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Presidential Documents

Title 3—

The President

Proclamation 10607 of August 18, 2023

National Employer Support of the Guard and Reserve Week, 2023

By the President of the United States of America

A Proclamation

The United States military is the greatest fighting force in the history of the world—and that's in no small part due to our National Guard and Reserve members, who stand ready to defend our Nation at a moment's notice. Just as these brave women and men have shown ultimate faith to our country, many of their employers have gone above and beyond to keep faith with them. This week, we honor our Guard and Reserve troops for all that they sacrifice to keep our country and their communities safe. And we thank their employers, whose support makes their service possible.

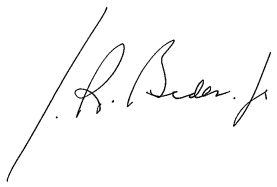
Our National Guard and Reserve members are not only a source of pride for the military, they are also often the bedrock of their communities. While serving as citizen Soldiers and Airmen of the National Guard and Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen of the Reserve, they serve as teachers, pastors, public servants, engineers, medical professionals, small business owners, mothers, fathers, and so much more. Every day, they balance the competing demands of civilian life and military service, including leaving their communities at a moment's notice when our country calls.

Many patriotic employers have stepped up to do all that they can to support the mission of their Guard and Reserve employees. They offer generous leave policies while service members are deployed or undergoing military training. They ensure that spouses and families maintain access to health care and benefits while their loved ones are away. And they demonstrate steadfast support for the service members who sacrifice so much for all of us. That matters—it ensures that our National Guard and Reserve members can continue to strengthen our national security while maintaining meaningful roles at home.

The Biden family is a National Guard family, and we remain inspired by all Americans who choose to serve something bigger than themselves, just as our son Major Beau Biden did in the Delaware Army National Guard. We owe our troops, including our Guard and Reserve members, a debt of gratitude that we can never fully repay. During National Employer Support of the Guard and Reserve Week, let us also show our appreciation to employers for all that they do to support the brave Americans who stand at the ready to dare all, risk all, and give all for our Nation.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim August 20 through August 26, 2023, as National Employer Support of the Guard and Reserve Week. I call upon all Americans to observe this week by honoring our National Guard and Reserve service members, who sacrifice so much to keep our country and communities safe and secure, and to commend the employers who empower these service members to thrive.

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



[FR Doc. 2023–18246
Filed 8–22–23; 8:45 am]
Billing code 3395–F3–P

Rules and Regulations

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1042; Project Identifier MCAI–2023–00274–A; Amendment 39–22518; AD 2023–15–06]

RIN 2120–AA64

Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Pilatus Aircraft Ltd. (Pilatus) Model PC–24 airplanes. This AD was prompted by reports of an electrical burning smell in the cabin without the presence of smoke. This AD requires revising the Limitations Section of the existing airplane flight manual (AFM) for your airplane, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective September 27, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 27, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1042; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For EASA service information identified in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this material on the EASA website: *ad.easa.europa.eu.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2023–1042.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Pilatus Model PC–24 airplanes. The NPRM published in the **Federal Register** on May 15, 2023 (88 FR 30909). The NPRM was prompted by AD 2023–0038, dated February 14, 2023, issued by EASA, which is the Technical Agent for the Member States of the European Union (referred to after this as ''the MCAI''). The MCAI states that there have been reports of an electrical burning smell in the cabin without the presence of smoke and there is currently no AFM procedure for addressing this condition. The current AFM procedure for smoke/fume in the cockpit and/or cabin requires the immediate use of supplemental oxygen and smoke goggles for the flight crew, which leads to increased flight crew workload. Failure to revise the AFM to include a new task addressing an electrical burning smell in the cabin without the presence of smoke could result in an unsafe condition.

In the NPRM, the FAA proposed to provide the flight crew with a new procedure in the existing AFM for your airplane to address the presence of an electrical burning smell in the cabin without the presence of smoke. This condition, if not addressed, could lead to increased pilot workload, possibly resulting in a reduction of safety margins and an emergency landing. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1042.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from one commenter, Pilatus. The following presents the comment received on the NPRM and the FAA's response to the comment.

Request To Revise Emergency Procedures Instead of Limitations Section

Pilatus commented that Section 2, Limitations, of the AFM is not affected by this new procedure, but Section 3, Emergency Procedures, is. The FAA infers that the commenter is requesting that the information in Pilatus PC–24 AFM Temporary Revision 02371–055 (AFM TR 02371–055) be inserted in Section 3A, Abnormal Procedures within the Emergency Procedures Section of the AFM and not in the Limitations Section.

The FAA agrees that AFM TR 02371–055 affects Section 3A, Abnormal Procedures, of the AFM, but FAA regulations do not mandate compliance with the Abnormal Procedures Section of the AFM. As explained in the ''Differences Between this AD and the MCAI'' section of this final rule, EASA AD 2023–0038 requires inserting AFM TR 02371–055 into the Abnormal Procedures Section of the AFM, but this AD requires inserting AFM TR 02371–055 into the Limitations Section of the existing AFM because FAA regulations mandate compliance with only the operating limitations section of the flight manual. The FAA did not change this AD as a result of this comment.

Conclusion

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comment received,

and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0038 requires revising the AFM by inserting a copy of AFM TR 02371–055 into the Abnormal Procedures Section, informing all flight crews, and operating the airplane accordingly. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Differences Between This AD and the MCAI

EASA AD 2023–0038 requires inserting AFM TR 02371–055 into the Abnormal Procedures Section of the AFM, but this AD requires inserting AFM TR 02371–055 into the Limitations Section of the existing AFM because FAA regulations mandate compliance with only the operating limitations section of the flight manual.

EASA AD 2023–0038 specifies to ''inform all flight crews and, thereafter, operating the airplane accordingly'' and this AD does not specifically require those actions.

14 CFR 91.9 requires that no person may operate a civil aircraft without complying with the operating limitations specified in the AFM. Therefore, including a requirement in this AD to operate the airplane according to the revised AFM would be redundant and unnecessary. Further, compliance with such a requirement in an AD would be impracticable to demonstrate or track on an ongoing basis; therefore, a requirement to operate the airplane in such a manner would be unenforceable.

Interim Action

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

Costs of Compliance

The FAA estimates that this AD affects 97 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise AFM	0.50 work-hour × $85 per hour = $42.50	$0	$42.50	$4,122.50

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–15–06 Pilatus Aircraft Ltd: Amendment 39–22518; Docket No. FAA–2023–1042; Project Identifier MCAI–2023–00274–A.

(a) Effective Date

This airworthiness directive (AD) is effective September 27, 2023.

(b) Affected Ads

None.

(c) Applicability

This AD applies to Pilatus Aircraft Ltd. Model PC–24 airplanes, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code: 2100, Heating System.

(e) Unsafe Condition

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI states that there have been reports of an electrical burning smell in the cabin without the presence of smoke and there is currently no airplane flight manual (AFM) procedure for addressing this condition. The FAA is issuing this AD to provide the flight crew with a new procedure in the existing AFM for your airplane to address the presence of an electrical burning smell in the cabin without the presence of smoke. This condition, if not addressed, could lead to increased pilot workload, possibly resulting in a reduction of safety margins and an emergency landing.

(f) Compliance

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

(g) Required Action

(1) Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation

Safety Agency (EASA) AD 2023–0038, dated February 14, 2023 (EASA AD 2023–0038).

(2) The actions required by paragraph (g)(1) of this AD may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR 43.9(a) and 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439.

(h) Exceptions to EASA AD 2023–0038

(1) Where EASA AD 2023–0038 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where paragraph (1) of EASA AD 2023–0038 specifies to ''amend the AFM by inserting a copy of the AFM TR,'' this AD requires replacing those words with ''revise the Limitations Section of the existing AFM for your airplane by inserting a copy of the AFM TR as defined in EASA AD 2023–0038.''

(3) Where paragraph (1) of EASA AD 2023–0038 specifies to ''inform all flight crews and, thereafter, operate the [airplane] accordingly,'' this AD does not require those actions.

(4) This AD does not adopt the Remarks paragraph of EASA AD 2023–0038.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (j) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(j) Additional Information

For more information about this AD, contact Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) European Union Aviation Safety Agency AD 2023–0038, dated February 14, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0038, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this EASA AD on the EASA website *ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on August 17, 2023.

Ross Landes,

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

[FR Doc. 2023–18121 Filed 8–22–23; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 310

RIN 3084–AA98

Telemarketing Sales Rule Fees

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''Commission'') is amending its Telemarketing Sales Rule (''TSR'') by updating the fees charged to entities accessing the National Do Not Call Registry (''Registry'') as required by the Do-Not-Call Registry Fee Extension Act of 2007.

DATES: This final rule is effective October 1, 2023.

ADDRESSES: Copies of this document are available on the internet at the Commission's website: *https://www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Ami Joy Dziekan (202) 326–2648, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Room CC–9225, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: To comply with the Do-Not-Call Registry Fee Extension Act of 2007 (15 U.S.C. 6152) (the ''Act''), the Commission is amending the TSR, which is contained in 16 CFR part 310, by updating the fees entities are charged for accessing the Registry. Specifically, the revised rule increases (1) the annual fee for access to the Registry for each area code of data from $75 to $78 per area code, and (2) the maximum amount that will be charged to any single entity for accessing area codes of data from $20,740 to $21,402. Entities may add area codes during the second six months of their annual subscription period, and the fee for those additional area codes increases from $38 to $39.

These increases are in accordance with the Act, which specifies that beginning after fiscal year 2009, the dollar amounts charged shall be increased by an amount equal to the amounts specified in the Act, multiplied by the percentage (if any) by which the average of the monthly consumer price index (for all urban consumers published by the Department of Labor) (''CPI'') for the most recently ended 12-month period ending on June 30 exceeds the CPI for the 12-month period ending June 30, 2008. The Act also states any increase shall be rounded to the nearest dollar and there shall be no increase in the dollar amounts if the change in the CPI since the last fee increase is less than one percent. For fiscal year 2009, the Act specified that the original annual fee for access to the Registry for each area code of data was $54 per area code, or $27 per area code of data during the second six months of an entity's annual subscription period, and that the maximum amount that would be charged to any single entity for accessing area codes of data would be $14,850.

The determination of whether a fee change is required and the amount of the fee changes involves a two-step process. First, to determine whether a fee change is required, we measure the change in the CPI from the time of the previous increase in fees. There was an increase in the fees for fiscal year 2023. Accordingly, we calculated the change in the CPI since last year, and the increase was 3.0 percent. Because this change is over the one percent threshold, the fees will change for fiscal year 2024.

Second, to determine how much the fees should increase this fiscal year, we use the calculation specified by the Act set forth above: the percentage change in the baseline CPI applied to the original fees for fiscal year 2009. The average value of the CPI for July 1, 2007, to June 30, 2008, was 211.702; the average value for July 1, 2022, to June 30, 2023, was 305.109, an increase of 44.12 percent. Applying the 44.12 percent increase to the base amount from fiscal year 2009, leads to a $78 fee for access to a single area code of data for a full year for fiscal year 2024, an increase of $3 from last year. The actual amount is $77.83 but when rounded, pursuant to the Act, $78 is the appropriate fee. The fee for accessing an additional area code for a half year increases by one dollar to $39 (rounded from $38.91). The maximum

amount charged increases to $21,402 (rounded from $21,402.11).

Administrative Procedure Act; Regulatory Flexibility Act; Paperwork Reduction Act. Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. The fee adjustments set forth in this final rule are mandated by the Do-Not-Call Registry Fee Extension Act of 2007. Accordingly, the amendments to the TSR are merely technical in nature, making notice and comment unnecessary and contrary to the public interest. *See* 5 U.S.C. 553(b). For this reason, the requirements of the Regulatory Flexibility Act also do not apply. *See* 5 U.S.C. 603, 604.

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501–3521, the Office of Management and Budget (''OMB'') approved the information collection requirements in the TSR and assigned the following existing OMB Control Number: 3084–0169. The amendments outlined in this final rule pertain only to the fee provision (§ 310.8) of the TSR and will not establish or alter any record keeping, reporting, or third-party disclosure requirements elsewhere in the TSR.

List of Subjects in 16 CFR Part 310

Advertising, Consumer protection, Reporting and recordkeeping requirements, Telephone, Trade practices.

Accordingly, the Federal Trade Commission amends part 310 of title 16 of the Code of Federal Regulations as follows:

PART 310—TELEMARKETING SALES RULE

■ 1. The authority citation for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101–6108; 15 U.S.C. 6151–6155.

§ 310.8 [Amended]

■ 2. In § 310.8:

■ a. Amend paragraph (c) by:

■ i. Removing ''$75'' and adding ''$78'' in its place; and

■ ii. Removing ''$20,740'' and adding ''$21,402'' in its place;

■ b. Amend paragraph (d) by:

■ i. Removing ''$75'' and adding ''$78'' in its place; and

■ ii. Removing ''$38'' and adding ''$39'' in its place.

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2023–18085 Filed 8–22–23; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

30 CFR Part 250

[Docket ID: BSEE–2022–0009; EEEE500000 234E1700D2 ET1SF0000.EAQ000]

RIN 1014–AA52

Oil and Gas and Sulfur Operations in the Outer Continental Shelf-Blowout Preventer Systems and Well Control Revisions

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior (DOI or Department), through the Bureau of Safety and Environmental Enforcement (BSEE), is revising certain regulatory provisions published in the 2019 final well control rule for drilling, workover, completion, and decommissioning operations. BSEE is finalizing these revisions to clarify blowout preventer (BOP) system requirements and to modify certain specific BOP equipment capability requirements. This final rule will provide consistency and clarity to industry regarding the BOP equipment and associated operational requirements necessary for BSEE review and approval and will further ensure operations are conducted safely and in an environmentally responsible manner.

DATES: This final rule is effective on October 23, 2023. However, BSEE will defer the compliance date for the Remotely Operated Vehicle (ROV) intervention open functionality provision at 30 CFR 250.734(a)(4) until August 22, 2024. The Director of the Federal Register approved the incorporation by reference of certain publications listed in this final rule as of July 15, 2019.

FOR FURTHER INFORMATION CONTACT: For questions, contact Kirk Malstrom, Regulations and Standards Branch, (202) 258–1518, or by email: *regs@bsee.gov*.

SUPPLEMENTARY INFORMATION:

Executive Summary

This final rule revises certain regulatory provisions that were published in the 2019 final rule entitled, ''Oil and Gas and Sulfur Operations in the Outer Continental Shelf–Blowout Preventer Systems and Well Control Revisions,'' 84 FR 21908 (May 15, 2019) (2019 WCR). On January 20, 2021, the President issued Executive Order (E.O.) 13990 (Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis). The accompanying ''President's Fact Sheet: List of Agency Actions for Review'' included the 2019 WCR on a list of rules the President instructed DOI to review for potential revisions to promote and protect public health and the environment, among other policy goals identified in the E.O. This review confirmed that the 2019 WCR contains many provisions that help ensure that federally regulated outer Continental Shelf (OCS) oil and gas operations are conducted safely and in an environmentally responsible manner. Therefore, this final rule addresses only select provisions that, consistent with and as authorized by the Outer Continental Shelf Lands Act (OCSLA), will further promote the objectives of E.O. 13990. At this time, BSEE is finalizing narrowly focused revisions to improve operations that use a BOP, certain BOP capabilities and functionalities, and BSEE oversight of such operations. The final rule:

- Clarifies the general BOP system expectations,
- Modifies the timeframes for commencing a failure analysis,
- Requires submission of independent third-party qualifications,
- Establishes dual shear ram requirements for surface BOPs on existing floating production facilities when an operator replaces an entire surface BOP stack,
- Requires Remotely Operated Vehicle (ROV) open functions on subsea BOPs, and
- Requires submittal of certain BOP test results if BSEE is unable to witness the testing.

BSEE will continue to evaluate the effectiveness of the 2019 WCR and all BSEE regulations for any necessary and appropriate rulemakings in the future.

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V. Procedural Matters

I. Background

A. BSEE Statutory and Regulatory Authority and Responsibilities

BSEE's authority for this rule flows from OCSLA, 43 U.S.C. 1331–1356a. OCSLA, enacted in 1953 and substantially revised in 1978, authorizes the Secretary of the Interior (Secretary) to lease the OCS for mineral development and to regulate oil and gas exploration, development, and production operations on the OCS. The Secretary has delegated authority to perform certain of these functions to BSEE.

To carry out its responsibilities, BSEE regulates offshore oil and gas operations to: enhance the safety of exploration for and development of oil and gas on the OCS, ensure that those operations protect the environment, and implement advancements in technology. BSEE also conducts onsite inspections to ensure compliance with regulations, lease terms, and approved plans and permits. Detailed information concerning BSEE's regulations and guidance to the offshore oil and gas industry may be found on BSEE's website at: *https://www.bsee.gov/guidance-and-regulations.*

BSEE's regulatory program covers a wide range of OCS facilities and activities—including drilling, completion, workover, production, pipeline, and decommissioning operations—that offshore operators [1] perform throughout the OCS. This rule is applicable to these listed operational activities (*e.g.,* drilling, completion and workovers) that involve certain BOP operations, capabilities, or functionalities.

B. Purpose and Summary of the Rulemaking

After the *Deepwater Horizon* incident in 2010, BSEE adopted several recommendations from multiple investigation teams to improve the safety of offshore operations. Subsequently, on April 29, 2016, BSEE published the 2016 Blowout Preventer Systems and Well Control Final Rule (81 FR 25888) (2016 WCR). The 2016 WCR consolidated the equipment and operational requirements for well control into one part of BSEE's regulations; enhanced BOP and well design requirements; modified well-control requirements; and incorporated certain industry technical standards. Most of the 2016 WCR provisions became effective on July 28, 2016.

Although the 2016 WCR addressed a significant number of issues that were identified during the analyses of the *Deepwater Horizon* incident, BSEE recognized that BOP equipment and systems continue to improve and that well control processes also evolve. Therefore, after the 2016 WCR took effect, BSEE continued to engage with the offshore oil and gas industry, Standards Development Organizations (SDOs), and other stakeholders. During these engagements, BSEE identified issues, and stakeholders expressed a variety of concerns regarding the implementation of the 2016 WCR. BSEE completed a review of the 2016 WCR and, on May 15, 2019, published the 2019 WCR in the **Federal Register** (84 FR 21908). The 2019 WCR left most of the 2016 WCR unchanged.

Following publication of the 2019 WCR, BSEE continued to engage with stakeholders to gather information to ensure that industry was effectively implementing the governing regulatory requirements. On January 20, 2021, the President issued Executive Order (E.O.) 13990 (Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis). The accompanying ''President's Fact Sheet: List of Agency Actions for Review'' included the 2019 WCR on a list of rules the President instructed DOI to review for potential revisions to promote and protect public health and the environment, among other policy goals identified in the E.O. This review confirmed that the 2019 WCR contains many provisions that help ensure that federally regulated outer Continental Shelf (OCS) oil and gas operations are conducted safely and in an environmentally responsible manner. Therefore, this final rule addresses only select provisions that, consistent with and as authorized by the OCSLA, will further promote the objectives of E.O. 13990. At this time, BSEE is finalizing narrowly focused revisions to improve operations that use a BOP, certain BOP capabilities and functionalities, and BSEE oversight of such operations.

II. Discussion of Compliance Dates for the Final Rule

BSEE considered the public comments on the proposed rule (87 FR 56354, September 14, 2022), as well as relevant information gained during BSEE's interactions with stakeholders, involvement in development of industry standards, and evaluation of current technology. Based on its analysis, BSEE is setting an effective date of 60 days following publication of the final rule, by which time operators will be required to comply with most of the final rule's provisions. BSEE determined, however, that it is appropriate to defer the compliance requirements in § 250.734(a)(4) until one year after this rule is published. In this final rule, BSEE is requiring operators to equip subsea BOP stacks with the ROV intervention capability to both open and close each shear ram, ram locks, and one pipe ram. (Current regulations require only closure capability.) BSEE is allowing a 1-year deferred compliance date, from the date of publication of this final rule, to allow operators to make the required equipment modifications to enable the ROV intervention capability to open the specified components. Detailed explanations for the requirements associated with this compliance date are provided in section IV of this preamble.

III. Discussion of Public Comments on the Proposed Rule

In response to the proposed rule, BSEE received 26 sets of submitted comments containing general statements, specific comments on the proposed provisions, and discussions of provisions not included in the proposed rule. Comments included submittals from the following entities: 13 companies, 2 industry organizations, 4 non-governmental organizations, 1 State government, 1 member of academia, 2 private citizens, and 3 anonymous submitters. All relevant comments are posted at the *Federal eRulemaking* portal: *https://www.regulations.gov.* To access the comments at that website, enter BSEE–2022–0009 in the Search box. BSEE reviewed all comments submitted, and this section of this preamble contains brief summaries of the relevant comments as well as BSEE's responses.

