 2023–24 season.

v. Pintails

Council Recommendations: The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended adoption of the liberal regulatory alternative with a 1-pintail daily bag limit for their respective flyways. The flyway-specific regulations consist of a season length of 60 days in the Atlantic and Mississippi Flyways, 74 days in the Central Flyway, and 107 days in the Pacific Flyway.

Service Response: The Service and four Flyway Councils adopted an AHM protocol for pintail in 2010 (75 FR 44856, July 29, 2010) whereby we set pintail hunting regulations in all four flyways based on the status and demographics of these birds.

For the 2023–24 hunting season, we evaluated alternative harvest regulations for pintails using: (1) A management objective of maximum long-term sustainable harvest, including a closed-season constraint of 1.75 million birds; (2) the regulatory alternatives; and (3) current population models and associated weights. Based on a liberal regulatory alternative with a 1-bird daily bag limit for the 2022–23 season, and the 2022 survey estimates of 1.78 million pintails at a mean latitude of 57.31 degrees (Federal WBPBS traditional survey area; strata 1–18, 20–50, and 75–77), the optimal regulation for all four flyways is the liberal alternative with a 1-pintail daily bag limit. Therefore, we concur with the recommendations of the four Flyway Councils.

vi. Scaup

Council Recommendations: The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended adoption of the restrictive regulatory alternative for the 2023–24 season. The flyway-specific regulations consist of a 60-day season with a 1-bird daily bag limit during 40 consecutive days and a 2-bird daily bag limit during 20 consecutive days in the Atlantic Flyway, a 60-day season with a 2-bird daily bag limit during 45 consecutive days and a 1-bird daily bag limit during 15 consecutive days in the Mississippi Flyway, a 1-bird daily bag limit for 74 days in the Central Flyway (which may have separate segments of 39 days and 35 days), and an 86-day season with a 2-bird daily bag limit in the Pacific Flyway.

Service Response: The Service and four Flyway Councils adopted an AHM protocol for scaup in 2008 (73 FR 43290, July 24, 2008; and 73 FR 51124, August 29, 2008) whereby we set scaup hunting regulations in all four flyways based on the status and demographics of these birds.

For the 2023–24 hunting season, we evaluated alternative harvest regulations for scaup using: (1) A management objective of 95 percent of maximum sustainable harvest; (2) the regulatory alternatives; and (3) the current population model. Based on a restrictive regulatory alternative for the 2022–23 season, and the 2022 survey estimate of 3.60 million scaup (Federal WBPBS traditional survey area; strata 1–18, 20–50, and 75–77), the optimal regulation for all four flyways is the restrictive alternative. Therefore, we concur with the recommendations of the four flyway councils.

vii. Mottled Ducks

Council Recommendations: The Mississippi Flyway Council recommended that high-harvest States in the flyway reduce harvest of mottled ducks by 50 percent by setting a bag limit of zero (0) for the first 15 days of the general duck season for a minimum of 3 years (2023–24 through 2025–26 seasons). High-harvest States were defined as those that exceeded 20 percent of the flyway total harvest of mottled ducks.

Service Response: The Service and other agencies have been concerned about the status of mottled ducks since the late 1990s. In 2009, the Service strongly encouraged the Central and Mississippi Flyway Councils to examine the status of mottled ducks and assess the potential need for any regulatory actions for the 2009–10 season (74 FR

16339, April 10, 2009). Subsequently, the States of Texas and Louisiana took steps to reduce harvest of mottled ducks within the West Gulf Coast (WGC) population. Despite these steps to reduce harvest of mottled ducks, the average population decline from multiple surveys in Louisiana since 2009 was 64 percent. Thus, we concur with and appreciate the proactive nature of this recommendation to further reduce harvest of mottled ducks in the Mississippi Flyway while continuing efforts to monitor population numbers and vital rates in concert with ongoing research and habitat conservation efforts. Finally, we encourage the Central Flyway and Mississippi Flyway Councils to cooperatively engage in long-term management of the WGC population of mottled ducks by reviewing all relevant research and population information at the conclusion of this 3-year period of targeted reduced harvest so that future regulatory recommendations, if warranted, will address mottled duck conservation throughout the WGC.

ix. Eastern Mallards

Council Recommendations: The Atlantic Flyway Council recommended the Service follow the eastern mallard AHM strategy and adopt a mallard daily bag limit of four birds, no more than two of which may be female, for the 2023–24 duck hunting season.

Service Response: As we stated in the November 3, 2022, proposed rule (87 FR 66251), the development of an eastern mallard AHM strategy has been completed, and we proposed to adopt it in place of the interim harvest strategy beginning with the 2023–24 season. We subsequently adopted the eastern mallard AHM strategy in the January 30, 2023, proposed rule (88 FR 6054). We set mallard hunting regulations in the Atlantic Flyway based on the status and demographics of these birds. The 2022 Federal WBPHS (eastern survey area) and AFBWS estimate was 1.2 million eastern mallards; a 15 percent increase from the 2019 estimate when the breeding waterfowl survey was last completed, and the greatest survey estimate since 2012. The recent increase in eastern mallard abundance may be in part due to restrictive mallard bag limits in the 2019–20, 2020–21, and 2021–22 hunting seasons. Based on the eastern mallard AHM strategy and current survey estimate of eastern mallards, the optimal regulation for the Atlantic Flyway is the liberal alternative with a daily bag limit of four mallards (no more than two of which may be female). Therefore, we concur with the

recommendation of the Atlantic Flyway Council.

4. Canada and Cackling Geese

B. Regular Seasons

Council Recommendations: The Atlantic Flyway Council recommended the liberal regulatory option for Atlantic Population (AP) Canada geese for the 2023–24 hunting season and eliminating the Southern James Bay Population (SJB) Zone in Virginia. The Pacific Flyway Council recommended eliminating the Tillamook Special Management Area in Oregon's Northwest Permit Zone.

Service Response: We agree with the Atlantic Flyway Council's recommendation to implement the liberal regulatory option for AP Canada geese for the 2023–24 hunting season. The Atlantic Flyway Council recommends AP Canada goose harvest regulations following their AP Canada goose harvest strategy. This strategy is based on a demographic model that predicts abundance and other metrics of the population's health 1 year beyond current data.

The AP Canada goose population is one of three populations of Canada geese managed in the Atlantic Flyway and has a long history of intensive management due to its importance to subsistence hunters in Canada and general hunters in both Canada and the United States. The population experienced a drastic decline from 118,000 to 34,000 breeding pairs between 1988 and 1995, resulting in restrictive hunting regulations, including closed seasons in some regions of the Atlantic Flyway. Public hunting harvest was not fully reopened for AP Canada geese until 2005. The AP Canada goose population recovered to an estimated abundance of 182,000 in 2002 due to a combination of hunting regulation restrictions and favorable breeding habitat conditions. The AP Canada goose population ranged from 161,000 to 216,000 breeding pairs between 2002 and 2017 but experienced another decline in abundance between 2018 and 2020 due largely to poor breeding habitat conditions and limited reproduction. In response to this most recent decline and poor reproduction, the Atlantic Flyway Council and Service implemented restrictive regulations (30-day season with a one-bird daily bag limit) for the 2019–20, 2020–21, 2021–22, and 2022–23 seasons. Canada also implemented restrictive regulations in Ontario and Quebec for the 2020–21 to 2023–24 hunting seasons. Furthermore, the Atlantic Flyway Council recommended, and the Service agreed to

implement, restrictive regulations for the 2022–23 season despite an estimated breeding population (153,000) exceeding the threshold (125,000) for the moderate harvest package. The recommendation to continue with restrictive regulations in 2022–23 was based on the lack of breeding survey estimates in 2020 and 2021, average breeding conditions in 2022, and that Canada committed to hunting regulation restrictions through the 2023–24 season.

The 2022 AP Canada goose breeding index was 164,000 birds. This was the highest estimated index since 2016 and was 37 percent higher than the 2019 estimate and 6 percent higher than the long-term average. The results of the 2022 breeding survey suggest AP Canada geese have increased in response to hunting regulation restrictions and improved breeding habitat conditions similar to the pattern observed in the late 1990s and early 2000s. An analysis of the pre-season banding data and hunter harvest indicated adult and juvenile harvest rates declined in response to restrictive hunting regulations whereas survival rates exhibited a slight increase. The predicted 2023 breeding population is 180,500 with a predicted 2022 age ratio of 1.36 (similar to the 1997–2018 average). The recovery of the AP Canada goose population since 2018 and predictions of the 2023 breeding population are in accordance with a liberal regulatory alternative as defined in the Council's AP Canada goose harvest strategy. The Service concludes the liberal alternative will provide maximum hunting opportunity while achieving long-term conservation objectives for the AP Canada goose population.

In regard to the SJB, we agree with the Atlantic Flyway Council's recommendation to eliminate the SJB Zone in Virginia. The SJB of Canada geese is no longer recognized as a separate population by the Service or the Atlantic and Mississippi Flyway Councils. The SJB is now considered part of the larger Southern Hudson Bay Population (SHBP), which is monitored and managed according to the Mississippi Flyway Council's management plan. Elimination of the SJB Canada geese zone in Virginia and incorporation into the resident population and AP zones will simplify regulations, provide greater harvest opportunity and management control over the resident population, and afford sufficient protection to AP Canada geese.

We also agree with the Pacific Flyway Council's recommendation to eliminate the Tillamook Special Management

Area in Oregon's Northwest Permit Zone. The special management area is near Tillamook, Oregon, and was established in 1982 as a goose hunting closure to minimize harvest of Aleutian cackling geese, particularly the Semidi Islands breeding population segment.

Aleutian geese were listed as endangered in 1967, downgraded to threatened status in 1990, and removed from protection under the Endangered Species Act in 2001. Aleutian geese have increased from 790 geese in 1975. The most recent 3-year (2020–2022) average population estimate for Aleutian cackling geese is 172,000 and is well above the Council's population objective of 60,000 geese. The population has grown 8.2 percent annually since 1996. The goose hunting closure zone in Oregon has been reduced in size five times (in 2002, 2005, 2007, 2011, and 2018) in accordance with the recovery of Aleutian geese.

Prior to delisting, two population segments of Aleutian geese were recognized based on breeding distribution: A western Aleutian Islands segment comprises birds from the central and western Aleutian Islands, and a Semidi Islands segment comprises birds from the Semidi Islands of the eastern Aleutian Islands. The western Aleutian Islands segment winters primarily in the San Joaquin Valley and Sacramento River Delta areas of central California, and stages in the Eureka and Crescent City areas on the northern California coast and Bandon and Langlois areas in southern Oregon in spring. The Semidi Islands segment winters primarily on the northern Oregon coast near Pacific City and Tillamook, Oregon. Aleutian geese on the Semidi Islands (and Chagulak Island) are considered to be remnants of the previously more continuously distributed population of Aleutian geese. As part of the delisting, we rejected the notion of retaining threatened species status for the smaller Semidi Islands subpopulation of Aleutian Canada geese while delisting the remainder of the subspecies as the listing entity in question is the entire Aleutian cackling goose subspecies.

Seven subspecies of white-cheeked geese, including Aleutian geese, winter in the Pacific Flyway and are managed as separate populations. All populations of white-cheeked geese are at or above population objectives in the Pacific Flyway. There is substantial mixing of white-cheeked geese populations during winter in the Pacific Flyway. Complaints of goose depredation on private lands in the Tillamook special management area have increased in

association with increasing abundance of multiple populations of geese.

Elimination of the special management area would allow goose hunting on about 2,470 acres; however, only about 200 acres are considered to be goose habitat and would be potentially impacted as the rest of the area is forested or part of Nestucca Bay National Wildlife Refuge that is closed to goose hunting. Removal of the goose hunting closure will help address depredation issues on privately owned lands caused by wintering geese and remove constraints imposed on some private landowners and not others where Aleutian geese may occur. Geese wintering in the Tillamook area continue to have access to areas closed to hunting on Nestucca Bay National Wildlife Refuge and privately owned lands voluntarily closed to hunting. Elimination of the special management area will simplify goose hunting regulations in the Pacific Flyway, and impacts to the population of Aleutian geese are expected to be negligible.

6. Brant

Council Recommendations: The Atlantic Flyway Council recommended the Service follow the Council's Atlantic brant harvest strategy for the 2023–24 hunting season and adopt the restrictive regulatory alternative consisting of a 30-day season with a one-bird daily bag limit. The Pacific Flyway Council recommended that the brant season frameworks be determined based on the harvest strategy in the Council's management plan for the Pacific population of brant pending results of the Winter Brant Survey (WBS). If results of the WBS are not available, results of the most recent WBS should be used.

Service Response: We agree with the Atlantic Flyway Council's recommendation for the restrictive regulatory alternative for the 2023–24 hunting season. The Atlantic Flyway Council adopted their revised harvest strategy for Atlantic brant in October 2020. This revised strategy has been used to guide annual regulations for Atlantic brant since the 2021–22 hunting season. The goal of the Council's Atlantic brant harvest strategy is to provide for subsistence harvest in Canada and general hunting opportunity in both Canada and the United States of the Atlantic brant population that are consistent with maintenance of a viable population throughout its range. This goal is achieved by: (1) attaining the population objective of 150,000 birds; (2) maximizing hunting opportunity commensurate with population abundance; (3) providing simple

regulations; and (4) learning about the effects of harvest on the Atlantic brant population.

The harvest strategy uses a demographic model that predicts abundance 1 year beyond current data. The model depends on data from the Midwinter Waterfowl Survey (MWS), fall productivity survey, pre-season banding and recovery data, and weather data. The predicted breeding population size is used to inform the regulatory decision for the hunting season 1 year in advance. The strategy uses four regulatory alternatives including: closed (predicted population <100,000); restrictive (predicted population ≥100,000 and ≤115,000); standard (predicted population >115,000 and ≤150,000); and liberal (predicted population >150,000). The predicted population abundance for spring 2023 is 107,000 brant, which corresponds to the restrictive regulatory option.

The 2022 MWS count of 109,194 was 12 percent lower than the 2020 count and 15 percent below the long-term average. Further, the population has exhibited a slow decline in abundance since 2018. The estimated adult Atlantic brant survival has ranged from 75 to 85 percent since 2001 with a near high estimate of 81 percent in 2021. Adult brant harvest rates have ranged from 1 to 10 percent since 2001 and was 5 percent during the 2021–22 season. Previous experience suggests that Atlantic brant can exhibit positive growth rates when the population is <150,000 and exposed to a 50-day and 2-bird bag limit regulations. Therefore, the Service expects the restrictive regulatory alternative (30-day season with one-bird bag limit) will provide subsistence harvest opportunity in Canada and public harvest opportunity in the United States and Canada while maintaining a stable to slightly increasing population.

We also agree with the Pacific Flyway Council's recommendation that the Pacific brant season framework be determined by the harvest strategy in the Council's management plan for the Pacific population of brant pending results of the WBS. As we discussed in the August 21, 2020, **Federal Register** (85 FR 51854), the harvest strategy used to determine the Pacific brant season frameworks does not fit well within the current regulatory process. In developing the annual proposed frameworks for Pacific brant, the Pacific Flyway Council and the Service use the 3-year average number of brant counted during the WBS in the Pacific Flyway to determine annual allowable season length and daily bag limits. The WBS is conducted each January, which is after

the date that proposed frameworks are formulated in the regulatory process. However, the data are typically available by the expected publication of these final frameworks. When we acquire the survey data, we determine the appropriate allowable harvest for the Pacific brant season according to the harvest strategy in the Pacific Flyway Council's management plan for the Pacific population of brant published in the August 21, 2020, **Federal Register** (85 FR 51854).

The recent 3-year average (2021–2023) WBS count of Pacific brant was 143,052. Based on the harvest strategy, the appropriate season length and daily bag limit framework for Pacific brant in the 2023–24 season is a 107-day season with a 2-bird daily bag limit in Alaska, and a 27-day season with a 2-bird daily bag limit in California, Oregon, and Washington.

8. Swans

Council Recommendations: The Atlantic Flyway Council recommended Delaware be granted operational status for the tundra swan hunting season, beginning with the 2023–24 season.

Service Response: The Service supports making the Delaware tundra swan season operational. The Atlantic, Mississippi, Central, and Pacific Flyway Councils adopted a management plan for the Eastern Population (EP) of tundra swan in 2007. The primary goal of the management plan is to maintain the EP tundra swan population at levels that will allow for harvest of swans consistent with habitat availability and international treaties. The specific objective is to maintain at least 80,000 EP tundra swans based on the 3-year average MWS population index for the Mississippi and Atlantic Flyways. The population objective provides desired social uses of the population, maintains distribution throughout their range, minimizes human–wildlife conflicts, and provides sustainable levels of harvest. The targeted maximum harvest rate for EP tundra swans (including subsistence and general harvest) is 10 percent, with recreational harvest less than or equal to 5 percent. Tundra swan harvest is managed using a permit system that provides opportunity across States corresponding to tundra swan distribution. The management plan provides a process for redistributing permits among participating States, recognizing total harvest is limited by the number of permits available to all participating States. State agencies are required to monitor total harvest and provide annual reports to the Service.

The EP tundra swan management plan provides a process for allowing

additional States to offer a tundra swan hunting season. Each “new” State wanting to provide an EP tundra swan hunting season must initiate the process 1 year prior to the season and will be allowed if the permit request (expected harvest in the new State) does not result in total swan harvest exceeding the 5 percent public harvest limit. The allocation of permits to the new State are drawn from other States in the same flyway. All States requesting a new tundra swan season must conduct a 3-year experiment to evaluate the effects of the season on the swan population and hunter participation. States conducting an experimental season must submit annual and final reports detailing how the hunts were administered, number of applications and permits issued, hunter participation rate, reporting rate, harvest (including retrieved and un-retrieved birds), and age ratio of harvest birds. All experimental seasons require a memorandum of agreement (MOA) between the requesting State and the Service.

The Delaware Division of Fish and Wildlife (DDFW) requested a new tundra swan hunting season in 2018 starting with the 2019–2020 season and entered into an MOA with the Service in July 2019. The experimental season was approved by the Atlantic Flyway Council and the Service, and was conducted in accordance with the Councils' management plan for EP tundra swans and MOA. The DDFW issued 80, 63, and 63 permits via lottery for the 2019–20, 2020–21, and 2021–22 hunting seasons. Total applicants were 286, 222, and 234 for the 2019–20, 2020–21, and 2021–22 seasons. An additional four permits were issued to hunters via auctions held by conservation organizations for each season. Tundra swan harvest ranged from 22 to 40 birds, and hunter success rate ranged from 44 to 64 percent across the 3 hunting seasons. Participation rate, among permittees, ranged from 75 to 83 percent. Hunters spent an average of 4.2 days hunting across all 3 years. Hunters reported 97 harvested tundra swans. All harvested birds were confirmed to be tundra swans by State personnel. Hunter success for immature to mature tundra swan ratio ranged from 10 to 14 percent. During the 3-year experimental season, the number of swans counted in Delaware was 4,728, 1,602, and 3,830 in 2020, 2021, and 2022. The number of swans counted in the Atlantic Flyway was 61,354, 76,701, and 89,142. The DDFW submitted annual reports and a final report detailing how the tundra swan hunting

season was administered. The DDFW provided data on total harvest, age ratios, and hunter participation metrics as specified in the MOA.

The DDFW met all requirements under the MOA and in accordance with the Councils' management plan for EP tundra swans. The realized harvest experienced during the 3-year experiment was within desired thresholds (*i.e.*, <5 percent), and no trumpeter swans or other nontarget species were harvested. During the 3-year experiment, the tundra swan population increased from 61,354 to 89,142 birds in the Atlantic Flyway and from 70,595 to 90,859 birds in the Atlantic and Mississippi Flyways based on the MWS. The DDFW is prepared to implement an operational season in accordance with the Councils' management plan, including continued monitoring of the population, harvest, and hunter participation. An operational hunting season in Delaware will contribute to meeting the goals of the Councils' management plan for EP tundra swans.

9. Sandhill Cranes

Council Recommendations: The Mississippi Flyway Council recommended that Alabama be granted operational status for their sandhill crane hunting season, beginning in 2023–2024, after successfully completing a 4-year, experimental hunting season evaluation based on criteria outlined in the Mississippi and Atlantic Flyway Councils' management plan for the Eastern Population (EP) of sandhill cranes. The Central and Pacific Flyway Councils recommended that allowable harvest of the Rocky Mountain Population (RMP) of sandhill cranes be determined based on the formula described in the Pacific and Central Flyway Councils' management plan for RMP cranes.

Service Response: We concur with the Mississippi Flyway Council's recommendation concerning granting operational status to Alabama for sandhill crane hunting beginning with the 2023–2024 season. Alabama met all criteria set forth in the Councils' management plan for EP cranes and will join Kentucky and Tennessee as the third State in the Mississippi Flyway to successfully complete an evaluation of sandhill crane harvest under criteria outlined in the management plan. All applicable criteria (*e.g.*, population monitoring, permit numbers, hunter training, post-season harvest survey) in the EP crane management plan will continue to apply to sandhill crane hunting in Alabama.

We also agree with the Central and Pacific Flyway Councils' recommendations to determine allowable harvest of RMP cranes using the formula in the Pacific and Central Flyway Councils' management plan for RMP cranes pending results of the fall 2022 abundance and recruitment surveys. As we discussed in the March 28, 2016, **Federal Register** (81 FR 17302), the harvest strategy used to calculate the allowable harvest of RMP cranes does not fit well within the current regulatory process. In developing the annual proposed frameworks for RMP cranes, the Flyway Councils and the Service use the fall abundance and recruitment surveys of RMP cranes to determine annual allowable harvest. Results of the fall abundance and recruitment surveys of RMP cranes are released between December 1 and January 31 each year, which is after the date proposed frameworks are developed. However, the data are typically available by the expected publication of these final frameworks. When we acquire the survey data, we determine the appropriate allowable harvest for the RMP crane season according to the harvest strategy in the Central and Pacific Flyway Councils' management plan for RMP cranes published in the March 28, 2016, **Federal Register** (81 FR 17302).

The 2022 fall RMP crane abundance estimate was 18,632 cranes, resulting in a 3-year (2020–2022) average of 22,744 cranes, which is lower than the previous 3-year average of 23,630 cranes (similar to the previous 3-year average, which was 23,630 cranes). The RMP crane recruitment estimate was 10.78 percent young in the fall population, resulting in a 3-year (2020–2022) average of 9.74 percent, which is higher than the previous 3-year average of 9.12 percent. Using the current harvest strategy and the above most recent 3-year average abundance and recruitment estimates, the allowable harvest for the 2023–24 season is 2,546 cranes, which is lower than the previous season allowable harvest of 2,778 cranes.

Required Determinations

National Environmental Policy Act (NEPA) Consideration

The programmatic document, “Second Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (EIS 20130139),” filed with the Environmental Protection Agency (EPA) on May 24, 2013, addresses NEPA compliance by the

Service for issuance of the annual framework regulations for hunting of migratory game bird species. We published a notice of availability in the **Federal Register** on May 31, 2013 (78 FR 32686), and our Record of Decision on July 26, 2013 (78 FR 45376). We also address NEPA compliance for waterfowl hunting frameworks through the annual preparation of separate environmental assessments, the most recent being “Duck Hunting Regulations for 2023–24,” with its corresponding finding of no significant impact, available at <https://www.regulations.gov> at Docket No. FWS–HQ–MB–2022–0090. In addition, an August 1985 environmental assessment entitled “Guidelines for Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands” is available from the person listed above under **FOR FURTHER INFORMATION CONTACT**.

Endangered Species Act Consideration

Before issuance of the 2023–24 migratory game bird hunting regulations, we will comply with provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1544; hereinafter “the Act”), to ensure that hunting is not likely to jeopardize the continued existence of any species designated as endangered or threatened or adversely modify or destroy its critical habitat and is consistent with conservation programs for those species.