BSEE received multiple comments expressing general support for the proposed rule. BSEE received supporting comments from, but not limited to, oil and gas companies, industry trade groups, private citizens, and non-governmental organizations. Some of the commenters expressing general support for the proposed rule also provided specific detailed comments, addressed further below. While these commenters voiced support broadly for certain proposed changes, some of them also disagreed with other specific proposals and provided suggested revisions. Many of the commenters who expressed general

[1] BSEE's regulations at 30 CFR part 250 generally apply to ''a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee(s)'' (30 CFR 250.105 (definition of ''you'') and ''the person actually performing the activity to which the requirement applies'' (30 CFR 250.146(c)). For convenience, this preamble will refer to these regulated entities as ''operators'' unless otherwise indicated.

support for the rule also recommended that BSEE continue to evaluate other provisions of the 2019 WCR and provide stakeholders with further opportunities to continue discussions on the topics covered in the previous WCRs.

Multiple commenters provided statements or comments that were not relevant to the scope of the proposed rule, and therefore BSEE is not addressing them in this final rule.

Comments on the Initial Regulatory Impact Analysis (IRIA)

Summary of comments: A commenter suggested that BSEE should quantitatively and/or qualitatively describe the full range of harms that the Bureau expects to avoid by decreasing the risk of well blowouts, which include fatalities, negative health impacts on coastal populations, and the destruction of fragile ecosystems.

Response: BSEE appreciates the comment that BSEE should account for the full range of benefits associated with decreasing the risk of well blowouts. In the Final RIA, BSEE has added a qualitative summary of the types of benefits the rule will provide; however, BSEE has elected not to provide a quantitative accounting of the benefits as this rule is not a significant regulatory action as defined under Executive Order 12866, as amended by Executive Order 14094 (''Modernizing Regulatory Review,'' 88 FR 21879 (April 6, 2023)).

Summary of comments: A commenter suggested that BSEE should also conduct a break-even analysis to support its finding that the proposed rule's benefits justify its costs.

Response: BSEE disagrees with the commenter. Executive Orders 12866 and 14094 require agencies to conduct such analyses only for significant regulatory actions, and this rule is not a significant regulatory action, as demonstrated in the cost section of the RIA.

Miscellaneous Comments

Summary of comments: One commenter suggested that BSEE hold periodic workshops and smaller WCR updates to encourage ongoing discussions on this topic.

Response: BSEE agrees in part with the commenter and will continue to look for ways to engage with all stakeholders on the provisions associated with the WCRs and WCR-related topics.

Summary of Comments: Source Control and Containment Equipment (SCCE) Mandatory Equipment—30 CFR 250.462(b)

A commenter stated that the 2019 WCR changed a ''must'' to a ''may'' in 30 CFR 250.462(b), thereby eliminating the requirement that an operator have access to all the identified SCCE. The commenter suggested that the regulations should establish a default ''must'' requirement for all equipment, and clearly articulate the specific conditions under which BSEE would allow an operator an exemption for one or more pieces of equipment. The commenter suggested that BSEE should make access to all the listed equipment a requirement for all operators under all conditions unless provided for under a clearly articulated exception.

Response: BSEE disagrees with the commenter. Under both the 2016 WCR and the 2019 WCR, the regulations make it mandatory for operators to have access to and the ability to deploy appropriate SCCE necessary for regaining control of the well at issue. In the 2019 WCR, BSEE clarified that there are different categories of SCCE (*e.g.,* supporting equipment, co-located equipment) that warrant distinct treatment. Accordingly, BSEE revised the list of SCCE found in 30 CFR 250.462(b) and clarified that the SCCE required for any given situation ''may include, but is not limited to'' the items on that list. The intent of this revision was to clarify that the analysis required in 30 CFR 250.462(a) should be used to determine which SCCE an operator must have access to for its operations, and that the list in 30 CFR 250.462(b) provides examples of SCCE types that may be deemed appropriate, and thus required, based on the analysis of the particular well scenario. The SCCE that is necessary and appropriate to regain well control may vary based on the circumstances of the drilling operations (*e.g.,* well design and integrity, nature and structure of facility and associated infrastructure), even across distinct wells within one region (*e.g.,* Gulf of Mexico). BSEE intends to ensure the use of a consistent, objective review of the operator's ability to respond to a blowout based on actual conditions, as opposed to rote application of a fixed checklist of equipment, some of which may be inappropriate or incompatible depending on the specific circumstances. The 2019 WCR removed the potential suggestion that every possible type of SCCE—regardless of relevance, necessity, or compatibility under the circumstances—must be maintained for every well (which was never the intent) and replaced that suggestion with the more streamlined requirement that operators must have available SCCE appropriate for the specific operations. The requested changes are not necessary, as the regulations continue to require that operators ''must have access to and the ability to deploy'' the SCCE necessary to regain control of the well.

Summary of Comments: Cement Evaluation Logs for Complex Wells

A commenter requested that BSEE provide studies that show all well blowouts with failed cement and include a comparison of a pressure test versus the use of cement evaluation tools, the number of wells that require a pressure test and evaluation logs, and the number of wells that have remedial cement repairs as a result of cement evaluation logs. The commenter requested that BSEE revise its regulations to make cement evaluation logs mandatory for all offshore wells, and, in particular, for complex wells or wells in environmentally sensitive locations, to determine cement placement and quality and to verify cement repairs.

Response: BSEE disagrees with the suggestion that it would be necessary or appropriate to require cement evaluation logs for every well, as there are other viable indicators of successful cement placement and well integrity. These include tests required under existing regulations, such as pressure integrity testing required under 30 CFR 250.427 and the requirement to locate the top of cement (including through use of cement logs) and take remedial actions (per 30 CFR 250.428(c), (d)) where those tests provide indications of an inadequate cement job. BSEE has the discretion to require additional analysis, including cement logs, if warranted.

Summary of Comments: Mechanical Integrity Assessment (MIA) Report—30 CFR 250.732(d)

A commenter suggested that BSEE should restore the MIA Report requirements from the 2016 WCR that were eliminated in the 2019 WCR. The commenter asserted that BSEE now allows for industry self-regulation instead of independent third-party review that was required with the MIA Report.

Response: BSEE disagrees with the commenter that it is necessary or appropriate to restore the MIA Report requirements from the 2016 WCR. The regulations, taken as a whole, ensure proper mechanical integrity of equipment (*e.g.,* specific BOP requirements of 30 CFR part 250,

subparts G through S). All of the material informational requirements in the former MIA Reports continue to be captured in the regulations following the 2019 WCR. While those requirements are more dispersed throughout the regulations, BSEE has experienced no informational disadvantage or reduction based on the elimination of the cumulative MIA Report requirement.

Summary of Comments: BOP 5-Year Complete Breakdown—30 CFR 250.739

A commenter suggested that BSEE should issue guidance to explain how far the BOP must be broken down to meet an acceptable BOP ''major, detailed'' 5-year inspection. The commenter also suggested that BSEE restore the requirement for the independent third-party expert to be present at the 5-year BOP inspection.

Response: As BSEE explained in response to questions surrounding implementation of the 2016 WCR, BOP equipment must be broken down to allow for an appropriately detailed physical inspection. BSEE did not intend for this requirement to mean that each component must be dismantled to its smallest possible part. (See 2019 WCR, 84 FR 21961) Operators may use original equipment manufacturer (OEM)-approved methods (*e.g.,* x-ray or ultrasonic) to assist in the detailed inspection. BSEE disagrees with the commenter's suggestion that the independent third party must be present at the 5-year BOP inspection, as there are other means for independent third-party verifications and certifications that help ensure that the BOP is fit for service at a specific location for its intended use. For example, the regulations require that an independent third party review the inspection documentation and compile a detailed inspection report, which allows the independent third party to compare the design data with the current status of the equipment and accomplishes BSEE's goal of verifying that the well control system components are fit for service and within design tolerances to be utilized for specific well conditions. BSEE's experience reviewing these inspection reports since 2019 has indicated no material change or reduction in the comprehensiveness or effectiveness of its oversight.

Summary of Comments: BOP Testing Frequency—30 CFR 250.737(b)

Multiple commenters recommended that BSEE remove the 21-day BOP testing interval option (even if supported by a BOP health monitoring plan required under § 250.737(a)(4)) and instead retain the 14-day test interval requirement for all BOPs and also require the BOP health monitoring plan for all BOPs.

Response: BSEE disagrees with the commenters' recommendations to remove the 21-day BOP testing frequency alternative. Since promulgation of the 2016 WCR, BSEE has obtained and considered additional data relevant to the effects of different BOP testing intervals, including from the 2017 SafeOCS report [2] regarding BOP equipment failure, operator-submitted BOP health monitoring plan information (as required by 30 CFR 250.737(a)(4)(i) through (iv)), the 2019 Argonne National Laboratory research report,[3] international experience with 21-day testing cycles, and the results of a two-year pilot program examining BOP testing frequency and associated BOP health monitoring data. BSEE has found that the BOP health monitoring plans provide relevant data on BOP equipment operation throughout the equipment's lifecycle and provide sufficient additional assurance of successful functioning and oversight of BOP equipment to support a 21-day testing interval. Based on this data, BSEE has concluded that BOP reliability is not reduced by permitting a 21-day testing frequency that includes BOP health monitoring. BSEE continues to evaluate the BOP testing frequency to ensure proper equipment functionality. BSEE will also continue to evaluate the information gathered under the BOP health monitoring plans to determine if it would be appropriate to apply the health monitoring plan requirement to all BOPs.

Summary of Comments: Real-Time Monitoring (RTM) Transmission—30 CFR 250.724

A commenter suggested that BSEE should make clear in the regulation that transmission from one computer to another on the same rig or platform or having ''qualified personnel'' on the same rig or platform would not satisfy the 2019 WCR.

Response: BSEE does not permit RTM under § 250.724 to be conducted by personnel located on the same rig or facility where the activities being monitored are taking place. Offsite personnel must conduct the monitoring. BSEE does not believe that a regulatory revision is necessary, as the commenter's suggestion reflects BSEE's position under existing regulations.

Summary of Comments: Use of API Bulletin 92L Related to Drilling Margin—30 CFR 250.427(b)

A commenter expressed concerns about operators relying on API Bulletin 92L in situations where the Bulletin does not provide adequate methods to address lost circulation events. The commenter also requested that BSEE issue guidance to address what those situations are and how they should be handled.

Response: Since 2019, BSEE's experience with application of API Bulletin 92L relative to ongoing operations has confirmed its successful use for lost circulation events. BSEE believes the Bulletin adequately addresses how to proceed in the event of lost circulation and how to diagnose associated well stability issues safely and appropriately. The Bulletin provides operators with flow charts to use for evaluating what is happening in the well during lost circulation events and determining how to respond accordingly (*e.g.,* stopping drilling to run casing or drilling ahead a short distance to a safe stopping point). There are circumstances where limited drilling forward is safer than immediately halting operations in response to a lost circulation or drilling margin event. However, BSEE and API Bulletin 92L recognize that there are situations where it is not appropriate to continue operations when there are indications of lost circulation, and the Bulletin does not contemplate drilling ahead under those circumstances. For example, an operator may not continue operations with inadequate mud volume on location if the mud weight is insufficient to control expected pore pressure or when the open hole formation integrity test is below predicted equivalent circulating density. Accordingly, the Bulletin adequately identifies those circumstances where continued operations are not appropriate and, in those circumstances, the regulation requires the operator to obtain BSEE's approval before it may proceed. Regulatory changes are not needed. BSEE will continue to consider the extent to which guidance may be appropriate to provide additional clarity around these subjects.

Summary of Comments: Ensuring Adequate Cement Job—30 CFR 250.423(a) and (b)

A commenter recommended that this regulation should be revised to clarify that latching mechanisms need to be engaged upon successful installation and cementing of casing strings or liners for the purpose of ensuring that casing

[2] *https://safeocs.gov/file/2017_WCR_Annual_Report_v4.pdf.*

[3] *https://www.bsee.gov/sites/bsee.gov/files/examination-of-blowout-preventer-pressure-test-frequency.pdf.*

and liners are properly secured for wellbore integrity, or alternatively the latching or lock down mechanism must engage automatically upon installing the string or casing, prior to cementing.

Response: BSEE disagrees with the commenter that clarification is needed for this associated regulation. BSEE requires the latching or lock down mechanisms to be engaged upon successfully installing the casing or liner.

Summary of Comments: Effective Seal—30 CFR 250.731(a)(5)

A commenter asserted that the 2019 WCR's revisions to the language of this provision from ''achieve an effective seal'' to ''close'' imposes a lesser standard, as closing does not necessarily mean there is an effective seal. The commenter recommended that the regulations should be revised to clearly specify which ram types must meet an ''effective seal'' standard.

Response: BSEE disagrees with the commenter. As previously stated in the 2019 WCR, the requirements of paragraph (a)(5) relate only to the regulator set points used to activate the rams and do not alter any of the ram operational requirements contained in §§ 250.733 and 250.734 for surface and subsea BOPs, respectively. Those provisions continue to require that BOP systems contain rams that, when activated, are capable of ''sealing the wellbore after shearing,'' and other rams ''capable of closing and sealing'' on downhole equipment. Some rams are not designed or intended to seal, such as the casing shear ram. BSEE uses the data obtained through this provision in the permit application to evaluate ram closing and sealing capabilities. The word ''effective'' in this context is not necessary and does not provide any supplemental regulatory standard.

Summary of Comments: Test Demonstration Time—30 CFR 250.732(a)(2)(ii)

A commenter expressed concerns that the 5-minute testing time is insufficient. This commenter suggested that BSEE should not abandon the 30-minute test protocol and that BSEE must provide supporting rationale for adopting anything other than the recommended pressure time.

Response: BSEE is unaware of any data indicating BOP pressure testing failures between 5 and 30 minutes, such that extending test length would capture additional relevant data. In developing the 2019 WCR, BSEE considered and reevaluated the 2016 WCR requirements regarding BOP testing done in laboratories or test facilities against historical data and the past application of that data. Based on the historical data, BSEE found that the 5-minute pressure integrity testing timeframe was well established and adequate to demonstrate effective sealing. This conclusion was bolstered through increased and ongoing interactions with testing facilities, through which BSEE was kept apprised of new test protocols and test data and what they indicated regarding appropriate test period length. In reviews of historical lab testing data as well as permits issued since 2010, BSEE found no indications of failures between the 5-minute and 30-minute marks. BSEE also reviewed publicly available incident data and did not identify any past incidents involving failure of equipment after successfully sealing a well. Accordingly, BSEE views the 5-minute pressure integrity test hold time to provide sufficient confirmation of the required capabilities, and more prolonged tests do not provide material safety gains.

Summary of Comments: Shear Ram Capability—30 CFR 250.734(a)(6)(vi)

A commenter expressed concerns that the 2019 WCR removed the 2016 WCR ''fail safe'' requirement that the control systems for certain emergency functions be a failsafe design once activated, and recommended that BSEE restore that language in the regulations.

Response: BSEE disagrees with the commenter's recommendation, as the relevant systems already function as fail-safe designs once activated, and adding that language would not alter the required emergency functionality. BSEE removed this language in the 2019 WCR because certain required emergency functions, such as the autoshear/deadman systems, are already considered fail-safe systems (*i.e.,* they will fail in the mode that results in activation of the emergency function). They are designed to function automatically in emergency situations and do not require intervention by surface personnel to function. Existing regulatory requirements maintain these inherently fail-safe emergency functions (*e.g.,* autoshear/deadman systems) adequately and ensure that the required emergency systems function in a fail-safe manner, without the commenter's proposed language change.

IV. Section-by-Section Summary and Responses to Comments on the Proposed Rule

BSEE is finalizing revisions to the following regulations:

Subpart G—Well Operations and Equipment

What are the general requirements for BOP systems and system components? (§ 250.730)

This section of the existing regulations includes requirements for the design, installation, maintenance, inspection, repair, testing, and use of BOP systems and system components. This section also requires compliance with certain provisions of API Standard 53 and several related industry standards, and requires operators to use failure reporting procedures.

Summary of proposed rule revisions to paragraph (a):

BSEE proposed to revise paragraph (a) by modifying the current requirement that the ''BOP system must be capable of closing and sealing the wellbore in the event of flow due to a kick, including under anticipated flowing conditions for the specific well conditions,'' to a requirement that the ''BOP system must be capable of closing and sealing the wellbore at all times to the well's maximum kick tolerance design limits.'' Additional minor, non-substantive wording and grammatical changes were proposed for readability to accommodate this proposed revision.

Summary of final rule revisions to paragraph (a):

Based upon comments received, BSEE is revising paragraph (a) to state that the ''BOP system must be capable of closing and sealing the wellbore to the well's [maximum anticipated surface pressure] at all times, except as otherwise specified in the BOP system requirements of this subpart.'' These revisions will help ensure there is a consistent and proven approach for BOP system design criteria and will also provide clarity for operators to ensure the BOP system meets the requirements of the regulations at all times.

Summary of comments to proposed paragraph (a):

Summary of comments: Multiple commenters expressed concerns with the inclusion of the well's maximum kick tolerance design limit and suggested that the use of the maximum anticipated surface pressure (MASP) is a more appropriate and conservative design criteria.

Response: BSEE agrees that the maximum anticipated surface pressure, in this case, is a better design criterion than the maximum kick tolerance design limit. MASP is used extensively in the requirements for design and operation of multiple pieces of equipment across BSEE regulations. Industry has substantial experience in calculating MASP, while experience

with the methods for determining the maximum kick tolerance is less extensive and consistent. BSEE also recognizes that there may be circumstances where the use of MASP as a design parameter for identifying and sizing appropriate well control equipment would require more equipment capabilities than use of the maximum kick tolerance. Therefore, BSEE is revising the proposed provision to replace the reference to maximum kick tolerance design limit as the capability threshold with a reference to MASP to ensure consistency for calculating the design criteria and utilization of the most conservative design parameter.

Summary of comments: Multiple commenters expressed general support for the use of the maximum kick tolerance design limit. However, the commenters also expressed concerns that the maximum kick tolerance design limit is unclear and suggested that BSEE define and clarify the term.

Response: BSEE agrees with the commenters' concerns about the clarity of using the maximum kick tolerance design limit as a standard. The maximum kick tolerance design limit concept is not referenced in the current BSEE regulations, so there is no clear experience from which a general consistent approach for calculating the maximum kick tolerance design limit can be developed. In response to comments, BSEE will not finalize the use of the maximum kick tolerance design limit as the applicable threshold and will instead require the use of a well-established design parameter: the well's MASP. The MASP is a commonly used design criterion referenced throughout the BSEE regulations. It is thoroughly understood and provides a comparable, and often more conservative, standard to ensure adequate BOP capability.

Summary of comments: Multiple commenters recommended that BSEE clarify that BOP systems must close and seal the wellbore at all times to the requirements of the regulations.

Response: BSEE agrees with the commenters' assertion that BOP systems must properly function at all times to the requirements of the regulations. Therefore, BSEE is revising the proposed provision to state that the BOP system must be capable of closing and sealing the wellbore to MASP at all times, except as otherwise specified in the regulations (such as in §§ 250.730(a)(3); 250.732(a)(1)(i), (iii), and (v); and 250.733(a)(1)). BSEE's regulations include requirements related to BOP system design, fabrication, operation, maintenance, and testing, as well as independent validation and certification for ensuring the BOP was designed, tested, and maintained to perform under the maximum environmental and operational conditions anticipated to occur at the well. As a whole, the BOP system regulatory requirements help ensure that the BOP systems are appropriate for their intended use at all times and provide regulatory certainty to stakeholders for compliance and, if necessary, BSEE enforcement.

Summary of comments: A commenter expressed concerns that this paragraph does not go far enough to ensure that the BOP system is capable of closing and sealing the wellbore at all times based on existing exclusions in the current regulations. The commenter suggested revising the paragraph to specify that the BOP system must be capable of closing and sealing on all tubulars, including tool joints, drill collars, slip-proof sections, bottom hole assemblies, heavy casing, and pipe under compression, and under the maximum flowing conditions. The commenter also asserted that their trademarked technology is the only system able to meet the standard reflected in their suggested revisions.

Response: BSEE agrees in part with the commenter's assertion that technology can help drive improvements to existing BOP system capabilities. However, at this time and based on existing knowledge, data, and experience, there is not adequate data demonstrating that the referenced equipment is necessary or proven for general adoption or implementation. In the context of existing proven and available technologies, imposition of an ''at all times'' mandate without further context would not accurately recognize prevailing operational realities. A BOP functions as a mitigation device, designed to backstop other prevention mechanisms to keep a well from progressing to a full blowout; its purpose is not to halt a full blowout once it has commenced. Operators must ensure ram closure time and sealing integrity within the operational and mechanical design limits of proven and available equipment that are reflected in the equipment capability requirements of the regulations. The changes in the final rule further support and reflect the totality of improved BOP equipment, procedures, and testing, while acknowledging the safe and appropriate purpose and function of the BOP, clarifying these requirements from the 2016 and 2019 WCRs. BSEE regulations accommodate use of new or unusual technology to demonstrate improvements that can influence development of regulatory requirements. BSEE will continue to evaluate, and, if appropriate, allow the use of new technology, including the commenter's cited technology, while responsibly overseeing developments in the field through regulations designed to ensure safety and environmental protection. BSEE will also continue to evaluate the BOP system regulations to ensure they are appropriate and effective, and, if necessary, revise the regulations based on proven improved technology. BSEE believes that the existing cited regulatory standards are consistent with the capabilities of currently proven technologies and the purpose and intended functions of BOPs.

Summary of comments: A commenter expressed concerns that industry is not currently using BOP systems properly to ensure well control. The commenter stated that, during certain stripping operations, industry is using subsea BOP elastomeric elements in a manner that may not constitute ''proper use'' of the equipment under § 250.730(a). The commenter asserted that their company-specific technology would eliminate the concerns related to stripping operations.

Response: BSEE agrees in part with the commenter's assertion that BOP systems need to be properly used. However, the commenter's discussion of stripping operations does not pertain to any of the proposals promulgated through the proposed rule and is therefore outside the scope of this final rule. Further, BSEE would not codify a requirement to use a specific company's product. BSEE will continue to review and evaluate existing stripping operations and their effects on the associated equipment.

Summary of proposed rule revisions to paragraph (c):

BSEE proposed to revise paragraph (c) by removing, throughout the paragraph, the option to submit failure reports to a designated third party. BSEE also proposed to revise paragraph (c)(2) to ensure that the operator starts a failure investigation and analysis within 90 days of the failure instead of within 120 days.

Summary of final rule revisions to paragraph (c):

Based on comments received, BSEE is requiring throughout paragraph (c) that the failure reporting must be sent to BSEE's Office of Offshore Regulatory Programs Chief, any BSEE-designated third party to collect failure data, and the manufacturer of the equipment. BSEE also received and considered comments on the proposed provisions in paragraph (c)(2) that would require the investigation and failure analysis to

be started within 90 days of the failure, and BSEE includes the proposed language in the final rule without change.

Summary of Comments on paragraph (c)—Submission of Failure Reporting to a Designated Third Party:

Summary of comments: Multiple commenters strongly opposed the removal of BSEE's ability to use a third party to collect failure data. The commenters expressed their concerns that the proposed revisions may discourage the same level of details currently submitted to the third party, which includes confidential data, commercially sensitive information, and operators' internal processes. The commenters also cited the value of utilizing the third party, including the prevention of disclosure of proprietary and confidential data under the Confidential Information Protection and Statistical Efficiency Act (CIPSEA). The commenters suggested that BSEE retain the language in the current regulations and continue to allow the use of a designated third party. The commenters also suggested that BSEE work with the designated third party to establish increased reporting protocols to facilitate BSEE's timely review of failure data, identify trends, and respond appropriately.

Response: BSEE agrees in part with the commenters' suggestion to retain the use of a designated third party to collect failure data. However, this final rule also requires submittal of the failure data to BSEE. BSEE continues to find value in using the Bureau of Transportation Statistics (BTS) for monitoring failure analysis and compiling and analyzing trend data, but this reporting arrangement limits BSEE's ability to efficiently and effectively address all of the issues associated with certain failures. Receiving failure reports directly will facilitate BSEE's timely review of the failure data to help more quickly identify trends and respond to systemic issues falling within BSEE's regulatory authority. BSEE also agrees with the commenters' suggestion to establish an increased reporting protocol from the third party (or parties) to BSEE. BSEE is in discussions with the currently designated third party to establish a monthly dashboard, as well as additional tools that would enhance BSEE's ability to review data and take appropriate action if necessary. BSEE does not want to disrupt the reporting process and the detailed data collected under CIPSEA. Furthermore, BSEE will protect confidential, proprietary, or sensitive information to the extent permitted by law, similar to its treatment of similar information submitted regularly to BSEE through the permitting process and other regulatory processes.

Summary of comments: Multiple commenters support the proposed revision to remove the option to use a third party for failure data collection and explained that the revisions would enable BSEE to review and respond to the failure information quickly and efficiently.

Response: BSEE agrees in part with the commenters that BSEE's timely review and response to the failure data is important. Accordingly, BSEE is now requiring the failure data to be submitted to BSEE in addition to the designated third party. Furthermore, BSEE is in discussions with the current designated third party to establish a monthly dashboard as well as additional tools that would enhance BSEE's ability to review data and to take additional action if necessary. These revisions will allow BSEE to continue to use BTS for monitoring failure analysis and trend data while also facilitating BSEE's access to and timely review of the relevant failure data for the purposes discussed in the prior response.

Summary of Comments on paragraph (c)(2)—Timeframe to Start a Failure Analysis:

Summary of comments: Multiple commenters expressed concerns about shortening the timeframe for starting the failure analysis due to the time it takes to transport the equipment from remote offshore locations to various onshore equipment manufacturers' locations. The commenters recommended that BSEE keep the timeframe as in the existing regulations.

Response: BSEE disagrees with the recommendation to keep the timeframe in the existing regulations. BSEE understands the need to allow for transportation of the equipment, but experience indicates that 90 days is enough time to ensure proper transport, if necessary, under most circumstances, as discussed in the proposed rule. The regulations allow for BSEE approval of alternate procedures if necessary and justified under the regulatory standards.

Summary of comments: Multiple commenters expressed concerns that BSEE did not provide adequate justification to support the change of the failure analysis paradigm from the 2016 WCR to the 2019 WCR and that shortening the timeframe in this rule is still inadequate. The commenters suggested that the timeframe should revert to the 2016 WCR standard of 120 days to start and complete the failure analysis.

Response: BSEE disagrees with the commenters' request to revert to the 2016 WCR timeframe and is finalizing the timeframe as proposed. The commenters did not proffer new data that would call into question the justifications provided for the changes made in the 2019 WCR, including the operational safety and practical issues implicated by the prior timelines. As discussed in the proposed rule, based in part on experience gathered through implementation of the 2019 WCR, the selected timeframe allows for sufficient time to commence the analysis without jeopardizing safety or compromising investigation resources, while acknowledging that certain timeframes established in the 2016 WCR were inconsistent with some operational realities.

Summary of comments: A commenter expressed concerns that, in certain circumstances, operations are allowed to continue during an investigation. The commenter requested that BSEE provide a list of planned exemptions and rationale for each exemption and expressed concern with using a BOP with known failures.

Response: Other BSEE regulations specify the required actions to be taken when there are certain failures, including suspending operations as appropriate (*e.g.,* § 250.738), and establish the substantive requirements for BOP capabilities during operations (*e.g.,* §§ 250.730, 250.733, 250.734). Paragraph (c)(2) refers to the failure investigation and reporting requirements, not the equipment operational or functional requirements. Regulatory revisions are not required to address this concern.

What are the independent third party requirements for BOP systems and system components? (§ 250.732)

This section of the existing regulations describes the required qualifications of an independent third party. It also identifies the circumstances in which an operator must use an independent third party to satisfy certification, verification, or reporting requirements.

Summary of proposed revisions to paragraph (b):

BSEE proposed to revise paragraph (b) by adding that an independent third party must be accredited by a qualified standards development organization and that BSEE may review the independent third party accreditation and qualifications to ensure that it has sufficient capabilities to perform the required functions.

Summary of final rule revisions to paragraph (b):

Based on comments received, BSEE is not finalizing the proposed revision to paragraph (b) that would have stated that the independent third party must be accredited by a qualified standards development organization (SDO). BSEE will instead require the operator to submit the independent third party's qualifications to BSEE with the associated permit application. This final rule will also add clarification that BSEE will evaluate the submitted qualifications to ensure they meet the regulatory requirements for permit approval. This revision will ensure that BSEE receives the third party qualifications and has the ability to evaluate the qualifications in connection with the permit review and approval process. This revision will also provide BSEE with an additional tool to increase oversight of the independent third party qualifications and ensure properly qualified entities perform the required verifications and certifications.

Summary of Comments:

Summary of comments: Multiple commenters expressed concerns that it was unclear who or what SDO would provide the proposed accreditation, and that no accreditation process currently exists to satisfy the proposed requirement. The commenters asserted that the regulatory framework has successfully incorporated use of independent third parties for many years and that the proposed accreditation requirements would disrupt those established systems without contributing materially to independent third party accountability. These commenters suggested keeping the existing regulations unchanged.

Response: BSEE disagrees with the commenters' suggestion to keep the existing requirements unchanged, which would not achieve the desired improvement for BSEE's oversight of the independent third party qualifications. BSEE does agree in part with the commenters' assertion that the proposed SDO process and the expectations for the accreditation of the independent third parties through that process were unclear. BSEE understands that there are many SDOs that provide many different types of accreditations. BSEE also understands that there is no regulated entity in a position to provide consistency with an accreditation process under these circumstances. Therefore, BSEE is not finalizing the proposed requirement for SDO accreditation and is instead requiring operators to submit the independent third party's qualifications directly to BSEE with the associated permit application. In considering whether to approve the permit application, BSEE will evaluate whether the identified qualifications satisfy the regulatory requirement to use an independent third party with the mandated credentials and ''capable of providing the required certifications and verifications.'' This will achieve the appropriate enhancement of oversight for the qualifications of independent third parties providing the required verifications, while avoiding the ambiguity and uncertainty surrounding the proposed SDO accreditation requirement.

Summary of comments: Multiple commenters suggested that BSEE should restore the BSEE approved verification organizations (BAVO) process established in the 2016 WCR.

Response: BSEE disagrees that the BAVO process is necessary. As discussed, BSEE is taking alternative steps to review and ensure independent third party qualifications to perform the necessary verification functions by requiring submission of their qualification for review with the associated permit application (*e.g.,* Application for Permit to Drill (APD) and Application for Permit to Modify (APM)). These qualifications would be fully considered as part of the permit review and associated permit approval process. BSEE would identify any gaps in the potential qualifications of the independent third parties and address any issues related to adequate oversight. This is similar to the functions BSEE anticipated performing through its BAVO approval process. The Department does not perceive meaningful gains in accountability or vetting from implementing the additional layer of administrative certification of the former BAVO framework, which never went into effect and was replaced based on BSEE's positive experiences interacting and attending inspections and testing with independent third parties in its stead.

Summary of comments: A commenter asserted that BSEE should take a larger role in oversight of the independent third party qualifications and should require review of the qualifications in the regulations.

Response: BSEE agrees with the commenter and is requiring in this final rule the submission of the independent third party's qualifications with the associated permit application (*e.g.,* APD and APM). BSEE will fully review these qualifications during the permit review and associated permit approval process to ensure that the regulatory requirement to use independent third parties with the identified credentials and necessary capabilities has been met. BSEE will use those reviews to identify any gaps in the potential qualifications and address any issues related to the validity or reliability of the associated verifications. If BSEE determines that the submitted third party qualifications do not meet the regulatory requirements, then BSEE would not approve the associated permit application.

Summary of comments: A commenter disagreed with the third party review concept and suggested that BSEE use an auditing process similar to that applied in the Safety and Environmental Management Systems Program. The commenter also suggested that BSEE study the effects of accreditation and third party review.

Response: BSEE disagrees with the suggested use of an auditing process to review the third party qualifications or in lieu of using independent third parties. Similar to the issues identified above regarding the proposed imposition of an SDO accreditation requirement, BSEE is not aware of existing organizations or systems with the frameworks currently in place to implement an audit process that would adequately replace the important functions currently served by independent third party verifications and certifications or that would be materially superior to the enhanced BSEE oversight of those functions facilitated by this final rule. BSEE will continue to evaluate the appropriateness of an auditing process for future potential rulemaking.

What are the requirements for a surface BOP stack? (§ 250.733)

This section of the existing regulations describes the capability, type, and number of BOPs required when an operator uses a surface BOP stack for drilling or for conducting operations.

This section also describes the requirements for the risers and BOP stack when a surface BOP is used on a floating production facility.

Summary of proposed rule revisions to paragraph (b)(1):

BSEE proposed to revise paragraph (b)(1) by adding that an operator must also follow the BOP requirements of § 250.734(a)(1) when replacing an entire surface BOP stack on an existing floating production facility. That provision requires dual shear rams for applicable BOP stacks.

Summary of final rule revisions:

BSEE received and considered comments on the proposed revisions and includes the proposed revisions in the final rule without change.

Summary of Comments:

Summary of comments: A commenter asserted that consideration should be given to the extent to which this revision might create a disincentive for replacing old BOP stacks.

Response: BSEE disagrees with the assertion that the provision might create a disincentive for replacing old BOP stacks. BSEE is aware of every facility and BOP stack that does not have dual shear rams and the potential constraints on a complete BOP stack replacement. If a BOP stack reaches the point of needing immediate replacement, the operator would not realistically have the option to neglect that action to avoid meeting the dual shear ram requirements. If a stack needs to be entirely replaced, the operator would likely have no choice but to replace the BOP stack to remain in compliance with the general regulatory requirements of part 250, subpart G. BSEE has identified only seven facilities potentially implicated by this provision and will work with the operators on a case-by-case basis to ensure appropriate action is taken without creating a disincentive to make the upgrades.

Summary of comments: Multiple commenters expressed concerns that the proposed rule is unclear and could require significant (and perhaps infeasible) modifications to be made to existing facilities on the OCS, and that this rulemaking does not fully account for these impacts. The commenters suggested that BSEE engage with industry to determine how to achieve the intent of the proposed provision and then repropose a modified provision in a later rulemaking. The commenters suggested that BSEE should keep the existing regulations unchanged.

Response: BSEE disagrees with the commenters' suggestion to keep the existing regulations unchanged. BSEE is working to ensure that all BOPs have dual shear rams. However, BSEE recognizes that the existing facilities without the dual shear rams must complete the upgrades at an appropriate time. BSEE is aware of every facility and BOP stack that does not have dual shear rams and the potential constraints on a complete BOP stack replacement. If there is an immediate need to replace the entire BOP stack, beyond routine maintenance, those circumstances are serious enough to warrant the upgrade of the BOP stack to meet the dual shear ram requirements. BSEE has identified only seven facilities potentially implicated by this provision and will work with the operators on a case-by-case basis to ensure appropriate action is taken without creating unnecessary and potentially hazardous modifications to the associated facility to ensure regulatory compliance.

Summary of comments: Multiple commenters expressed support for requiring dual shear rams to be installed whenever the BOP stack is replaced, not merely on new facilities.

Response: BSEE agrees with these commenters in part and is finalizing the proposed provisions to require that certain facilities upgrade their BOP stacks to include dual shear rams at an appropriate time.

Summary of comments: A commenter asserted that all existing facilities should have dual shear rams and opined on the importance of redundancy.

Response: BSEE generally agrees and is working to ensure that all BOPs have dual shear rams, within operational, practical, and safety constraints. The provisions of the final rule advance those efforts.

Summary of comments: A commenter expressed concerns that the financial impact is grossly underestimated, as requiring operators to raise the substructure of existing platform rigs to accommodate a taller BOP system after adding another BOP cavity would result in massive structural impacts. The commenter asserts this could have the effect of rendering some leases and projects uneconomic.

Response: BSEE disagrees with the commenter that it has underestimated the economic impacts of this provision. BSEE has identified only seven existing facilities using BOP stacks that would potentially be subject to the requirements of this revision, most of which are located in depleted fields and only one of which is projected to replace its entire BOP stack over the next ten years. If an operator of such a facility has determined an immediate need to replace the entire BOP stack, beyond routine maintenance, those circumstances are serious enough that the operation would be necessary for the operator to comply with the general regulatory requirements of part 250, subpart G. Irrespective of this change, replacement of an entire BOP stack would entail rig downtime and require such facilities to take a number of actions to accommodate the new BOP stack, *i.e.,* such replacement would be an appropriate time to accommodate the dual shear rams. Furthermore, potential facility modifications can be conducted simultaneously with anticipated rig down time for replacement of the entire BOP stack to help minimize overall rig down time. BSEE anticipates that any facility modifications and burdens associated with that replacement would be incurred because of the otherwise-required stack replacement itself, and that this particular element of that substantial undertaking is unlikely to contribute significantly to the overall costs. See the accompanying Regulatory Impact Analysis for more detailed discussion of estimated costs. BSEE is not requiring all remaining surface BOP stacks to be immediately upgraded and is allowing completion of the upgrades at an appropriate time when other facility modifications would be necessary. BSEE will work with the operators on a case-by-case basis to ensure that they take appropriate actions for regulatory compliance without creating unnecessary and potentially hazardous modifications to the associated facility.

What are the requirements for a subsea BOP system? (§ 250.734)

This section of the existing regulations identifies the requirements for a subsea BOP system used for drilling or conducting operations. The section describes the requirements for subsea BOP system capabilities, as well as the functionality, type, and quantity of required equipment (*e.g.,* BOPs, pod control systems, accumulator capacity, ROVs, autoshear and deadman, acoustic control system, and management and operating protocols).

Summary of proposed rule revisions to paragraph (a)(4):

BSEE proposed to revise paragraph (a)(4) by adding that the operator must have the ROV intervention capability to both open and close each shear ram, ram locks, and one pipe ram. (Current regulations require only closure capability.)

Summary of final rule revisions:

BSEE received comments in general support of the proposed revisions to this section and is including the proposed language in the final rule without change. However, based on comments, BSEE is also adding a deferred compliance date—one year after publication of the final rule—to allow operators to make the required equipment modifications.

Summary of Comments:

Summary of comments: Multiple commenters expressed support for the proposal to require the ROV intervention capability to both open and close certain components. However, multiple commenters also requested a one-year deferred compliance date to allow sufficient time to make the required modifications to the existing equipment and ensure compliance with the regulations.

Response: BSEE agrees with the commenters' request to allow a one-year deferred compliance date in order to allow sufficient time for operators to

make the necessary equipment modifications to comply with this provision. This is a reasonable amount of time for executing the modifications to the impacted subsea BOP systems that currently lack these functionalities, which must be removed from subsea service at a safe operational time and undergo necessary equipment modifications before being returned to subsea service. One year is a reasonable period of time for responsibly accomplishing these steps, particularly given that the critical function of ram closure will continue to be required in the interim. BSEE does not want to inadvertently increase the risk during any of the ongoing BOP operations and the one-year deferred compliance date allows enough time for the operators to conduct the necessary equipment modifications during routine maintenance and other opportunities when the well is placed in a safe condition.

What are the BOP system testing requirements? (§ 250.737)

This section of the existing regulations details the pressure test frequency, procedures, and duration for BOP systems. This section also contains additional testing requirements, including compliance with API Standard 53, and specifies documentation required for certain BOP testing.

Summary of proposed rule revisions to paragraphs (d)(2)(ii) and (d)(3)(iii):

BSEE proposed to revise paragraphs (d)(2)(ii) and (d)(3)(iii) by adding the requirement that, if a BSEE representative is unable to witness the testing, the operator must provide the initial test results to the appropriate District Manager within 72 hours after completion of the tests.

Summary of final rule revisions:

BSEE received comments in general support of the proposed revisions to this section and is including the proposed language in the final rule without change.

Summary of Comments:

Summary of comments: Multiple commenters expressed support for the proposed return to the 2016 WCR requirement that, if BSEE is unable to witness testing, the operator must provide initial test results within 72 hours.

Response: BSEE agrees with the commenters' support for these provisions and is including the proposed language in the final rule without change.

V. Procedural Matters

Regulatory Planning and Review (Executive Orders (E.O.) 12866 and 13563)

E.O. 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. To determine if this rulemaking is a significant rule, a BSEE contractor prepared an economic analysis that assessed the anticipated costs and potential benefits of the rulemaking. The following discussion summarizes the economic analysis; a complete copy of the economic analysis can be viewed at *www.Regulations.gov* (use the keyword/ID ''BSEE–2022–0009'').

Changes to Federal regulations must undergo several types of economic analyses. First, E.O.s 12866, 14094, and 13563 direct agencies to assess the costs and benefits of regulatory alternatives and, if regulation is necessary, to select a regulatory approach that maximizes net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity), unless a statute requires another regulatory approach. Under E.O.s 12866 and 14094, an agency must determine whether a regulatory action is significant and, therefore, subject to review by OMB. 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:

—Has an annual effect on the economy of $200 million or more, or adversely affects 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 (also referred to as ''economically significant'');
—Creates serious inconsistency or otherwise interferes with an action taken or planned by another agency;
—Materially alters the budgetary impacts of entitlement grants, user fees, loan programs, or the rights and obligations of recipients thereof; or
—Raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

OIRA has determined that this final rule is not significant within the definition of E.O. 12866 because the estimated annual costs or benefits would not exceed $200 million in any year of the 10-year analysis period and the rule will not meet any of the other significance triggers. Accordingly, OMB has not reviewed this final rule.

(1) Need for Regulatory Action

BSEE has identified a need to amend the existing well control regulations to ensure that oil and gas operations on the OCS are conducted in a safe and environmentally responsible manner. In particular, BSEE considers the rule necessary to reduce the likelihood of an oil or gas blowout, which can lead to the loss of life, serious injuries, and harm to the environment. As the *Deepwater Horizon* incident demonstrated, blowouts can result in catastrophic consequences.

After the *Deepwater Horizon* incident in 2010, BSEE adopted several recommendations from multiple investigation teams to improve the safety of offshore operations. Subsequently, on April 29, 2016, BSEE published the 2016 Blowout Preventer Systems and Well Control Final Rule (81 FR 25888) (2016 WCR). The 2016 WCR consolidated the equipment and operational requirements for well control into one part of BSEE's regulations; enhanced BOP and well design requirements; modified well-control requirements; and incorporated certain industry technical standards. Most of the 2016 WCR provisions became effective on July 28, 2016.