Regulatory Planning and Review—Executive Orders 12866, 13563, and 14094

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. We have developed this final rule in a manner consistent with these requirements.

E.O. 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. This action is a “significant regulatory action”, as defined under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by

Executive Order 14094 (88 FR 21879, April 11, 2023).

An economic analysis was prepared for the 2023–24 migratory bird hunting season. This analysis was based on data from the 2011 and 2016 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (National Survey), the most recent year for which data are available. See discussion under Required Determinations, *Regulatory Flexibility Act*, below. This analysis estimated consumer surplus for four alternatives for duck hunting regulations. As defined by OMB in Circular A–4, consumers' surplus is the difference between what a consumer pays for a unit of a good or service and the maximum amount the consumer would be willing to pay for that unit. The duck hunting regulatory alternatives are (1) not opening a hunting season, (2) issuing restrictive regulations that allow fewer days than the 2022–23 season, (3) issuing moderate regulations that allow more days than those in Alternative 2 but fewer days than the 2022–23 season, and (4) issuing liberal regulations that allow days similar to the 2022–23 season. For the 2023–24 season, we chose Alternative 4, with an estimated consumer surplus across all flyways of \$356 million. We also chose Alternative 4 for the 2009–10 through 2022–2023 seasons. The 2023–24 analysis is part of the record for this rulemaking action and is available at <https://www.regulations.gov> at Docket No. FWS–HQ–MB–2022–0090.

Regulatory Flexibility Act

The annual migratory bird hunting regulations have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial regulatory flexibility analysis was prepared to analyze the economic impacts of the annual hunting regulations on small business entities. This analysis is updated annually. The primary source of information about hunter expenditures for migratory game bird hunting is the National Survey, which is generally conducted at 5-year intervals. The 2022 analysis is based on the 2016 National Survey and the U.S. Department of Commerce's County Business Patterns, from which it is estimated that migratory bird hunters would spend approximately \$2.2 billion at small businesses in 2022. Copies of the analysis are available upon request from the person listed above under **FOR FURTHER INFORMATION CONTACT** or from <https://www.regulations.gov> at Docket No. FWS–HQ–MB–2022–0090.

Congressional Review Act

Pursuant to subtitle E of the Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.*, OIRA designated this action as a major rule, as defined by 5 U.S.C. 804(2), because it is likely to result in an annual effect on the economy of \$100 million or more. However, because this rule would establish a regulatory program for activity related to hunting and because hunting seasons are time sensitive, we do not plan to defer the effective date under the exemption in the CRA, 5 U.S.C. 808(1).

Paperwork Reduction Act

This rule does not contain any new collection of information that requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has previously approved the information collection requirements associated with migratory bird surveys and the procedures for establishing annual migratory bird hunting seasons under the following OMB control numbers:

- 1018-0019, “North American Woodcock Singing Ground Survey” (expires 02/29/2024).
- 1018-0023, “Migratory Bird Surveys, 50 CFR 20.20” (expires 05/31/2026). Includes Migratory Bird Harvest Information Program, Migratory Bird Hunter Surveys, Sandhill Crane Survey, and Parts Collection Survey.
- 1018-0171, “Establishment of Annual Migratory Bird Hunting Seasons, 50 CFR part 20” (expires 10/31/2024).

You may view the information collection request(s) 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.

Unfunded Mandates Reform Act

We have determined and certify, in compliance with the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*, that this final rulemaking does not include 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 million or more (adjusted for inflation) in any one year and does not significantly or uniquely affect small governments.

Civil Justice Reform—Executive Order 12988

The Department, in promulgating this final rule, has determined that this rule

will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988.

Takings Implication Assessment—Executive Order 12630

In accordance with E.O. 12630, this final rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule would not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, this rule would allow hunters to exercise otherwise unavailable privileges and, therefore, would reduce restrictions on the use of private and public property.

Energy Effects—Executive Order 13211

E.O. 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. While this final rule is a significant regulatory action under E.O. 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy and has not been designated by OIRA as a significant energy action. Therefore, no statement of energy effects is required.

Government-to-Government Relationship With Tribes

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), E.O. 13175, and 512 DM 2, we have evaluated possible effects on federally recognized Indian Tribes and have determined that there are de minimis effects on Indian trust resources. Through this process to establish annual hunting regulations, we regularly coordinate with Tribes that are affected by this rulemaking action. As noted previously, for the 2023–24 season, we will handle Tribal regulations via a separate rulemaking in later **Federal Register** documents.

Federalism Effects—Executive Order 13132

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. We annually prescribe frameworks from which the States make selections regarding the hunting of migratory birds, and we employ guidelines to establish special regulations on Federal Indian reservations and ceded lands. This

process preserves the ability of the States and Tribes to determine which seasons meet their individual needs. Any State or Tribe may be more restrictive in its regulations than the Federal frameworks at any time. The frameworks are developed in a cooperative process with the States and the Flyway Councils. This process allows States to participate in the development of frameworks from which they will make selections, thereby having an influence on their own regulations. These rules do not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 13132, these regulations do not have federalism implications and do not warrant the preparation of a federalism summary impact statement.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Authority

The rules that eventually will be promulgated for the 2023–24 hunting season are authorized under 16 U.S.C. 703–711, 712, and 742 a–j.

Final Regulatory Frameworks for 2023–24 Hunting Seasons on Certain Migratory Game Birds

Pursuant to the Migratory Bird Treaty Act and delegated authorities, the Department of the Interior is establishing the following frameworks for outside dates, season lengths, shooting hours, bag and possession limits, and areas within which States may select seasons for hunting migratory game birds between the dates of September 1, 2023, and March 10, 2024. These frameworks are summarized below.

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I. General

Outside Dates: Outside dates are the earliest and latest dates within which States may establish hunting seasons. All outside dates specified below are inclusive.

Season Lengths: Season lengths are the maximum number of days hunting may occur within the outside dates for hunting seasons. Days are consecutive and concurrent for all species included in each season framework unless otherwise specified.

Season Segments: Season segments are the maximum number of consecutive-day segments into which

the season lengths may be divided. The sum of the hunting days for all season segments may not exceed the season lengths allowed.

Zones: Unless otherwise specified, States may select hunting seasons by zones. Zones for duck seasons (and associated youth and veterans-active military waterfowl hunting days, gallinule seasons, and snipe seasons) and dove seasons may be selected only in years we declare such changes may be made (*i.e.*, open seasons for zones and splits) and according to federally established guidelines for duck and dove zones and split seasons.

Area, Zone, and Unit Descriptions: Areas open to hunting must be described, delineated, and designated as such in each State's hunting regulations, and, except for early teal seasons, these areas must also be published in the **Federal Register** as a Federal migratory bird hunting frameworks final rule. Geographic descriptions related to regulations are contained in a later portion of this document.

Shooting and Hawking (taking by falconry) Hours: Unless otherwise specified, from one-half hour before sunrise to sunset daily.

Possession Limits: Unless otherwise specified, possession limits are three times the daily bag limits.

Permits: For some species of migratory birds, the Service authorizes the use of permits to regulate harvest or monitor their take by hunters, or both. In such cases, the Service determines the amount of harvest that may be taken during hunting seasons during its formal regulations-setting process, and the States then issue permits to hunters at levels predicted to result in the amount of take authorized by the Service. Thus, although issued by States, the permits would not be valid unless the Service approved such take in its regulations.

These federally authorized, State-issued permits are issued to individuals, and only the individual whose name and address appears on the permit at the time of issuance is authorized to take migratory birds at levels specified in the permit, in accordance with provisions of both Federal and State regulations governing the hunting season. The permit must be carried by the permittee when exercising its provisions and must be presented to any law enforcement officer upon request. The permit is not transferrable or assignable to another individual, and may not be sold, bartered, traded, or otherwise provided to another person. If the permit is altered or defaced in any way, the permit becomes invalid.

A. Flyways and Management Units

We generally set migratory bird hunting frameworks for the conterminous United States by Flyway or Management Unit/Region. Frameworks for Alaska, Hawaii, Puerto Rico, and the Virgin Islands are contained in separate sections near the end of the frameworks portion of this document. The States included in the Flyways and Management Units/Regions are described below.

1. Waterfowl Flyways

Atlantic Flyway: Includes Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Mississippi Flyway: Includes Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin.

Central Flyway: Includes Colorado (east of the Continental Divide), Kansas, Montana (Counties of Blaine, Carbon, Fergus, Judith Basin, Stillwater, Sweetgrass, Wheatland, and all counties east thereof), Nebraska, New Mexico (east of the Continental Divide except the Jicarilla Apache Indian Reservation), North Dakota, Oklahoma, South Dakota, Texas, and Wyoming (east of the Continental Divide).

Pacific Flyway: Includes Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, and those portions of Colorado, Montana, New Mexico, and Wyoming not included in the Central Flyway.

2. Mallard Management Units

High Plains Management Unit: Roughly defined as that portion of the Central Flyway that lies west of the 100th meridian. See III. Area, Unit, and Zone Descriptions, *Ducks (Including Mergansers) and Coots*, below, for specific boundaries in each State.

Columbia Basin Management Unit: In Washington, all areas east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County; and in Oregon, the counties of Gilliam, Morrow, and Umatilla.

3. Mourning Dove Management Units

Eastern Management Unit: All States east of the Mississippi River, and Louisiana.

Central Management Unit: Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

Western Management Unit: Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

4. Woodcock Management Regions

Eastern Management Region: Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Central Management Region: Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Wisconsin.

B. Definitions

For the purpose of the frameworks listed below, the collective terms “dark” and “light” geese include the following species:

Dark geese: Canada geese, cackling geese, white-fronted geese, brant (except in Alaska, California, Oregon, Washington, and the Atlantic Flyway), and all other goose species except light geese.

Light geese: Snow (including blue) geese and Ross’s geese.

C. Migratory Game Bird Seasons in the Atlantic Flyway

In the Atlantic Flyway States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, North Carolina, and Pennsylvania, if Sunday hunting of migratory birds is prohibited statewide by State law or regulation, all Sundays are closed to the take of all migratory game birds. For these States where Sunday hunting is prohibited statewide by State law or regulation, the State may extend their hunting season length beyond the framework season length for any migratory game bird by one day for each Sunday included in the State’s regular hunting season. Total season days must be within the season framework outside dates, season days must be consecutive except as provided in framework split-season provisions, and total season length (including extended falconry and other special seasons) must not exceed 107 days.

II. Season Frameworks

A. Special Youth and Veterans—Active Military Personnel Waterfowl Hunting Days

Outside Dates and Season Lengths: States may select 2 days per duck-hunting zone, designated as “Youth Waterfowl Hunting Days,” and 2 days per duck-hunting zone, designated as

“Veterans and Active Military Personnel Waterfowl Hunting Days,” in addition to their regular duck seasons. The days may be held concurrently or may be nonconsecutive. The Youth Waterfowl Hunting Days must be held outside any regular duck season on weekends, holidays, or other non-school days when youth hunters would have the maximum opportunity to participate. Both sets of days may be held up to 14 days before or after any regular duck-season frameworks or within any split of a regular duck season, or within any other open season on migratory birds.

Daily Bag Limits: The daily bag limits may include ducks, geese, swans, mergansers, coots, and gallinules. Bag limits are the same as those allowed in the regular season except in States that implement a hybrid season for scaup (i.e., different bag limits during different portions of the season), in which case the bag limit will be 2 scaup per day. Flyway species and area restrictions would remain in effect.

Participation Restrictions for Youth Waterfowl Hunting Days: States may use their established definition of age for youth hunters. However, youth hunters must be under the age of 18. In addition, an adult at least 18 years of age must accompany the youth hunter into the field. This adult may not duck hunt but may participate in other seasons that are open on the special youth day. Swans may be taken only by participants possessing applicable swan permits.

Participation Restrictions for Veterans and Active Military Personnel Waterfowl Hunting Days: Veterans (as defined in section 101 of title 38, United States Code) and members of the Armed Forces on active duty, including members of the National Guard and Reserves on active duty (other than for training), may participate. Swans may be taken only by participants possessing applicable swan permits.

B. Special Early Teal Seasons

Areas:

Atlantic Flyway: Delaware, Florida, Georgia, Maryland, North Carolina, South Carolina, and Virginia.

Mississippi Flyway: Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin. The season in Minnesota is experimental.

Central Flyway: Colorado (part), Kansas, Nebraska, New Mexico (part), Oklahoma, and Texas.

Outside Dates: September 1–30.

Season Lengths: 16 days.

Daily Bag Limits: 6 teal.

Shooting Hours: One-half hour before sunrise to sunset, except in the States of

Arkansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, South Carolina, and Wisconsin, where the hours are from sunrise to sunset.

C. Special Early Teal—Wood Duck Seasons

Areas: Florida, Kentucky, and Tennessee.

Seasons: In lieu of a special early teal season, a 5-consecutive-day teal-wood duck season may be selected in September. The daily bag limit may not exceed 6 teal and wood ducks in the aggregate, of which no more than 2 may be wood ducks. In addition, a 4-consecutive-day teal-only season may be selected in September either immediately before or immediately after the 5-day teal-wood duck season. The daily bag limit is 6 teal.

D. Duck, Merganser, Coot, and Goose Seasons

1. Atlantic Flyway

a. Duck, Merganser, and Coot Seasons

Outside Dates: Saturday nearest September 24 (September 23)–January 31.

Season Lengths and Daily Bag Limits: 60 days. The daily bag limit is 6 ducks, including no more than 4 mallards (no more than 2 of which may be female), 2 black ducks, 1 pintail, 1 mottled duck, 1 fulvous whistling duck, 3 wood ducks, 2 redheads, 2 canvasbacks, and 4 sea ducks (including no more than 3 scoters, 3 long-tailed ducks, or 3 eiders and no more than 1 female eider). The season for scaup may be split into 2 segments, with one segment consisting of 40 consecutive days with a 1-scaup daily bag limit, and the second segment consisting of 20 consecutive days with a 2-scaup daily bag limit. The daily bag limit of mergansers is 5. In States that include mergansers in the duck bag limit, the daily limit is the same as the duck bag limit. The daily bag limit of coots is 15.

Closed Seasons: There is no open season on the harlequin duck.

Zones and Split Seasons: Delaware, Florida, Georgia, Rhode Island, South Carolina, and West Virginia may split their seasons into 3 segments. Maine, Massachusetts, New Hampshire, New Jersey, and Vermont may select seasons in each of 3 zones; Pennsylvania may select seasons in each of 4 zones; New York may select seasons in each of 5 zones; and all these States may split their season in each zone into 2 segments. Connecticut, Maryland, North Carolina, and Virginia may select seasons in each of 2 zones; and all these States may split their season in each zone into 3 segments. Connecticut,

Maryland, North Carolina, and Virginia must conduct an evaluation of the impacts of zones and splits on hunter dynamics (e.g., hunter numbers, satisfaction) and harvest during the 2021–25 seasons.

Other Provisions: The seasons, limits, and shooting hours should be the same between New York's Lake Champlain Zone and Vermont's Lake Champlain Zone, and between Vermont's Connecticut River Zone and New Hampshire's Inland Zone.

A craft under power may be used to shoot and retrieve dead or crippled birds in the Sea Duck Area in the Atlantic Flyway. The Sea Duck Area includes all coastal waters and all waters of rivers and streams seaward from the first upstream bridge in Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, and New York; in New Jersey, all coastal waters seaward from the International Regulations for Preventing Collisions at Sea (COLREGS) Demarcation Lines shown on National Oceanic and Atmospheric Administration (NOAA) Nautical Charts

and further described in 33 CFR 80.165, 80.501, 80.502, and 80.503; in any waters of the Atlantic Ocean and in any tidal waters of any bay that are separated by at least 1 mile of open water from any shore, island, and emergent vegetation in South Carolina and Georgia; and in any waters of the Atlantic Ocean and in any tidal waters of any bay that are separated by at least 800 yards of open water from any shore, island, and emergent vegetation in Delaware, Maryland, and North Carolina. In Virginia, the Sea Duck Area includes all ocean waters of Virginia, the tidal waters of Northampton and Accomack Counties up to the first highway bridge, and the Chesapeake Bay and each of its tributaries up to the first highway bridge; Back Bay and its tributaries are not included in the Special Sea Duck area. The information in this paragraph is provided under the assumption that any such areas have been described, delineated, and designated as special sea duck hunting areas under the hunting regulations adopted by the respective States.

b. Special Early Canada and Cackling Goose Seasons

Outside Dates and Season Lengths: 15 days during September 1–15 in the Eastern Unit of Maryland; 30 days during September 1–30 in Connecticut, Florida, Georgia, New Jersey, Long Island Zone of New York, North Carolina, Rhode Island, and South Carolina; and 25 days during September 1–25 in the remainder of the Atlantic Flyway.

Daily Bag Limits: 15 geese in the aggregate.

Shooting Hours: One-half hour before sunrise to sunset, except that during any special early Canada and cackling goose season, shooting hours may extend to one-half hour after sunset if all other waterfowl seasons are closed in the specific applicable area.

c. Dark Goose Seasons

Outside Dates, Season Lengths, and Daily Bag Limits: Regulations are State and zone specific as provided below.

Area	Outside dates	Season length	Season segments	Daily bag limit
Connecticut:				
Atlantic Population (AP) Zone	Oct 10–Feb 5	45	2	3
AP Zone Late-Season Area (Special season)	Dec 15–Feb 15	54	1	5
North Atlantic Population (NAP) Zone	Oct 1–Jan 31	60	2	2
NAP Late-Season Area (Special season)	Jan 15–Feb 15	27	1	5
Resident Population (RP) Zone	Oct 1–Feb 15	80	3	5
Delaware:				
Nov 15–Feb 5	45	2	2	
Florida:				
Oct 1–Mar 10	80	3	5	
Georgia:				
Oct 1–Mar 10	80	3	5	
Maine:				
North NAP–H Zone	Oct 1–Jan 31	60	2	2
South NAP–H Zone	Oct 1–Jan 31	60	2	2
Coastal NAP–L Zone	Oct 1–Feb 15	70	2	3
Maryland:				
AP Zone	Nov 15–Feb 5	45	2	2
RP Zone	Nov 15–Mar 10	80	3	5
Massachusetts:				
AP Zone	Oct 10–Feb 5	45	2	3
AP Zone Late-Season Area (Special season)	Dec 15–Feb 15	54	1	5
NAP Zone	Oct 1–Jan 31	60	2	2
NAP Late-Season Area (Special season)	Jan 15–Feb 15	27	1	5
New Hampshire:				
Oct 1–Jan 31	60	2	2	
New Jersey:				
AP Zone	Fourth Saturday in Oct (28)–Feb 5	45	2	3
NAP Zone	Oct 1–Jan 31	60	2	2
Special Late-Season Area (Special season)	Jan 15–Feb 15	27	1	5
New York:				
AP Zone	Fourth Saturday in Oct (28)–Feb 5	45	2	3
AP (Lake Champlain) Zone	Oct 10–Feb 5	45	2	3
NAP High-Harvest Zone	Oct 1–Jan 31	60	2	2
NAP Low-Harvest Zone	Oct 1–Feb 15	70	2	3
Western Long Island RP Zone	Saturday nearest Sep 24 (23)–last day of Feb (29)	107	3	8
Remainder of RP Zone	Fourth Saturday in Oct (28)–last day of Feb (29)	80	3	5
AP (Lake Champlain) Zone Late Season (Special season)	Dec 1–Feb 15	77	1	5
North Carolina:				
Northeast Zone	Saturday prior to Dec 25 (23)–Jan 31	30	1	2
RP Zone	Oct 1–Mar 10	80	3	5

Area	Outside dates	Season length	Season segments	Daily bag limit
<i>Pennsylvania:</i>				
AP Zone	Fourth Saturday in Oct (28)–Feb 5	45	2	3
RP Zone	Fourth Saturday in Oct (28)–Mar 10	80	3	5
<i>Rhode Island:</i>				
Statewide	Oct 1–Jan 31	60	2	2
Late-Season Area (Special season)	Jan 15–Feb 15	32	2	5
<i>South Carolina</i>	Oct 1–Mar 10	80	3	5
<i>Vermont:</i>				
Connecticut River Zone	Oct 1–Jan 31	60	2	2
Interior Zone	Oct 10–Feb 5	45	2	3
Lake Champlain Zone	Oct 10–Feb 5	45	2	3
Interior, and Lake Champlain Zones Late Season (Special Season).	Dec 1–Feb 15	77	1	5
<i>Virginia:</i>				
AP Zone	Nov 15–Feb 5	45	2	2
RP Zone	Nov 15–Mar 10	80	3	5
<i>West Virginia</i>	Oct 1–Mar 10	80	3	5

d. Light Goose Seasons

Outside Dates: October 1–March 10.

Season Lengths: 107 days. Seasons may be split into 3 segments.

Daily Bag Limits: 25 light geese. There is no possession limit.

e. Brant Seasons

Outside Dates: Saturday nearest September 24 (September 23)–January 31.

Season Lengths: 30 days. Seasons may be split into 2 segments.

Daily Bag Limits: 1 brant.

2. Mississippi Flyway

a. Duck, Merganser, and Coot Seasons

Outside Dates: Saturday nearest September 24 (September 23)–January 31.

Season Lengths and Daily Bag Limits: 60 days. The daily bag limit is 6 ducks, including no more than 4 mallards (no more than 2 of which may be females), 1 mottled duck, 2 black ducks, 1 pintail, 3 wood ducks, 2 canvasbacks, and 2 redheads. In Louisiana (the only high-harvest State in the Mississippi Flyway for mottled ducks), the daily bag limit for mottled ducks is zero for the first 15 days. The season for scaup may be split into 2 segments, with one segment consisting of 45 days with a 2-scaup daily bag limit, and the second segment consisting of 15 days with a 1-scaup daily bag limit. The daily bag limit of mergansers is 5, only 2 of which may be hooded mergansers. In States that include mergansers in the duck bag limit, the daily limit is the same as the duck bag limit, only 2 of which may be hooded mergansers. The daily bag limit of coots is 15.

Zones and Split Seasons: Alabama, Arkansas, and Mississippi may split their seasons into 3 segments. Kentucky and Tennessee may select seasons in each of 2 zones; Indiana, Iowa,

Michigan, Minnesota, Missouri, Ohio, and Wisconsin may select seasons in each of 3 zones; and all these States may split their season in each zone into 2 segments. Illinois may select seasons in each of 4 zones. Louisiana may select seasons in each of 2 zones and may split their season in each zone into 3 segments. Louisiana must conduct an evaluation of the impacts of zones and splits on hunter dynamics (e.g., hunter numbers, satisfaction) and harvest during the 2021–25 seasons.

b. Canada and Cackling Goose Seasons

Outside Dates: September 1–February 15.

Season Lengths: 107 days, which may be split into 4 segments.

Daily Bag Limits: 5 geese in the aggregate.

Shooting Hours: One-half hour before sunrise to sunset, except that during September 1–15 shooting hours may extend to one-half hour after sunset for Canada and cackling geese if all other waterfowl and crane seasons are closed in the specific applicable area.

c. White-Fronted Goose Seasons

Outside Dates: September 1–February 15.

Season Lengths and Daily Bag Limits: 74 days with a daily bag limit of 3 geese, 88 days with a daily bag limit of 2 geese, or 107 days with a daily bag limit of 1 goose. Seasons may be split into 4 segments.

d. Brant Seasons

Outside Dates: September 1–February 15.

Season Lengths and Daily Bag Limits: 70 days with a daily bag limit of 2 brant or 107 days with a daily bag limit of 1 brant. Seasons may be split into 4 segments.

Other Provisions: In lieu of a separate brant season, brant may be included in

the season for Canada and cackling geese with a daily bag limit of 5 geese in the aggregate.

e. Dark Goose Seasons

Areas: Alabama, Iowa, Indiana, Michigan, Minnesota, Ohio, and Wisconsin in lieu of separate seasons for Canada and cackling geese, white-fronted geese, and brant.