Although the 2016 WCR addressed a significant number of issues that were identified during the analyses of the *Deepwater Horizon* incident, BSEE recognized that BOP equipment and systems continue to improve and that well control processes also evolve. Therefore, after the 2016 WCR took effect, BSEE continued to engage with the offshore oil and gas industry, Standards Development Organizations (SDOs), and other stakeholders. During these engagements, BSEE identified issues, and stakeholders expressed a variety of concerns regarding the implementation of the 2016 WCR. BSEE completed a review of the 2016 WCR and, on May 15, 2019, published the 2019 WCR in the **Federal Register** (84 FR 21908). The 2019 WCR left most of the 2016 WCR unchanged.

Following publication of the 2019 WCR, BSEE continued to engage with stakeholders to gather information to ensure that industry was effectively implementing the governing regulatory requirements. On January 20, 2021, the President issued Executive Order (E.O.) 13990 (Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis). The accompanying ''President's Fact Sheet: List of Agency Actions for Review'' included the 2019 WCR on a list of rules the President instructed DOI to review for potential revisions to promote and

protect public health and the environment, among other policy goals identified in the E.O. This review confirmed that the 2019 WCR contains many provisions that help ensure that federally regulated outer Continental Shelf (OCS) oil and gas operations are conducted safely and in an environmentally responsible manner. Therefore, this final rule addresses only select provisions that, consistent with and as authorized by the Outer Continental Shelf Lands Act (OCSLA), will further promote the objectives of E.O. 13990. At this time, BSEE is finalizing narrowly focused revisions to improve operations that use a BOP, certain BOP capabilities and functionalities, and BSEE oversight of such operations. The final rule will:

(A) Clarify the general BOP system expectations,

(B) Require failure notifications to be sent to BSEE and modify the timeframes for commencing a failure analysis,

(C) Require submission of the independent third party qualifications with the associated permit application,

(D) Establish dual shear ram requirements for surface BOPs on existing floating production facilities when an operator replaces an entire surface BOP stack,

(E) Require ROV open functions for subsea BOPs, and

(F) Require submittal of certain BOP test results if BSEE is unable to witness the testing.

(2) Alternatives

BSEE has considered two regulatory alternatives:

(A) Promulgate the requirements contained within the final rule.

(B) Take no regulatory action and continue to rely on existing well control regulations in combination with permit conditions, deepwater operations plans (DWOPs), operator prudence, and industry standards.

Alternative 1—the final rule—would incorporate recommendations provided by government, industry, academia, and other stakeholders. In addition to addressing concerns and aligning with industry standards, this final rule would prudently improve efficiency and consistency of the regulations.

(3) Economic Analysis

BSEE's economic analysis evaluated the expected impacts of the final rule compared with the baseline. The baseline refers to current industry practice in accordance with existing regulations, industry permits, DWOPs, and industry standards with which operators already comply. Impacts that exist as part of the baseline were not considered costs or benefits of the final rule. Thus, the cost analysis evaluates only activities, expenditures, and capital investments representing a change from the baseline that would result when the rule is finalized. BSEE quantified and monetized the costs, in year 2022 dollars, of all the provisions in the final rule determined to result in a change compared to the baseline. These estimated compliance costs are discussed more specifically in the associated final regulatory impact analysis, which can be viewed at *www.regulations.gov* (use the keyword/ID ''BSEE–2022–0009'').

BSEE qualitatively assessed the benefits of the final rule. The rulemaking will allow BSEE to address stakeholder concerns related to the BOP and well control provisions in 30 CFR part 250 and provide clarification about regulations in this section. The amendments will have a positive net impact on worker safety and the environment. The benefits include clarification, more timely review of data to facilitate faster response to systemic risks, increased accountability of verification entities to ensure that risks are accurately assessed and verified, improved protection from a blowout, improved ability to manage a blowout, and the assurance that BSEE receives and is able to review BOP testing data to help identify risks.

BSEE's economic analysis covers 10 years (2023 through 2032) to ensure it encompasses any significant costs and benefits likely to result from this final rule. A 10-year period was used for this analysis because of the uncertainty associated with predicting industry's activities and the advancement of technical capabilities beyond 10 years. It is very difficult to predict, plan, or project costs associated with technological innovation due to unknown technological or business constraints that could drive a product into mainstream adoption or into obsolescence. The regulated community itself has difficulty conducting business modeling beyond a 10-year time frame. Over time, the costs associated with a particular new technology may drop because of various supply and demand factors, causing the technology to be more broadly adopted. In other cases, an existing technology may be replaced by a lower-cost alternative as business needs may drive technological innovation. Extrapolating costs and benefits beyond this 10-year time frame would produce more speculative results and therefore be disadvantageous in determining actual costs and benefits likely to result from this final rule. BSEE concluded that this 10-year analysis period provides the best overall ability to forecast reliable costs and benefits likely to result from this final rule. When summarizing the costs and benefits, we present the estimated annual effects, as well as the 10-year discounted totals using discount rates of 3 and 7 percent, per OMB Circular A–4, ''Regulatory Analysis.''

Table 1 presents the total costs per year of the final rule. As seen in the table, the estimated costs over the ten-year period are $2.8 million undiscounted, $2.6 million discounted at 3%, and $2.4 million discounted at 7%.

TABLE 1—TOTAL COSTS ASSOCIATED WITH FINAL AMENDMENTS TO BOP AND WELL CONTROL REGULATIONS

[2022$]

Year	Undiscounted	Discounted at 3%	Discounted at 7%
2023	$38,046	$38,046	$38,046
2024	1,898,190	1,842,903	1,774,009
2025	38,046	35,862	33,231
2026	38,046	34,817	31,057
2027	595,852	529,407	454,573
2028	38,046	32,819	27,126
2029	38,046	31,863	25,352
2030	38,046	30,935	23,693
2031	38,046	30,034	22,143
2032	38,046	29,159	20,694

TABLE 1—TOTAL COSTS ASSOCIATED WITH FINAL AMENDMENTS TO BOP AND WELL CONTROL REGULATIONS—Continued

[2022$]

Year	Undiscounted	Discounted at 3%	Discounted at 7%
Total	2,798,410	2,635,845	2,449,924
Annualized	279,841	309,001	348,814

Note: Annualized costs are calculated by the annuity method.

Small Business Regulatory Enforcement Fairness Act, Regulatory Flexibility Act, and the Congressional Review Act

The Principal Deputy Assistant Secretary, Land and Minerals Management, certifies that this final rule will not have a significant economic impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA).

The RFA, at 5 U.S.C. 603, requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation would have a significant economic impact on a substantial number of small entities. Further, under the Congressional Review Act, 5 U.S.C. 801 *et seq.,* an agency is required to produce compliance guidance for small entities if the rule would have a significant economic impact. For the reasons explained in this section, BSEE believes that this final rule likely will not have a significant economic impact on a substantial number of small entities. BSEE provides this Regulatory Flexibility Act Analysis to demonstrate the relatively minor impact of this final rule on small entities and to support DOI's certification.

(1) Description of the Reasons That Action by the Agency Is Being Considered

Following publication of the 2019 WCR, BSEE continued to engage with stakeholders to gather information to ensure that industry was effectively implementing the governing regulatory requirements. On January 20, 2021, the President issued Executive Order (E.O.) 13990 (Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis). The accompanying ''President's Fact Sheet: List of Agency Actions for Review'' included the 2019 WCR on a list of rules the President instructed DOI to review for potential revisions to promote and protect public health and the environment, among other policy goals identified in the E.O.

(2) Description and Estimated Number of Small Entities Regulated

Small entities, as defined by the RFA, consist of small businesses, small organizations, and small governmental jurisdictions. 5 U.S.C. 601(6). We have not identified any small organizations or small government jurisdictions that the rule would impact, so this analysis focuses on impacts to small businesses. A small business is one that is independently owned and operated and that is not dominant in its field of operation. See, *e.g.,* 5 U.S.C. 601(3); 15 U.S.C. 632(a)(1). The definition of small business varies from industry to industry to properly reflect differing industry characteristics. 15 U.S.C. 632(a)(3).

The final rule will affect all well drilling operators and Federal oil and gas lease holders on the OCS, primarily those working in the Gulf of Mexico. BSEE's analysis shows that this will include 48 companies that drilled at least one offshore well during the period 2015 to 2021. Of these drilling operators, approximately 20 are likely to be active in each given year. Entities that will operate under the final rule are classified primarily under North American Industry Classification System (NAICS) codes 211120 (Crude Petroleum Extraction), 211130 (Natural Gas Extraction), and 213111 (Drilling Oil and Gas Wells). For NAICS classifications 211120 and 211130, the Small Business Administration defines a small business as one with fewer than 1,251 employees; the rest are considered large businesses (the threshold for 213111 is lower, and thus less inclusive). BSEE estimates that approximately 83 percent of offshore operators drilling on the OCS are small under this standard.

(3) Description and Estimate of Compliance Requirements

BSEE has estimated the incremental costs for small operators and lease holders in the offshore oil and natural gas production industry. BSEE did not consider costs already incurred as a result of current industry practice in accordance with existing regulations, industry permits, DWOPs, and API industry standards with which operators already comply because they are part of the baseline.

Three provisions of the final rule will have cost impacts on a substantial number of small businesses. For the amendments to § 250.730(c), BSEE estimates that the annual cost of adding an additional recipient to failure notification submissions is $101 per company. For the amendments to § 250.732(b), BSEE estimates that the annual cost of adding independent third-party qualifications to associated permit application (*e.g.,* APDs and APMs) is $682 per company. For the new requirements under § 250.737(d)(2)(ii) and (d)(3)(iii) to submit BOP testing data to BSEE when it does not witness the testing, BSEE estimates that the annual cost per company to comply with these requirements will be $58.03. The combined cost of these provisions constitutes less than 1 percent of revenues for the smallest operators and therefore is not a significant economic impact.

(4) Identification of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Final Rule

The final rule will not conflict with any relevant Federal rules or duplicate or overlap with any Federal rules in any way that will unnecessarily add cumulative regulatory burdens on small entities without any gain in regulatory benefits.

(5) Description of Significant Alternatives to the Final Rule

BSEE has considered two regulatory alternatives:

(A) Promulgate the requirements contained within the final rule.

(B) Take no regulatory action and continue to rely on existing well control regulations in combination with permit conditions, DWOPs, operator prudence, and industry standards.

Alternative 1—the final rule—would incorporate recommendations provided by government, industry, academia, and

other stakeholders. In addition to addressing concerns and aligning with industry standards, this final rule will prudently improve efficiency and consistency of the regulations.

The potential costs to small entities are believed to be small; however, the risk of safety or environmental accidents for small companies is not necessarily lower than it is for larger companies. Offshore operations are highly technical and can be hazardous. Adverse consequences in the event of incidents are similar regardless of the operator's size. The final rule will reduce risk for entities of all sizes.

Unfunded Mandates Reform Act of 1995

This final rule will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $189 million per year. The final rule will not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings Implication Assessment (E.O. 12630)

Under the criteria in E.O. 12630, this final rule does not have significant takings implications. The rule is not a governmental action capable of interference with constitutionally protected property rights. A Takings Implication Assessment is not required.

Federalism (E.O. 13132)

Under the criteria in E.O. 13132, this final rule does not have federalism implications. This final rule does not substantially and directly affect the relationship between the Federal and State governments. To the extent that State and local governments have a role in OCS activities, this final rule does not affect that role. A federalism assessment is not required.

Civil Justice Reform (E.O. 12988)

This final rule complies with the requirements of E.O. 12988. Specifically, this rule:

(1) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(2) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (E.O. 13175)

BSEE strives to strengthen its government-to-government relationships with Tribal Nations and Alaska Natives through a commitment to consultation with the Tribes and recognition of their right to self-governance and Tribal sovereignty. We are also respectful of our responsibilities for consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations. BSEE evaluated the subject matter of this rulemaking under the criteria in E.O. 13175, Consultation and Coordination with Indian Tribal Governments (dated November 6, 2000), DOI's Policy on Consultation with Indian Tribes and Policy on Consultation with Alaska Native Claims Settlement Act Corporations (512 Departmental Manual 4, dated November 30, 2022 and 512 Departmental Manual 6, dated November 30, 2022, respectively), and DOI's Procedures for Consultation with Indian Tribes and Procedures for Consultation with Alaska Native Claims Settlement Act Corporations (512 Departmental Manual 5, dated November 30, 2022, and 512 Departmental Manual 7, dated November 30, 2022, respectively) and determined that it has no substantial direct effects on Tribal Nations or Alaska Natives. Therefore, consultation under E.O. 13175 and DOI's Procedures for Consultation with Tribal Nations and ANCSA Corporations is not required.

Paperwork Reduction Act (PRA) of 1995

This final 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 30 CFR part 250, subpart G, Well Operations and Equipment, and assigned OMB Control Number 1014–0028. That approval is currently with OMB under the renewal process, and in accordance with 5 CFR 1320.10, an agency may continue to conduct or sponsor this collection of information while the submission is pending at OMB. The currently approved annual burden associated with this information collection is 160,842 hours. 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.

During the proposed rule stage, BSEE suggested changing the requirements in subpart G, Well Operations and Equipment, by revising regulatory provisions published in the 2019 WCR for drilling, workover, completion, and decommissioning operations. These changes provide clarity to BOP system requirements and revise a few specific BOP equipment capabilities. These proposed changes were estimated to add 10 burden hours to the 1014–0028 collection.

The following provides a breakdown of the paperwork hour burdens and non-hour cost burdens for this final rule.

Section 250.730—This section will add text requiring that BSEE and the designated third party receive failure reports. This will result in no burden changes in the currently approved failure reporting burden because adding BSEE to already-required transmissions to third parties would impose minimal to no additional burden.

Section 250.732(b)—This section will add to the current paragraph that the independent third party qualifications must be sent to BSEE with the associated permit application (hour burden and any associated fees are covered under 1014–0025 or 1014–0026); furthermore, there are no changes in hour burden. Any anticipated burdens are miniscule and won't add any additional burdens to the permitting process.

Section 250.737(d)(2) and (3)—This section will add the requirement that if BSEE is unable to witness BOP testing, the operator must provide the initial test results to the appropriate District Manager within 72 hours after completion of the tests. The 2019 WCR provisions removed this requirement from the regulations. Yet, BSEE inadvertently never removed the IC burden associated with this requirement; therefore, no burden changes are needed.

National Environmental Policy Act of 1969 (NEPA)

BSEE analyzed the provisions of the rule in compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) to determine whether they could have a significant impact on the quality of the human environment. The DOI implementing regulations for NEPA encourage the use of existing NEPA analyses when a bureau determines those analyses ''adequately assess[ ] the environmental effects of the proposed action and reasonable alternatives,'' and the supporting record for that determination evaluates ''whether new circumstances, new information[,] or

changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.'' (43 CFR 46.120)

BSEE prepared Environmental Assessments (EAs) for both the 2016 WCR and the 2019 WCR. Those EAs analyzed the environmental effects of regulatory revisions the same as or similar to those contained in this final rule, because the majority of this rule reverts to the regulatory standards established in the 2016 WCR (and revised through the 2019 WCR). Both EAs resulted in a Finding of No Significant Impact. BSEE evaluated this rulemaking through a Determination of NEPA Adequacy (DNA) and found that the previous EAs adequately assessed the environmental effects of the potentially impact-producing portions of this rulemaking and that no new circumstances, new information, or changes in the action or its impacts exist that could result in significantly different environmental effects than those analyzed in the previous EAs. The balance of the changes in the final rule are purely administrative in nature with no potential for environmental impacts. Consequently, no additional NEPA analysis is required.

Data Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554, app. C, sec. 515, 114 Stat. 2763, 2763A–153–154).

Effects on the Nation's Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. The rule is not a significant regulatory action under E.O. 12866, as amended by Executive Order 14094, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. A Statement of Energy Effects is not required.

List of Subjects in 30 CFR Part 250

Administrative practice and procedure, Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Incorporation by reference, Investigations, Oil and gas exploration, Outer Continental Shelf—mineral resources, Outer Continental Shelf—rights-of-way, Penalties, Pipelines, Reporting and recordkeeping requirements, Sulfur.

Laura Daniel-Davis,

Principal Deputy Assistant Secretary, Land and Minerals Management.

For the reasons stated in the preamble, the Department of the Interior amends 30 CFR part 250 as follows:

PART 250—OIL AND GAS AND SULFUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

■ 1. The authority citation for part 250 continues to read as follows:

Authority: 30 U.S.C. 1751, 31 U.S.C. 9701, 33 U.S.C. 1321(j)(1)(C), 43 U.S.C. 1334.

■ 2. Amend § 250.730 by revising paragraphs (a) introductory text and (c) to read as follows:

§ 250.730 What are the general requirements for BOP systems and system components?

(a) You must ensure that the BOP system and system components are designed, installed, maintained, inspected, tested, and used properly to ensure well control. The working-pressure rating of each BOP component (excluding annular(s)) must exceed MASP as defined for the operation. For a subsea BOP, the MASP must be determined at the mudline. The BOP system includes the BOP stack, control system, and any other associated system(s) and equipment. The BOP system and individual components must be able to perform their expected functions and be compatible with each other. Your BOP system must be capable of closing and sealing the wellbore to the well's MASP at all times, except as otherwise specified in the BOP system requirements of this subpart. The BOP system must be capable of closing and sealing without losing ram closure time and sealing integrity due to the corrosiveness, volume, and abrasiveness of any fluids in the wellbore that the BOP system may encounter. Your BOP system must meet the following requirements:

* * * * *

(c) You must follow the failure reporting procedures contained in API Standard 53 (incorporated by reference in § 250.198) and:

(1) You must provide a written notice of equipment failure to the Office of Offshore Regulatory Programs (OORP) Chief, any third party designated by BSEE pursuant to paragraph (c)(4) of this section, and the manufacturer of such equipment within 30 days after the discovery and identification of the failure. A failure is any condition that prevents the equipment from meeting the functional specification.

(2) You must start an investigation and a failure analysis within 90 days of the failure to determine the cause of the failure and complete the investigation and the failure analysis within 120 days after initiation. You also must document the results and any corrective action. You must submit the analysis report to the OORP Chief, any third party designated by BSEE pursuant to paragraph (c)(4) of this section, and the manufacturer. If you cannot complete the investigation and analysis within the specified time, you must submit an extension request detailing when and how you will complete the investigation and analysis to BSEE for approval. You must submit the extension request to the OORP Chief.

(3) If the equipment manufacturer notifies you that it has changed the design of the equipment that failed or if you have changed operating or repair procedures as a result of a failure, then you must, within 30 days of such changes, report the design change or modified procedures in writing to the OORP Chief, and any third party designated by BSEE pursuant to paragraph (c)(4) of this section.

(4) Submit notices and reports to the Chief, Office of Offshore Regulatory Programs; Bureau of Safety and Environmental Enforcement; 45600 Woodland Road, Sterling, Virginia 20166. BSEE may designate a third party to also receive the data and reports. If BSEE designates a third party, you must submit the data and reports to the designated third party as well.

* * * * *

■ 3. Amend § 250.732 by revising paragraph (b) to read as follows:

§ 250.732 What are the independent third party requirements for BOP systems and system components?

* * * * *

(b) The independent third party must be a technical classification society, a licensed professional engineering firm, or a registered professional engineer capable of providing the required certifications and verifications. You must submit the independent third party qualifications to BSEE with the associated permit application (*e.g.,* APD and APM). BSEE will evaluate the submitted qualifications to ensure they meet the regulatory requirements for permit approval.

* * * * *

■ 4. Amend § 250.733 by revising paragraph (b)(1) to read as follows:

§ 250.733 What are the requirements for a surface BOP stack?

* * * * *

(b) * * *

(1) On new floating production facilities installed after April 29, 2021, that include a surface BOP, or when you replace an entire surface BOP stack on an existing floating production facility, follow the BOP requirements in § 250.734(a)(1).

* * * * *

■ 5. Amend § 250.734 by revising paragraph (a)(4) to read as follows:

§ 250.734 What are the requirements for a subsea BOP system?

(a) * * *

When operating with a subsea BOP system, you must:	Additional requirements
* *	* * * * * * *
(4) Have a subsea BOP stack equipped with remotely operated vehicle (ROV) intervention capability.	You must have the ROV intervention capability to open and close each shear ram, ram locks, one pipe ram, and disconnect the lower marine riser package (LMRP) under MASP conditions as defined for the operation. You must be capable of performing these functions in the response times outlined in API Standard 53 (as incorporated by reference in § 250.198). The ROV panels on the BOP and LMRP must be compliant with API RP 17H (as incorporated by reference in § 250.198).
* *	* * * * * * *

* * * * *

■ 6. Amend § 250.737 by revising paragraphs (d)(2)(ii) and (d)(3)(iii) to read as follows:

§ 250.737 What are the BOP system testing requirements?

* * * * *

(d) * * *

You must . . .	Additional requirements . . .
* *	* * * * * * *
(2) * * *	(ii) Contact the District Manager at least 72 hours prior to beginning the initial test to allow BSEE representative(s) to witness the testing. If BSEE representative(s) are unable to witness the testing, you must provide the initial test results to the appropriate District Manager within 72 hours after completion of the tests.
* *	* * * * * * *
(3) * * *	(iii) Contact the District Manager at least 72 hours prior to beginning the stump test to allow BSEE representative(s) to witness the testing. If BSEE representative(s) are unable to witness the testing, you must provide the test results to the appropriate District Manager within 72 hours after completion of the tests.
* *	* * * * * * *

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[FR Doc. 2023–17847 Filed 8–22–23; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF THE TREASURY

Office of Investment Security

31 CFR Part 802

[Docket ID TREAS–DO–2023–0006]

RIN 1505–AC82

Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States

AGENCY: Office of Investment Security, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This final rule adopts without change the proposed rule amending the definition of ''military installation'' and adding eight military installations to the appendix in the regulations of the Committee on Foreign Investment in the United States that implement the provisions relating to real estate transactions pursuant to the Defense Production Act of 1950, as amended. This rule also makes technical amendments in the form of name changes to five military installations.

DATES: This final rule is effective September 22, 2023.

FOR FURTHER INFORMATION CONTACT: For questions about this rule, contact: Meena R. Sharma, Acting Director, Office of Investment Security Policy and International Relations, or James Harris, Senior Policy Advisor, at U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220; telephone: (202) 622–3425; email: *CFIUS.FIRRMA@treasury.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Proposed Definition of Military Installation and Appendix A

On May 5, 2023, the U.S. Department of the Treasury (Treasury Department) published in the **Federal Register** a proposed rule (88 FR 29003) amending the definition of ''military installation'' and adding eight military installations to the list at appendix A of the regulations in part 802 to title 31 of the Code of Federal Regulations (part 802) that implement the provisions relating to real estate transactions pursuant to section 721 of the Defense Production Act of 1950, as amended (section 721). Part 802 sets forth the processes and procedures of the Committee on Foreign Investment in the United States (CFIUS) for reviewing transactions involving the purchase or lease by, or concession to, a foreign person of certain real estate in the United States. Appendix A identifies, among other things, the bases, ranges, and other installations

that meet the definition of ''military installation'' at § 802.227. The amendments were proposed as a result of the ongoing evaluation of military installations by the U.S. Department of Defense (Defense Department).

B. Additional Technical Amendments To Update the Names of Certain Military Installations

This final rule also includes technical amendments to update the names of five military installations at appendix A: Fort Cavazos (formerly Fort Hood); Fort Gregg-Adams (formerly Fort Lee); Fort Johnson (formerly Fort Polk); Fort Liberty (formerly Fort Bragg); and Fort Moore (formerly Fort Benning). These are name changes to installations already on the list at appendix A and reflect decisions made by the Defense Department to implement the recommendations of the Defense Department Naming Commission. The military installation name changes in this final rule are those that have officially been changed by the Defense Department as of the publication date of this rule in the **Federal Register**. Additional bases may be renamed in the future, and information on the full list of recommended name changes is available at *https://media.defense.gov/2022/Oct/06/2003092544/-1/-1/1/IMPLEMENTATION-OF-THE-NAMING-COMMISSIONS-RECOMMENDATIONS.PDF* and *https://www.defense.gov/News/News-Stories/Article/Article/3260434/dod-begins-implementing-naming-commission-recommendations/.*

C. Additional Guidance

The Treasury Department, in coordination with the Defense Department and the U.S. Department of Commerce's Census Bureau (Census Bureau), makes available a web-based tool to help the public understand the geographic coverage of part 802. This web-based tool is available at *https://mtgis-portal.geo.census.gov/arcgis/apps/webappviewer/index.html?id=0bb1d5751d76498181b4b531987ce263* and allows users to input an address and determine the distance to certain military installations. The tool was developed to assist the public and is provided for reference only; it should not be interpreted as guidance or an advisory opinion by CFIUS with respect to any particular transaction.

II. Summary of Comments

The public was provided an opportunity to comment on the proposed rule, and comments were due by June 5, 2023. During the public comment period, the Treasury Department received five comments reflecting a range of views. All comments received are available on the public rulemaking docket at *https://www.regulations.gov* and are addressed herein.

The Treasury Department considered each comment submitted on the proposed rule. One commenter expressed the view that these provisions should be expanded to U.S. developers and realtors to address the overdevelopment of U.S. land located in natural disaster zones. The rule makes no change in response to this comment as it is outside the scope of section 721.

One commenter expressed the view that the regulations should further address risks posed by incompatible development around military installations such as from the construction of obstructions, visual and other interference from certain land uses, and light emissions, among other things. The commenter further expressed a view with respect to adding air installations to appendix A and related operational security risks. The rule makes no change in response to these comments. The Treasury Department and the Defense Department consult on the composition of appendix A and part 802 more broadly, taking into account the statutory requirements under section 721 and a variety of considerations.

One commenter requested guidance regarding whether legal name changes, inherited property, and gifts to relatives would be within the definition of a covered real estate transaction under part 802. The rule makes no change in response to this comment. Consistent with section 721 and as defined in § 802.212(a), a covered real estate transaction includes any purchase or lease by, or concession to, a foreign person of covered real estate that affords the foreign person at least three property rights under § 802.233. Real estate acquired by gift or inheritance is distinct from a purchase, lease, or concession as those terms are defined in part 802. By contrast, a person or entity that amends a property record or document to reflect a legal name change may or may not have engaged in a purchase, lease, or concession as those terms are defined in part 802—further analysis of the underlying reason for the name change would be required. For example, a corporate name change may follow an acquisition transaction, which, depending on the rights conveyed in that transaction, could be a covered real estate transaction (or be subject to CFIUS's jurisdiction relating to foreign investment in U.S. businesses which is detailed in 31 CFR part 800). As a general reminder, the Treasury Department notes that pursuant to § 802.212, the definition of a ''covered real estate transaction'' includes any transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of section 721 as it relates to real estate transactions.

One commenter suggested adding Whiteman Air Force Base in Missouri to the list of military installations at appendix A. The rule makes no change in response to this comment. As noted in the proposed rule, the Defense Department will continue on an ongoing basis to assess its military installations and the geographic scope set under the rule to ensure appropriate application in light of national security considerations.

One commenter suggested an amendment to § 802.216(c) to exclude from the definition of ''excepted real estate transaction'' any purchase, lease, or concession of covered real estate by a person owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary. The rule makes no change in response to this comment. The Treasury Department and the Defense Department consult on the definition of ''excepted real estate transaction'' taking into account the statutory requirements under section 721 and a variety of considerations.

No additional comments were received. The final rule therefore adopts the proposed rule without change other than the technical amendments described above.

III. Rulemaking Requirements

Executive Order 12866

This rule is not subject to the general requirements of Executive Order 12866, as amended, which covers review of regulations by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), because it relates to a foreign affairs function of the United States, pursuant to section 3(d)(2) of that order. In addition, this rule is not subject to review under section 6(b) of Executive Order 12866 pursuant to section 1(d) of the June 9, 2023, Memorandum of Agreement between the Treasury Department and OMB, which states that CFIUS regulations are not subject to OMB's standard centralized review process under Executive Order 12866.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to prepare a regulatory flexibility analysis, unless the agency

certifies that the rule, once implemented, will not have a significant economic impact on a substantial number of small entities. The final rule makes amendments to part 802 (see 85 FR 3158), which the Treasury Department previously determined would not significantly impact a substantial number of small entities. The amendments in this rule do not change that analysis or determination.

Congressional Review Act

This rule has been submitted to the OMB's Office of Information and Regulatory Affairs, which has determined that the rule is not a ''major'' rule under the Congressional Review Act.

List of Subjects in 31 CFR Part 802

Foreign investments in the United States, Federal buildings and facilities, Government property, Investigations, Investments, Investment companies, Land sales, National defense, Public lands, Real property acquisition, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Treasury Department amends 31 CFR part 802 as follows:

PART 802—REGULATIONS PERTAINING TO CERTAIN TRANSACTIONS BY FOREIGN PERSONS INVOLVING REAL ESTATE IN THE UNITED STATES

■ 1. The authority citation for part 802 continues to read as follows:

Authority: 50 U.S.C. 4565; E.O. 11858, as amended, 73 FR 4677.

Subpart B—Definitions

§ 802.227 [Amended]

■ 2. Amend § 802.227, in paragraph (m), by removing the words ''Oregon, Nevada, Idaho, Wisconsin, Mississippi, North Carolina, or Florida'' and adding in their place ''Arizona, California, Florida, Idaho, Iowa, Mississippi, Nevada, North Carolina, North Dakota, Oregon, South Dakota, Texas, or Wisconsin''.

■ 3. Revise parts 1 and 2 of appendix A to part 802 to read as follows:

Appendix A to Part 802—List of Military Installations and Other U.S. Government Sites

Site name	Location
Part 1	
Adelphi Laboratory Center	Adelphi, MD.
Air Force Maui Optical and Supercomputing Site	Maui, HI.
Air Force Office of Scientific Research	Arlington, VA.
Andersen Air Force Base	Yigo, Guam.
Army Futures Command	Austin, TX.
Army Research Lab—Orlando Simulations and Training Technology Center	Orlando, FL.
Army Research Lab—Raleigh Durham	Raleigh Durham, NC.
Arnold Air Force Base	Coffee County and Franklin County, TN.
Beale Air Force Base	Yuba City, CA.
Biometric Technology Center (Biometrics Identity Management Activity)	Clarksburg, WV.
Buckley Air Force Base	Aurora, CO.
Camp MacKall	Pinebluff, NC.
Cape Cod Air Force Station	Sandwich, MA.
Cape Newenham Long Range Radar Site	Cape Newenham, AK.
Cavalier Air Force Station	Cavalier, ND.
Cheyenne Mountain Air Force Station	Colorado Springs, CO.
Clear Air Force Station	Anderson, AK.
Creech Air Force Base	Indian Springs, NV.
Davis-Monthan Air Force Base	Tucson, AZ.
Defense Advanced Research Projects Agency	Arlington, VA.
Eareckson Air Force Station	Shemya, AK.
Eielson Air Force Base	Fairbanks, AK.
Ellington Field Joint Reserve Base	Houston, TX.
Fairchild Air Force Base	Spokane, WA.
Fort Belvoir	Fairfax County, VA.
Fort Bliss	El Paso, TX.
Fort Campbell	Hopkinsville, KY.
Fort Carson	Colorado Springs, CO.
Fort Cavazos	Killeen, TX.
Fort Detrick	Frederick, MD.
Fort Drum	Watertown, NY.
Fort Gordon	Augusta, GA.
Fort Gregg-Adams	Petersburg, VA.
Fort Knox	Fort Knox, KY.
Fort Leavenworth	Leavenworth, KS.
Fort Leonard Wood	Pulaski County, MO.
Fort Meade	Anne Arundel County, MD.
Fort Moore	Columbus, GA.
Fort Riley	Junction City, KS.
Fort Shafter	Honolulu, HI.
Fort Sill	Lawton, OK.
Fort Stewart	Hinesville, GA.
Fort Yukon Long Range Radar Site	Fort Yukon, AK.
Francis E. Warren Air Force Base	Cheyenne, WY.
Guam Tracking Station	Inarajan, Guam.
Hanscom Air Force Base	Lexington, MA.
Holloman Air Force Base	Alamogordo, NM.
Holston Army Ammunition Plant	Kingsport, TN.

Site name	Location
Joint Base Anacostia-Bolling	Washington, DC.
Joint Base Andrews	Camp Springs, MD.
Joint Base Elmendorf-Richardson	Anchorage, AK.
Joint Base Langley-Eustis	Hampton, VA and Newport News, VA.
Joint Base Lewis-McChord	Tacoma, WA.
Joint Base McGuire-Dix-Lakehurst	Lakehurst, NJ.
Joint Base Pearl Harbor-Hickam	Honolulu, HI.
Joint Base San Antonio	San Antonio, TX.
Joint Expeditionary Base Little Creek-Fort Story	Virginia Beach, VA.
Kaena Point Satellite Tracking Station	Waianae, HI.
King Salmon Air Force Station	King Salmon, AK.
Kirtland Air Force Base	Albuquerque, NM.
Kodiak Tracking Station	Kodiak Island, AK.
Los Angeles Air Force Base	El Segundo, CA.
MacDill Air Force Base	Tampa, FL.
Malmstrom Air Force Base	Great Falls, MT.
Marine Corps Air Ground Combat Center Twentynine Palms	Twentynine Palms, CA.
Marine Corps Air Station Beaufort	Beaufort, SC.
Marine Corps Air Station Cherry Point	Cherry Point, NC.
Marine Corps Air Station Miramar	San Diego, CA.
Marine Corps Air Station New River	Jacksonville, NC.
Marine Corps Air Station Yuma	Yuma, AZ.
Marine Corps Base Camp Lejeune	Jacksonville, NC.
Marine Corps Base Camp Pendleton	Oceanside, CA.
Marine Corps Base Hawaii	Kaneohe Bay, HI.
Marine Corps Base Hawaii, Camp H.M. Smith	Halawa, HI.
Marine Corps Base Quantico	Quantico, VA.
Mark Center	Alexandria, VA.
Minot Air Force Base	Minot, ND.
Moody Air Force Base	Valdosta, GA.
Naval Air Station Joint Reserve Base New Orleans	Belle Chasse, LA.
Naval Air Station Oceana	Virginia Beach, VA.
Naval Air Station Oceana Dam Neck Annex	Virginia Beach, VA.
Naval Air Station Whidbey Island	Oak Harbor, WA.
Naval Base Guam	Apra Harbor, Guam.
Naval Base Kitsap Bangor	Silverdale, WA.
Naval Base Point Loma	San Diego, CA.
Naval Base San Diego	San Diego, CA.
Naval Base Ventura County—Port Hueneme Operating Facility	Port Hueneme, CA.
Naval Research Laboratory	Washington, DC.
Naval Research Laboratory—Blossom Point	Welcome, MD.
Naval Research Laboratory—Stennis Space Center	Hancock County, MS.
Naval Research Laboratory—Tilghman	Tilghman, MD.
Naval Station Newport	Newport, RI.
Naval Station Norfolk	Norfolk, VA.
Naval Submarine Base Kings Bay	Kings Bay, GA.
Naval Submarine Base New London	Groton, CT.
Naval Surface Warfare Center Carderock Division—Acoustic Research Detachment	Bayview, ID.
Naval Support Activity Crane	Crane, IN.
Naval Support Activity Orlando	Orlando, FL.
Naval Support Activity Panama City	Panama City, FL.
Naval Support Activity Philadelphia	Philadelphia, PA.
Naval Support Facility Carderock	Bethesda, MD.
Naval Support Facility Dahlgren	Dahlgren, VA.
Naval Support Facility Indian Head	Indian Head, MD.
Naval Weapons Station Seal Beach Detachment Norco	Norco, CA.
New Boston Air Station	New Boston, NH.
Offutt Air Force Base	Bellevue, NE.
Oliktok Long Range Radar Site	Oliktok, AK.
Orchard Combat Training Center	Boise, ID.
Peason Ridge Training Area	Leesville, LA.
Pentagon	Arlington, VA.
Peterson Air Force Base	Colorado Springs, CO.
Picatinny Arsenal	Morris County, NJ.
Piñon Canyon Maneuver Site	Tyrone, CO.
Pohakuloa Training Area	Hilo, HI.
Point Barrow Long Range Radar Site	Point Barrow, AK.
Portsmouth Naval Shipyard	Kittery, ME.
Radford Army Ammunition Plant	Radford, VA.
Redstone Arsenal	Huntsville, AL.
Rock Island Arsenal	Rock Island, IL.
Rome Research Laboratory	Rome, NY.
Schriever Air Force Base	Colorado Springs, CO.
Seymour Johnson Air Force Base	Goldsboro, NC.

Site name	Location
Shaw Air Force Base	Sumter, SC.
Southeast Alaska Acoustic Measurement Facility	Ketchikan, AK.
Tin City Long Range Radar Site	Tin City, AK.
Tinker Air Force Base	Midwest City, OK.
Travis Air Force Base	Fairfield, CA.
Tyndall Air Force Base	Bay County, FL.
U.S. Army Natick Soldier Systems Center	Natick, MA.
Watervliet Arsenal	Watervliet, NY.
Wright-Patterson Air Force Base	Dayton, OH.
Part 2	
Aberdeen Proving Ground	Aberdeen, MD.
Air Force Plant 42	Palmdale, CA.
Camp Shelby	Hattiesburg, MS.
Cape Canaveral Air Force Station	Cape Canaveral, FL.
Dare County Range	Manns Harbor, NC.
Dyess Air Force Base	Abilene, TX.
Edwards Air Force Base	Edwards, CA.
Eglin Air Force Base	Valparaiso, FL.
Ellsworth Air Force Base	Box Elder, SD.
Fallon Range Complex	Fallon, NV.
Fort Greely	Delta Junction, AK.
Fort Huachuca	Sierra Vista, AZ.
Fort Irwin	San Bernardino County, CA.
Fort Johnson	Leesville, LA.
Fort Liberty	Fayetteville, NC.
Fort Wainwright	Fairbanks, AK.
Grand Forks Air Force Base	Grand Forks, ND.
Hardwood Range	Necehuenemedah, WI.
Hill Air Force Base	Ogden, UT.
Iowa National Guard Joint Force Headquarters	Des Moines, IA.
Lackland Air Force Base	San Antonio, TX.
Laughlin Air Force Base	Del Rio, TX.
Luke Air Force Base	Glendale, AZ.
Mountain Home Air Force Base	Mountain Home, ID.
Naval Air Station Meridian	Meridian, MS.
Naval Air Station Patuxent River	Lexington Park, MD.
Naval Air Weapons Station China Lake	Ridgecrest, CA.
Naval Base Kitsap—Keyport	Keyport, WA.
Naval Base Ventura County—Point Mugu Operating Facility	Point Mugu, CA.
Naval Weapons Systems Training Facility Boardman	Boardman, OR.
Nellis Air Force Base	Las Vegas, NV.
Nevada Test and Training Range	Tonopah, NV.
Pacific Missile Range Facility	Kekaha, HI.
Patrick Air Force Base	Cocoa Beach, FL.
Tropic Regions Test Center	Wahiawa, HI.
Utah Test and Training Range	Barro, UT.
Vandenberg Air Force Base	Lompoc, CA.
West Desert Test Center	Dugway, UT.
White Sands Missile Range	White Sands Missile Range, NM.
Yuma Proving Ground	Yuma, AZ.

* * * * *

Paul M. Rosen,

Assistant Secretary for Investment Security.

[FR Doc. 2023–17678 Filed 8–22–23; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0700]

RIN 1625–AA87

Security Zone; Lake Tahoe, Glenbrook, NV

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone in the navigable waters of Lake Tahoe, Glenbrook, NV within the San Francisco Captain of the Port Zone. This moving security zone will encompass all navigable waters within 100 yards of the vessel carrying high-ranking government officials and their official party. The security zone is necessary to protect the harbors, ports, and waterfront facilities of Lake Tahoe during a visit by high-ranking government officials and their official party. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port San Francisco or a designated representative.

DATES: This rule is effective without actual notice from August 23, 2023 through August 27, 2023. For the purposes of enforcement, actual notice will be used from August 18, 2023, until August 23, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0700 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 about this rule, call or email LT William Harris, U.S. Coast Guard Sector San Francisco, Waterways Management Division; telephone 415–399–7443, email *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable and contrary to the public interest. The Coast Guard was notified of the need of this security zone with less than two weeks' notice and did not receive final details until August 16, 2023. The high-ranking government official visit will occur before the completion of any comment period, thereby jeopardizing the security of the official and the harbors, ports, and waterfront facilities of Lake Tahoe. Additionally, it is impracticable to publish an NPRM because the visit is scheduled to occur on August 18–27, 2023, and we must establish this security zone by those dates. We lack sufficient time to solicit public comments and review the prior to issuing a final action.

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 would be impracticable because immediate action is needed to provide for the protection of high-ranking government officials, security of the harbors, ports, and waterfront facilities, and mitigation of potential subversive acts.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70051 and 70124. The Captain of the Port (COTP) has determined that the high-ranking government officials and their official party plan to visit various locations throughout the Lake Tahoe area and will transit the lake by boat, necessitating a moving security zone. The navigable waters of Lake Tahoe are in the San Francisco COTP zone. This rule is needed to ensure the safety of high-ranking government officials and their official party.

IV. Discussion of the Rule

This rule establishes a moving security zone from August 18 through 27, 2023. The moving security zone will cover all navigable waters of Lake Tahoe, from surface to bottom, within 100 yards of the vessel carrying high-ranking government officials and their official party. This zone will be in effect from 12:01 a.m. on August 18, 2023, until 11:59 p.m. on August 27, 2023, and enforced as necessary during that period.