Outside Dates: September 1–February 15.

Season Lengths: 107 days, which may be split into 4 segments.

Daily Bag Limits: 5 geese in the aggregate.

f. Light Goose Seasons

Outside Dates: September 1–February 15.

Season Lengths: 107 days, which may be split into 4 segments.

Daily Bag and Possession Limits: The daily bag limit is 20 geese. There is no possession limit for light geese.

3. Central Flyway

a. Ducks, Merganser, and Coot Seasons

Outside Dates: Saturday nearest September 24 (September 23)–January 31.

Season Lengths and Duck Daily Bag Limits: 74 days, except in the High Plains Mallard Management Unit where the season length is 97 days and the last 23 days must be consecutive and may start no earlier than the Saturday nearest December 10 (December 9). The daily bag limit is 6 ducks and mergansers in the aggregate, including no more than 5 mallards (no more than 2 of which may be females), 2 redheads, 3 wood ducks, 1 pintail, 1 scaup, and 2 canvasbacks. In Texas, the daily bag limit on mottled ducks is 1, except that no mottled ducks may be taken during the first 5 days of the season. In addition to the daily limits listed above, the States of

Montana, North Dakota, South Dakota, and Wyoming, in lieu of selecting an experimental September teal season, may include an additional daily bag and possession limit of 2 and 6 blue-winged teal, respectively, during the first 16 days of the regular duck season in each respective duck hunting zone. These extra limits are in addition to the regular duck bag and possession limits.

Coot Daily Bag Limits: 15 coots.

Zones and Split Seasons: Colorado, Kansas (Low Plains portion), Montana, Nebraska, New Mexico, Oklahoma (Low Plains portion), South Dakota (Low Plains portion), Texas (Low Plains portion), and Wyoming may select hunting seasons by zones.

North Dakota may split their season into 3 segments. Montana, New Mexico, Oklahoma, and Texas may select seasons in each of 2 zones; and Colorado, Kansas, South Dakota, and Wyoming may select seasons in each of 3 zones; and all these States may split their season in each zone into 2 segments. Nebraska may select seasons in each of 4 zones.

b. Special Early Canada and Cackling Goose Seasons

Outside Dates and Seasons Lengths: In Kansas, Nebraska, Oklahoma, South Dakota, and Texas, 30 days between September 1–30; in Colorado, New Mexico, Montana, and Wyoming, Canada and cackling goose seasons of not more than 15 days between September 1–15; and in North Dakota, 22 days between September 1–22.

Daily Bag Limits: 5 geese in the aggregate in Colorado, New Mexico, Montana, Wyoming, and Texas; 8 geese in the aggregate in Kansas, Nebraska, and Oklahoma; and 15 geese in the aggregate in North Dakota and South Dakota.

Shooting Hours: One-half hour before sunrise to sunset, except that during September 1–15 shooting hours may extend to one-half hour after sunset if all other waterfowl and crane seasons are closed in the specific applicable area.

c. Canada Goose, Cackling Goose, and Brant Seasons

Outside Dates: Saturday nearest September 24 (September 23)–the Sunday nearest February 15 (February 18).

Seasons and Daily Bag Limits: In Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and the Eastern Goose Zone of Texas, 107 days with a daily bag limit of 8 geese; in Colorado, Montana, New Mexico, and Wyoming, 107 days with a daily bag limit of 5 geese; and in Texas (Western

Goose Zone), 95 days with a daily bag limit of 5 geese.

Split Seasons: Seasons may be split into 3 segments. Three-segment seasons require Central Flyway Council and U.S. Fish and Wildlife Service approval, and a 3-year evaluation by each participating State.

d. White-Fronted Goose Seasons

Outside Dates: Saturday nearest September 24 (September 23)–the Sunday nearest February 15 (February 18).

Season Length and Daily Bag Limits: Except as subsequently provided, either 74 days with a daily bag limit of 3 geese, or 88 days with a daily bag limit of 2 geese, or 107 days with a daily bag limit of 1 goose. In Texas (Western Goose Zone), 95 days with a daily bag limit of 2 geese. Seasons may be split into 3 segments.

e. Light Goose Seasons

Outside Dates: Saturday nearest September 24 (September 23)–March 10.

Season Lengths: 107 days. Seasons may be split into 3 segments.

Daily Bag and Possession Limits: The daily bag limit is 50 with no possession limit.

Other Provisions: In the Rainwater Basin Light Goose Area (East and West) of Nebraska, temporal and spatial restrictions that are consistent with the late-winter snow goose hunting strategy cooperatively developed by the Central Flyway Council and the Service are required.

4. Pacific Flyway

a. Duck, Merganser, Coot, and Gallinule Seasons

Outside Dates: Saturday nearest September 24 (September 23)–January 31.

Season Lengths and Daily Bag Limits: 107 days. The daily bag limit is 7 ducks and mergansers in the aggregate, including no more than 2 female mallards, 1 pintail, 2 canvasbacks, 2 scaup, and 2 redheads. For scaup, the season length is 86 days, which may be split according to applicable zones and split duck hunting configurations approved for each State. The daily bag limit of coots and gallinules is 25 in the aggregate.

Zones and Split Seasons: Montana and New Mexico may split their seasons into 3 segments. Arizona, Colorado, Oregon, Utah, Washington, and Wyoming may select seasons in each of 2 zones; Nevada may select seasons in each of 3 zones; California may select seasons in each of 5 zones; and all these States may split their season in each

zone into 2 segments. Idaho may select seasons in each of 4 zones.

Other Provisions: The seasons, limits, and shooting hours should be the same between the Colorado River Zone of California and the South Zone of Arizona.

b. Goose Seasons

i. Special Early Canada and Cackling Goose Seasons

Outside Dates: September 1–20.

Season Lengths: 15 days.

Daily Bag Limits: 5 geese in the aggregate, except in Pacific County, Washington, where the daily bag limit is 15 geese in the aggregate.

ii. Canada Goose, Cackling Goose, and Brant Seasons

Outside Dates: Except as subsequently provided, Saturday nearest September 24 (September 23)–January 31.

Season Lengths: Except as subsequently provided, 107 days.

Daily Bag Limits: Except as subsequently provided, in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming, the daily bag limit is 5 Canada and cackling geese and brant in the aggregate. In Oregon and Washington, the daily bag limit is 4 Canada and cackling geese in the aggregate. In California, the daily bag limit is 10 Canada and cackling geese in the aggregate.

Split Seasons: Seasons may be split into 3 segments. Three-segment seasons require Pacific Flyway Council and U.S. Fish and Wildlife Service approval and a 3-year evaluation by each participating State.

iii. Brant Seasons

Areas: California, Oregon, and Washington.

Outside Dates: Saturday nearest September 24 (September 23)–January 31.

Season Lengths and Daily Bag Limits: 27 days and 2 brant.

Zones: Washington and California may select seasons in each of 2 zones.

Other Provisions: In Oregon and California, the brant season must end no later than December 15.

iv. White-fronted Goose Seasons

Outside Dates: Saturday nearest September 24 (September 23)–March 10.

Season Lengths: 107 days.

Daily Bag Limits: Except as subsequently provided, 10 geese.

Split Seasons: Seasons may be split into 3 segments. Three-segment seasons require Pacific Flyway Council and U.S. Fish and Wildlife Service approval and a 3-year evaluation by each participating State.

v. Light Goose Seasons

Outside Dates: Saturday nearest September 24 (September 23)–March 10.

Season Lengths: 107 days. Seasons may be split into 3 segments.

Daily Bag Limits: 20 geese, except in Washington where the daily bag limit for light geese is 10 on or before the last Sunday in January (January 28).

vi. Other Provisions

California

Balance of State Zone: A Canada and cackling goose season may be selected with outside dates between the Saturday nearest September 24 (September 23) and March 10 and may be split into 3 segments. In the Sacramento Valley Special Management Area, the season on white-fronted geese must end on or before December 28, and the daily bag limit is 3 white-fronted geese. In the North Coast Special Management Area, hunting days that occur after January 31 should be concurrent with Oregon's South Coast Zone.

Northeastern Zone: The white-fronted goose season may be split into 3 segments.

Oregon

Eastern Zone: For Lake County only, the daily white-fronted goose bag limit is 1.

Northwest Permit Zone: A Canada and cackling goose season may be selected with outside dates between the Saturday nearest September 24 (September 23) and March 10 with a daily bag limit of 3 geese in the aggregate. Canada and cackling goose and white-fronted goose seasons may be split into 3 segments.

South Coast Zone: A Canada and cackling goose season may be selected with outside dates between the Saturday nearest September 24 (September 23) and March 10 with a daily bag limit of 6 geese in the aggregate. Canada and cackling goose and white-fronted goose seasons may be split into 3 segments. Hunting days that occur after January 31 should be concurrent with California's North Coast Special Management Area.

Utah

Wasatch Front Zone: A Canada and cackling goose and brant season may be selected with outside dates between the Saturday nearest September 24 (September 23) and February 15.

Washington

Areas 2 Inland and 2 Coastal (Southwest Permit Zone): A Canada and cackling goose season may be selected in each zone with outside dates between the Saturday nearest September 24 (September 23) and March 10 with a

daily bag limit of 3 geese in the aggregate. Canada and cackling goose and white-fronted goose seasons may be split into 3 segments.

Area 4: Canada and cackling goose and white-fronted goose seasons may be split into 3 segments.

Permit Zones

In Oregon and Washington permit zones, the hunting season is closed on dusky Canada geese. A dusky Canada goose is any dark-breasted Canada goose (Munsell 10 YR color value 5 or less) with a bill length between 40 and 50 millimeters. Hunting of geese will only be by hunters possessing a State-issued permit authorizing them to do so. Shooting hours for geese may begin no earlier than sunrise. Regular Canada and cackling goose seasons in the permit zones of Oregon and Washington remain subject to the Memorandum of Understanding entered into with the Service regarding monitoring the impacts of take during the regular Canada and cackling goose season on the dusky Canada goose population.

5. Swan Seasons

Pacific Flyway

Areas: Idaho, Montana, Nevada, and Utah.

Outside Dates: Saturday nearest September 24 (September 23)–January 31.

Season Lengths: 107 days. Seasons may be split into 2 segments.

Permits: Hunting is by permit only. Permits will be issued by the State. The total number of permits issued may not exceed 50 in Idaho, 500 in Montana, 650 in Nevada, and 2,750 in Utah. Permits will authorize the take of no more than 1 swan per permit. Only 1 permit may be issued per hunter in Montana and Utah; 2 permits may be issued per hunter in Nevada.

Quotas: The swan season in the respective State must end upon attainment of the following reported harvest of trumpeter swans: 20 in Utah and 10 in Nevada. There is no quota in Idaho and Montana.

Monitoring: Each State must evaluate hunter participation, species-specific swan harvest, and hunter compliance in providing either species-determinant parts (at least the intact head) or bill measurements (bill length from tip to posterior edge of the nares opening, and presence or absence of yellow lore spots on the bill in front of the eyes) of harvested swans for species identification. Each State should use appropriate measures to maximize hunter compliance with the State's program for swan harvest reporting.

Each State must achieve a hunter compliance of at least 80 percent in providing species-determinant parts or bill measurements of harvested swans for species identification, or subsequent permits will be reduced by 10 percent in the respective State. Each State must provide to the Service by June 30 following the swan season a report detailing hunter participation, species-specific swan harvest, and hunter compliance in reporting harvest. In Idaho and Montana, all hunters that harvest a swan must complete and submit a reporting card (bill card) with the bill measurement and color information from the harvested swan within 72 hours of harvest for species determination. In Utah and Nevada, all hunters that harvest a swan must have the swan or species-determinant parts examined by a State or Federal biologist within 72 hours of harvest for species determination.

Other Provisions: In Utah, the season is subject to the terms of the Memorandum of Agreement entered into with the Service in January 2019 regarding harvest monitoring, season closure procedures, and education requirements to minimize take of trumpeter swans during the swan season.

Atlantic and Central Flyways

Areas: Delaware, North Carolina, and Virginia in the Atlantic Flyway and North Dakota, South Dakota east of the Missouri River, and part of Montana in the Central Flyway.

Outside Dates: October 1–January 31 in the Atlantic Flyway and the Saturday nearest October 1 (September 30)–January 31 in the Central Flyway.

Season Lengths: 90 days in the Atlantic Flyway and 107 days in the Central Flyway.

Permits: Hunting is by permit only. Permits will be issued by the States. No more than 5,600 permits may be issued in the Atlantic Flyway including 347 in Delaware, 4,721 in North Carolina, and 532 in Virginia. No more than 4,000 permits may be issued in the Central Flyway including 500 in Montana, 2,200 in North Dakota, and 1,300 in South Dakota. Permits will authorize the take of no more than 1 swan per permit. A second permit may be issued to hunters from unissued permits remaining after the first drawing. Unissued permits may be reallocated to States within a Flyway.

Monitoring: Each State must evaluate hunter participation, species-specific swan harvest, and hunter compliance in providing measurements of harvested swans for species identification. Each State should use appropriate measures to maximize hunter compliance with

the State's program for swan harvest reporting. Each State must achieve a hunter compliance of at least 80 percent in providing species-determinant measurements of harvested swans for species identification. Each State must provide to the Service by June 30 following the swan season a report detailing hunter participation, species-specific swan harvest, and hunter compliance in reporting harvest.

Other Provisions: In lieu of a general swan hunting season, States may select a season only for tundra swans. States selecting a season only for tundra swans must obtain harvest and hunter participation data.

6. Sandhill Crane Seasons

Mississippi Flyway

Areas: Alabama, Kentucky, Minnesota, and Tennessee.

Outside Dates: September 1–February 28 in Minnesota, and September 1–January 31 in Alabama, Kentucky, and Tennessee.

Season Lengths: 37 days in the designated portion of Minnesota's Northwest Goose Zone, and 60 days in Alabama, Kentucky, and Tennessee.

Daily Bag and Possession Limits: The daily bag limit is 1 crane in Minnesota, 2 cranes in Kentucky, and 3 cranes in Alabama and Tennessee. In Alabama, Kentucky, and Tennessee, the seasonal bag limit is 3 cranes.

Permits: Hunting is by permit only. Permits will be issued by the State.

Other Provisions: The number of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with Council management plans and approved by the Mississippi Flyway Council.

Central Flyway

Areas: Colorado, Kansas, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

Outside Dates: September 1–February 28.

Season Lengths: 37 days in Texas (Zone C), 58 days in Colorado, Kansas, Montana, North Dakota, South Dakota, and Wyoming, and 93 days in New Mexico, Oklahoma, and Texas.

Daily Bag Limits: 3 cranes, except 2 cranes in North Dakota (Area 2) and Texas (Zone C).

Permits: Hunting is by permit only. Permits will be issued by the States.

Central and Pacific Flyways

Areas: Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming within the range of the Rocky Mountain Population (RMP) of sandhill cranes.

Outside Dates: September 1–January 31.

Season Lengths: 60 days. The season may be split into 3 segments.

Daily Bag and Possession limits: The daily bag limit is 3 cranes, and the possession limit is 9 cranes per season.

Permits: Hunting is by permit only. Permits will be issued by the State.

Other Provisions: Numbers of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with Councils' management plan and approved by the Central and Pacific Flyway Councils, with the following exceptions:

1. In Utah, 100 percent of the harvest will be assigned to the RMP crane quota;

2. In Arizona, monitoring the species composition of the harvest must be conducted at 3-year intervals unless 100 percent of the harvest will be assigned to the RMP crane quota;

3. In Idaho, 100 percent of the harvest will be assigned to the RMP crane quota; and

4. In the Estancia Valley hunt area of New Mexico, the level and species composition of the harvest must be monitored; greater sandhill cranes in the harvest will be assigned to the RMP crane quota.

7. Gallinule Seasons

Atlantic, Mississippi, and Central Flyways

Outside Dates: September 1–January 31.

Season Lengths: 70 days.

Daily Bag Limits: 15 gallinules.

Zones and Split Seasons: Seasons may be selected by zones established for duck hunting. The season in each zone may be split into 2 segments.

Pacific Flyway

States in the Pacific Flyway may select their hunting seasons between the outside dates for the season on ducks, mergansers, and coots; therefore, Pacific Flyway frameworks for gallinules are included with the duck, merganser, and coot frameworks.

8. Rail Seasons

Areas: Atlantic, Mississippi, and Central Flyways and the Pacific Flyway Portions of Colorado, Montana, New Mexico, and Wyoming.

Outside Dates: September 1–January 31.

Season Lengths: 70 days. Seasons may be split into 2 segments.

Daily Bag Limits

Clapper and King Rails: In Connecticut, Delaware, Maryland, New Jersey, and Rhode Island, 10 rails in the aggregate. In Alabama, Florida, Georgia,

Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia, 15 rails in the aggregate.

Sora and Virginia Rails: 25 rails in the aggregate.

9. Snipe Seasons

Outside Dates: September 1–February 28, except in Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia, where the season must end no later than January 31.

Season Lengths: 107 days.

Daily Bag limits: 8 snipe.

Zones and Split Seasons: Seasons may be selected by zones established for duck seasons. The season in each zone may be split into 2 segments.

10. American Woodcock Seasons

Areas: Eastern and Central Management Regions

Outside Dates: September 13–January 31.

Season Lengths: Except as subsequently provided, 45 days.

Daily Bag Limits: 3 woodcock.

Zones and Split Seasons: Seasons may be split into 2 segments. New Jersey may select seasons in each of 2 zones. The season in each zone may not exceed 36 days.

11. Band-Tailed Pigeon Seasons

California, Oregon, Washington, and Nevada

Outside Dates: September 15–January 31.

1. *Seasons Lengths:* 9 days.

Daily Bag Limits: 2 pigeons.

Zones: California may select seasons in each of 2 zones. The season in each zone may not exceed 9 days. The season in the North Zone must close by October 3.

Arizona, Colorado, New Mexico, and Utah

Outside Dates: September 1–November 30.

Season Lengths: 14 days.

Daily Bag Limits: 2 pigeons.

Zones: New Mexico may select seasons in each of 2 zones. The season in each zone may not exceed 14 days. The season in the South Zone may not open until October 1.

12. Dove Seasons

Eastern Management Unit

Outside Dates: September 1–January 31.

Season Lengths: 90 days.

Daily Bag Limits: 15 mourning and white-winged doves in the aggregate.

Zones and Split Seasons: Seasons may be split into 3 segments; Alabama,

Louisiana, and Mississippi may select seasons in each of 2 zones and may split their season in each zone into 3 segments.

Central Management Unit

Outside Dates: September 1–January 15.

Season Lengths: 90 days.

All States Except Texas

Daily Bag Limits: 15 mourning and white-winged doves in the aggregate.

Zones and Split Seasons: Seasons may be split into 3 segments; New Mexico may select seasons in each of 2 zones and may split their season in each zone into 3 segments.

Texas

Daily Bag Limits: 15 mourning, white-winged, and white-tipped doves in the aggregate, of which no more than 2 may be white-tipped doves.

Zones and Split Seasons: Texas may select hunting seasons for each of 3 zones subject to the following conditions:

1. The season may be split into 2 segments, except in that portion of Texas in which the special white-winged dove season is allowed, where a limited take of mourning and white-tipped doves may also occur during that special season (see Special White-winged Dove Area in Texas, below).

2. A season may be selected for the North and Central Zones between September 1 and January 25; and for the South Zone between September 14 and January 25.

Special White-Winged Dove Season in Texas

In addition, Texas may select a hunting season of not more than 6 days, consisting of two 3-consecutive-day periods, for the Special White-winged Dove Area between September 1 and 19. The daily bag limit may not exceed 15 white-winged, mourning, and white-tipped doves in the aggregate, of which no more than 2 may be mourning doves and no more than 2 may be white-tipped doves. Shooting hours are from noon to sunset.

Western Management Unit

Outside Dates: September 1–January 15.

Idaho, Nevada, Oregon, Utah, and Washington

Season Lengths: 60 days.

Daily Bag Limits: 15 mourning and white-winged doves in the aggregate.

Zones and Split Seasons: Idaho, Nevada, Utah, and Washington may split their seasons into 2 segments.

Oregon may select hunting seasons in each of 2 zones and may split their season in each zone into 2 segments.

Arizona and California

Season Lengths: 60 days, which may be split between 2 segments, September 1–15 and November 1–January 15.

Daily Bag Limits: In Arizona, during the first segment of the season, the daily bag limit is 15 mourning and white-winged doves in the aggregate, of which no more than 10 may be white-winged doves. During the remainder of the season, the daily bag limit is 15 mourning doves. In California, the daily bag limit is 15 mourning and white-winged doves in the aggregate, of which no more than 10 may be white-winged doves.

13. Alaska

a. Duck, Goose, Sandhill Crane, and Snipe Seasons

Outside Dates: Except as subsequently provided, September 1–January 26.

Season Lengths: Except as subsequently provided, 107 days for ducks, geese (except brant), sandhill cranes, and snipe. The season length for brant will be determined based on the upcoming brant winter survey results and the Pacific brant harvest strategy.

Zones and Split Seasons: A season may be established in each of 5 zones. The season in the Southeast Zone may be split into 2 segments.

Closed Seasons: The hunting season is closed on the spectacled eider and Steller's eider.

Daily Bag and Possession Limits and Special Conditions Ducks: The basic daily bag limit is 7 ducks. The basic daily bag limit in the North Zone is 10 ducks and in the Gulf Coast Zone is 8 ducks. The basic daily bag limits may include 2 canvasbacks and may not include sea ducks.

In addition to the basic daily bag limits, the sea duck daily bag limit is 10, including 6 each of either harlequin or long-tailed ducks. Sea ducks include scoters, common and king eiders, harlequin ducks, long-tailed ducks, and common, hooded, and red-breasted mergansers.

Light Geese: The daily bag limit is 6 geese.

Canada and Cackling Geese: The daily bag limit is 4 Canada and cackling geese in the aggregate with the following exceptions, and subject to the following conditions:

1. In Game Management Units (Units) 5 and 6, in the Gulf Coast Zone, outside dates are September 28–December 16.

2. On Middleton Island in Unit 6, in the Gulf Coast Zone, all hunting is by

permit only. Each hunter is required to complete a mandatory Canada and cackling goose identification class prior to being issued a permit. Hunters must check in and check out when hunting. The daily bag and possession limits are 1 goose. The season will close if incidental harvest includes 5 dusky Canada geese. A dusky Canada goose is any dark-breasted Canada goose (Munsell 10 YR color value 5 or less) with a bill length between 40 and 50 millimeters.

3. In Unit 10, in the Pribilof and Aleutian Islands Zone, the daily bag limit is 6 geese in the aggregate.

White-fronted Geese: The daily bag limit is 4 geese with the following exceptions:

1. In Unit 9, in the Gulf Coast Zone, Unit 10, in the Pribilof and Aleutian Islands Zone, and Unit 17, in the North Zone, the daily bag limit is 6 geese.

2. In Unit 18, in the North Zone, the daily bag limit is 10 geese.

Emperor Geese: The emperor goose season is subject to the following conditions:

1. All hunting is by permit only.

2. One goose may be harvested per hunter per season.

3. Total harvest may not exceed 500 geese.

4. In Unit 8, in the Kodiak Zone, the Kodiak Island Road Area is closed to hunting. The Kodiak Island Road Area consists of all lands and water (including exposed tidelands) east of a line extending from Crag Point in the north to the west end of Saltery Cove in the south and all lands and water south of a line extending from Termination Point along the north side of Cascade Lake extending to Anton Larsen Bay. Marine waters adjacent to the closed area are closed to harvest within 500 feet from the water's edge. The offshore islands are open to harvest, for example: Woody, Long, Gull, and Puffin islands.

Brant: The daily bag limit is 2 brant.

Snipe: The daily bag limit is 8 snipe.