The duration of this zone is intended to protect the harbors, ports, and waterfront facilities during the high-ranking government officials' visit to the local area and to ensure the safety of the official party. No vessel or person will be permitted to enter the security zone except for authorized support vessels, aircraft, and support personnel, or other vessels authorized by 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, and duration of the security zone. The effect of this rule will not be significant because local waterway users will be notified by on-scene enforcement to ensure the security zone will result in minimal impact. Additionally, vessel traffic will be able to pass safely around the area of the security zone. The entities most likely to be affected are pleasure craft engaged in recreational activities. The rule will allow vessels to seek permission to enter the zone by contacting the COTP or the COTP's designated representative through the Command Post at telephone (202) 604–8857 or by VHF Marine Radio channel 21A.

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 security zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture

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

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a temporary moving security zone of limited duration in effect over a period of ten days. 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.T11–138 to read as follows:

§ 165.T11–138 Security Zone: Lake Tahoe, Glenbrook, NV.

(a) *Location.* The following area is a security zone: (1) All waters within 100 yards of the vessel carrying high ranking government officials and members of their official party when transiting Lake Tahoe.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel, and a Federal, State, or local officer designated by or assisting the Captain of the Port (COTP) San Francisco in the enforcement of the security zone.

(c) *Regulations.* (1) Under the general security zone regulations in subpart D of this part, you may not enter the security zone described in paragraph (a) of this section unless authorized by the COTP or a designated representative.

(2) The security zone is closed to all vessel traffic, except as may be permitted by the COTP or a designated representative.

(3) To seek permission to enter, contact the COTP or the COTP's designated representative through the Command Post at telephone (202) 604–8857 or by VHF Marine Radio channel 21A. Those in the security zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced, when necessary, from 12:01 a.m. on August 18, 2023, until 11:59 p.m. on August 27, 2023.

Dated: August 17, 2023.

Taylor Q. Lam,

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

[FR Doc. 2023–18168 Filed 8–22–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0699]

RIN 1625–AA87

Security Zone; Lake Tahoe, Glenbrook, NV

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone in the navigable waters of Lake Tahoe, Glenbrook, NV within the San Francisco Captain of the Port Zone. The security zone is along the Lake Tahoe shoreline from approximately 200 yards from shore in the Glenbrook area. The security zone is necessary to protect the harbors, ports, and waterfront facilities of Lake Tahoe during a visit by high-ranking government officials and their official party. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port San Francisco or a designated representative.

DATES: This rule is effective without actual notice from August 23, 2023 through August 27, 2023. For the

purposes of enforcement, actual notice will be used from August 18, 2023, until August 23, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0699 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 about this rule, call or email LT William Harris, U.S. Coast Guard Sector San Francisco, Waterways Management Division; telephone 415–399–7443, email *SFWaterways@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable and contrary to the public interest. The Coast Guard was notified of the need of this security zone with less than two weeks' notice and did not receive final details until August 16, 2023. The high-ranking government official visit will occur before completion of any comment period, thereby jeopardizing the security of the official and the harbors, ports, and waterfront facilities of Lake Tahoe. Additionally, it is impracticable to publish an NPRM because the visit is scheduled to occur on August 18–27, 2023, and we must establish this security zone by those dates. We lack sufficient time to solicit comments and review them prior to issuing a final action.

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 would be impracticable because immediate action is needed to provide for the protection of high-ranking government officials, security of the harbors, ports, and waterfront facilities, and mitigation of potential subversive acts.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70051 and 70124. The Captain of the Port (COTP) has determined that the high-ranking government officials and their official party plan to visit the Glenbrook, NV area on Lake Tahoe. This area is located adjacent to U.S. navigable waters in the San Francisco COTP zone. This rule is needed to ensure the safety of high-ranking government officials and their official party.

IV. Discussion of the Rule

This rule establishes a security zone from August 18 through August 27, 2023. This security zone will cover all navigable waters of Lake Tahoe, from surface to bottom, within the area formed by connecting the following latitude and longitude points in the following order: 39°5′33.7″ N, 119°56′37.8″ W; thence to 39°5′36.7″ N, 119°56′28.2″ W; thence along the shore to 39°5′30.8″ N, 119°56′25.6″ W; thence to 39°5′29.7″ N, 119°56′36.2″ W and thence to the point of beginning. This zone will be in effect from 12:01 a.m. on August 18, 2023, until 11:59 p.m. on August 27, 2023.

The duration of this zone is intended to protect the harbors, ports, and waterfront facilities during the high-ranking government officials' visit to the local area and to ensure the safety of the official party. No vessel or person will be permitted to enter the security zone except for authorized support vessels, aircraft, and support personnel, or other vessels authorized by 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, and duration of the security zone. The effect of this rule will not be significant because local waterways users will be notified by on-scene enforcement to ensure the security zone will result in minimum impact. Additionally, vessel traffic will be able to pass safely around the area of the security zone. The entities most likely to be affected are pleasure craft engaged in recreational activities. The rule will allow vessels to seek permission to enter the zone by contacting the COTP or the COTP's designated representative through the Command Post at telephone (202) 604–8857 or by VHF Marine Radio channel 21A.

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 security 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 security zone in effect 24 hours a day over a period of ten days. 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.T11–137 to read as follows:

§ 165.T11–137 Security Zone: Lake Tahoe, Glenbrook, NV.

(a) *Location.* The following area is a security zone: All navigable waters, from surface to bottom, within the area formed by connecting the following latitude and longitude points in the following order: 39°5′33.7″ N, 119°56′37.8″ W; thence to 39°5′36.7″ N, 119°56′28.2″ W; thence to 39°5′30.8″ N, 119°56′25.6″ W; thence to 39°5′29.7″ N, 119°56′36.2″ W and thence along the shoreline to the point of beginning.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel, and a Federal, State, or local officer designated by or assisting the Captain of the Port (COTP) San Francisco in the enforcement of the security zone.

(c) *Regulations.* (1) Under the general security zone regulations in subpart D of this part, you may not enter the security zone described in paragraph (a) of this section unless authorized by the COTP or a designated representative.

(2) The security zone is closed to all vessel traffic, except as may be permitted by the COTP or a designated representative.

(3) To seek permission to enter, contact the COTP or the COTP's designated representative through the Command Post at telephone (202) 604–8857 or by VHF Marine Radio channel 21A. Those in the security zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced from 12:01 a.m. on August 18, 2023, until 11:59 p.m. on August 27, 2023.

Dated: August 17, 2023.

Taylor Q. Lam,

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

[FR Doc. 2023–18170 Filed 8–22–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0705]

RIN 1625–AA00

Safety Zone; La Quinta and Corpus Christi Shipping Channel, Ingleside, TX

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary, moving safety zone for all navigable waters of the La Quinta and Corpus Christi Shipping Channel between gated pair lights 11 and 12 to the Sea buoy. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the rig NFE PIONEER I while it is towed offshore from the Kiewit Offshore Services facility. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Corpus Christi or a designated representative.

DATES: This rule is effective from 6 a.m. to 6 p.m. from August 21, 2023, through August 26, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0705 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

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

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. We must establish this safety zone immediately to protect personnel, vessels, and the marine environment from potential hazards created by the possibility that a Floating Production Unit being towed by a heavy-lift vessel could separate from the towing vessel and float off, and we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with towing the offshore rig through the La Quinta Channel and Corpus Christi Shipping Channel.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port, Sector Corpus Christi (COTP) has determined that hazards inherent in the towing of the rig NFE PIONEER I, which will take place between August 21, 2023 and August 26, 2023, will be a safety concern for anyone within the La Quinta and Corpus Christi Shipping Channel between gated pair lights 11 and 12 and the Sea buoy. The purpose of this rule is to ensure safety of vessels and persons on these navigable waters in the safety zone while the rig is being towed.

IV. Discussion of the Rule

This rule is effective from 6 a.m. to 6 p.m. from August 21, 2023, through August 26, 2023. The transit will begin at the Kiewit Offshore Services facility, adjacent to the La Quinta Channel between gated pair lights 11 and 12 to the Sea buoy. No vessel or person will be permitted to enter the temporary, moving safety zone during the effective period without obtaining permission from the COTP or a designated representative, who may be contacted on Channel 16 VHF–FM (156.8 MHz) or by telephone at 361–939–0450. The Coast Guard will issue Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety Marine Information Broadcasts as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866 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, and duration of the safety zone. This safety zone covers a 5 nautical mile area of the La Quinta and Corpus Christi Shipping Channel near Ingleside, TX. The temporary, moving safety zone will be enforced for a period of only 12 hours a day, from August 21, 2023 through August 26, 2023. The rule does not completely restrict the traffic within a waterway and allows mariners to request permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the temporary moving safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132,

Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. If you believe this rule has implications for federalism or Indian Tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishment of a temporary moving safety zone for navigable waters of the La Quinta Channel between gated pair lights 11 and 12 to the Sea buoy. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the rig NFE PIONEER I while it is towed from Kiewit Offshore Services. It is categorically excluded from further review under paragraph L60(c), in Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C 70034, 70051; 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0705 to read as follows:

§ 165.T08–0705 Safety Zone; La Quinta and Corpus Christi Shipping Channel, Ingleside, TX.

(a) *Location.* The following area is a safety zone: all navigable waters of the La Quinta Channel between gated pair lights 11 and 12 to the Sea buoy. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Corpus Christi (COTP) or a designated representative.

(b) *Enforcement period.* This section will be enforced from 6 a.m. to 6 p.m. from August 21, 2023, through August 26, 2023.

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

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

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

M.A. Cintron,

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

[FR Doc. 2023–18124 Filed 8–21–23; 4:15 pm]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2022–0397; FRL–10011–02–R4]

Air Plan Approval; South Carolina: New Source Review Updates

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing approval of a State Implementation Plan (SIP) revision submitted by the State of South Carolina, through the South Carolina Department of Health and Environmental Control (hereinafter referred to as SC DHEC or South Carolina) via a letter dated February 3, 2022. The SIP revision updates portions of South Carolina's Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) regulations, including changes to reflect the regulation of greenhouse gases (GHGs) pursuant to the Tailoring Rule and updates promulgated in the recent NSR Corrections Rule. With the exception of the Project Emissions Accounting provisions, which EPA expects to act on in a separate final rule, EPA is approving these revisions pursuant to the Clean Air Act (CAA or Act) and implementing Federal regulations.

DATES: This rule is effective September 22, 2023.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2022–0397. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the 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. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Pearlene Williams-Miles, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9144. Ms. Williams-Miles can also be reached via electronic mail at *WilliamsMiles.Pearlene@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. This Action

In this final rule, EPA is approving into the South Carolina SIP updated PSD and NNSR rules. Specifically, EPA is approving the incorporation by reference of South Carolina's Regulation 61–62.5, Standard No. 7—*Prevention of Significant Deterioration,* State effective on November 26, 2021, except for paragraphs (A)(2)(d)(vi) and (A)(2)(d)(vii) related to Project Emissions Accounting into South Carolina's SIP. EPA is also finalizing the incorporation by reference of South Carolina's Regulation 61–62.5, Standard No. 7.1—*Nonattainment New Source Review,* State effective on November 26, 2021, into South Carolina's SIP except for paragraphs (A)(8) and (A)(9) related to Project Emissions Accounting and the portions of paragraphs (A)(11)(t) and (B)(22)(c)(xx) related to the Ethanol Rule Provisions.

II. Background

As described in the notice of proposed rulemaking (NPRM) published on July 26, 2022,[1] over time, EPA has updated its NNSR and PSD permitting minimum requirements for State implementation plans at 40 CFR 51.165 and 51.166, respectively, and States and localities are required to update their SIP-approved rules to ensure consistency with these Federal rules.[2] Collectively, EPA commonly refers to its NNSR and PSD permitting programs as the major ''new source review,'' or NSR, permitting programs.

EPA last approved updates to South Carolina's SIP-approved major NSR regulations on October 28, 2021, by acting on an April 24, 2020, submittal from the State. *See* 86 FR 59646. Since the time of South Carolina's April 24, 2020, submittal, EPA has updated the Federal major NSR regulations to clarify the Project Emissions Accounting provisions and to correct certain errors in the NSR regulations that had accumulated over time.[3]

On February 3, 2022, SC DHEC submitted SIP revisions to EPA for approval that included changes to South Carolina's major NSR permitting regulations to align them with recent updates to Federal requirements for PSD and NNSR permitting.[4] Specifically, these changes update South Carolina's Regulation 61–62.5, Standard No. 7—*Prevention of Significant Deterioration,* and Standard No. 7.1—*Nonattainment New Source Review.*[5] The State's February 3, 2022, SIP submittal incorporates into the South Carolina SIP updated PSD provisions related to the regulation of GHGs pursuant to the Tailoring Rule,[6] which was previously implemented in South Carolina through legislative action (South Carolina Joint Resolution H4888 (2010)). The State's February 3, 2022, SIP submittal also incorporates changes promulgated in EPA's November 24, 2020, Project Emissions Accounting Rule[7] and in EPA's July 19, 2021, NSR Corrections Rule.[8]

Through the July 26, 2022, NPRM, EPA proposed to approve these changes as meeting the requirements of the Federal PSD and NNSR programs and as being consistent with the CAA. However, EPA excluded a portion of paragraphs (A)(11)(t) and (B)(22)(c)(xx) as they relate to the Ethanol Rule Provisions, found in Regulation 61–62.5, Standard No. 7.1, from the proposed approval. Additional details on South Carolina's February 3, 2022, revisions and EPA's analysis of the changes can be found in the July 26, 2022, NPRM. Comments on the July 26, 2022, NPRM were due on or before August 25, 2022.

III. Response to Comments

EPA received comments on the July 26, 2022, NPRM, which are included in the docket of this rulemaking. The comments arrived in a letter dated August 25, 2022, and originate from one Commenter, Center for Biological Diversity. The Commenter provided supplemental documentation to support the comments submitted. The comments generally oppose incorporating the Federal Project Emission Accounting provisions at 40 CFR 51.165 and 51.166 within the February 3, 2022, submission.

EPA is not finalizing adoption of the Project Emissions Accounting provisions into South Carolina's SIP in this action.[9] Therefore, EPA is not responding to these comments at this time. EPA expects to take final action on the Project Emissions Accounting provisions contained within SC DHEC's submittal in a separate final rule and to respond to these comments in that action.

IV. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, and as discussed in sections I and II of this preamble, EPA is finalizing the incorporation by reference of South Carolina's Regulation 61–62.5, Standard No. 7—*Prevention of Significant Deterioration,* State effective on November 26, 2021, except for paragraphs (A)(2)(d)(vi) and (A)(2)(d)(vii) related to Project Emissions Accounting. EPA is also finalizing the incorporation by reference of South Carolina's Regulation 61–62.5, Standard No. 7.1—*Nonattainment New Source Review,* State effective on November 26, 2021, except for paragraphs (A)(8) and (A)(9) related to

[1] *See* 87 FR 44314.

[2] Over time, EPA has also updated its corresponding PSD and NNSR rules at 40 CFR 52.21 and 40 CFR part 51, appendix S.

[3] The ''Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting'' rule was finalized on November 24, 2020. *See* 85 FR 74890 (hereinafter ''Project Emissions Accounting Rule'').

[4] EPA notes that the February 3, 2022, submittal was received by EPA on February 4, 2022. For clarity, EPA will refer to this submittal based on the date of the letter.

[5] EPA notes that under the February 3, 2022, cover letter, SC DHEC also submitted updates to the following State Regulations: 61–62.60, *South Carolina Designated Facility Plan and New Source Performance Standards;* Regulation 61–62.63, *National Emission Standards for Hazardous Air Pollutants (NESHAP) for Source Categories;* and Regulation 61–62.70, *Title V Operating Permit Program.* However, South Carolina explains in the February 3, 2022, cover letter that these regulations are not part of the SIP, and they are not being requested for approval by EPA into the South Carolina SIP at this time.

[6] ''Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule.'' *See* 75 FR 31514 (June 3, 2010).

[7] *See* 85 FR 74890 (November 24, 2020).

[8] *See* 86 FR 37918 (July 19, 2021).

[9] These provisions are contained in Regulation 61–62.5, Standard 7, section (A)(2)(d)(vi) (revising hybrid test in PSD rules); Regulation 61–62.5, Standard 7, section (A)(2)(d)(vii) (defining ''sum of the difference'' in PSD rules); Regulation 61–62.5, Standard 7.1, section (A)(8) (setting forth hybrid test in NNSR rules); Regulation 61–62.5, Standard 7.1, section (A)(9) (defining ''sum of the difference'' in NNSR rules).

Project Emissions Accounting and the portions of paragraphs (A)(11)(t) and (B)(22)(c)(xx) related to the Ethanol Rule Provisions. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[10]

V. Final Action

EPA is approving, with the exceptions noted, the changes to the South Carolina Regulation 61–62.5, Standards No. 7—*Prevention of Significant Deterioration,* and Standard No. 7.1—*Nonattainment New Source Review,* both State effective on November 26, 2021. These changes were submitted by South Carolina on February 3, 2022.

VI. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 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.

Because this final rule merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law, this final rule for the State of South Carolina does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). Therefore, this action will not impose substantial direct costs on Tribal governments or preempt Tribal law. The Catawba Indian Nation (CIN) Reservation is located within the boundary of York County, South Carolina. Pursuant to the Catawba Indian Claims Settlement Act, S.C. Code Ann. 27–16–120 (Settlement Act), ''all State and local environmental laws and regulations apply to the [Catawba Indian Nation] and Reservation and are fully enforceable by all relevant State and local agencies and authorities.'' The CIN also retains authority to impose regulations applying higher environmental standards to the Reservation than those imposed by State law or local governing bodies, in accordance with the Settlement Act.

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.''

SC DHEC 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 action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving EJ for people of color, low-income populations, and Indigenous peoples.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 23, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation byreference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 17, 2023.

Jeaneanne Gettle,

Acting Regional Administrator, Region 4.

For the reasons stated in the preamble, EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

[10] *See* 62 FR 27968 (May 22, 1997).

Subpart PP—South Carolina

■ 2. In § 52.2120(c), amend the table under the heading ''Regulation No. 62.5'' by revising the entries for ''Standard No. 7'' and ''Standard No. 7.1'' to read as follows:

§ 52.2120 Identification of plan.

* * * * *

(c) * * *

TABLE 1 TO PARAGRAPH (c)—EPA-APPROVED SOUTH CAROLINA LAWS AND REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	* * *
Regulation No. 62.5.	Air Pollution Control Standards.	.....	.....	
*	*	*	*	* * *
Standard No. 7 ..	Prevention of Significant Deterioration.	11/26/2021	8/23/2023, [Insert citation of publication].	Except for the project emissions accounting provisions at paragraphs (A)(2)(d)(vi) and (A)(2)(d)(vii).
Standard No. 7.1	Nonattainment New Source Review.	11/26/2021	8/23/2023, [Insert citation of publication].	Except for the ethanol production facilities exclusion in paragraphs (A)(11)(t) and (B)(22)(c)(xx) and the project emissions accounting provisions at paragraphs (A)(8) and (A)(9).
*	*	*	*	* * *

* * * * *

[FR Doc. 2023–18120 Filed 8–22–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0682; FRL–10126–02–R9]

Air Plan Approval; California; San Diego County Air Pollution Control District; Oxides of Nitrogen

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the San Diego County Air Pollution Control District (SDCAPCD) portion of the California State Implementation Plan (SIP). The California Air Resources Board (CARB) submitted the rule, on behalf of SDCAPCD, to the EPA as part of the requirement to implement major source reasonable available control technology (RACT) for emissions of oxides of nitrogen (NO_X) for the San Diego County ozone nonattainment area. This revision concerns NO_X emissions from boilers, process heaters, and steam generators. We are approving a local rule to regulate these emission sources under the Clean Air Act (CAA or the ''Act'').

DATES: This rule is effective September 22, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2022–0682. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: La Kenya Evans-Hopper, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3245 or by email at *evanshopper.lakenya@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA.

Table of Contents

I. Proposed Action

On January 30, 2023 (88 FR 5833), the EPA proposed to approve the following rule into the California SIP.

TABLE 1—SUBMITTED RULE

Local agency	Rule No.	Rule title	Adopted	Submitted
SDCAPCD	69.2.2	Medium Boilers, Process Heaters, and Steam Generators	09/09/21	03/09/22

We proposed to approve this rule because we determined that it complies with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received three comments, two of which were submitted by the same commenter. The full text of all three comments is available in the docket for this rulemaking. The comments were broadly supportive of SIPs, in the general sense, as a necessary tool to

address air pollution, particularly NO_X emissions, although they were not specific to this rulemaking action. After stating the need for the EPA to approve and enforce SIPs to ensure areas meet the national ambient air quality standards (NAAQS), one comment contained a general statement that SIPs could be argued to be overly burdensome because of their economic impacts on businesses and consumers. After reviewing this comment, the EPA has determined that the comment does not raise issues germane to our proposed finding that SDCAPCD Rule 69.2.2 satisfies the requirements of CAA sections 110 and part D, which focuses the rule evaluation on enforceability, stringency, and interference with CAA requirements. Therefore, we have determined that this comment does not necessitate a response, and the EPA will not provide a specific response to the comment in this document.