Sandhill Cranes: The daily bag limit is 2 cranes in the Southeast, Gulf Coast, Kodiak, and Pribilof and Aleutian Islands Zones, and Unit 17 in the North Zone. In the remainder of the North Zone (outside Unit 17), the daily bag limit is 3 cranes.

b. Tundra Swan Seasons

Outside Dates: September 1–October 31.

Season Lengths: 31 days.

Daily Bag and Possession Limits and Special Conditions: All hunting is by permit only according to the following conditions.

1. In Unit 17, in the North Zone, 200 permits may be issued; 3 tundra swans

may be authorized per permit, and 1 permit may be issued per hunter per season.

2. In Unit 18, in the North Zone, 500 permits may be issued; 3 tundra swans may be authorized per permit, and 1 permit may be issued per hunter per season.

3. In Unit 22, in the North Zone, 300 permits may be issued; 3 tundra swans may be authorized per permit, and 1 permit may be issued per hunter per season.

4. In Unit 23, in the North Zone, 300 permits may be issued; 3 tundra swans may be authorized per permit, and 1 permit may be issued per hunter per season.

14. Hawaii

a. Mourning Dove Seasons

Outside Dates: October 1–January 31.

Season Lengths and Daily Bag Limits: 65 days with a daily bag limit of 15 doves or 75 days with a daily bag of 12 doves.

Note: Mourning doves may be taken in Hawaii in accordance with shooting hours and other regulations set by the State of Hawaii, and subject to the applicable provisions of 50 CFR part 20.

15. Puerto Rico

a. Dove and Pigeon Seasons

Outside Dates: September 1–January

15.

Season Lengths: 60 days.

Daily Bag Limits: 30 Zenaida, mourning, and white-winged doves in the aggregate, of which 10 may be Zenaida doves and 3 may be mourning doves, and 5 scaly-naped pigeons.

Closed Seasons: There is no open season on the white-crowned pigeon and the plain pigeon, which are protected by the Commonwealth of Puerto Rico.

Closed Areas: There is no open season on doves or pigeons in the following areas: Municipality of Culebra, Desecheo Island, Mona Island, El Verde Closure Area, and Cidra Municipality and adjacent areas.

b. Duck, Coot, Gallinule, and Snipe Seasons

Outside Dates: October 1–January 31.

Season Lengths: 55 days. The season may be split into 2 segments.

Daily Bag Limits: 6 ducks, 6 common gallinules, and 8 snipe.

Closed Seasons: There is no open season on the ruddy duck, white-cheeked pintail, West Indian whistling duck, fulvous whistling duck, and masked duck, which are protected by the Commonwealth of Puerto Rico. There is no open season on the purple

gallinule, American coot, and Caribbean coot.

Closed Areas: There is no open season on ducks, gallinules, and snipe in the Municipality of Culebra and on Desecheo Island.

16. Virgin Islands

a. Dove and Pigeon Seasons

Outside Dates: September 1–January 15.

Season Lengths: 60 days.

Daily Bag and Possession Limits: 10 Zenaida doves.

Closed Seasons: There is no open season for ground-doves, quail-doves, and pigeons.

Closed Areas: There is no open season for migratory game birds on Ruth Cay (just south of St. Croix).

Local Names for Certain Birds:

Zenaida dove, also known as mountain dove; bridled quail-dove, also known as Barbary dove or partridge; common ground-dove, also known as stone dove, tobacco dove, rola, or tortolita; scaly-naped pigeon, also known as red-necked or scaled pigeon.

b. Duck Seasons

Outside Dates: December 1–January 31.

Season Lengths: 55 days.

Daily Bag Limits: 6 ducks.

Closed Seasons: There is no open season on the ruddy duck, white-cheeked pintail, West Indian whistling-duck, fulvous whistling-duck, and masked duck.

17. Special Falconry Regulations

In accordance with 50 CFR 21.82, falconry is a permitted means of taking migratory game birds in any State except for Hawaii. States may select an extended season for taking migratory game birds in accordance with the following:

Outside Dates: September 1–March 10.

Season Lengths: For all hunting methods combined, the combined length of the extended season, regular season, and any special or experimental seasons must not exceed 107 days for any species or group of species in a geographical area. Each extended season may be split into 3 segments.

Daily Bag Limits: Falconry daily bag limits for all permitted migratory game birds must not exceed 3 birds in the aggregate, during extended falconry seasons, any special or experimental seasons, and regular hunting seasons in each State, including those that do not select an extended falconry season.

Note: General hunting regulations, including seasons and hunting hours, apply

to falconry. Regular season bag limits do not apply to falconry. The falconry bag limit is not in addition to shooting limits.

III. Area, Unit, and Zone Descriptions

Ducks (Including Mergansers) and Coots

Atlantic Flyway

Connecticut

North Zone: That portion of the State north of I-95.

South Zone: Remainder of the State.

Maine

North Zone: That portion north of the line extending east along Maine State Highway 110 from the New Hampshire-Maine State line to the intersection of Maine State Highway 11 in Newfield; then north and east along Route 11 to the intersection of U.S. Route 202 in Auburn; then north and east on Route 202 to the intersection of I-95 in Augusta; then north and east along I-95 to Route 15 in Bangor; then east along Route 15 to Route 9; then east along Route 9 to Stony Brook in Baileyville; then east along Stony Brook to the U.S. border.

Coastal Zone: That portion south of a line extending east from the Maine-New Brunswick border in Calais at the Route 1 Bridge; then south along Route 1 to the Maine-New Hampshire border in Kittery.

South Zone: Remainder of the State.

Maryland

Western Zone: Allegany, Carroll, Garrett, Frederick and Washington Counties; and those portions of Baltimore, Howard, Prince George's, and Montgomery Counties west of a line beginning at I-83 at the Pennsylvania State line, following I-83 south to the intersection of I-83 and I-695 (Outer Loop), south following I-695 (Outer Loop) to its intersection with I-95, south following I-95 to its intersection with I-495 (Outer Loop), and following I-495 (Outer Loop) to the Virginia shore of the Potomac River.

Eastern Zone: That portion of the State not included in the Western Zone.

Special Teal Season Area: Calvert, Caroline, Cecil, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester Counties; that part of Anne Arundel County east of Interstate 895, Interstate 97, and Route 3; that part of Prince George's County east of Route 3 and Route 301; and that part of Charles County east of Route 301 to the Virginia State Line.

Massachusetts

Western Zone: That portion of the State west of a line extending south

from the Vermont State line on I-91 to MA 9, west on MA 9 to MA 10, south on MA 10 to U.S. 202, south on U.S. 202 to the Connecticut State line.

Central Zone: That portion of the State east of the Berkshire Zone and west of a line extending south from the New Hampshire State line on I-95 to U.S. 1, south on U.S. 1 to I-93, south on I-93 to MA 3, south on MA 3 to U.S. 6, west on U.S. 6 to MA 28, west on MA 28 to I-195, west to the Rhode Island State line; except the waters, and the lands 150 yards inland from the high-water mark, of the Assonet River upstream to the MA 24 bridge, and the Taunton River upstream to the Center Street-Elm Street bridge shall be in the Coastal Zone.

Coastal Zone: That portion of Massachusetts east and south of the Central Zone.

New Hampshire

Northern Zone: That portion of the State east and north of the Inland Zone beginning at the Jct. of Route 10 and Route 25-A in Orford, east on Route 25-A to Route 25 in Wentworth, southeast on Route 25 to Exit 26 of Route I-93 in Plymouth, south on Route I-93 to Route 3 at Exit 24 of Route I-93 in Ashland, northeast on Route 3 to Route 113 in Holderness, north on Route 113 to Route 113-A in Sandwich, north on Route 113-A to Route 113 in Tamworth, east on Route 113 to Route 16 in Chocorua, north on Route 16 to Route 302 in Conway, east on Route 302 to the Maine-New Hampshire border.

Inland Zone: That portion of the State south and west of the Northern Zone, west of the Coastal Zone, and includes the area of Vermont and New Hampshire as described for hunting reciprocity. A person holding a New Hampshire hunting license that allows the taking of migratory waterfowl or a person holding a Vermont resident hunting license that allows the taking of migratory waterfowl may take migratory waterfowl and coots from the following designated area of the Inland Zone: the State of Vermont east of Route I-91 at the Massachusetts border, north on Route I-91 to Route 2, north on Route 2 to Route 102, north on Route 102 to Route 253, and north on Route 253 to the border with Canada and the area of New Hampshire west of Route 63 at the Massachusetts border, north on Route 63 to Route 12, north on Route 12 to Route 12-A, north on Route 12-A to Route 10, north on Route 10 to Route 135, north on Route 135 to Route 3, north on Route 3 to the intersection with the Connecticut River.

Coastal Zone: That portion of the State east of a line beginning at the

Maine-New Hampshire border in Rollinsford, then extending to Route 4 west to the city of Dover, south to the intersection of Route 108, south along Route 108 through Madbury, Durham, and Newmarket to the junction of Route 85 in Newfields, south to Route 101 in Exeter, east to Interstate 95 (New Hampshire Turnpike) in Hampton, and south to the Massachusetts border.

New Jersey

Coastal Zone: That portion of the State seaward of a line beginning at the New York State line in Raritan Bay and extending west along the New York State line to NJ 440 at Perth Amboy; west on NJ 440 to the Garden State Parkway; south on the Garden State Parkway to NJ 109; south on NJ 109 to Cape May County Route 633 (Lafayette Street); south on Lafayette Street to Jackson Street; south on Jackson Street to the shoreline at Cape May; west along the shoreline of Cape May beach to COLREGS Demarcation Line 80.503 at Cape May Point; south along COLREGS Demarcation Line 80.503 to the Delaware State line in Delaware Bay.

North Zone: That portion of the State west of the Coastal Zone and north of a line extending west from the Garden State Parkway on NJ 70 to the New Jersey Turnpike, north on the turnpike to U.S. 206, north on U.S. 206 to U.S. 1 at Trenton, west on U.S. 1 to the Pennsylvania State line in the Delaware River.

South Zone: That portion of the State not within the North Zone or the Coastal Zone.

New York

Lake Champlain Zone: That area east and north of a continuous line extending along U.S. 11 from the New York-Canada International boundary south to NY 9B, south along NY 9B to U.S. 9, south along U.S. 9 to NY 22 south of Keesville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont State line.

Long Island Zone: That area consisting of Nassau County, Suffolk County, that area of Westchester County southeast of I-95, and their tidal waters.

Western Zone: That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I-81, and south along I-81 to the Pennsylvania State line.

Northeastern Zone: That area north of a continuous line extending from Lake Ontario east along the north shore of the Salmon River to I-81, south along I-81

to NY 31, east along NY 31 to NY 13, north along NY 13 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to NY 22, north along NY 22 to Washington County Route 153, east along CR 153 to the New York-Vermont boundary, exclusive of the Lake Champlain Zone.

Southeastern Zone: The remaining portion of New York.

North Carolina

Coastal Zone: All counties and portions of counties east of I-95.

Inland Zone: All counties and portions of counties west of I-95.

Pennsylvania

Lake Erie Zone: The Lake Erie waters of Pennsylvania and a shoreline margin along Lake Erie from New York on the east to Ohio on the west extending 150 yards inland but including all of Presque Isle Peninsula.

Northwest Zone: The area bounded on the north by the Lake Erie Zone and including all of Erie and Crawford Counties and those portions of Mercer and Venango Counties north of I-80.

North Zone: That portion of the State east of the Northwest Zone and north of a line extending east on I-80 to U.S. 220, Route 220 to I-180, I-180 to I-80, and I-80 to the Delaware River.

South Zone: The remaining portion of Pennsylvania.

Vermont

Lake Champlain Zone: The U.S. portion of Lake Champlain and that area north and west of the line extending from the New York border along U.S. 4 to VT 22A at Fair Haven; VT 22A to U.S. 7 at Vergennes; U.S. 7 to VT 78 at Swanton; VT 78 to VT 36; VT 36 to Maquam Bay on Lake Champlain; along and around the shoreline of Maquam Bay and Hog Island to VT 78 at the West Swanton Bridge; VT 78 to VT 2 in Alburg; VT 2 to the Richelieu River in Alburg; along the east shore of the Richelieu River to the Canadian border.

Interior Zone: That portion of Vermont east of the Lake Champlain Zone and west of a line extending from the Massachusetts border at Interstate 91; north along Interstate 91 to U.S. 2; east along U.S. 2 to VT 102; north along VT 102 to VT 253; north along VT 253 to the Canadian border.

Connecticut River Zone: The remaining portion of Vermont east of the Interior Zone.

Virginia

Western Zone: All counties and portions of counties west of I-95.

Eastern Zone: All counties and portions of counties east of I-95.

Mississippi Flyway Illinois

North Zone: That portion of the State north of a line extending west from the Indiana border along Peotone-Beecher Road to Illinois Route 50, south along Illinois Route 50 to Wilmington-Peotone Road, west along Wilmington-Peotone Road to Illinois Route 53, north along Illinois Route 53 to New River Road, northwest along New River Road to Interstate Highway 55, south along I-55 to Pine Bluff-Lorenzo Road, west along Pine Bluff-Lorenzo Road to Illinois Route 47, north along Illinois Route 47 to I-80, west along I-80 to I-39, south along I-39 to Illinois Route 18, west along Illinois Route 18 to Illinois Route 29, south along Illinois Route 29 to Illinois Route 17, west along Illinois Route 17 to the Mississippi River, and due south across the Mississippi River to the Iowa border.

Central Zone: That portion of the State south of the North Duck Zone line to a line extending west from the Indiana border along I-70 to Illinois Route 4, south along Illinois Route 4 to Illinois Route 161, west along Illinois Route 161 to Illinois Route 158, south and west along Illinois Route 158 to Illinois Route 159, south along Illinois Route 159 to Illinois Route 3, south along Illinois Route 3 to St. Leo's Road, south along St. Leo's Road to Modoc Road, west along Modoc Road to Modoc Ferry Road, southwest along Modoc Ferry Road to Levee Road, southeast along Levee Road to County Route 12 (Modoc Ferry entrance Road), south along County Route 12 to the Modoc Ferry route and southwest on the Modoc Ferry route across the Mississippi River to the Missouri border.

South Zone: That portion of the State south and east of a line extending west from the Indiana border along Interstate 70, south along U.S. Highway 45, to Illinois Route 13, west along Illinois Route 13 to Greenbriar Road, north on Greenbriar Road to Sycamore Road, west on Sycamore Road to N Reed Station Road, south on N Reed Station Road to Illinois Route 13, west along Illinois Route 13 to Illinois Route 127, south along Illinois Route 127 to State Forest Road (1025 N), west along State Forest Road to Illinois Route 3, north along Illinois Route 3 to the south bank of the Big Muddy River, west along the south bank of the Big Muddy River to the Mississippi River, west across the Mississippi River to the Missouri border.

South Central Zone: The remainder of the State between the south border of the Central Zone and the North border of the South Zone.

Indiana

North Zone: That part of Indiana north of a line extending east from the Illinois border along State Road 18 to U.S. 31; north along U.S. 31 to U.S. 24; east along U.S. 24 to Huntington; southeast along U.S. 224; south along State Road 5; and east along State Road 124 to the Ohio border.

Central Zone: That part of Indiana south of the North Zone boundary and north of the South Zone boundary.

South Zone: That part of Indiana south of a line extending east from the Illinois border along I-70; east along National Ave.; east along U.S. 150; south along U.S. 41; east along State Road 58; south along State Road 37 to Bedford; and east along U.S. 50 to the Ohio border.

Iowa

North Zone: That portion of Iowa north of a line beginning on the South Dakota-Iowa border at Interstate 29, southeast along Interstate 29 to State Highway 20 to the Iowa-Illinois border. The south duck hunting zone is that part of Iowa west of Interstate 29 and south of State Highway 92 east to the Iowa-Illinois border. The central duck hunting zone is the remainder of the State.

Central Zone: The remainder of Iowa not included in the North and South zones.

South Zone: The south duck hunting zone is that part of Iowa west of Interstate 29 and south of State Highway 92 east to the Iowa-Illinois border.

Kentucky

West Zone: All counties west of and including Butler, Daviess, Ohio, Simpson, and Warren Counties.

East Zone: The remainder of Kentucky.

Louisiana

East Zone: That area of the State beginning at the Arkansas border, then south on U.S. Hwy 79 to State Hwy 9, then south on State Hwy 9 to State Hwy 147, then south on State Hwy 147 to U.S. Hwy 167, then south and east on U.S. Hwy 167 to U.S. Hwy 90, then south on U.S. Hwy 90 to the Mississippi State line.

West Zone: Remainder of the State.

Michigan

North Zone: The Upper Peninsula.

Middle Zone: That portion of the Lower Peninsula north of a line beginning at the Michigan-Wisconsin boundary line in Lake Michigan, directly due west of the mouth of Stoney Creek in section 31, T14N R18W, Oceana County, then proceed easterly

and southerly along the centerline of Stoney Creek to its intersection with Scenic Drive, southerly on Scenic Drive to Stoney Lake Road in section 5, T13N R18W, Oceana County, easterly on Stoney Lake Road then both west and east Garfield Roads (name change only; not an intersection) then crossing highway U.S.-31 to State Highway M-20 (north of the town of New Era; also locally named Hayes Road) in section 33, T14N R17W, Oceana County, easterly on M-20 through Oceana, Newaygo, Mecosta, Isabella, and Midland Counties to highway U.S.-10 business route in the city of Midland, easterly on U.S.-10 Business Route (BR) to highway U.S.-10 at the Bay County line, easterly on U.S.-10 then crossing U.S.-75 to State Highway M-25 (west of the town of Bay City), easterly along M-25 into Tuscola County then northeasterly and easterly on M-25 through Tuscola County into Huron County, turning southeasterly on M-25 (near the town of Huron City; also locally named North Shore Road) to the centerline of Willow Creek in section 4, T18N R14E, Huron County, then northerly along the centerline of Willow Creek to the mouth of Willow Creek into Lake Huron, then directly due east along a line from the mouth of Willow Creek heading east into Lake Huron to a point due east and on the Michigan/U.S.-Canadian border.

South Zone: The remainder of Michigan.

Minnesota

North Duck Zone: That portion of the State north of a line extending east from the North Dakota State line along State Highway 210 to State Highway 23 and east to State Highway 39 and east to the Wisconsin State line at the Oliver Bridge.

South Duck Zone: The portion of the State south of a line extending east from the South Dakota State line along U.S. Highway 212 to Interstate 494 and east to Interstate 94 and east to the Wisconsin State line.

Central Duck Zone: The remainder of the State.

Missouri

North Zone: That portion of Missouri north of a line running west from the Illinois border at I-70; west on I-70 to Hwy 65; north on Hwy 65 to Hwy 41, north on Hwy 41 to Hwy 24; west on Hwy 24 to MO Hwy 10, west on Hwy 10 to Hwy 69, north on Hwy 69 to MO Hwy 116, west on MO Hwy 116 to Hwy 59, south on Hwy 59 to the Kansas border.

Middle Zone: The remainder of Missouri not included in other zones.

South Zone: That portion of Missouri south of a line running west from the Illinois border on MO Hwy 74 to MO Hwy 25; south on MO Hwy 25. to U.S. Hwy 62; west on U.S. Hwy 62 to MO Hwy 53; north on MO Hwy 53 to MO Hwy 51; north on MO Hwy 51 to U.S. Hwy 60; west on U.S. Hwy 60 to MO Hwy 21; north on MO Hwy 21 to MO Hwy 72; west on MO Hwy 72 to MO Hwy 32; west on MO Hwy 32 to U.S. Hwy 65; north on U.S. Hwy 65 to U.S. Hwy 54; west on U.S. Hwy 54 to the Kansas border.

Ohio

Lake Erie Marsh Zone: Includes all land and water within the boundaries of the area bordered by a line beginning at the intersection of Interstate 75 at the Ohio-Michigan State line and continuing south to Interstate 280, then south on I-280 to the Ohio Turnpike (I-80/I-90), then east on the Ohio Turnpike to the Erie-Lorain County line, then north to Lake Erie, then following the Lake Erie shoreline at a distance of 200 yards offshore, then following the shoreline west toward and around the northern tip of Cedar Point Amusement Park, then continuing from the westernmost point of Cedar Point toward the southernmost tip of the sand bar at the mouth of Sandusky Bay and out into Lake Erie at a distance of 200 yards offshore continuing parallel to the Lake Erie shoreline north and west toward the northernmost tip of Cedar Point National Wildlife Refuge, then following a direct line toward the southernmost tip of Wood Tick Peninsula in Michigan to a point that intersects the Ohio-Michigan State line, then following the State line back to the point of the beginning.

North Zone: That portion of the State, excluding the Lake Erie Marsh Zone, north of a line extending east from the Indiana State line along U.S. Highway (U.S.) 33 to State Route (SR) 127, then south along SR 127 to SR 703, then south along SR 703 and including all lands within the Mercer Wildlife Area to SR 219, then east along SR 219 to SR 364, then north along SR 364 and including all lands within the St. Mary's Fish Hatchery to SR 703, then east along SR 703 to SR 66, then north along SR 66 to U.S. 33, then east along U.S. 33 to SR 385, then east along SR 385 to SR 117, then south along SR 117 to SR 273, then east along SR 273 to SR 31, then south along SR 31 to SR 739, then east along SR 739 to SR 4, then north along SR 4 to SR 95, then east along SR 95 to SR 13, then southeast along SR 13 to SR 3, then northeast along SR 3 to SR 60, then north along SR 60 to U.S. 30, then east along U.S. 30 to SR 3, then south

along SR 3 to SR 226, then south along SR 226 to SR 514, then southwest along SR 514 to SR 754, then south along SR 754 to SR 39/60, then east along SR 39/60 to SR 241, then north along SR 241 to U.S. 30, then east along U.S. 30 to SR 39, then east along SR 39 to the Pennsylvania State line.

South Zone: The remainder of Ohio not included in the Lake Erie Marsh Zone or the North Zone.

Tennessee

Reelfoot Zone: All or portions of Lake and Obion Counties.

Remainder of State: That portion of Tennessee outside of the Reelfoot Zone.

Wisconsin

North Zone: That portion of the State north of a line extending east from the Minnesota State line along U.S. Highway 10 to U.S. Highway 41, then north on U.S. Highway 41 to the Michigan State line.

Open Water Zone: That portion of the State extending 500 feet or greater from the Lake Michigan shoreline bounded by the Michigan State line and the Illinois State line.

South Zone: The remainder of the State.

Central Flyway

Colorado (Central Flyway Portion)

Special Teal Season Area: Lake and Chaffee Counties and that portion of the State east of Interstate Highway 25.

Northeast Zone: All areas east of Interstate 25 and north of Interstate 70.

Southeast Zone: All areas east of Interstate 25 and south of Interstate 70, and all of El Paso, Pueblo, Huerfano, and Las Animas Counties.

Mountain/Foothills Zone: All areas west of Interstate 25 and east of the Continental Divide, except El Paso, Pueblo, Huerfano, and Las Animas Counties.

Kansas

High Plains: That portion of the State west of U.S. 283.