III. EPA Action

No comments were submitted that change our assessment of the rule as described in our proposed action that this rule meets CAA requirements and is consistent with relevant guidance regarding enforceability, RACT, and SIP revisions. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is fully approving this rule into the California SIP.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of San Diego County Air Pollution Control District, Rule 69.2.2, ''Medium Boilers, Process Heaters, and Steam Generators,'' adopted on September 9, 2021, which regulates NO_X emissions from boilers, process heaters, and steam generators with a heat input rating greater than 2 million British thermal unit (Btu) per hour to less than 5 million Btu per hour that are manufactured, sold, offered for sale or distributed, or installed for use within San Diego County. The EPA has made, and will continue to make, these documents available through *https://www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 23, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

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

Dated: August 17, 2023.

Cheree Peterson,

Acting Regional Administrator, Region IX.

For the reasons stated in the preamble, the Environmental Protection Agency amends part 52, chapter I, title 40 of the Code of Federal Regulations as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(604) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(604) The following regulations were submitted on March 9, 2022, by the Governor's designee as an attachment to a letter dated March 9, 2022.

(i) *Incorporation by reference.* (A) San Diego County Air Pollution Control District.

(*1*) Rule 69.2.2, ''Medium Boilers, Process Heaters, and Steam Generators,'' adopted on September 9, 2021.

(*2*) [Reserved]

(B) [Reserved]

(ii) [Reserved]

[FR Doc. 2023–18110 Filed 8–22–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 21–450; FCC 22–87; FR ID 164120]

Affordable Connectivity Program; Emergency Broadband Benefit Program

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Federal Communications Commission (Commission) announces that the Office of Management and Budget (OMB) has approved, for a period of three years, an information collection titled Affordable Connectivity Program (ACP) Transparency Data Collection, which is associated with the rules contained in the Fourth Report and Order, FCC 22–87 (Nov. 23, 2022) (*Fourth Report and Order*), which was summarized in a document published on January 13, 2023. This document is consistent with the *Fourth Report and Order* and its summary.

DATES: The amendments to § 54.1813(b) through (d) (instruction 3), published at 88 FR 2248, January 13, 2023, and the amendments to § 54.1813(c) and (g) in this final rule, are effective August 23, 2023.

FOR FURTHER INFORMATION CONTACT: Eric Wu, Attorney Advisor, Telecommunications Access Policy Division, Wireline Competition Bureau, at (202) 418–7400 or *eric.wu@fcc.gov*. For additional information concerning the Paperwork Reduction Act information collection requirements contact Nicole Ongele at (202) 418–2991 or *nicole.ongele@fcc.gov*.

SUPPLEMENTARY INFORMATION: The Commission submitted information collection requirements for review and approval by OMB, as required by the Paperwork Reduction Act (PRA) of 1995, on June 7, 2023, which were approved by OMB on August 11, 2023. The information collection requirements are found in the Commission's *Affordable Connectivity Program; Emergency Broadband Benefit Program,* WC Docket No. 21–450, Fourth Report and Order, FCC 22–87 (Nov. 23, 2022) (*Fourth Report and Order*), which was summarized in 88 FR 2248, January 13, 2023. The OMB Control Number is 3060–1310. If you have any comments on the burden estimates listed in the following, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Nicole Ongele, Federal Communications Commission, 45 L Street NE, Washington, DC 20554. Please include the OMB Control Number, 3060–1310, in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov*.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the Commission is notifying the public that it received OMB approval on August 11, 2023, for the information collection requirements contained in 47 CFR 54.1813, published at 88 FR 2248, January 13, 2023.

Section 54.1813(g) of title 47 of the Code of Federal Regulations provides that compliance with § 54.1813(b) through (d) wouldn't be required until § 54.1813(g) is removed or contains a compliance date, which wouldn't occur until after OMB completes review pursuant to the PRA. Since OMB has completed its review of the information collection requirements, this document removes § 54.1813(g). This document further revises § 54.1813(c) to delete the reference to paragraph (g) and to add the compliance date for the ACP Transparency Data Collection.

These amendments to § 54.1813(c) and (g) are effective on the date this document is published in the **Federal Register**. The amendments are minor corrections, and the public was given notice in the November 2022 *Fourth Report and Order* that the rules would need to be amended to reflect completion of OMB review under the Paperwork Reduction Act. Additionally, the Commission separately announced the compliance date for the ACP Transparency Data Collection in a Public Notice issued on August 11, 2023. These amendments impose no immediate burdens or obligations on members of the public, and making them effective upon publication will enhance notice to the public by incorporating the compliance date sooner into the Code of Federal Regulations. There is thus good cause under 5 U.S.C. 553(d)(3) for the amendments to be effective less than 30 days after their publication.

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

Additionally, no person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–1310.

The foregoing notification is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–1310.

OMB Approval Date: August 11, 2023.

OMB Expiration Date: August 31, 2026.

Title: Affordable Connectivity Program (ACP) Transparency Data Collection.

Form Number: FCC Form 5651.

Type of Review: New information collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 1,755 respondents; 1,755 responses.

Estimated Time per Response: 31 hours.

Frequency of Response: Annual reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in section 904 of Division N, Title IX of the Consolidated Appropriations Act, 2021, Public Law 116–260, 134 Stat. 1182, as amended by the Infrastructure Investment and Jobs Act, Public Law 117–58, section 60502(c), 135 Stat. 429, 1243 (2021) and 47 U.S.C. 1752.

Total Annual Burden: 54,405 hours.

Total Annual Cost: No cost.

Needs and Uses: On November 15, 2021, the President signed the Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429 (2021), which appropriated $14.2 billion to expand and modify the Emergency Broadband Benefit Program in the form of a new, longer-term broadband affordability program called the Affordable Connectivity Program (ACP). The Affordable Connectivity Program provides qualifying low-income households with a monthly discount of up to $30 per month (or up to $75 per month for households on qualifying Tribal Lands) for broadband services, and a one-time $100 discount on a connected device (tablet, laptop, or desktop computer) from the participating provider with a co-pay of more than $10 but less than $50.

The Infrastructure Act also directed the Commission to ''issue final rules regarding the annual collection by the Commission of data relating to the price and subscription rates of each internet service offering of a participating provider under the Affordable Connectivity Program . . . to which an eligible household subscribes.'' Infrastructure Act, section 60502(c)(1). On November 23, 2022, the Commission adopted a Fourth Report and Order, WC Docket No. 21–450, FCC 22–87 (*Fourth Report and Order*), establishing the ACP Data Collection to satisfy the statutory collection requirement. The data collection also will allow the Commission to determine the value being provided by the affordable connectivity benefit.

List of Subjects in 47 CFR Part 54

Internet, Telecommunications, Telephone.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 as follows:

PART 54—UNIVERSAL SERVICE

■ 1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 229, 254, 303(r), 403, 1004, 1302, 1601–1609, and 1752, unless otherwise noted.

■ 2. Amend § 54.1813 by:

■ a. Revising paragraph (c); and

■ b. Removing paragraph (g).

The revision reads as follows:

§ 54.1813 Affordable Connectivity Program Transparency Data Collection.

* * * * *

(c) *Timing of collection.* No later than November 9, 2023, and annually thereafter, participating providers must submit to the Commission the information in paragraph (b) of this section for all plans in which an Affordable Connectivity Program household is subscribed. The information must be current as of an annual snapshot date established and announced by the Bureau.

* * * * *

[FR Doc. 2023–18081 Filed 8–22–23; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 88, No. 162
Wednesday, August 23, 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 ENERGY

10 CFR Part 850

[EHSS–RM–11–CBDPP]

RIN 1992–AA39

Chronic Beryllium Disease Prevention Program

AGENCY: Office of Environment, Health, Safety and Security, U.S. Department of Energy.

ACTION: Supplemental notice of proposed rulemaking and request for comment.

SUMMARY: On June 7, 2016, the U.S. Department of Energy (DOE or the Department) published a Notice of Proposed Rulemaking (NOPR) in the **Federal Register** proposing to amend its current Chronic Beryllium Disease Prevention Program (CBDPP) regulations. In the NOPR, DOE proposed an action level of 0.05 micrograms of beryllium per cubic meter of air (μg/m^3), calculated as an 8-hour time-weighted average (TWA), but declined to propose a short-term exposure limit (STEL). In this supplemental notice of proposed rulemaking (SNOPR), DOE solicits comments on an alternative proposed action level of 0.1 μg/m^3, calculated as an 8-hour TWA exposure, and a STEL of 2.0 μg/m^3 measured over a period of fifteen minutes. DOE is also proposing to set its own TWA permissible exposure limit (PEL) for airborne beryllium, which is consistent with the TWA PEL currently set by the Occupational Safety and Health Administration (OSHA), rather than adopt OSHA's current or any future 8-hour TWA PEL. The proposed amendments are intended to improve and strengthen the current CBDPP regulations and are applicable to DOE contractors and Federal employees who are, were, or potentially were exposed to beryllium at DOE sites.

DATES: DOE will accept comments, data, and information regarding this SNOPR on or before September 22, 2023. Please refer to section V (Public Participation–Submission of Comments) of this SNOPR for additional information.

ADDRESSES: You may send comments, identified by EHSS–RM–11–CBDPP and/or Regulation Identification Number (RIN) 1992–AA39, by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions in the portal for submitting comments.
- *Email: Rulemaking.850@hq.doe.gov.* Include docket number EHSS–RM–11–CBDPP and/or RIN 1992–AA39 in the subject line of the email. Please include the full body of your comments in the text of the message or as an attachment.
- *Mail:* Address written comments to James Dillard, U.S. Department of Energy, Office of Environment, Health, Safety and Security, Mailstop EHSS–11, Docket Number EHSS–RM–11–CBDPP, 1000 Independence Ave. SW, Washington, DC 20585 (due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt).

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation—Submission of Comments'' (section V) of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket, which includes **Federal Register** notices, comments, and other supporting documents/materials, go to *www.regulations.gov/docket/DOE-HQ-2016-0024.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

FOR FURTHER INFORMATION CONTACT: Mr. James Dillard, U.S. Department of Energy, Office of Environment, Health, Safety and Security, Mailstop EHSS–11, 1000 Independence Ave. SW, Washington, DC 20585. Telephone: (301) 903–1165. Email: *james.dillard@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Authority

DOE has broad authority to regulate worker safety and health with respect to its nuclear and nonnuclear functions pursuant to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.;* the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.;* and the Department of Energy Organization Act (DOEOA), 42 U.S.C. 7101 *et seq.* Specifically, the AEA authorized and directed the Atomic Energy Commission (AEC), a predecessor agency to DOE, to protect health and promote safety during the performance of activities under the AEA. *See* Sec. 31a.(5) of the AEA, 42 U.S.C. 2051(a)(5); Sec. 161 b. of the AEA, 42 U.S.C. 2201(b); Sec. 161 i.(3) of the AEA, 42 U.S.C. 2201(i)(3); and Sec. 161 p. of the AEA, 42 U.S.C. 2201(p). In addition, Congress amended the AEA in 2002 by adding section 234C, 42 U.S.C. 2282c, which, among other things, directed DOE to ''promulgate regulations for industrial and construction health and safety at Department of Energy facilities that are operated by contractors covered by agreements of indemnification under section 2210(d)'' of title 42 of the United States Code.

The ERA abolished the AEC and replaced it with the Nuclear Regulatory Commission (NRC), which became responsible for the licensing of

commercial nuclear activities, and the Energy Research and Development Administration (ERDA), which became responsible for the other functions of the AEC under the AEA, as well as several nonnuclear functions. The ERA authorized ERDA to use the regulatory authority under the AEA to carry out its nuclear and nonnuclear functions, including those functions that might become vested in ERDA in the future. *See* Sec. 105(a) of the ERA, 42 U.S.C. 5815(a); and Sec. 107 of the ERA, 42 U.S.C. 5817. The DOEOA transferred the functions and authorities of ERDA to DOE. *See* Sec. 301(a) of DOEOA, 42 U.S.C. 7151(a); Sec. 641 of DOEOA, 42 U.S.C. 7251; and Sec. 644 of DOEOA, 42 U.S.C. 7254.

Additional authority for the rule, insofar as it applies to DOE Federal employees, is found in section 19 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 668) and Executive Order 12196, ''Occupational Safety and Health Programs for Federal Employees'' (5 U.S.C. 7902 note), which require Federal agencies to establish comprehensive occupational safety and health programs for their employees.

II. Background and Summary of the Supplemental Notice of Proposed Rulemaking

On December 8, 1999, DOE published its final rule establishing the CBDPP (64 FR 68854), which became effective January 7, 2000. In the CBDPP, DOE adopted, among other things, OSHA's PEL in 29 CFR 1910.1000, which was 2.0 μg/m^3 measured as an 8-hour TWA, and any more stringent TWA PEL that may be promulgated by OSHA as a health standard in the future. The AEC first applied the 2.0 μg/m^3 TWA PEL in 1949 and it had been continuously applied by DOE and its predecessor agencies through the years. Additionally, DOE set an ''action level'' for worker exposure to airborne concentrations of beryllium at 0.2 μg/m^3, calculated as an 8-hour TWA exposure. The ''action level'' is the level of airborne concentrations of beryllium which, if met or exceeded, would require a DOE office or contractor to implement certain worker protection provisions. Since the rule's January 7, 2000, effective date, DOE facilities have been expected to maintain worker exposures to beryllium at levels at or below OSHA's PEL, as well as operate with an action level.

Other than OSHA's PEL, DOE employers are not subject to any other OSHA beryllium-specific requirements in 29 CFR 1910.1024. Section 4(b)(1) of the Occupational Safety and Health Act of 1970 [29 U.S.C. 653(b)(1)] (OSH Act) states that ''[n]othing in [the OSH Act] shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.''

To avoid confusion among its contractors and their employees regarding with which standard to comply, the Department amended 10 CFR part 851, *Worker Safety and Health Program* (80 FR 69564, November 10, 2015). The amendment clarified that it is DOE's intent to only adopt OSHA's 8-hour PEL for beryllium, and that the ancillary provisions (*e.g.,* exposure assessment, personal protective clothing and equipment, medical surveillance, medical removal, training, and regulated areas or access control) of OSHA's standard do not apply to DOE and DOE contractor employees.

On June 7, 2016, DOE published a NOPR for public comment in the **Federal Register** (81 FR 36704) proposing to amend its CBDPP regulations. The public comment period ended on September 6, 2016. The proposed amendments included in the NOPR were intended to strengthen the current CBDPP and the worker protection programs established under 10 CFR part 851, *Worker Safety and Health Program.* In part, the proposed amendments in the NOPR would have reduced the action level for worker exposure to airborne concentrations of beryllium to 0.05 μg/m^3, calculated as an 8-hour TWA exposure. In the NOPR, DOE also proposed to adopt OSHA's current and any future PELs for worker exposure to beryllium and beryllium compounds. DOE did not propose adopting a STEL because DOE's proposed action level of 0.05 μg/m^3 would be exceeded in less than the 15-minute sampling period for the STEL where exposure levels were at OSHA's PEL of 2.0 μg/m^3.

After publication of DOE's NOPR, OSHA promulgated new regulations in 29 CFR parts 1910, 1915 and 1926 for the protection of workers from the effects of exposure to beryllium and beryllium compounds in the workplace (82 FR 2470, January 9, 2017). OSHA's regulations contained new PELs for occupational exposure to beryllium and beryllium compounds, consisting of: (1) an 8-hour TWA PEL of 0.2 μg/m^3; and (2) a STEL of 2.0 μg/m^3 as measured over a 15-minute sampling period. In its final rule, OSHA stated that it was establishing an 8-hour TWA PEL of 0.2 μg/m^3 because it found that occupational exposure to beryllium at the previous PEL of 2.0 μg/m^3 posed a significant risk of material impairment to the health of exposed workers, and the lower TWA PEL of 0.2 μg/m^3 would substantially reduce that risk. OSHA promulgated a STEL of 2.0 μg/m^3, as measured over a 15-minute sampling period, to help reduce the risk of beryllium sensitization (BeS) and chronic beryllium disease (CBD) in beryllium-exposed workers. OSHA also adopted an action level for airborne beryllium of 0.1 μg/m^3, calculated as an 8-hour TWA.

DOE is now issuing this SNOPR to consider having the Department set its own 8-hour TWA PEL of 0.2 μg/m^3 for airborne beryllium, which is consistent with the current TWA PEL set by OSHA, rather than, as proposed in the NOPR, adopting OSHA's current or future TWA PELs. The Department is also proposing to require an airborne action level of 0.1 μg/m^3, calculated as an 8-hour TWA exposure, as measured in the worker's breathing zone by personal monitoring, as an alternative to the previously proposed airborne action level of 0.05 μg/m^3. Finally, the Department is proposing to require a STEL of 2.0 μg/m^3, as measured over a period of fifteen minutes. The TWA PEL, STEL, and action level proposed by the Department in this SNOPR would be consistent with OSHA's current TWA PEL, STEL, and action level.

III. Discussion of Specific Proposed Sections

This section describes the Department's proposals for which the Department is soliciting public comment.

A. Proposed § 850.22—Permissible Exposure Limits

1. TWA PEL

The newly proposed § 850.22(a) would continue to establish the TWA PEL for the CBDPP. The PEL supplements the action level by establishing an absolute 8-hour TWA level above which, no worker may be exposed. Engineering or work practice controls are required to bring exposures to at or below the PEL.

In the NOPR, DOE proposed that § 850.22(a) would continue to adopt OSHA's 8-hour TWA PEL established in 29 CFR 1910.1000 for airborne exposure to beryllium, as measured in the worker's breathing zone by personal monitoring but allowed for the adoption of a stricter standard should OSHA establish one through its rulemaking process. DOE also proposed in the NOPR [§ 850.22(b)] that DOE would inform employers of any change in the TWA PEL through a notice in the **Federal Register**.

In this SNOPR, proposed § 850.22(a) would require employers to ensure that no worker is exposed to an airborne concentration of beryllium in excess of 0.2 μg/m³, calculated as an 8-hour TWA exposure, as measured in the worker's breathing zone by personal monitoring. This TWA PEL is consistent with the TWA PEL adopted by OSHA in 29 CFR parts 1910, 1915, and 1926. The Department is proposing to adopt its own TWA PEL, rather than adopt OSHA's current or future TWA PEL, because the Department believes by exercising its authority to issue regulations for industrial and construction health and safety at DOE facilities, including setting a TWA PEL, it can better provide clarity and consistency to employers at DOE sites regarding the TWA PEL with which they must comply.

2. STEL

In the NOPR, DOE did not propose adopting a STEL. In the preamble to the NOPR, DOE stated that it considered adopting OSHA's proposed STEL of 2.0 μg/m³ but did not do so because DOE's proposed action level of 0.05 μg/m³ would be exceeded in less than the 15-minute sampling period (see discussion regarding § 850.23 in the NOPR (81 FR 36704, 36722)). In conjunction with its proposal in this SNOPR to adopt an action level of 0.1 μg/m³ (discussed below), the Department is proposing to adopt a STEL that is consistent with the STEL set by OSHA in 29 CFR parts 1910, 1915, and 1926. In OSHA's January 9, 2017, final rule (82 FR 2470), OSHA found that there are still significant risks of BeS and CBD remaining at the 8-hour TWA PEL. DOE notes that the goal of a STEL is to provide additional protection to workers from the risk of harm that can occur as a result of brief, high-level exposures to beryllium, which have been associated with development of BeS and CBD. Many of the beryllium activities at DOE sites are performed for short durations of time.

DOE believes a STEL would protect workers from the risk of harm that can occur because of brief, high-level exposures to beryllium. Proposed § 850.22(b) would establish a STEL for the CBDPP by requiring employers to ensure that no worker is exposed to an airborne concentration of beryllium in excess of 2.0 μg/m³ as determined over a sampling period of 15 minutes and measured in the worker's breathing zone by personal monitoring.

B. Proposed § 850.23—Action Level

Currently, 10 CFR 850.23(a) requires a responsible employer to include in its CBDPP an action level that is no greater than 0.2 μg/m³, calculated as an 8-hour TWA exposure, as measured in the worker's breathing zone by personal monitoring. In the NOPR, DOE proposed in § 850.23(a) that employers would be required to include in their CBDPPs an action level that was no greater than 0.05 μg/m³, calculated as an 8-hour TWA exposure, as measured in the worker's breathing zone by personal monitoring. The 0.05 μg/m³ action level was chosen based on the Department's review of epidemiological studies and the American Conference of Governmental Industrial Hygienists (ACGIH®) threshold limit value (TLV®). The Department believed that adopting a lower action level for airborne beryllium would result in reduced worker exposures and fewer workers developing BeS and CBD.