Low Plains Early Zone: That part of Kansas bounded by a line from the Federal Hwy U.S.-283 and State Hwy 96 junction, then east on State Hwy 96 to its junction with Federal Hwy U.S.-183, then north on Federal Hwy U.S.-183 to its junction with Federal Hwy U.S.-24, then east on Federal Hwy U.S.-24 to its junction with Federal Hwy U.S.-281, then north on Federal Hwy U.S.-281 to its junction with Federal Hwy U.S.-36, then east on Federal Hwy U.S.-36 to its junction with State Hwy K-199, then south on State Hwy K-199 to its junction with Republic County 30th Road, then south on Republic

County 30th Road to its junction with State Hwy K-148, then east on State Hwy K-148 to its junction with Republic County 50th Road, then south on Republic County 50th Road to its junction with Cloud County 40th Road, then south on Cloud County 40th Road to its junction with State Hwy K-9, then west on State Hwy K-9 to its junction with Federal Hwy U.S.-24, then west on Federal Hwy U.S.-24 to its junction with Federal Hwy U.S.-181, then south on Federal Hwy U.S.-181 to its junction with State Hwy K-18, then west on State Hwy K-18 to its junction with Federal Hwy U.S.-281, then south on Federal Hwy U.S.-281 to its junction with State Hwy K-4, then east on State Hwy K-4 to its junction with interstate Hwy I-135, then south on interstate Hwy I-135 to its junction with State Hwy K-61, then southwest on State Hwy K-61 to its junction with McPherson County 14th Avenue, then south on McPherson County 14th Avenue to its junction with McPherson County Arapaho Road, then west on McPherson County Arapaho Road to its junction with State Hwy K-61, then southwest on State Hwy K-61 to its junction with State Hwy K-96, then northwest on State Hwy K-96 to its junction with Federal Hwy U.S.-56, then southwest on Federal Hwy U.S.-56 to its junction with State Hwy K-19, then east on State Hwy K-19 to its junction with Federal Hwy U.S.-281, then south on Federal Hwy U.S.-281 to its junction with Federal Hwy U.S.-54, then west on Federal Hwy U.S.-54 to its junction with Federal Hwy U.S.-183, then north on Federal Hwy U.S.-183 to its junction with Federal Hwy U.S.-56, then southwest on Federal Hwy U.S.-56 to its junction with North Main Street in Spearville, then south on North Main Street to Davis Street, then east on Davis Street to Ford County Road 126 (South Stafford Street), then south on Ford County Road 126 to Garnett Road, then east on Garnett Road to Ford County Road 126, then south on Ford County Road 126 to Ford Spearville Road, then west on Ford Spearville Road to its junction with Federal Hwy U.S.-400, then northwest on Federal Hwy U.S.-400 to its junction with Federal Hwy U.S.-283, and then north on Federal Hwy U.S.-283 to its junction with Federal Hwy U.S.-96.

Low Plains Late Zone: That part of Kansas bounded by a line from the Federal Hwy U.S.-283 and State Hwy 96 junction, then north on Federal Hwy U.S.-283 to the Kansas-Nebraska State line, then east along the Kansas-Nebraska State line to its junction with the Kansas-Missouri State line, then

southeast along the Kansas-Missouri State line to its junction with State Hwy K-68, then west on State Hwy K-68 to its junction with interstate Hwy I-35, then southwest on interstate Hwy I-35 to its junction with Butler County NE 150th Street, then west on Butler County NE 150th Street to its junction with Federal Hwy U.S.-77, then south on Federal Hwy U.S.-77 to its junction with the Kansas-Oklahoma State line, then west along the Kansas-Oklahoma State line to its junction with Federal Hwy U.S.-283, then north on Federal Hwy U.S.-283 to its junction with Federal Hwy U.S.-400, then east on Federal Hwy U.S.-400 to its junction with Ford Spearville Road, then east on Ford Spearville Road to Ford County Road 126 (South Stafford Street), then north on Ford County Road 126 to Garnett Road, then west on Garnett Road to Ford County Road 126, then north on Ford County Road 126 to Davis Street, then west on Davis Street to North Main Street, then north on North Main Street to its junction with Federal Hwy U.S.-56, then east on Federal Hwy U.S.-56 to its junction with Federal Hwy U.S.-183, then south on Federal Hwy U.S.-183 to its junction with Federal Hwy U.S.-54, then east on Federal Hwy U.S.-54 to its junction with Federal Hwy U.S.-281, then north on Federal Hwy U.S.-281 to its junction with State Hwy K-19, then west on State Hwy K-19 to its junction with Federal Hwy U.S.-56, then east on Federal Hwy U.S.-56 to its junction with State Hwy K-96, then southeast on State Hwy K-96 to its junction with State Hwy K-61, then northeast on State Hwy K-61 to its junction with McPherson County Arapaho Road, then east on McPherson County Arapaho Road to its junction with McPherson County 14th Avenue, then north on McPherson County 14th Avenue to its junction with State Hwy K-61, then east on State Hwy K-61 to its junction with interstate Hwy I-135, then north on interstate Hwy I-135 to its junction with State Hwy K-4, then west on State Hwy K-4 to its junction with Federal Hwy U.S.-281, then north on Federal Hwy U.S.-281 to its junction with State Hwy K-18, then east on State Hwy K-18 to its junction with Federal Hwy U.S.-181, then north on Federal Hwy U.S.-181 to its junction with Federal Hwy U.S.-24, then east on Federal Hwy U.S.-24 to its junction with State Hwy K-9, then east on State Hwy K-9 to its junction with Cloud County 40th Road, then north on Cloud County 40th Road to its junction with Republic County 50th Road, then north on Republic County 50th Road to its junction with State Hwy K-148, then

west on State Hwy K-148 to its junction with Republic County 30th Road, then north on Republic County 30th Road to its junction with State Hwy K-199, then north on State Hwy K-199 to its junction with Federal Hwy U.S.-36, then west on Federal Hwy U.S.-36 to its junction with Federal Hwy U.S.-281, then south on Federal Hwy U.S.-281 to its junction with Federal Hwy U.S.-24, then west on Federal Hwy U.S.-24 to its junction with Federal Hwy U.S.-183, then south on Federal Hwy U.S.-183 to its junction with Federal Hwy U.S.-96, and then west on Federal Hwy U.S.-96 to its junction with Federal Hwy U.S.-283.

Low Plains Southeast Zone: That part of Kansas bounded by a line from the Missouri-Kansas State line west on K-68 to its junction with I-35, then southwest on I-35 to its junction with Butler County, NE 150th Street, then west on NE 150th Street to its junction with Federal Hwy U.S.-77, then south on Federal Hwy U.S.-77 to the Oklahoma-Kansas State line, then east along the Kansas-Oklahoma State line to its junction with the Kansas-Missouri State line, then north along the Kansas-Missouri State line to its junction with State Hwy K-68.

Montana (Central Flyway Portion)

Zone 1: The Counties of Blaine, Carter, Daniels, Dawson, Fallon, Fergus, Garfield, Golden Valley, Judith Basin, McCone, Musselshell, Petroleum, Phillips, Powder River, Richland, Roosevelt, Sheridan, Stillwater, Sweet Grass, Valley, Wheatland, and Wibaux.

Zone 2: The Counties of Big Horn, Carbon, Custer, Prairie, Rosebud, Treasure, and Yellowstone.

Nebraska

High Plains: That portion of Nebraska lying west of a line beginning at the South Dakota-Nebraska border on U.S. Hwy 183; south on U.S. Hwy 183 to U.S. Hwy 20; west on U.S. Hwy 20 to NE Hwy 7; south on NE Hwy 7 to NE Hwy 91; southwest on NE Hwy 91 to NE Hwy 92; southeast on NE Hwy 2 to NE Hwy 92; west on NE Hwy 92 to NE Hwy 40; south on NE Hwy 40 to NE Hwy 47; south on NE Hwy 47 to NE Hwy 23; east on NE Hwy 23 to U.S. Hwy 283; and south on U.S. Hwy 283 to the Kansas-Nebraska border.

Zone 1: Area bounded by designated Federal and State highways and political boundaries beginning at the South Dakota-Nebraska border at U.S. Hwy 183; south along Hwy 183 to NE Hwy 12; east to NE Hwy 137; south to U.S. Hwy 20; east to U.S. Hwy 281; north to the Niobrara River; east along the Niobrara River to the Boyd County

Line; north along the Boyd County line to NE Hwy 12; east to NE 26E Spur; north along the NE 26E Spur to the Ponca State Park boat ramp; north and west along the Missouri River to the Nebraska-South Dakota border; west along the Nebraska-South Dakota border to U.S. Hwy 183. Both banks of the Niobrara River in Keya Paha and Boyd Counties east of U.S. Hwy 183 shall be included in Zone 1.

Zone 2: Those areas of the State that are not contained in Zones 1, 3, or 4.

Zone 3: Area bounded by designated Federal and State highways, County roads, and political boundaries beginning at the Wyoming-Nebraska border at its northernmost intersection with the Interstate Canal; southeast along the Interstate Canal to the northern border of Scotts Bluff County; east along northern borders of Scotts Bluff and Morrill Counties to Morrill County Road 125; south to Morrill County Rd 94; east to County Rd 135; south to County Rd 88; east to County Rd 147; south to County Rd 88; southeast to County Rd 86; east to County Rd 151; south to County Rd 80; east to County Rd 161; south to County Rd 76; east to County Rd 165; south to County Rd 167; south to U.S. Hwy 26; east to County Rd 171; north to County Rd 68; east to County Rd 183; south to County Rd 64; east to County Rd 189; north to County Rd 70; east to County Rd 201; south to County Rd 60A; east to County Rd 203; south to County Rd 52; east to Keith County Line; north along the Keith County line to the northern border of Keith County; east along the northern boundaries of Keith and Lincoln Counties to NE Hwy 97; south to U.S. Hwy 83; south to E Hall School Rd; east to North Airport Road; south to U.S. Hwy 30; east to NE Hwy 47; south to NE Hwy 23; east on NE Hwy 23 to U.S. Hwy 283; south on U.S. Hwy 283 to the Kansas-Nebraska border; west along Kansas-Nebraska border to the Nebraska-Colorado border; north and west to the Wyoming-Nebraska border; north along the Wyoming-Nebraska border to its northernmost intersection with the Interstate Canal.

Zone 4: Area encompassed by designated Federal and State highways and County Roads beginning at the intersection of U.S. Hwy 283 at the Kansas-Nebraska border; north to NE Hwy 23; west to NE Hwy 47; north to Dawson County Rd 769; east to County Rd 423; south to County Rd 766; east to County Rd 428; south to County Rd 763; east to NE Hwy 21; south to County Rd 761; east on County Rd 761 to County Road 437; south to the Dawson County Canal; southeast along Dawson County Canal; east to County Rd 444; south to

U.S. Hwy 30; east to U.S. Hwy 183; north to Buffalo County Rd 100; east to 46th Ave.; north to NE Hwy 40; east to NE Hwy 10; north to County Rd 220 and Hall County Husker Highway; east to Hall County S 70th Rd; north to NE Hwy 2; east to U.S. Hwy 281; north to Chapman Rd; east to 7th Rd; south to U.S. Hwy 30; north and east to NE Hwy 14; south to County Rd 22; west to County Rd M; south to County Rd 21; west to County Rd K; south to U.S. Hwy 34; west to NE Hwy 2; south to U.S. Hwy I-80; west to Gunbarrel Rd (Hall/Hamilton County line); south to Giltner Rd; west to U.S. Hwy 281; south to W 82nd St; west to Holstein Ave.; south to U.S. Hwy 34; west to NE Hwy 10; north to Kearney County Rd R and Phelps County Rd 742; west to Gosper County Rd 433; south to N Railway Street; west to Commercial Ave.; south to NE Hwy 23; west to Gosper County Rd 427; south to Gosper County Rd 737; west to Gosper County Rd 426; south to Gosper County Rd 735; east to Gosper County Rd 427; south to Furnas County Rd 276; west to Furnas County Rd 425.5/425; south to U.S. Hwy 34; east to NE Hwy 4; east to NE Hwy 10; south to U.S. Hwy 136; east to NE Hwy 14; south to NE Hwy 8; east to U.S. Hwy 81; north to NE Hwy 4; east to NE Hwy 15; north to U.S. Hwy 6; east to NE Hwy 33; east to SW 142 Street; south to W Hallam Rd; east to SW 100 Rd; south to W Chestnut Rd; west to NE Hwy 103; south to NE Hwy 4; west to NE Hwy 15; south to U.S. Hwy 136; east to Jefferson County Rd 578 Ave.; south to PWF Rd; east to NE Hwy 103; south to NE Hwy 8; east to U.S. Hwy 75; north to U.S. Hwy 136; east to the intersection of U.S. Hwy 136 and the Steamboat Trace (Trace); north along the Trace to the intersection with Federal Levee R-562; north along Federal Levee R-562 to the intersection with Nemaha County Rd 643A; south to the Trace; north along the Trace/Burlington Northern Railroad right-of-way to NE Hwy 2; west to U.S. Hwy 75; north to NE Hwy 2; west to NE Hwy 50; north to Otoe County Rd D; east to N 32nd Rd; north to Otoe County Rd B; west to NE Hwy 50; north to U.S. Hwy 34; west to NE Hwy 63; north to NE Hwy 66; north and west to U.S. Hwy 77; north to NE Hwy 109; west along NE Hwy 109 and Saunders County Rd X to Saunders County 19; south to NE Hwy 92; west to NE Hwy Spur 12F; south to Butler County Rd 30; east to County Rd X; south to County Rd 27; west to County Rd W; south to County Rd 26; east to County Rd X; south to County Rd 21 (Seward County Line); west to NE Hwy 15; north to County Rd 34; west to County Rd H; south to NE Hwy 92; west

to U.S. Hwy 81; south to NE Hwy 66; west to Dark Island Trail, north to Merrick County Rd M; east to Merrick County Rd 18; north to NE Hwy 92; west to NE Hwy 14; north to NE Hwy 52; west and north to NE Hwy 91; west to U.S. Hwy 281; south to NE Hwy 58; west to NE Hwy 11; west and south to NE Hwy 2; west to NE Hwy 68; north to NE Hwy L82A; west to NE Hwy 10; north to NE Hwy 92; west to U.S. Hwy 183; north to Round Valley Rd; west to Sargent River Rd; west to Sargent Rd; west to NE Hwy S21A; west to NE Hwy 2; north to NE Hwy 91 to North Loup Spur Rd; north to North Loup River Rd; north and east along to Pleasant Valley/Worth Rd; east to Loup County Line; north along the Loup County Line to Loup-Brown County line; east along northern boundaries of Loup and Garfield Counties to NE Hwy 11; south to Cedar River Road; east and south to NE Hwy 70; east to U.S. Hwy 281; north to NE Hwy 70; east to NE Hwy 14; south to NE Hwy 39; southeast to NE Hwy 22; east to U.S. Hwy 81; southeast to U.S. Hwy 30; east to the Iowa-Nebraska border; south to the Missouri-Nebraska border; south to Kansas-Nebraska border; west along Kansas-Nebraska border to U.S. Hwy 283.

New Mexico (Central Flyway Portion)

North Zone: That portion of the State north of I-40 and U.S. 54.

South Zone: The remainder of New Mexico.

North Dakota

High Plains: That portion of the State south and west of a line beginning at the junction of U.S. Hwy 83 and the South Dakota State line, then north along U.S. Hwy 83 and I-94 to ND Hwy 41, then north on ND Hwy 41 to ND Hwy 53, then west on ND Hwy 53 to U.S. Hwy 83, then north on U.S. Hwy 83 to U.S. Hwy 2, then west on U.S. Hwy 2 to the Williams County line, then north and west along the Williams and Divide County lines to the Canadian border.

Low Plains: The remainder of North Dakota.

Oklahoma

High Plains: The Counties of Beaver, Cimarron, and Texas.

Low Plains Zone 1: That portion of the State east of the High Plains Zone and north of a line extending east from the Texas State line along OK 33 to OK 47, east along OK 47 to U.S. 183, south along U.S. 183 to I-40, east along I-40 to U.S. 177, north along U.S. 177 to OK 33, east along OK 33 to OK 18, north along OK 18 to OK 51, west along OK 51 to I-35, north along I-35 to U.S. 412, west along U.S. 412 to OK 132, then

north along OK 132 to the Kansas State line.

Low Plains Zone 2: The remainder of Oklahoma.

South Dakota

High Plains: That portion of the State west of a line beginning at the North Dakota State line and extending south along U.S. 83 to U.S. 14, east on U.S. 14 to Blunt, south on the Blunt-Canning Road to SD 34, east and south on SD 34 to SD 50 at Lee's Corner, south on SD 50 to I-90, east on I-90 to SD 50, south on SD 50 to SD 44, west on SD 44 across the Platte-Winner bridge to SD 47, south on SD 47 to U.S. 18, east on U.S. 18 to SD 47, south on SD 47 to the Nebraska State line.

Low Plains North Zone: That portion of northeastern South Dakota east of the High Plains Unit and north of a line extending east along U.S. 212 to the Minnesota State line.

Low Plains South Zone: That portion of Gregory County east of SD 47 and south of SD 44; Charles Mix County south of SD 44 to the Douglas County line; south on SD 50 to Geddes; east on the Geddes Highway to U.S. 281; south on U.S. 281 and U.S. 18 to SD 50; south and east on SD 50 to the Bon Homme County line; the Counties of Bon Homme, Yankton, and Clay south of SD 50; and Union County south and west of SD 50 and I-29.

Low Plains Middle Zone: The remainder of South Dakota.

Texas

High Plains: That portion of the State west of a line extending south from the Oklahoma State line along U.S. 183 to Vernon, south along U.S. 283 to Albany, south along TX 6 to TX 351 to Abilene, south along U.S. 277 to Del Rio, then south along the Del Rio International Toll Bridge access road to the Mexico border.

Low Plains North Zone: That portion of northeastern Texas east of the High Plains Zone and north of a line beginning at the International Toll Bridge south of Del Rio, then extending east on U.S. 90 to San Antonio, then continuing east on I-10 to the Louisiana State line at Orange, Texas.

Low Plains South Zone: The remainder of Texas.

Wyoming (Central Flyway Portion)

Zone C1: Big Horn, Converse, Goshen, Hot Springs, Natrona, Park, Platte, and Washakie Counties; and Fremont County excluding the portions west or south of the Continental Divide.

Zone C2: Campbell, Crook, Johnson, Niobrara, Sheridan, and Weston Counties.

Zone C3: Albany and Laramie Counties; and that portion of Carbon County east of the Continental Divide.

Pacific Flyway

Arizona

North Zone: Game Management Units 1–5, those portions of Game Management Units 6 and 8 within Coconino County, and Game Management Units 7, 9, 11M, and 12A.

South Zone: Those portions of Game Management Units 6 and 8 in Yavapai County, and Game Management Units 10 and 12B–46B.

California

Northeastern Zone: That portion of California lying east and north of a line beginning at the intersection of Interstate 5 with the California-Oregon line; south along Interstate 5 to its junction with Walters Lane south of the town of Yreka; west along Walters Lane to its junction with Easy Street; south along Easy Street to the junction with Old Highway 99; south along Old Highway 99 to the point of intersection with Interstate 5 north of the town of Weed; south along Interstate 5 to its junction with Highway 89; east and south along Highway 89 to Main Street Greenville; north and east to its junction with North Valley Road; south to its junction of Diamond Mountain Road; north and east to its junction with North Arm Road; south and west to the junction of North Valley Road; south to the junction with Arlington Road (A22); west to the junction of Highway 89; south and west to the junction of Highway 70; east on Highway 70 to Highway 395; south and east on Highway 395 to the point of intersection with the California-Nevada State line; north along the California-Nevada State line to the junction of the California-Nevada-Oregon State lines; west along the California-Oregon State line to the point of origin.

Colorado River Zone: Those portions of San Bernardino, Riverside, and Imperial Counties east of a line from the intersection of Highway 95 with the California-Nevada State line; south on Highway 95 through the junction with Highway 40; south on Highway 95 to Vidal Junction; south through the town of Rice to the San Bernardino-Riverside County line on a road known as “Aqueduct Road” also known as Highway 62 in San Bernardino County; southwest on Highway 62 to Desert Center Rice Road; south on Desert Center Rice Road/Highway 177 to the town of Desert Center; east 31 miles on Interstate 10 to its intersection with Wiley Well Road; south on Wiley Well

Road to Wiley Well; southeast on Milpitas Wash Road to the Blythe, Brawley, Davis Lake intersections; south on Blythe Ogilby Road also known as County Highway 34 to its intersection with Ogilby Road; south on Ogilby Road to its intersection with Interstate 8; east 7 miles on Interstate 8 to its intersection with the Andrade-Algodones Road/Highway 186; south on Highway 186 to its intersection with the U.S.-Mexico border at Los Algodones, Mexico.

Southern Zone: That portion of southern California (but excluding the Colorado River zone) south and east of a line beginning at the mouth of the Santa Maria River at the Pacific Ocean; east along the Santa Maria River to where it crosses Highway 101–166 near the City of Santa Maria; north on Highway 101–166; east on Highway 166 to the junction with Highway 99; south on Highway 99 to the junction of Interstate 5; south on Interstate 5 to the crest of the Tehachapi Mountains at Tejon Pass; east and north along the crest of the Tehachapi Mountains to where it intersects Highway 178 at Walker Pass; east on Highway 178 to the junction of Highway 395 at the town of Inyokern; south on Highway 395 to the junction of Highway 58; east on Highway 58 to the junction of Interstate 15; east on Interstate 15 to the junction with Highway 127; north on Highway 127 to the point of intersection with the California-Nevada State line.

Southern San Joaquin Valley Zone: All of Kings and Tulare Counties and that portion of Kern County north of the Southern Zone.

Balance of State Zone: The remainder of California not included in the Northeastern, Colorado River, Southern, and the Southern San Joaquin Valley Zones.

Colorado (Pacific Flyway Portion)

Eastern Zone: Routt, Grand, Summit, Eagle, and Pitkin Counties, those portions of Saguache, San Juan, Hinsdale, and Mineral Counties west of the Continental Divide, those portions of Gunnison County except the North Fork of the Gunnison River Valley (Game Management Units 521, 53, and 63), and that portion of Moffat County east of the northern intersection of Moffat County Road 29 with the Moffat-Routt County line, south along Moffat County Road 29 to the intersection of Moffat County Road 29 with the Moffat-Routt County line (Elkhead Reservoir State Park).

Western Zone: All areas west of the Continental Divide not included in the Eastern Zone.

Idaho

Zone 1: All lands and waters within the Fort Hall Indian Reservation, including private inholdings; Power County east of State Highway 37 and State Highway 39; and Bannock, Bear Lake, Bingham, Bonneville, Butte, Caribou, Clark, Fremont, Jefferson, Madison, and Teton Counties.

Zone 2: Benewah, Bonner, Boundary, Kootenai, and Shoshone Counties.

Zone 3: Power County west of State Highway 37 and State Highway 39, and Ada, Adams, Blaine, Boise, Camas, Canyon, Cassia, Clearwater, Custer, Elmore, Franklin, Gem, Gooding, Idaho, Jerome, Latah, Lemhi, Lewis, Lincoln, Minidoka, Nez Perce, Oneida, Owyhee, Payette, Twin Falls, and Washington Counties.

Zone 4: Valley County.

Nevada

Northeast Zone: Elko, Eureka, Lander, and White Pine Counties.

Northwest Zone: Carson City, Churchill, Douglas, Humboldt, Lyon, Mineral, Pershing, Storey, and Washoe Counties.

South Zone: Clark, Esmeralda, Lincoln, and Nye Counties.

Moapa Valley Special Management Area: That portion of Clark County including the Moapa Valley to the confluence of the Muddy and Virgin Rivers.

Oregon

Zone 1: Benton, Clackamas, Clatsop, Columbia, Coos, Curry, Douglas, Gilliam, Hood River, Jackson, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Polk, Sherman, Tillamook, Umatilla, Wasco, Washington, and Yamhill, Counties.

Zone 2: The remainder of Oregon not included in Zone 1.

Utah

Northern Zone: Box Elder, Cache, Daggett, Davis, Duchesne, Morgan, Rich, Salt Lake, Summit, Uintah, Utah, Wasatch, and Weber Counties, and that part of Toole County north of I–80.

Southern Zone: The remainder of Utah not included in the Northern Zone.

Washington

East Zone: All areas east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County.

West Zone: The remainder of Washington not included in the East Zone.

Wyoming (Pacific Flyway Portion)

Snake River Zone: Beginning at the south boundary of Yellowstone National Park and the Continental Divide; south

along the Continental Divide to Union Pass and the Union Pass Road (U.S.F.S. Road 600); west and south along the Union Pass Road to U.S.F.S. Road 605; south along U.S.F.S. Road 605 to the Bridger-Teton National Forest boundary; along the national forest boundary to the Idaho State line; north along the Idaho State line to the south boundary of Yellowstone National Park; east along the Yellowstone National Park boundary to the Continental Divide.

Balance of State Zone: The remainder of the Pacific Flyway portion of Wyoming not included in the Snake River Zone.

Geese

Atlantic Flyway

Connecticut

Early Canada and Cackling Goose Seasons

South Zone: Same as for ducks.

North Zone: Same as for ducks.

Regular Seasons

AP Unit: Litchfield County and the portion of Hartford County west of a line beginning at the Massachusetts border in Suffield and extending south along Route 159 to its intersection with I-91 in Hartford, and then extending south along I-91 to its intersection with the Hartford-Middlesex County line.

NAP-H Unit: That part of the State east of a line beginning at the Massachusetts border in Suffield and extending south along Route 159 to its intersection with I-91 in Hartford and then extending south along I-91 to State Street in New Haven; then south on State Street to Route 34, west on Route 34 to Route 8, south along Route 8 to Route 110, south along Route 110 to Route 15, north along Route 15 to the Milford Parkway, south along the Milford Parkway to I-95, north along I-95 to the intersection with the east shore of the Quinnipiac River, south to the mouth of the Quinnipiac River and then south along the eastern shore of New Haven Harbor to the Long Island Sound.

Atlantic Flyway Resident Population (AFRP) Unit: Remainder of the State not included in AP and NAP Units.

South Zone: Same as for ducks.

Maine

North NAP-H Zone: Same as North Zone for ducks.

Coastal NAP-L Zone: Same as Coastal Zone for ducks.

South NAP-H Zone: Same as South Zone for ducks.

Maryland

Early Canada and Cackling Goose Seasons

Eastern Unit: Calvert, Caroline, Cecil, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester Counties; and that part of Anne Arundel County east of Interstate 895, Interstate 97, and Route 3; that part of Prince George's County east of Route 3 and Route 301; and that part of Charles County east of Route 301 to the Virginia State line.

Western Unit: Allegany, Baltimore, Carroll, Frederick, Garrett, Howard, Montgomery, and Washington Counties and that part of Anne Arundel County west of Interstate 895, Interstate 97, and Route 3; that part of Prince George's County west of Route 3 and Route 301; and that part of Charles County west of Route 301 to the Virginia State line.

Regular Seasons

Resident Population (RP) Zone: Allegany, Frederick, Garrett, Montgomery, and Washington Counties; that portion of Prince George's County west of Route 3 and Route 301; that portion of Charles County west of Route 301 to the Virginia State line; and that portion of Carroll County west of Route 31 to the intersection of Route 97, and west of Route 97 to the Pennsylvania State line.

AP Zone: Remainder of the State.

Massachusetts

NAP Zone: Central and Coastal Zones (see duck zones).

AP Zone: The Western Zone (see duck zones).

Special Late-Season Area: The Central Zone and that portion of the Coastal Zone (see duck zones) that lies north of the Cape Cod Canal, north to the New Hampshire State line.

New Hampshire

Same zones as for ducks.

New Jersey

AP Zone: North and South Zones (see duck zones).

NAP Zone: The Coastal Zone (see duck zones).

Special Late-Season Area: In northern New Jersey, that portion of the State within a continuous line that runs east along the New York State boundary line to the Hudson River; then south along the New York State boundary to its intersection with Route 440 at Perth Amboy; then west on Route 440 to its intersection with Route 287; then west along Route 287 to its intersection with Route 206 in Bedminster (Exit 18); then north along Route 206 to its intersection

with Route 94; then west along Route 94 to the toll bridge in Columbia; then north along the Pennsylvania State boundary in the Delaware River to the beginning point. In southern New Jersey, that portion of the State within a continuous line that runs west from the Atlantic Ocean at Ship Bottom along Route 72 to Route 70; then west along Route 70 to Route 206; then south along Route 206 to Route 536; then west along Route 536 to Route 322; then west along Route 322 to Route 55; then south along Route 55 to Route 553 (Buck Road); then south along Route 553 to Route 40; then east along Route 40 to route 55; then south along Route 55 to Route 552 (Sherman Avenue); then west along Route 552 to Carmel Road; then south along Carmel Road to Route 49; then east along Route 49 to Route 555; then south along Route 555 to Route 553; then east along Route 553 to Route 649; then north along Route 649 to Route 670; then east along Route 670 to Route 47; then north along Route 47 to Route 548; then east along Route 548 to Route 49; then east along Route 49 to Route 50; then south along Route 50 to Route 9; then south along Route 9 to Route 625 (Sea Isle City Boulevard); then east along Route 625 to the Atlantic Ocean; then north to the beginning point.

New York

Lake Champlain Goose Area: The same as the Lake Champlain Waterfowl Hunting Zone, which is that area of New York State lying east and north of a continuous line extending along Route 11 from the New York-Canada international boundary south to Route 9B, south along Route 9B to Route 9, south along Route 9 to Route 22 south of Keeseville, south along Route 22 to the west shore of South Bay along and around the shoreline of South Bay to Route 22 on the east shore of South Bay, southeast along Route 22 to Route 4, northeast along Route 4 to the New York-Vermont boundary.

Northeast Goose Area: The same as the Northeastern Waterfowl Hunting Zone, which is that area of New York State lying north of a continuous line extending from Lake Ontario east along the north shore of the Salmon River to Interstate 81, south along Interstate 81 to Route 31, east along Route 31 to Route 13, north along Route 13 to Route 49, east along Route 49 to Route 365, east along Route 365 to Route 28, east along Route 28 to Route 29, east along Route 29 to Route 22 at Greenwich Junction, north along Route 22 to Washington County Route 153, east along CR 153 to the New York-Vermont boundary, exclusive of the Lake Champlain Zone.

East Central Goose Area: That area of New York State lying inside of a continuous line extending from Interstate Route 81 in Cicero, east along Route 31 to Route 13, north along Route 13 to Route 49, east along Route 49 to Route 365, east along Route 365 to Route 28, east along Route 28 to Route 29, east along Route 29 to Route 147 at Kimball Corners, south along Route 147 to Schenectady County Route 40 (West Glenville Road), west along Route 40 to Touareuna Road, south along Touareuna Road to Schenectady County Route 59, south along Route 59 to State Route 5, east along Route 5 to the Lock 9 bridge, southwest along the Lock 9 bridge to Route 5S, southeast along Route 5S to Schenectady County Route 58, southwest along Route 58 to the NYS Thruway, south along the Thruway to Route 7, southwest along Route 7 to Schenectady County Route 103, south along Route 103 to Route 406, east along Route 406 to Schenectady County Route 99 (Windy Hill Road), south along Route 99 to Dunnsville Road, south along Dunnsville Road to Route 397, southwest along Route 397 to Route 146 at Altamont, west along Route 146 to Albany County Route 252, northwest along Route 252 to Schenectady County Route 131, north along Route 131 to Route 7, west along Route 7 to Route 10 at Richmondville, south on Route 10 to Route 23 at Stamford, west along Route 23 to Route 7 in Oneonta, southwest along Route 7 to Route 79 to Interstate Route 88 near Harpursville, west along Route 88 to Interstate Route 81, north along Route 81 to the point of beginning.

West Central Goose Area: That area of New York State lying within a continuous line beginning at the point where the northerly extension of Route 269 (County Line Road on the Niagara-Orleans County boundary) meets the international boundary with Canada, south to the shore of Lake Ontario at the eastern boundary of Golden Hill State Park, south along the extension of Route 269 and Route 269 to Route 104 at Jeddo, west along Route 104 to Niagara County Route 271, south along Route 271 to Route 31E at Middleport, south along Route 31E to Route 31, west along Route 31 to Griswold Street, south along Griswold Street to Ditch Road, south along Ditch Road to Foot Road, south along Foot Road to the north bank of Tonawanda Creek, west along the north bank of Tonawanda Creek to Route 93, south along Route 93 to Route 5, east along Route 5 to Crittenden-Murrays Corners Road, south on Crittenden-Murrays Corners Road to the NYS Thruway, east along the Thruway 90 to

Route 98 (at Thruway Exit 48) in Batavia, south along Route 98 to Route 20, east along Route 20 to Route 19 in Pavilion Center, south along Route 19 to Route 63, southeast along Route 63 to Route 246, south along Route 246 to Route 39 in Perry, northeast along Route 39 to Route 20A, northeast along Route 20A to Route 20, east along Route 20 to Route 364 (near Canandaigua), south and east along Route 364 to Yates County Route 18 (Italy Valley Road), southwest along Route 18 to Yates County Route 34, east along Route 34 to Yates County Route 32, south along Route 32 to Steuben County Route 122, south along Route 122 to Route 53, south along Route 53 to Steuben County Route 74, east along Route 74 to Route 54A (near Pulteney), south along Route 54A to Steuben County Route 87, east along Route 87 to Steuben County Route 96, east along Route 96 to Steuben County Route 114, east along Route 114 to Schuyler County Route 23, east and southeast along Route 23 to Schuyler County Route 28, southeast along Route 28 to Route 409 at Watkins Glen, south along Route 409 to Route 14, south along Route 14 to Route 224 at Montour Falls, east along Route 224 to Route 228 in Odessa, north along Route 228 to Route 79 in Mecklenburg, east along Route 79 to Route 366 in Ithaca, northeast along Route 366 to Route 13, northeast along Route 13 to Interstate Route 81 in Cortland, north along Route 81 to the north shore of the Salmon River to shore of Lake Ontario, extending generally northwest in a straight line to the nearest point of the international boundary with Canada, south and west along the international boundary to the point of beginning.

Hudson Valley Goose Area: That area of New York State lying within a continuous line extending from Route 4 at the New York-Vermont boundary, west and south along Route 4 to Route 149 at Fort Ann, west on Route 149 to Route 9, south along Route 9 to Interstate Route 87 (at Exit 20 in Glens Falls), south along Route 87 to Route 29, west along Route 29 to Route 147 at Kimball Corners, south along Route 147 to Schenectady County Route 40 (West Glenville Road), west along Route 40 to Touareuna Road, south along Touareuna Road to Schenectady County Route 59, south along Route 59 to State Route 5, east along Route 5 to the Lock 9 bridge, southwest along the Lock 9 bridge to Route 5S, southeast along Route 5S to Schenectady County Route 58, southwest along Route 58 to the NYS Thruway, south along the Thruway to Route 7, southwest along Route 7 to Schenectady County Route 103, south

along Route 103 to Route 406, east along Route 406 to Schenectady County Route 99 (Windy Hill Road), south along Route 99 to Dunnsville Road, south along Dunnsville Road to Route 397, southwest along Route 397 to Route 146 at Altamont, southeast along Route 146 to Main Street in Altamont, west along Main Street to Route 156, southeast along Route 156 to Albany County Route 307, southeast along Route 307 to Route 85A, southwest along Route 85A to Route 85, south along Route 85 to Route 443, southeast along Route 443 to Albany County Route 301 at Clarksville, southeast along Route 301 to Route 32, south along Route 32 to Route 23 at Cairo, west along Route 23 to Joseph Chadderdon Road, southeast along Joseph Chadderdon Road to Hearts Content Road (Greene County Route 31), southeast along Route 31 to Route 32, south along Route 32 to Greene County Route 23A, east along Route 23A to Interstate Route 87 (the NYS Thruway), south along Route 87 to Route 28 (Exit 19) near Kingston, northwest on Route 28 to Route 209, southwest on Route 209 to the New York-Pennsylvania boundary, southeast along the New York-Pennsylvania boundary to the New York-New Jersey boundary, southeast along the New York-New Jersey boundary to Route 210 near Greenwood Lake, northeast along Route 210 to Orange County Route 5, northeast along Orange County Route 5 to Route 105 in the Village of Monroe, east and north along Route 105 to Route 32, northeast along Route 32 to Orange County Route 107 (Quaker Avenue), east along Route 107 to Route 9W, north along Route 9W to the south bank of Moodna Creek, southeast along the south bank of Moodna Creek to the New Windsor-Cornwall town boundary, northeast along the New Windsor-Cornwall town boundary to the Orange-Dutchess County boundary (middle of the Hudson River), north along the county boundary to Interstate Route 84, east along Route 84 to the Dutchess-Putnam County boundary, east along the county boundary to the New York-Connecticut boundary, north along the New York-Connecticut boundary to the New York-Massachusetts boundary, north along the New York-Massachusetts boundary to the New York-Vermont boundary, north to the point of beginning.

Eastern Long Island Goose Area (NAP High-Harvest Area): That area of Suffolk County lying east of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of Roanoke Avenue in the Town of Riverhead; then south on Roanoke Avenue (which becomes

County Route 73) to State Route 25; then west on Route 25 to Peconic Avenue; then south on Peconic Avenue to County Route (CR) 104 (Riverleigh Avenue); then south on CR 104 to CR 31 (Old Riverhead Road); then south on CR 31 to Oak Street; then south on Oak Street to Potunk Lane; then west on Stevens Lane; then south on Jessup Avenue (in Westhampton Beach) to Dune Road (CR 89); then due south to international waters.

Western Long Island Goose Area (RP Area): That area of Westchester County and its tidal waters southeast of Interstate Route 95 and that area of Nassau and Suffolk Counties lying west of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of Sound Road (just east of Wading River Marsh); then south on Sound Road to North Country Road; then west on North Country Road to Randall Road; then south on Randall Road to Route 25A, then west on Route 25A to the Sunken Meadow State Parkway; then south on the Sunken Meadow Parkway to the Sagtikos State Parkway; then south on the Sagtikos Parkway to the Robert Moses State Parkway; then south on the Robert Moses Parkway to its southernmost end; then due south to international waters.

Central Long Island Goose Area (NAP Low-Harvest Area): That area of Suffolk County lying between the Western and Eastern Long Island Goose Areas, as defined above.

South Goose Area: The remainder of New York State, excluding New York City.

North Carolina

Northeast Zone: Includes the following counties or portions of counties: Bertie (that portion north and east of a line formed by NC 45 at the Washington County line to U.S. 17 in Midway, U.S. 17 in Midway to U.S. 13 in Windsor, U.S. 13 in Windsor to the Hertford County line), Camden, Chowan, Currituck, Dare, Hyde, Pasquotank, Perquimans, Tyrrell, and Washington.

RP Zone: Remainder of the State.

Pennsylvania

Resident Canada and Cackling Goose Zone: All of Pennsylvania area east of route SR 97 from the Maryland State Line to the intersection of SR 194, east of SR 194 to the intersection of U.S. Route 30, south of U.S. Route 30 to SR 441, east of SR 441 to SR 743, east of SR 743 to intersection of I-81, east of I-81 to intersection of I-80, and south of I-80 to the New Jersey State line.

AP Zone: The area east of route SR 97 from Maryland State Line to the intersection of SR 194, east of SR 194 to intersection of U.S. Route 30, south of U.S. Route 30 to SR 441, east of SR 441 to SR 743, east of SR 743 to intersection of I-81, east of I-81 to intersection of I-80, south of I-80 to the New Jersey State line.

Rhode Island

Special Area for Canada and Cackling Geese: Kent and Providence Counties and portions of the towns of Exeter and North Kingston within Washington County (see State regulations for detailed descriptions).

South Carolina

Canada and Cackling Goose Area: Statewide except for the following area:

East of U.S. 301: That portion of Clarendon County bounded to the North by S-14-25, to the East by Hwy 260, and to the South by the markers delineating the channel of the Santee River.

West of U.S. 301: That portion of Clarendon County bounded on the North by S-14-26 extending southward to that portion of Orangeburg County bordered by Hwy 6.

Vermont

Same zones as for ducks.

Virginia

AP Zone: The area to the east of the following line: the "Blue Ridge" (Loudoun-Clarke Counties border) at the West Virginia-Virginia border, south to Interstate 64 (the Blue Ridge line follows county borders along the western edge of Loudoun, Fauquier, Rappahannock, Madison, Greene, Albemarle and into Nelson Counties), then east along Interstate 64 to Interstate 95 in Richmond, then south along Interstate 95 to Route 460 in Petersburg, then southeast along Route 460 to Route 32 in the City of Suffolk, then south to the North Carolina border.

RP Zone: The remainder of the State west of the AP Zone.

Mississippi Flyway

Arkansas

Northwest Zone: Baxter, Benton, Boone, Carroll, Conway, Crawford, Faulkner, Franklin, Johnson, Logan, Madison, Marion, Newton, Perry, Pope, Pulaski, Searcy, Sebastian, Scott, Van Buren, Washington, and Yell Counties.

Remainder of State: That portion of the State outside of the Northwest Zone.

Illinois

North Zone: That portion of the State north of a line extending west from the

Indiana border along Interstate 80 to I-39, south along I-39 to Illinois Route 18, west along Illinois Route 18 to Illinois Route 29, south along Illinois Route 29 to Illinois Route 17, west along Illinois Route 17 to the Mississippi River, and due south across the Mississippi River to the Iowa border.

Central Zone: That portion of the State south of the North Goose Zone line to a line extending west from the Indiana border along I-70 to Illinois Route 4, south along Illinois Route 4 to Illinois Route 161, west along Illinois Route 161 to Illinois Route 158, south and west along Illinois Route 158 to Illinois Route 159, south along Illinois Route 159 to Illinois Route 3, south along Illinois Route 3 to St. Leo's Road, south along St. Leo's Road to Modoc Road, west along Modoc Road to Modoc Ferry Road, southwest along Modoc Ferry Road to Levee Road, southeast along Levee Road to County Route 12 (Modoc Ferry entrance Road), south along County Route 12 to the Modoc Ferry route and southwest on the Modoc Ferry route across the Mississippi River to the Missouri border.

South Zone: Same zone as for ducks.

South Central Zone: Same zone as for ducks.

Indiana

Same zones as for ducks.

Iowa

Same zones as for ducks.

Kentucky

Western: The area that includes all counties west of and including Hardin, Nelson, Washington, Marion, Taylor, Adair, and Cumberland Counties.

Eastern: The area that includes Bullitt County in its entirety and all other counties not included in the Western goose zone.

Louisiana

Same zones as for ducks.

Michigan

North Zone: Same as North duck zone.

Middle Zone: Same as Middle duck zone.

South Zone: Same as South duck zone.

Allegan County Game Management Unit (GMU): That area encompassed by a line beginning at the junction of 136th Avenue and Interstate Highway 196 in Lake Town Township and extending easterly along 136th Avenue to Michigan Highway 40, southerly along Michigan 40 through the city of Allegan to 108th Avenue in Trowbridge Township, westerly along 108th Avenue

to 46th Street, northerly along 46th Street to 109th Avenue, westerly along 109th Avenue to I-196 in Casco Township, then northerly along I-196 to the point of beginning.

Muskegon Wastewater GMU: That portion of Muskegon County within the boundaries of the Muskegon County wastewater system, east of the Muskegon State Game Area, in sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, and 32, T10N R14W, and sections 1, 2, 10, 11, 12, 13, 14, 24, and 25, T10N R15W, as posted.

Minnesota

Same zones as for ducks.

Missouri

Same zones as for ducks.

Ohio

Same zones as for ducks.

Tennessee

Reelfoot Zone: The lands and waters within the boundaries of Reelfoot Lake WMA only.

Remainder of State: The remainder of the State.

Wisconsin

North and South Zones: Same zones as for ducks.

Mississippi River Zone: That area encompassed by a line beginning at the intersection of the Burlington Northern & Santa Fe Railway and the Illinois State line in Grant County and extending northerly along the Burlington Northern & Santa Fe Railway to the city limit of Prescott in Pierce County, then west along the Prescott city limit to the Minnesota State line.

Central Flyway

Colorado (Central Flyway Portion)

North Park Area: Jackson County.

South Park Area: Chaffee, Custer, Fremont, Lake, Park, and Teller Counties.

San Luis Valley Area: All of Alamosa, Conejos, Costilla, and Rio Grande Counties, and those portions of Saguache, Mineral, Hinsdale, Archuleta, and San Juan Counties east of the Continental Divide.

Remainder: Remainder of the Central Flyway portion of Colorado.

Eastern Colorado Late Light Goose Area: That portion of the State east of Interstate Highway 25.

Montana (Central Flyway Portion)

Zone 1: Same as Zone 1 for ducks and coots.

Zone 2: Same as Zone 2 for ducks and coots.

Nebraska

Dark Geese

Niobrara Unit: That area contained within and bounded by the intersection of the Nebraska-South Dakota border and U.S. Hwy 83, south to U.S. Hwy 20, east to NE Hwy 14, north along NE Hwy 14 to NE Hwy 59 and County Road 872, west along County Road 872 to the Knox County Line, north along the Knox County Line to the Nebraska-South Dakota border, west along the Nebraska-South Dakota border to U.S. Hwy 83. Where the Niobrara River forms the boundary, both banks of the river are included in the Niobrara Unit.

Platte River Unit: The area bounded starting at the northernmost intersection of the Interstate Canal at the Nebraska-Wyoming border, south along the Nebraska-Wyoming border to the Nebraska-Colorado border, east and south along the Nebraska-Colorado border to the Nebraska-Kansas border, east along the Nebraska-Kansas border to the Nebraska-Missouri border, north along the Nebraska-Missouri and Nebraska-Iowa borders to the Burt-Washington Counties line, west along the Burt-Washington Counties line to U.S. Hwy 75, south to Dodge County Road 4/Washington County Road 4, west to U.S. Hwy 77, south to U.S. Hwy 275, northwest to U.S. Hwy 91, west to NE Hwy 45, north to NE Hwy 32, west to NE Hwy 14, north to NE Hwy 70, west to U.S. Hwy 281, south to NE Hwy 70, west along NE Hwy 70/91 to NE Hwy 11, north to the Holt County line, west along the northern border of Garfield, Loup, Blaine, and Thomas Counties to the Hooker County line, south along the Thomas-Hooker Counties lines to the McPherson County line, east along the south border of Thomas County to the Custer County line, south along the Custer-Logan Counties line to NE Hwy 92, west to U.S. Hwy 83, north to NE Hwy 92, west to NE Hwy 61, north to NE Hwy 2, west along NE Hwy 2 to the corner formed by Garden, Grant, and Sheridan Counties, west along the north borders of Garden, Morrill, and Scotts Bluff Counties to the intersection with the Interstate Canal, north and west along the Interstate Canal to the intersection with the Nebraska-Wyoming border.

North-Central Unit: Those portions of the State not in the Niobrara and Platte River zones.

Light Geese

Rainwater Basin Light Goose Area: The area bounded by the junction of NE Hwy 92 and NE Hwy 15, south along NE Hwy 15 to NE Hwy 4, west along NE Hwy 4 to U.S. Hwy 34, west along U.S.

Hwy 34 to U.S. Hwy 283, north along U.S. Hwy 283 to U.S. Hwy 30, east along U.S. Hwy 30 to NE Hwy 92, east along NE Hwy 92 to the beginning.

Remainder of State: The remainder of Nebraska.

New Mexico (Central Flyway Portion)

Dark Geese

Middle Rio Grande Valley Unit: Sierra, Socorro, and Valencia Counties.

Remainder: The remainder of the Central Flyway portion of New Mexico.

North Dakota

Missouri River Canada and Cackling Goose Zone: The area within and bounded by a line starting where ND Hwy 6 crosses the South Dakota border; then north on ND Hwy 6 to I-94; then west on I-94 to ND Hwy 49; then north on ND Hwy 49 to ND Hwy 200; then west on ND Hwy 200; then north on ND Hwy 8 to the Mercer-McLean Counties line; then east following the county line until it turns south toward Garrison Dam; then east along a line (including Mallard Island) of Lake Sakakawea to U.S. Hwy 83; then south on U.S. Hwy 83 to ND Hwy 200; then east on ND Hwy 200 to ND Hwy 41; then south on ND Hwy 41 to U.S. Hwy 83; then south on U.S. Hwy 83 to I-94; then east on I-94 to U.S. Hwy 83; then south on U.S. Hwy 83 to the South Dakota border; then west along the South Dakota border to ND Hwy 6.

Western North Dakota Canada and Cackling Goose Zone: Same as the High Plains Unit for ducks, mergansers, and coots, excluding the Missouri River Canada Goose Zone.

Rest of State: Remainder of North Dakota.

South Dakota

Early Canada and Cackling Goose Seasons

Special Early Canada and Cackling Goose Unit: The Counties of Campbell, Clark, Codington, Day, Deuel, Grant, Hamlin, Marshall, Roberts, Walworth; that portion of Perkins County west of State Highway 75 and south of State Highway 20; that portion of Dewey County north of Bureau of Indian Affairs Road 8, Bureau of Indian Affairs Road 9, and the section of U.S. Highway 212 east of the Bureau of Indian Affairs Road 8 junction; that portion of Potter County east of U.S. Highway 83; that portion of Sully County east of U.S. Highway 83; portions of Hyde, Buffalo, Brule, and Charles Mix Counties north and east of a line beginning at the Hughes-Hyde County line on State Highway 34, east to Lees Boulevard, southeast to State Highway 34, east 7 miles to 350th

Avenue, south to Interstate 90 on 350th Avenue, south and east on State Highway 50 to Geddes, east on 285th Street to U.S. Highway 281, and north on U.S. Highway 281 to the Charles Mix-Douglas Counties boundary; that portion of Bon Homme County north of State Highway 50; those portions of Yankton and Clay Counties north of a line beginning at the junction of State Highway 50 and 306th Street/County Highway 585 in Bon Homme County, east to U.S. Highway 81, then north on U.S. Highway 81 to 303rd Street, then east on 303rd Street to 444th Avenue, then south on 444th Avenue to 305th Street, then east on 305th Street/Bluff Road to State Highway 19, then south to State Highway 50 and east to the Clay/Union County Line; Aurora, Beadle, Brookings, Brown, Butte, Corson, Davison, Douglas, Edmunds, Faulk, Haakon, Hand, Hanson, Harding, Hutchinson, Jackson, Jerauld, Jones, Kingsbury, Lake, McCook, McPherson, Meade, Mellette, Miner, Moody, Oglala Lakota (formerly Shannon), Sanborn, Spink, Todd, Turner, and Ziebach Counties; and those portions of Minnehaha and Lincoln Counties outside of an area bounded by a line beginning at the junction of the South Dakota-Minnesota State line and Minnehaha County Highway 122 (254th Street) west to its junction with Minnehaha County Highway 149 (464th Avenue), south on Minnehaha County Highway 149 (464th Avenue) to Hartford, then south on Minnehaha County Highway 151 (463rd Avenue) to State Highway 42, east on State Highway 42 to State Highway 17, south on State Highway 17 to its junction with Lincoln County Highway 116 (Klondike Road), and east on Lincoln County Highway 116 (Klondike Road) to the South Dakota-Iowa State line, then north along the South Dakota-Iowa and South Dakota-Minnesota border to the junction of the South Dakota-Minnesota State line and Minnehaha County Highway 122 (254th Street).

Regular Seasons

Unit 1: Same as that for the Special Early Canada and Cackling Goose Unit.

Unit 2: All of South Dakota not included in Unit 1 and Unit 3.

Unit 3: Bennett County.

Texas

Northeast Goose Zone: That portion of Texas lying east and north of a line beginning at the Texas-Oklahoma border at U.S. 81, then continuing south to Bowie and then southeasterly along U.S. 81 and U.S. 287 to I-35W and I-35 to the juncture with I-10 in San Antonio,

then east on I-10 to the Texas-Louisiana border.

Southeast Goose Zone: That portion of Texas lying east and south of a line beginning at the International Toll Bridge at Laredo, then continuing north following I-35 to the juncture with I-10 in San Antonio, then easterly along I-10 to the Texas-Louisiana border.

West Goose Zone: The remainder of the State.

Wyoming (Central Flyway Portion)

Dark Geese

Zone G1: Big Horn, Converse, Hot Springs, Natrona, Park, and Washakie Counties.

Zone G1A: Goshen and Platte Counties.

Zone G2: Campbell, Crook, Johnson, Niobrara, Sheridan, and Weston Counties.

Zone G3: Albany and Laramie Counties; and that portion of Carbon County east of the Continental Divide.

Zone G4: Fremont County excluding those portions south or west of the Continental Divide.

Pacific Flyway

Arizona

Same zones as for ducks.

California

Northeastern Zone: That portion of California lying east and north of a line beginning at the intersection of Interstate 5 with the California-Oregon line; south along Interstate 5 to its junction with Walters Lane south of the town of Yreka; west along Walters Lane to its junction with Easy Street; south along Easy Street to the junction with Old Highway 99; south along Old Highway 99 to the point of intersection with Interstate 5 north of the town of Weed; south along Interstate 5 to its junction with Highway 89; east and south along Highway 89 to main street Greenville; north and east to its junction with North Valley Road; south to its junction of Diamond Mountain Road; north and east to its junction with North Arm Road; south and west to the junction of North Valley Road; south to the junction with Arlington Road (A22); west to the junction of Highway 89; south and west to the junction of Highway 70; east on Highway 70 to Highway 395; south and east on Highway 395 to the point of intersection with the California-Nevada State line; north along the California-Nevada State line to the junction of the California-Nevada-Oregon State lines west along the California-Oregon State line to the point of origin.

Klamath Basin Special Management Area: Beginning at the intersection of

Highway 161 and Highway 97; east on Highway 161 to Hill Road; south on Hill Road to N Dike Road West Side; east on N Dike Road West Side until the junction of the Lost River; north on N Dike Road West Side until the Volcanic Legacy Scenic Byway; east on Volcanic Legacy Scenic Byway until N Dike Road East Side; south on the N Dike Road East Side; continue east on N Dike Road East Side to Highway 111; south on Highway 111/Great Northern Road to Highway 120/Highway 124; west on Highway 120/Highway 124 to Hill Road; south on Hill Road until Lairds Camp Road; west on Lairds Camp Road until Willow Creek; west and south on Willow Creek to Red Rock Road; west on Red Rock Road until Meiss Lake Road/Old State Highway; north on Meiss Lake Road/Old State Highway to Highway 97; north on Highway 97 to the point of origin.

Colorado River Zone: Those portions of San Bernardino, Riverside, and Imperial Counties east of a line from the intersection of Highway 95 with the California-Nevada State line; south on Highway 95 through the junction with Highway 40; south on Highway 95 to Vidal Junction; south through the town of Rice to the San Bernardino-Riverside Counties line on a road known as "Aqueduct Road" also known as Highway 62 in San Bernardino County; southwest on Highway 62 to Desert Center Rice Road; south on Desert Center Rice Road/Highway 177 to the town of Desert Center; east 31 miles on Interstate 10 to its intersection with Wiley Well Road; south on Wiley Well Road to Wiley Well; southeast on Milpitas Wash Road to the Blythe, Brawley, Davis Lake intersections; south on Blythe Ogilby Road also known as County Highway 34 to its intersection with Ogilby Road; south on Ogilby Road to its intersection with Interstate 8; east 7 miles on Interstate 8 to its intersection with the Andrade-Algodones Road/Highway 186; south on Highway 186 to its intersection with the U.S.-Mexico border at Los Algodones, Mexico.

Southern Zone: That portion of southern California (but excluding the Colorado River zone) south and east of a line beginning at the mouth of the Santa Maria River at the Pacific Ocean; east along the Santa Maria River to where it crosses Highway 101-166 near the City of Santa Maria; north on Highway 101-166; east on Highway 166 to the junction with Highway 99; south on Highway 99 to the junction of Interstate 5; south on Interstate 5 to the crest of the Tehachapi Mountains at Tejon Pass; east and north along the crest of the Tehachapi Mountains to where it intersects Highway 178 at

Walker Pass; east on Highway 178 to the junction of Highway 395 at the town of Inyokern; south on Highway 395 to the junction of Highway 58; east on Highway 58 to the junction of Interstate 15; east on Interstate 15 to the junction with Highway 127; north on Highway 127 to the point of intersection with the California-Nevada State line.

Imperial County Special Management Area: The area bounded by a line beginning at Highway 86 and the Navy Test Base Road; south on Highway 86 to the town of Westmoreland; continue through the town of Westmoreland to Route S26; east on Route S26 to Highway 115; north on Highway 115 to Weist Road; north on Weist Road to Flowing Wells Road; northeast on Flowing Wells Road to the Coachella Canal; northwest on the Coachella Canal to Drop 18; a straight line from Drop 18 to Frink Road; south on Frink Road to Highway 111; north on Highway 111 to Niland Marina Road; southwest on Niland Marina Road to the old Imperial County boat ramp and the water line of the Salton Sea; from the water line of the Salton Sea, a straight line across the Salton Sea to the Salinity Control Research Facility and the Navy Test Base Road; southwest on the Navy Test Base Road to the point of beginning.

Balance of State Zone: The remainder of California not included in the Northeastern, Colorado River, and Southern Zones.

North Coast Special Management Area: Del Norte and Humboldt Counties.

Sacramento Valley Special Management Area: That area bounded by a line beginning at Willows south on I-5 to Hahn Road; easterly on Hahn Road and the Grimes-Arbuckle Road to Grimes; northerly on CA 45 to the junction with CA 162; northerly on CA 45/162 to Glenn; and westerly on CA 162 to the point of beginning in Willows.

Colorado (Pacific Flyway Portion)

Same zones as for ducks.

Idaho

Early Canada and Cackling Goose Seasons

Zone 1: Bannock, Butte, Clark, Fremont, Jefferson, Madison, and Teton Counties; Bingham County, except that portion within the Blackfoot Reservoir drainage; Caribou County within the Fort Hall Indian Reservation; Power County east of State Highway 37 and State Highway 39; and all lands and waters within the Fort Hall Indian Reservation, including private in-holdings.

Zone 2: Bonneville County.

Zone 3: Ada, Adams, Blaine, Boise, Camas, Canyon, Cassia, Clearwater, Custer, Elmore, Franklin, Gem, Gooding, Idaho, Jerome, Latah, Lemhi, Lewis, Lincoln, Minidoka, Nez Perce, Oneida, Owyhee, Payette, Twin Falls, and Washington Counties; and Power County west of State Highway 37 and State Highway 39.

Zone 4: Bear Lake County; Bingham County within the Blackfoot Reservoir drainage; and Caribou County, except that portion within the Fort Hall Indian Reservation.

Zone 5: Valley County.

Zone 6: Benewah, Bonner, Boundary, Kootenai, and Shoshone Counties.

Regular Seasons

Canada and Cackling Geese and Brant

Same as for early Canada and cackling goose seasons.

White-Fronted Geese

Zone 1: Bannock County; Bingham County except that portion within the Blackfoot Reservoir drainage; Caribou County within the Fort Hall Indian Reservation; Power County east of State Highway 37 and State Highway 39; and all lands and waters within the Fort Hall Indian Reservation, including private in-holdings.

Zone 2: Bear Lake, Bonneville, Butte, Clark, Fremont, Jefferson, Madison, and Teton Counties; Bingham County within the Blackfoot Reservoir drainage; and Caribou County except within the Fort Hall Indian Reservation.

Zone 3: Adams, Blaine, Camas, Clearwater, Custer, Franklin, Idaho, Latah, Lemhi, Lewis, Nez Perce, and Oneida Counties; and Power County west of State Highway 37 and State Highway 39.

Zone 4: Ada, Boise, Canyon, Cassia, Elmore, Gem, Gooding, Jerome, Lincoln, Minidoka, Owyhee, Payette, Twin Falls, and Washington Counties.

Zone 5: Valley County.

Zone 6: Benewah, Bonner, Boundary, Kootenai, and Shoshone Counties.

Light Geese

Zone 1: All lands and waters within the Fort Hall Indian Reservation, including private in-holdings; Bannock County; Bingham County east of the west bank of the Snake River, west of the McTucker boat ramp access road, and east of the American Falls Reservoir bluff, except that portion within the Blackfoot Reservoir drainage; Caribou County within the Fort Hall Indian Reservation; and Power County below the American Falls Reservoir bluff, and within the Fort Hall Indian Reservation.

Zone 2: Franklin and Oneida

Counties; Bingham County west of the west bank of the Snake River, east of the McTucker boat ramp access road, and west of the American Falls Reservoir bluff; Power County, except below the American Falls Reservoir bluff and those lands and waters within the Fort Hall Indian Reservation.

Zone 3: Ada, Boise, Canyon, Cassia, Elmore, Gem, Gooding, Jerome, Lincoln, Minidoka, Owyhee, Payette, Twin Falls, and Washington Counties.

Zone 4: Adams, Blaine, Camas, Clearwater, Custer, Idaho, Latah, Lemhi, Lewis, and Nez Perce Counties.

Zone 5: Bear Lake, Bonneville, Butte, Clark, Fremont, Jefferson, Madison, and Teton Counties; Bingham County within the Blackfoot Reservoir drainage; and Caribou County except within the Fort Hall Indian Reservation.

Zone 6: Valley County.

Zone 7: Benewah, Bonner, Boundary, Kootenai, and Shoshone Counties.

Nevada

Same zones as for ducks.

New Mexico (Pacific Flyway Portion)

North Zone: The Pacific Flyway portion of New Mexico located north of I-40.

South Zone: The Pacific Flyway portion of New Mexico located south of I-40.

Oregon

Northwest Permit Zone: Benton, Clackamas, Clatsop, Columbia, Lane, Lincoln, Linn, Marion, Multnomah, Polk, Tillamook, Washington, and Yamhill Counties.

Tillamook County Management Area: That portion of Tillamook County beginning at the point where Old Woods Road crosses the south shores of Horn Creek, north on Old Woods Road to Sand Lake Road at Woods, north on Sand Lake Road to the intersection with McPhillips Drive, due west (~200 yards) from the intersection to the Pacific coastline, south along the Pacific coastline to a point due west of the western end of Pacific Avenue in Pacific City, east from this point (~250 yards) to Pacific Avenue, east on Pacific Avenue to Broton Road, south and then east on Broton Road to Highway 101, north on Highway 101 to Resort Drive, north on Resort Drive to a point due west of the south shores of Horn Creek at its confluence with the Nestucca River, due east (~80 yards) across the Nestucca River to the south shores of Horn Creek, east along the south shores of Horn Creek to the point of beginning.

Southwest Zone: Those portions of Douglas, Coos, and Curry Counties east

of Highway 101, and Josephine and Jackson Counties.

South Coast Zone: Those portions of Douglas, Coos, and Curry Counties west of Highway 101.

Eastern Zone: Baker, Crook, Deschutes, Grant, Harney, Jefferson, Klamath, Lake, Malheur, Union, Wallowa, and Wheeler Counties.

Mid-Columbia Zone: Gilliam, Hood River, Morrow, Sherman, Umatilla, and Wasco Counties.

Utah

East Box Elder County Zone:

Boundary begins at the intersection of the eastern boundary of Public Shooting Grounds Waterfowl Management Area and SR-83 (Promontory Road); east along SR-83 to I-15; south on I-15 to the Perry access road; southwest along this road to the Bear River Bird Refuge boundary; west, north, and then east along the refuge boundary until it intersects the Public Shooting Grounds Waterfowl Management Area boundary; east and north along the Public Shooting Grounds Waterfowl Management Area boundary to SR-83.

Wasatch Front Zone: Boundary begins at the Weber-Box Elder Counties line at I-15; east along Weber County line to U.S.-89; south on U.S.-89 to I-84; east and south on I-84 to I-80; south on I-80 to U.S.-189; south and west on U.S.-189 to the Utah County line; southeast and then west along this line to the Tooele County line; north along the Tooele County line to I-80; east on I-80 to Exit 99; north from Exit 99 along a direct line to the southern tip of Promontory Point and Promontory Road; east and north along this road to the causeway separating Bear River Bay from Ogden Bay; east on this causeway to the southwest corner of Great Salt Lake Mineral Corporation's (GSLMC) west impoundment; north and east along GSLMC's west impoundment to the northwest corner of the impoundment; north from this point along a direct line to the southern boundary of Bear River Migratory Bird Refuge; east along this southern boundary to the Perry access road; northeast along this road to I-15; south along I-15 to the Weber-Box Elder Counties line.

Southern Zone: Boundary includes Beaver, Carbon, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, San Juan, Sanpete, Sevier, Washington, and Wayne Counties, and that part of Tooele County south of I-80.

Northern Zone: The remainder of Utah not included in the East Box Elder County, Wasatch Front, and Southern Zones.

Washington

Area 1: Skagit and Whatcom Counties, and that portion of Snohomish County west of Interstate 5.

Area 2 Inland (Southwest Permit Zone): Clark, Cowlitz, and Wahkiakum Counties, and that portion of Grays Harbor County east of Highway 101.

Area 2 Coastal (Southwest Permit Zone): Pacific County and that portion of Grays Harbor County west of Highway 101.

Area 3: All areas west of the Pacific Crest Trail and west of the Big White Salmon River that are not included in Areas 1, 2 Coastal, and 2 Inland.

Area 4: Adams, Benton, Chelan, Douglas, Franklin, Grant, Kittitas, Lincoln, Okanogan, Spokane, and Walla Walla Counties.

Area 5: All areas east of the Pacific Crest Trail and east of the Big White Salmon River that are not included in Area 4.

Wyoming

Early Canada and Cackling Goose Seasons

Teton County Zone: Teton County.

Balance of State Zone: Remainder of the State.

Brant

Pacific Flyway

California

Northern Zone: Del Norte, Humboldt, and Mendocino Counties.

Balance of State Zone: The remainder of the State not included in the Northern Zone.

Washington

Puget Sound Zone: Clallam, Skagit, and Whatcom Counties.

Coastal Zone: Pacific County.

Swans

Central Flyway

South Dakota

Open Area: Aurora, Beadle, Brookings, Brown, Brule, Buffalo, Campbell, Clark, Codington, Davison, Day, Deuel, Edmunds, Faulk, Grant, Hamlin, Hand, Hanson, Hughes, Hyde, Jerauld, Kingsbury, Lake, Marshall, McCook, McPherson, Miner, Minnehaha, Moody, Potter, Roberts, Sanborn, Spink, Sully, and Walworth Counties.

Pacific Flyway

Idaho

Open Area: Benewah, Bonner, Boundary, and Kootenai Counties.

Montana (Pacific Flyway Portion)

Open Area: Cascade, Chouteau, Hill, Liberty, and Toole Counties and those portions of Pondera and Teton Counties lying east of U.S. 287-89.

Nevada

Open Area: Churchill, Lyon, and Pershing Counties.

Utah

Open Area: Begins at I-15 and Exit 365 (SR 13/83); west and north on SR-83 to I-84; west on I-84 to SR-30; southwest on SR-30 to the Nevada-Utah State line; south on this State line to I-80; east on I-80 to I-15; north on I-15 to Exit 365 (SR 13/83).

Doves

Alabama

South Zone: Baldwin, Coffee, Covington, Dale, Escambia, Geneva, Henry, Houston, and Mobile Counties.

North Zone: Remainder of the State.

Florida

Northwest Zone: The Counties of Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, Washington, Leon (except that portion north of U.S. 27 and east of State Road 155), Jefferson (south of U.S. 27, west of State Road 59 and north of U.S. 98), and Wakulla (except that portion south of U.S. 98 and east of the St. Marks River).

South Zone: The remainder of the State.

Louisiana

North Zone: That portion of the State north of a line extending east from the Texas border along State Highway 12 to U.S. Highway 190, east along U.S. Highway 190 to Interstate Highway 12, east along Interstate Highway 12 to Interstate Highway 10, then east along Interstate Highway 10 to the Mississippi border.

South Zone: The remainder of the State.

Mississippi

North Zone: That portion of the State north and west of a line extending west from the Alabama State line along U.S. Highway 84 to its junction with State Highway 35, then south along State Highway 35 to the Louisiana State line.

South Zone: The remainder of Mississippi.

New Mexico

North Zone: North of I-40 from the New Mexico-Arizona border to U.S. Hwy. 54 at Tucumcari; U.S. Hwy. 54 from Tucumcari to the New Mexico-Texas border.

South Zone: South of I-40 from the New Mexico-Arizona border to U.S. Hwy. 54 at Tucumcari; U.S. Hwy. 54 from Tucumcari to the New Mexico-Texas border.

Oregon

Zone 1: Benton, Clackamas, Clatsop, Columbia, Coos, Curry, Douglas, Gilliam, Hood River, Jackson, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Polk, Sherman, Tillamook, Umatilla, Wasco, Washington, and Yamhill, Counties.

Zone 2: The remainder of Oregon not included in Zone 1.

Texas

North Zone: That portion of the State north of a line beginning at the International Bridge south of Fort Hancock; north along FM 1088 to TX 20; west along TX 20 to TX 148; north along TX 148 to I-10 at Fort Hancock; east along I-10 to I-20; northeast along I-20 to I-30 at Fort Worth; northeast along I-30 to the Texas-Arkansas State line.

Central Zone: That portion of the State lying between the North and South Zones.

South Zone: That portion of the State south and west of a line beginning at the International Bridge south of Del Rio, proceeding east on U.S. 90 to State Loop 1604 west of San Antonio; then south, east, and north along Loop 1604 to I-10 east of San Antonio; then east on I-10 to Orange, Texas.

Special White-winged Dove Area: Same as the South Zone.

New Mexico

North Zone: That portion of the State north of a line following I-40 from the Arizona border east to U.S. Hwy 54 at Tucumcari and U.S. Hwy 54 at Tucumcari east to the Texas border.

South Zone: The remainder of the State not included in the North Zone.

Band-Tailed Pigeons

California

North Zone: Alpine, Butte, Del Norte, Glenn, Humboldt, Lassen, Mendocino, Modoc, Plumas, Shasta, Sierra, Siskiyou, Tehama, and Trinity Counties.

South Zone: The remainder of the State not included in the North Zone.

New Mexico

North Zone: North of a line following U.S. 60 from the Arizona State line east to I-25 at Socorro and then south along I-25 from Socorro to the Texas State line.

South Zone: The remainder of the State not included in the North Zone.

Washington

Western Washington: The State of Washington excluding those portions lying east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County.

American Woodcock

New Jersey

North Zone: That portion of the State north of NJ 70.

South Zone: The remainder of the State.

Sandhill Cranes

Mississippi Flyway

Alabama

Open Area: That area north of Interstate 20 from the Georgia State line to the interchange with Interstate 65, then east of Interstate 65 to the interchange with Interstate 22, then north of Interstate 22 to the Mississippi State line.

Minnesota

Northwest Zone: That portion of the State encompassed by a line extending east from the North Dakota border along U.S. Highway 2 to State Trunk Highway (STH) 32, north along STH-32 to STH-92, east along STH-92 to County State Aid Highway (CSAH) 2 in Polk County, north along CSAH-2 to CSAH-27 in Pennington County, north along CSAH-27 to STH-1, east along STH-1 to CSAH-28 in Pennington County, north along CSAH-28 to CSAH-54 in Marshall County, north along CSAH-54 to CSAH-9 in Roseau County, north along CSAH-9 to STH-11, west along STH-11 to STH-310, and north along STH-310 to the Manitoba border.

Tennessee

Southeast Crane Zone: That portion of the State south of Interstate 40 and east of State Highway 56.

Remainder of State: That portion of Tennessee outside of the Southeast Crane Zone.

Central Flyway

Colorado

Open Area: The Central Flyway portion of the State except the San Luis Valley (Alamosa, Conejos, Costilla, Hinsdale, Mineral, Rio Grande, and Saguache Counties east of the Continental Divide) and North Park (Jackson County).

Kansas

Central Zone: That portion of the State within an area bounded by a line beginning where I-35 crosses the Kansas-Oklahoma border, then north on

I-35 to Wichita, then north on I-135 to Salina, then north on U.S. 81 to the Nebraska border, then west along the Kansas-Nebraska border to its intersection with Hwy 283, then south on Hwy 283 to the intersection with Hwy 18/24, then east along Hwy 18 to Hwy 183, then south on Hwy 183 to Route 1, then south on Route 1 to the Oklahoma border, then east along the Kansas-Oklahoma border to where it crosses I-35.

West Zone: That portion of the State west of the western boundary of the Central Zone.

Montana

Regular Season Open Area: The Central Flyway portion of the State except for that area south and west of Interstate 90, which is closed to sandhill crane hunting.

Special Season Open Area: Carbon County.

New Mexico

Regular-Season Open Area: Chaves, Curry, De Baca, Eddy, Lea, Quay, and Roosevelt Counties.

Special Season Open Areas

Middle Rio Grande Valley Area: The Central Flyway portion of New Mexico in Socorro and Valencia Counties.

Estancia Valley Area: Those portions of Santa Fe, Torrance, and Bernalillo Counties within an area bounded on the west by New Mexico Highway 55 beginning at Mountainair north to NM 337, north to NM 14, north to I-25; on the north by I-25 east to U.S. 285; on the east by U.S. 285 south to U.S. 60; and on the south by U.S. 60 from U.S. 285 west to NM 55 in Mountainair.

Southwest Zone: Area bounded on the south by the New Mexico-Mexico border; on the west by the New Mexico-Arizona border north to Interstate 10; on the north by Interstate 10 east to U.S. 180, north to NM 26, east to NM 27, north to NM 152, and east to Interstate 25; on the east by Interstate 25 south to Interstate 10, west to the Luna County line, and south to the New Mexico-Mexico border.

North Dakota

Area 1: That portion of the State west of U.S. 281.

Area 2: That portion of the State east of U.S. 281.

Oklahoma

Open Area: That portion of the State west of I-35.

South Dakota

Open Area: That portion of the State lying west of a line beginning at the

South Dakota-North Dakota border and State Highway 25, south on State Highway 25 to its junction with State Highway 34, east on State Highway 34 to its junction with U.S. Highway 81, then south on U.S. Highway 81 to the South Dakota-Nebraska border.

Texas

Zone A: That portion of Texas lying west of a line beginning at the international toll bridge at Laredo, then northeast along U.S. Highway 81 to its junction with Interstate Highway 35 in Laredo, then north along Interstate Highway 35 to its junction with Interstate Highway 10 in San Antonio, then northwest along Interstate Highway 10 to its junction with U.S. Highway 83 at Junction, then north along U.S. Highway 83 to its junction with U.S. Highway 62, 16 miles north of Childress, then east along U.S. Highway 62 to the Texas-Oklahoma State line.

Zone B: That portion of Texas lying within boundaries beginning at the junction of U.S. Highway 81 and the Texas-Oklahoma State line, then southeast along U.S. Highway 81 to its junction with U.S. Highway 287 in Montague County, then southeast along U.S. Highway 287 to its junction with Interstate Highway 35W in Fort Worth, then southwest along Interstate Highway 35 to its junction with Interstate Highway 10 in San Antonio, then northwest along Interstate Highway 10 to its junction with U.S. Highway 83 in the town of Junction, then north along U.S. Highway 83 to its junction with U.S. Highway 62, 16 miles north of Childress, then east along U.S. Highway 62 to the Texas-Oklahoma State line, then south along the Texas-Oklahoma State line to the south bank of the Red River, then eastward along the vegetation line on the south bank of the Red River to U.S. Highway 81.

Zone C: The remainder of the State, except for the closed areas.

Closed areas:

A. That portion of the State lying east and north of a line beginning at the junction of U.S. Highway 81 and the Texas-Oklahoma State line, then southeast along U.S. Highway 81 to its junction with U.S. Highway 287 in Montague County, then southeast along U.S. Highway 287 to its junction with I-35W in Fort Worth, then southwest along I-35 to its junction with U.S. Highway 290 East in Austin, then east along U.S. Highway 290 to its junction with Interstate Loop 610 in Harris County, then south and east along Interstate Loop 610 to its junction with Interstate Highway 45 in Houston, then south on Interstate Highway 45 to State Highway 342, then to the shore of the

Gulf of Mexico, and then north and east along the shore of the Gulf of Mexico to the Texas-Louisiana State line.

B. That portion of the State lying within the boundaries of a line beginning at the Kleberg-Nueces County line and the shore of the Gulf of Mexico, then west along the County line to Park Road 22 in Nueces County, then north and west along Park Road 22 to its junction with State Highway 358 in Corpus Christi, then west and north along State Highway 358 to its junction with State Highway 286, then north along State Highway 286 to its junction with Interstate Highway 37, then east along Interstate Highway 37 to its junction with U.S. Highway 181, then north and west along U.S. Highway 181 to its junction with U.S. Highway 77 in Sinton, then north and east along U.S. Highway 77 to its junction with U.S. Highway 87 in Victoria, then south and east along U.S. Highway 87 to its junction with State Highway 35 at Port Lavaca, then north and east along State Highway 35 to the south end of the Lavaca Bay Causeway, then south and east along the shore of Lavaca Bay to its junction with the Port Lavaca Ship Channel, then south and east along the Lavaca Bay Ship Channel to the Gulf of Mexico, and then south and west along the shore of the Gulf of Mexico to the Kleberg-Nueces Counties line.

Wyoming

Area 4: All lands within the Bureau of Reclamation's Riverton and Boysen Unit boundaries; those lands within Boysen State Park south of Cottonwood Creek, west of Boysen Reservoir, and south of U.S. Highway 20-26; and all non-Indian-owned fee title lands within the exterior boundaries of the Wind River Reservation, excluding those lands within Hot Springs County.

Area 6: Big Horn, Hot Springs, Park, and Washakie Counties.

Area 7: Campbell, Converse, Crook, Goshen, Laramie, Niobrara, Platte, and Weston Counties.

Area 8: Johnson, Natrona, and Sheridan Counties.

Pacific Flyway

Arizona

Zone 1: Beginning at the junction of the New Mexico State line and U.S. Hwy 80; south along the State line to the U.S.-Mexico border; west along the border to the San Pedro River; north along the San Pedro River to the junction with Arizona Hwy 77; northerly along Arizona Hwy 77 to the Gila River; northeast along the Gila River to the San Carlos Indian Reservation boundary; south then east

and north along the reservation boundary to U.S. Hwy 70; southeast on U.S. Hwy 70 to U.S. Hwy 191; south on U.S. Hwy 191 to the 352 exit on I-10; east on I-10 to Bowie-Apache Pass Road; southerly on the Bowie-Apache Pass Road to Arizona Hwy 186; southeasterly on Arizona Hwy 186 to Arizona Hwy 181; south on Arizona Hwy 181 to the West Turkey Creek-Kuykendall cutoff road; southerly on the Kuykendall cutoff road to Rucker Canyon Road; easterly on Rucker Canyon Road to the Tex Canyon Road; southerly on Tex Canyon Road to U.S. Hwy 80; northeast on U.S. Hwy 80 to the New Mexico State line.

Zone 2: Beginning at I-10 and the New Mexico State line; north along the State line to Arizona Hwy 78; southwest on Arizona Hwy 78 to U.S. Hwy 191; northwest on U.S. Hwy 191 to Clifton; westerly on the Lower Eagle Creek Road (Pump Station Road) to Eagle Creek; northerly along Eagle Creek to the San Carlos Indian Reservation boundary; southerly and west along the reservation boundary to U.S. Hwy 70; southeast on U.S. Hwy 70 to U.S. Hwy 191; south on U.S. Hwy 191 to I-10; easterly on I-10 to the New Mexico State line.

Zone 3: Beginning on I-10 at the New Mexico State line; westerly on I-10 to the Bowie-Apache Pass Road; southerly on the Bowie-Apache Pass Road to AZ Hwy 186; southeast on AZ Hwy 186 to AZ Hwy 181; south on AZ Hwy 181 to the West Turkey Creek-Kuykendall cutoff road; southerly on the Kuykendall cutoff road to Rucker Canyon Road; easterly on the Rucker Canyon Road to Tex Canyon Road; southerly on Tex Canyon Road to U.S. Hwy 80; northeast on U.S. Hwy 80 to the New Mexico State line; north along the State line to I-10.

Idaho

Area 1: All of Bear Lake County and all of Caribou County except that portion lying within the Grays Lake Basin.

Area 2: All of Teton County except that portion lying west of State Highway 33 and south of Packsaddle Road (West 400 North) and north of the North Cedron Road (West 600 South) and east of the west bank of the Teton River.

Area 3: All of Fremont County except the Chester Wetlands Wildlife Management Area.

Area 4: All of Jefferson County.

Area 5: All of Bannock County east of Interstate 15 and south of U.S. Highway 30; and all of Franklin County.

Area 6: That portion of Oneida County within the boundary beginning at the intersection of the Idaho-Utah border and Old Highway 191, then

north on Old Highway 191 to 1500 S, then west on 1500 S to Highway 38, then west on Highway 38 to 5400 W, then south on 5400 W to Pocatello Valley Road, then west and south on Pocatello Valley Road to 10000 W, then south on 10000 W to the Idaho–Utah border, then east along the Idaho–Utah border to the beginning point.

Montana

Zone 1: Those portions of Deer Lodge County lying within the following described boundary: beginning at the intersection of I–90 and Highway 273, then westerly along Highway 273 to the junction of Highway 1, then southeast along said highway to Highway 275 at Opportunity, then east along said highway to East Side County road, then north along said road to Perkins Lane, then west on said lane to I–90, then north on said interstate to the junction of Highway 273, the point of beginning. Except for sections 13 and 24, T5N, R10W; and Warm Springs Pond number 3.

Zone 2: That portion of the Pacific Flyway, located in Powell County lying within the following described boundary: beginning at the junction of State Routes 141 and 200, then west along Route 200 to its intersection with the Blackfoot River at Russell Gates Fishing Access Site (Powell–Missoula County line), then southeast along said river to its intersection with the Ovando–Helmville Road (County Road 104) at Cedar Meadows Fishing Access Site, then south and east along said road to its junction with State Route 141, then north along said route to its junction with State Route 200, the point of beginning.

Zone 3: Beaverhead, Gallatin, Jefferson, and Madison Counties.

Zone 4: Broadwater County.

Zone 5: Cascade and Teton Counties.

Utah

Cache County: Cache County.

East Box Elder County: That portion of Box Elder County beginning on the Utah–Idaho State line at the Box Elder–Cache County line; west on the State line to the Pocatello Valley County Road; south on the Pocatello Valley County Road to I–15; southeast on I–15 to SR–83; south on SR–83 to Lamp Junction; west and south on the Promontory Point County Road to the tip of Promontory Point; south from Promontory Point to the Box Elder–Weber Counties line; east on the Box Elder–Weber Counties line to the Box Elder–Cache Counties line; north on the Box Elder–Cache County line to the Utah–Idaho State line.

Rich County: Rich County.

Uintah County: Uintah and Duchesne Counties.

Wyoming

Area 1: All of the Bear River and Ham’s Fork River drainages in Lincoln County.

Area 2: All of the Salt River drainage in Lincoln County south of the McCoy Creek Road.

Area 3: All lands within the Bureau of Reclamation’s Eden Project in Sweetwater County.

Area 5: Uinta County.

All Migratory Game Birds in Alaska

North Zone: State Game Management Units 11–13 and 17–26.

Gulf Coast Zone: State Game Management Units 5–7, 9, 14–16, and 10 (Unimak Island only).

Southeast Zone: State Game Management Units 1–4.

Pribilof and Aleutian Islands Zone: State Game Management Unit 10 (except Unimak Island).

Kodiak Zone: State Game Management Unit 8.

All Migratory Game Birds in the Virgin Islands

Ruth Cay Closure Area: The island of Ruth Cay, just south of St. Croix.

All Migratory Game Birds in Puerto Rico

Municipality of Culebra Closure Area: All of the municipality of Culebra.

Desecheo Island Closure Area: All of Desecheo Island.

Mona Island Closure Area: All of Mona Island.

El Verde Closure Area: Those areas of the municipalities of Rio Grande and Loiza delineated as follows: (1) All lands between Routes 956 on the west and 186 on the east, from Route 3 on the north to the juncture of Routes 956 and 186 (Km 13.2) in the south; (2) all lands between Routes 186 and 966 from the juncture of 186 and 966 on the north, to the Caribbean National Forest Boundary on the south; (3) all lands lying west of Route 186 for 1 kilometer from the juncture of Routes 186 and 956 south to Km 6 on Route 186; (4) all lands within Km 14 and Km 6 on the west and the Caribbean National Forest Boundary on the east; and (5) all lands within the Caribbean National Forest Boundary whether private or public.

Cidra Municipality and adjacent areas: All of Cidra Municipality and portions of Aguas Buenas, Caguas, Cayey, and Comerio Municipalities as encompassed within the following boundary: beginning on Highway 172 as it leaves the municipality of Cidra on the west edge, north to Highway 156, east on Highway 156 to Highway 1, south on Highway 1 to Highway 765, south on Highway 765 to Highway 763, south on Highway 763 to the Rio Guavate, west along Rio Guavate to Highway 1, southwest on Highway 1 to Highway 14, west on Highway 14 to Highway 729, north on Highway 729 to Cidra Municipality boundary to the point of the beginning.

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

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FEDERAL REGISTER

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Part V

The President

Executive Order 14105—Addressing United States Investments in Certain
National Security Technologies and Products in Countries of Concern

Presidential Documents

Title 3—

Executive Order 14105 of August 9, 2023

The President

Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), and section 301 of title 3, United States Code,

I, JOSEPH R. BIDEN JR., President of the United States of America, find that countries of concern are engaged in comprehensive, long-term strategies that direct, facilitate, or otherwise support advancements in sensitive technologies and products that are critical to such countries' military, intelligence, surveillance, or cyber-enabled capabilities. Moreover, these countries eliminate barriers between civilian and commercial sectors and military and defense industrial sectors, not just through research and development, but also by acquiring and diverting the world's cutting-edge technologies, for the purposes of achieving military dominance. Rapid advancement in semiconductors and microelectronics, quantum information technologies, and artificial intelligence capabilities by these countries significantly enhances their ability to conduct activities that threaten the national security of the United States. Advancements in sensitive technologies and products in these sectors will accelerate the development of advanced computational capabilities that will enable new applications that pose significant national security risks, such as the development of more sophisticated weapons systems, breaking of cryptographic codes, and other applications that could provide these countries with military advantages.

As part of this strategy of advancing the development of these sensitive technologies and products, countries of concern are exploiting or have the ability to exploit certain United States outbound investments, including certain intangible benefits that often accompany United States investments and that help companies succeed, such as enhanced standing and prominence, managerial assistance, investment and talent networks, market access, and enhanced access to additional financing. The commitment of the United States to open investment is a cornerstone of our economic policy and provides the United States with substantial benefits. Open global capital flows create valuable economic opportunities and promote competitiveness, innovation, and productivity, and the United States supports cross-border investment, where not inconsistent with the protection of United States national security interests. However, certain United States investments may accelerate and increase the success of the development of sensitive technologies and products in countries that develop them to counter United States and allied capabilities.

I therefore find that advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries constitutes an unusual and extraordinary threat to the national security of the United States, which has its source in whole or substantial part outside the United States, and that certain United States investments risk exacerbating this threat. I hereby declare a national emergency to deal with this threat.

Accordingly, I hereby order:

Section 1. *Notifiable and Prohibited Transactions.* (a) To assist in addressing the national emergency declared in this order, the Secretary of the Treasury (Secretary), in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant executive departments and agencies (agencies), shall issue, subject to public notice and comment, regulations that require United States persons to provide notification of information relative to certain transactions involving covered foreign persons (notifiable transactions) and that prohibit United States persons from engaging in certain other transactions involving covered foreign persons (prohibited transactions).

(b) The regulations issued under this section shall identify categories of notifiable transactions that involve covered national security technologies and products that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, determines may contribute to the threat to the national security of the United States identified in this order. The regulations shall require United States persons to notify the Department of the Treasury of each such transaction and include relevant information on the transaction in each such notification.

(c) The regulations issued under this section shall identify categories of prohibited transactions that involve covered national security technologies and products that the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, determines pose a particularly acute national security threat because of their potential to significantly advance the military, intelligence, surveillance, or cyber-enabled capabilities of countries of concern. The regulations shall prohibit United States persons from engaging, directly or indirectly, in such transactions.

Sec. 2. *Duties of the Secretary.* In carrying out this order, the Secretary shall, as appropriate:

(a) communicate with the Congress and the public with respect to the implementation of this order;

(b) consult with the Secretary of Commerce on industry engagement and analysis of notified transactions;

(c) consult with the Secretary of State, the Secretary of Defense, the Secretary of Commerce, the Secretary of Energy, and the Director of National Intelligence on the implications for military, intelligence, surveillance, or cyber-enabled capabilities of covered national security technologies and products and potential covered national security technologies and products;

(d) engage, together with the Secretary of State and the Secretary of Commerce, with allies and partners regarding the national security risks posed by countries of concern advancing covered national security technologies and products;

(e) consult with the Secretary of State on foreign policy considerations related to the implementation of this order, including but not limited to the issuance and amendment of regulations; and

(f) investigate, in consultation with the heads of relevant agencies, as appropriate, violations of this order or the regulations issued under this order and pursue available civil penalties for such violations.

Sec. 3. *Program Development.* Within 1 year of the effective date of the regulations issued under section 1 of this order, the Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, shall assess whether to amend the regulations, including whether to adjust the definition of “covered national security technologies and products” to add or remove technologies and products in the semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors. The Secretary, in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies, shall periodically review the effectiveness of the regulations thereafter.

Sec. 4. *Reports to the President.* Within 1 year of the effective date of the regulations issued under section 1 of this order and, as appropriate

but no less than annually thereafter, the Secretary, in coordination with the Secretary of Commerce and in consultation with the heads of other relevant agencies and the Director of the Office of Management and Budget, as appropriate, shall provide the President, through the Assistant to the President for National Security Affairs:

(a) to the extent practicable, an assessment of the effectiveness of the measures imposed under this order in addressing threats to the national security of the United States described in this order; advancements by the countries of concern in covered national security technologies and products critical for such countries' military, intelligence, surveillance, or cyber-enabled capabilities; aggregate sector trends evident in notifiable transactions and related capital flows in covered national security technologies and products, drawing on analysis provided by the Secretary of Commerce, the Director of National Intelligence, and the heads of other relevant agencies, as appropriate; and other relevant information obtained through the implementation of this order; and

(b) recommendations, as appropriate, regarding:

(i) modifications to this order, including the addition or removal of identified sectors or countries of concern, and any other modifications to avoid circumvention of this order and enhance its effectiveness; and

(ii) the establishment or expansion of other Federal programs relevant to the covered national security technologies and products, including with respect to whether any existing legal authorities should be used or new action should be taken to address the threat to the national security of the United States identified in this order.

Sec. 5. Reports to the Congress. The Secretary is authorized to submit recurring and final reports to the Congress on the national emergency declared in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

Sec. 6. Official United States Government Business. Nothing in this order or the regulations issued under this order shall prohibit transactions for the conduct of the official business of the United States Government by employees, grantees, or contractors thereof.

Sec. 7. Confidentiality. The regulations issued by the Secretary under this order shall address the confidentiality of information or documentary material submitted pursuant to this order, consistent with applicable law.

Sec. 8. Additional Notifications and Prohibitions. (a) Any conspiracy formed to violate any regulation issued under this order is prohibited.

(b) Subject to the regulations issued under this order, any action that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order or any regulation issued under this order is prohibited.

(c) In the regulations issued under this order, the Secretary may prohibit United States persons from knowingly directing transactions if such transactions would be prohibited transactions pursuant to this order if engaged in by a United States person.

(d) In the regulations issued under this order, the Secretary may require United States persons to:

(i) provide notification to the Department of the Treasury of any transaction by a foreign entity controlled by such United States person that would be a notifiable transaction if engaged in by a United States person; and

(ii) take all reasonable steps to prohibit and prevent any transaction by a foreign entity controlled by such United States person that would be a prohibited transaction if engaged in by a United States person.

Sec. 9. Definitions. For purposes of this order:

(a) the term "country of concern" means a country or territory listed in the Annex to this order that the President has identified to be engaging in a comprehensive, long-term strategy that directs, facilitates, or otherwise

supports advancements in sensitive technologies and products that are critical to such country's military, intelligence, surveillance, or cyber-enabled capabilities to counter United States capabilities in a way that threatens the national security of the United States;

(b) the term "covered foreign person" means a person of a country of concern who or that is engaged in activities, as identified in the regulations issued under this order, involving one or more covered national security technologies and products;

(c) the term "covered national security technologies and products" means sensitive technologies and products in the semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a country of concern, as determined by the Secretary in consultation with the Secretary of Commerce and, as appropriate, the heads of other relevant agencies. Where applicable, "covered national security technologies and products" may be limited by reference to certain end-uses of those technologies or products;

(d) the term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(e) the term "person of a country of concern" means:

(i) any individual that is not a United States person and is a citizen or permanent resident of a country of concern;

(ii) any entity organized under the laws of a country of concern or with a principal place of business in a country of concern;

(iii) the government of each country of concern, including any political subdivision, political party, agency, or instrumentality thereof, or any person owned, controlled, or directed by, or acting for or on behalf of the government of such country of concern; or

(iv) any entity owned by a person identified in subsections (e)(i) through (e)(iii) of this section;

(f) the term "person" means an individual or entity;

(g) the term "relevant agencies" includes the Departments of State, Defense, Justice, Commerce, Energy, and Homeland Security, the Office of the United States Trade Representative, the Office of Science and Technology Policy, the Office of the Director of National Intelligence, the Office of the National Cyber Director, and any other department, agency, or office the Secretary determines appropriate; and

(h) the term "United States person" means any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branches of any such entity, and any person in the United States.

Sec. 10. General Provisions. (a) The Secretary is authorized to take such actions and to employ all powers granted to the President by IEEPA as may be necessary to carry out the purposes of this order, including to:

(i) promulgate rules and regulations, including elaborating upon the definitions contained in section 9 of this order for purposes of the regulations issued under this order and further prescribing definitions of other terms as necessary to implement this order;

(ii) investigate and make requests for information relative to notifiable or prohibited transactions from parties to such transactions or other relevant persons at any time, including through the use of civil administrative subpoenas as appropriate;

(iii) nullify, void, or otherwise compel the divestment of any prohibited transaction entered into after the effective date of the regulations issued under this order; and

(iv) refer potential criminal violations of this order or the regulations issued under this order to the Attorney General.

(b) Notwithstanding any other provision of this order, the Secretary is authorized to exempt from applicable prohibitions or notification requirements any transaction or transactions determined by the Secretary, in consultation with the heads of relevant agencies, as appropriate, to be in the national interest of the United States.

(c) To the extent consistent with applicable law, the Secretary may redelegate any functions authorized hereunder within the Department of the Treasury. All agencies of the United States Government shall take all appropriate measures within their authority to carry out the provisions of this order.

(d) If any provision of this order, or the application of any provision of this order to any person or circumstance, is held to be invalid, the remainder of this order and its application to any other person or circumstance shall not be affected thereby.

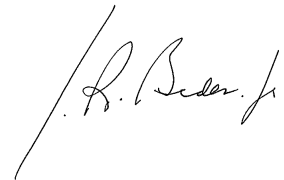
(e) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(f) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(g) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
August 9, 2023.

Annex

The People's Republic of China

The Special Administrative Region of Hong Kong

The Special Administrative Region of Macau

[FR Doc. 2023–17449

Filed 8–10–23; 11:15 a.m.]

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