In the NOPR, DOE expressed the belief that it did not anticipate that the proposed 0.05 μg/m³ action level would require the use of new or different types of equipment. However, the Department became aware that there are concerns as to the feasibility of complying with a 0.05 μg/m³ action level, and whether current analytical methods can detect airborne concentrations of beryllium at that level. Therefore, DOE is proposing an alternative action level of 0.1 μg/m³, as an 8-hour TWA exposure, as measured in the worker's breathing zone by personal monitoring. This action level would be consistent with the action level for beryllium adopted by OSHA in its regulations for beryllium and beryllium compounds. In OSHA's January 9, 2017, final rule (82 FR 2470), OSHA indicated that workers in facilities that meet the action level of 0.1 μg/m³ will face lower risks of BeS and CBD than workers in facilities that cannot meet the action level. The Department believes the of 0.1 μg/m³ action level will be more protective than the current action level of 0.2 μg/m³ and is feasible.

Proposed § 850.23(a) would require employers to include in their CBDPPs an action level that is no greater than 0.1 μg/m³, calculated as an 8-hour TWA exposure, as measured in the worker's breathing zone by personal monitoring. The action level triggers the requirements to use a number of controls and protective measures designed to protect employees from exposures to beryllium.

C. Proposed Conforming Amendments to §§ 850.11 and 850.25

If the proposed amendment to add the STEL is made, DOE proposes to make minor conforming amendments to §§ 850.11 and 850.25 to reflect that there would be two applicable exposure limits.

IV. Regulatory Review

A. Review Under Executive Order 12866, 13563, and 14094

Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), as supplemented and reaffirmed by Executive Order 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011) and amended by Executive Order 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (OIRA) has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this regulatory action is consistent with these principles. Section 6(a) of Executive Order 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this proposed regulatory action does not constitute a ''significant regulatory action'' within the scope of Executive Order 12866.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory flexibility analysis for any regulation for which a general notice of proposed rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). As required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE made its procedures and policies available on the Office of the General Counsel's website (*www.energy.gov/gc/office-general-counsel*).

DOE reviewed this SNOPR under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is set forth.

This SNOPR would update DOE's regulations on CBDPP and would only apply to activities conducted by DOE and DOE's contractors. DOE expects that any potential economic impact of the proposed rule on small businesses would be minimal because work performed at DOE sites is under contracts with DOE or the prime contractor at the site. DOE contractors are reimbursed through their contracts for the costs of complying with worker safety and health program requirements. Therefore, they would not be adversely impacted by the requirements in this proposed rule. For these reasons, DOE certifies that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities, and therefore, no regulatory flexibility analysis has been prepared.

C. Review Under the Paperwork Reduction Act of 1995

This SNOPR does not impose any new information or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act, 5 CFR 1320.1 *et seq.*

D. Review Under the National Environmental Policy Act of 1969

DOE analyzed this SNOPR in accordance with the National Environmental Policy Act of 1969 (NEPA) and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion (CX) for rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended (10 CFR part 1021, subpart D, appendix A5). DOE determined that this SNOPR is covered under that CX because the proposed rule is an amendment to an existing regulation that does not change the environmental effect of the amended regulation. Therefore, DOE determined that this SNOPR is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA and does not require an Environmental Assessment or an Environmental Impact Statement.

E. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; (6) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met, or it is unreasonable to meet one or more of them. DOE completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism'' (64 FR 43255, August 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE examined this SNOPR and tentatively determined that the proposed rule would not preempt State law and would not have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. Review Under Executive Order 13175

Under Executive Order 13175 (65 FR 67249, November 6, 2000) on ''Consultation and Coordination with Indian Tribal Governments,'' DOE may not issue a discretionary rule that has ''Tribal'' implications and imposes substantial direct compliance costs on Indian Tribal governments. DOE determined the proposed rule in this SNOPR would not have such effects and Executive Order 13175 does not apply to this proposed rule.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104–4) requires each Federal agency to assess the effects of a Federal regulatory action on State, local, and Tribal governments, and the private sector. (Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531)). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the

aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant Federal intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820) (This policy is also available at: *www.energy.gov/gc/guidance-opinions*). DOE examined the proposed rule according to UMRA and its statement of policy and determined the rule contains neither an intergovernmental mandate, nor a 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 in any year. Accordingly, no further assessment or analysis is required under UMRA.

I. Review Under Executive Order 12630

DOE determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) is a significant regulatory action under Executive Order 12866, or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (2) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This SNOPR would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This SNOPR would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE concluded it is not necessary to prepare a Family Policymaking Assessment.

L. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002).

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

V. Public Participation—Submission of Comments

DOE will accept comments, data, and information regarding this SNOPR no later than the date provided in the **DATES** section at the beginning of this document. Interested individuals are invited to participate in this proceeding by submitting data, views, or arguments with respect to the specific sections addressed in this proposed rule using the methods described in the **ADDRESSES** section at the beginning of this document.

1. *Submitting comments via www.regulations.gov.* The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable by DOE's Office of Worker Safety and Health Policy staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment. However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

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

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

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

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

3. *Confidential Business Information.* Pursuant to the provisions of 10 CFR 1004.11, any person submitting information or data he or she believes to be confidential and exempt by law from public disclosure should submit 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 to *Rulemaking.850@hq.doe.gov.* DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

4. *Campaign form letters.* Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

VI. Approval by the Office of the Secretary of Energy

The Secretary of Energy approved publication of this supplemental notice of proposed rulemaking.

List of Subjects in 10 CFR Part 850

Beryllium, Diseases, Hazardous substances, Lung diseases, Occupational safety and health, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on August 16, 2023, by Jennifer Granholm, 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 17, 2023.

Treena V. Garrett,

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

For the reasons set forth in the preamble, the Department of Energy proposes to amend 10 CFR part 850 as set forth below.

PART 850—CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM

■ 1. The authority citation for part 850 continues to read as follows:

Authority: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 29 U.S.C. 668; 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.,* E.O. 12196, 3 CFR 1981 comp., at 145 as amended.

§ 850.11 [Amended]

■ 2. Amend § 850.11 by:

■ a. Removing the word ''level'' and adding in its place, the word, ''limits'' in paragraph (b)(1); and

■ b. Removing the word ''limit'' and adding in its place, the word, ''limits'' in paragraph (b)(3)(iv).

■ 3. Revise § 850.22 to read as follows:

§ 850.22 Permissible exposure limits.

(a) *Time-weighted average (TWA) permissible exposure limit (PEL).* Employers must ensure that no worker is exposed to an airborne concentration of beryllium in excess of 0.2 μg/m^3, calculated as an 8-hour TWA exposure, as measured in the worker's breathing zone by personal monitoring.

(b) Short-term exposure limit (STEL). Employers must ensure that no worker is exposed to an airborne concentration of beryllium in excess of 2.0 μg/m3 as determined over a sampling period of 15 minutes and measured in the worker's breathing zone by personal monitoring.

■ 4. Amend § 850.23 by revising paragraph (a) to read as follows:

§ 850.23 Action level.

(a) Employers must include in their CBDPPs an action level that is no greater than 0.1 μg/m^3, calculated as an 8-hour TWA exposure, as measured in the worker's breathing zone by personal monitoring.

* * * * *

■ 5. Amend § 850.25 by revising paragraph (a) to read as follows:

§ 850.25 Exposure reduction and minimization.

(a) Employers must ensure that no worker is exposed above the exposure limits prescribed in § 850.22.

* * * * *

[FR Doc. 2023–18082 Filed 8–22–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 555

[Docket No. 2013R–15P; AG Order No. 5732–2023]

RIN 1140–AA51

Annual Reporting of Explosive Materials Storage Facilities to the Local Fire Authority

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice is proposing to amend Bureau of Alcohol, Tobacco, Firearms, and Explosives (''ATF'') regulations to require that any person who stores explosive materials notify on an annual basis the authority having jurisdiction for fire safety in the locality in which the explosive materials are being stored of the type of explosives, magazine capacity, and location of each site where such materials are stored. In addition, the proposed rule requires any person who stores explosive materials to notify the authority having jurisdiction for fire safety in the locality in which the explosive materials were stored whenever storage is discontinued. These changes are intended to increase public safety.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before November 21, 2023. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by docket number (ATF 2013R–15P), by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Shermaine Kenner, Mailstop 6N–602, Office of Regulatory Affairs, Enforcement Programs and Services,

Bureau of Alcohol, Tobacco, Firearms, and Explosives, 99 New York Avenue NE, Washington, DC 20226, *ATTN: ATF 2013R–15P.*

Instructions: All submissions received must include the agency name and docket number (2013R–15P) for this notice of proposed rulemaking (''NPRM''). All properly completed comments received from any of the methods described above will be posted without change to the Federal eRulemaking portal, *https://www.regulations.gov.* This includes any personal identifying information (''PII'') submitted in the body of the comment or as part of a related attachment. Commenters who submit through the Federal eRulemaking portal and who do not want any of their PII posted on the internet should omit PII from the body of their comment or in any uploaded attachments. Commenters who submit through mail should likewise omit their PII from the body of the comment and provide any PII on the coversheet only. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Shermaine Kenner, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648–7070.

SUPPLEMENTARY INFORMATION:

I. Background

Title XI of the Organized Crime Control Act of 1970, Public Law 91–452, 84 Stat. 922, added chapter 40 (Importation, Manufacture, Distribution and Storage of Explosive Materials) to title 18 of the United States Code. One purpose of title XI is to reduce the ''hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials.'' Public Law 91–452, sec. 1101, 84 Stat. at 952.

The Attorney General is responsible for implementing title XI. *See* 18 U.S.C. 847. The Attorney General has delegated that responsibility to the Director of the ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 CFR 0.130. Regulations in 27 CFR part 555 implement title XI.

On August 24, 1998, ATF published in the **Federal Register** a final rule to implement a storage notification requirement for manufacturers and other storers of explosives. Notice No. 841, 63 FR 44999. ATF amended the regulations in 27 CFR part 55 (now part 555) [1] to require that any person who starts storing explosive materials notify the authority having jurisdiction for fire safety in the locality in which the explosive materials are being stored of the type of explosives, magazine capacity, and location of each site where such explosives are stored. The 1998 final rule was issued in response to the numerous deaths and injuries sustained by emergency response personnel responding to fires at sites where explosives were stored without the knowledge of State and local officials. *See* Notice No. 841, 61 FR 53688 (Oct. 15, 1996).

ATF is concerned with the safety of emergency response personnel responding to fires on sites where explosives are stored, and the safety of the public around such areas. It is important that first responders are aware of explosives storage when responding to a fire site. Firefighters and other fire safety officials generally do not attempt to fight a fire that involves a container of explosive materials because of the potential for an explosion that could harm the responders. Knowledge of the existence of explosives in such close proximity to a fire would typically prompt an evacuation of the facility and the surrounding area to ensure the safety of the first responders and the public.

The regulation at 27 CFR 555.201(f) requires the reporting of certain information when storage of explosive materials commences, but does not specifically require subsequent reporting that might reflect changes in the type of explosives and magazine capacity. Explosives industry association representatives raised this issue with ATF during discussions conducted in connection with Executive Order 13650 of August 1, 2013, ''Improving Chemical Facility Safety and Security.'' These representatives recommended that this regulation be amended to require annual reporting. They stated that this would increase communication between industry members and their local emergency responders, mitigate the negative effects of turnover in the emergency response community, and increase training opportunities for the local responders.

Executive Order 13650 recognizes the importance of implementing safety measures for the handling and storage of chemicals, including explosive materials. In addition, it established the Chemical Facility Safety and Security Working Group, co-chaired by the heads of the Department of Homeland Security, the Environmental Protection Agency, and the Department of Labor, and whose membership includes the heads of the Department of Justice, Department of Agriculture, and Department of Transportation, to carry out the responsibilities of the order. Department heads can also delegate their responsibilities to a representative. A final report, submitted by the working group to the President in May 2014, notes that ATF will work closely with explosives industry associations to develop best practices, procedures, or regulations to improve communication with fire authorities, including more frequent notification of significant changes to storage facilities. *See* Executive Order 13650: Actions to Improve Chemical Facility Safety and Security—A Shared Commitment: Report for the President at 51 (May 2014), *https://www.cisa.gov/sites/default/files/publications/2014-08-25-final-chemical-eo-status-report-508.pdf.*

II. Proposed Amendments to 27 CFR Part 555

As a result of our consultations with explosives industry associations, ATF is proposing to amend the regulation at 27 CFR 555.201(f) to require annual reporting of explosive materials storage to local fire authorities. ATF believes that a requirement for annual reporting will lead to more frequent contact between persons storing explosive materials and local fire authorities, ensure that explosives storage information is timely provided to new first responder staff members, and serve to reinforce the importance of the information to fire response organizations. ATF believes that an annual reporting time frame would best balance the need for these results against the burden of more frequent reporting. For these reasons, ATF is proposing to amend the regulation at 27 CFR 555.201(f) to require persons to report storage of explosive materials to local fire authorities on an annual basis.

The current regulation at 27 CFR 555.201(f) requires any person who stores explosive materials to provide to fire safety officials an oral notification before the end of the day on which storage of the explosive materials commenced, and in writing (*e.g.,* email, letter) within 48 hours after commencement of storage. Both forms of notification must include the type of explosives, magazine capacity, and location of each site where such explosive materials are stored.

[1] On January 24, 2003, ATF issued a final rule titled ''Reorganization of Title 27, Code of Federal Regulations,'' which, among other things, removed part 55 from chapter I and recodified it as part 555 in the new chapter II. 68 FR 3744.

ATF proposes amending the regulation to require any person who stores explosive materials to notify authorities having jurisdiction for fire safety in the locality in which the explosive materials are being stored upon commencement of storage and every 12 months thereafter. In addition, such persons would be required to provide written notification whenever they discontinue the storage of explosives.

ATF further proposes to amend the regulation to require that each written notification contain the name, title, and agency of the fire authority official notified and the date of the written notification. The person submitting the notification will be required to retain a copy of the written notification for five years and make such notification available for examination or inspection by ATF at all reasonable times.

This annual notification will increase public safety through increased communication between storers of explosive materials and their local emergency responders, provide updated storage information to local authorities, and allow for risk assessments and emergency response preparation prior to incidents, thus reducing potential safety and damage risk to first responders and emergency equipment, respectively.

III. Statutory and Executive Order Review

A. Executive Orders 12866 and 13563—Regulatory Review

This proposed regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' sec. 1(b), The Principles of Regulation, and in accordance with Executive Order 13563, ''Improving Regulation and Regulatory Review.''

The Office of Management and Budget (''OMB'') has determined that this proposed rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f). Furthermore, this rulemaking will not have an annual effect on the economy of $100 million or more, nor will it 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.

This proposed rule would amend 27 CFR 555.201(f) to require annual notification to local authorities having jurisdiction for fire safety concerning the storage of explosive materials. More specifically, this proposed rule would require any person who stores explosive materials to notify, at the commencement of storage, local authorities with jurisdiction for fire safety with respect to the type of explosives, magazine capacity, and location of each site where such explosive materials are stored. Notification would also be required once every 12 months thereafter, but no later than the end of the month during which the 12-month period is completed, and upon discontinuance of the storage of explosives.

ATF estimates that this rulemaking will have an impact on approximately 9,674 licensees or permittees, and that notification will take 30 minutes per occasion. ATF cost estimates for this rulemaking are as follows:

Labor Costs: Half hour of labor ($41.86/hour × 0.5 hours) [2] for completing and mailing the notification × 9,674 licensees or permittees = $202,477. The annual cost of this rulemaking would be $202,477.

The benefits to this rulemaking would allow for improved risk assessments and emergency response preparation prior to incidents, thus reducing potential safety and damage risk to first responders and emergency equipment, respectively.

B. Executive Order 13132—Federalism

This proposed rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, ''Federalism,'' the Attorney General has determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988—Civil Justice Reform

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform.''

D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. 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.

By approving this proposed rule, the Attorney General certifies that it will not have a significant economic impact on a substantial number of small entities. ATF estimates that this rulemaking will have an impact on approximately 9,674 licensees or permittees, with the majority of those being small businesses. The notification is estimated to take 30 minutes annually for a phone call and to provide written notification, most likely by email. ATF cost estimates for this rulemaking are as follows:

Labor Costs: Half hour of labor ($41.86/hour × 0.5 hours) [3] for completing and mailing the notification = $21.

As such, the cost associated with the notification is minimal.

E. Congressional Review Act

This proposed rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804.

F. Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the aggregate expenditure by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538.

G. Paperwork Reduction Act

This proposed rule would call for a revision to an existing collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521. As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the

[2] ATF bases these economic cost estimates on employee compensation data for September 2022 as determined by the U.S. Department of Labor, Bureau of Labor Statistics, and announced in its news release dated December 15, 2022, which is found at *https://www.bls.gov/news.release/archives/ecec_12152022.pdf.* The Bureau of Labor Statistics determined the average hourly employer costs for employee compensation for private industry workers to be $41.86.

[3] ATF bases these economic cost estimates on employee compensation data for September 2022 as determined by the U.S. Department of Labor, Bureau of Labor Statistics, and announced in its news release dated December 15, 2022, which is found at *https://www.bls.gov/news.release/archives/ecec_12152022.pdf.* The Bureau of Labor Statistics determined the average hourly employer costs for employee compensation for private industry workers to be $41.86.

time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Title: Notification to Fire Safety Authority of Storage of Explosive Materials.

OMB Control Number: 1140–0071.

Summary of the Collection of Information: This proposed rule amends 27 CFR 555.201(f) to require annual notification to local authorities having jurisdiction for fire safety concerning the storage of explosive materials. Currently, any person who stores explosive materials is required at the commencement of storage to notify local authorities with jurisdiction for fire safety with respect to the type of explosives, magazine capacity, and location of each site where such explosive materials are stored. This proposed rule would require submission of such reports annually thereafter, and notification whenever storage is discontinued. Any person storing explosive materials would be required to maintain a copy of the written notification for five years from the date of notification.

Need for Information: It is important that first responders are aware of explosives storage when responding to a fire site. Firefighters and other fire safety officials generally do not attempt to fight a fire that involves a container of explosive materials because of the potential for an explosion that could harm the responders. Knowledge of the existence of explosives in such close proximity to a fire would typically prompt an evacuation of the facility and the surrounding area to ensure the safety of the first responders and the public.

Proposed Use of Information: To provide awareness of the existence of explosives in close proximity to a fire so that first responders prompt an evacuation of the facility and the surrounding area to ensure the safety of the first responders and the public.

Description of the Respondents: Persons or entities who store explosive materials.

Estimated Number of Respondents: 9,674.

Frequency of Response: Once annually.

Burden of Response: 30 minutes.

We ask for public comment on the proposed collection of information to help us determine how useful the information is, whether it can help the various levels of government perform their functions better, whether it is readily available elsewhere, how accurate our estimate of the burden of collection is, how valid our methods for determining burden are, how we can improve the quality, usefulness, and clarity of the information, and how we can minimize the burden of collection.

If you submit comments on the collection of information, submit them both to OMB and to the Docket Management Facility where indicated under **ADDRESSES**, by the date set forth under **DATES**.

You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information become effective, we will publish a notice in the **Federal Register** of OMB's decision to approve, modify, or disapprove the proposed collection.

IV. Public Participation

A. Comments Sought

ATF requests comments on the proposed rule from all interested persons. ATF specifically requests comments on the clarity of this proposed rule and how easy it is to understand, as well as comments on the costs or benefits of the proposed rule and on the appropriate methodology and data for calculating those costs and benefits.

In addition, ATF specifically requests comments regarding whether a different time frame would be more appropriate or less burdensome.

All comments must reference the docket number (ATF 2013R–15P) and be legible. Commenters must also include their complete first and last name and contact information. If submitting through the Federal eRulemaking portal, as described in Section IV.C., commenters should carefully review and follow the website's instructions on submitting comments. If submitting as an individual, any information provided for city, state, zip code, and phone will not be publicly viewable when the comment is published on *regulations.gov* by ATF. If submitting a comment by mail, commenters should review Section IV.B. ''Confidentiality,'' regarding proper submission of personally identifiable information (PII). ATF will not consider, or respond to, comments that do not meet these requirements or comments containing profanity. In addition, if ATF cannot read your comment due to technical difficulties and cannot contact you for clarification, ATF may not be able to consider your comment. ATF will treat all comments as originals and will not acknowledge receipt of comments.

ATF will carefully consider comments submitted on or before the closing date, and will give comments submitted after that date the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to timely comments.

B. Confidentiality

ATF will make all comments meeting the requirements of this section, whether submitted electronically or on paper, available for public viewing at ATF and on the internet as part of the eRulemaking initiative, and subject to the Freedom of Information Act (5 U.S.C. 552), with exceptions for confidential information as discussed below. Commenters who submit by mail and who do not want their name or other PII posted on the internet should submit comments along with a separate cover sheet containing their PII. Both the cover sheet and comment must reference this docket number (ATF 2013R–15P). Information contained in the cover sheet will not appear on the internet. ATF will not redact PII that appears within the body of comment, and it will appear on the internet. Commenters who submit through the Federal eRulemaking portal and who do not want any of their PII posted on the internet should omit such PII from the body of their comment or in any uploaded attachments.

The commenter should not include material that he or she considers inappropriate for disclosure to the public. Any person submitting a comment shall specifically designate that portion (if any) of the comment that contains material that is confidential under law (*e.g.,* trade secrets, processes). The commenter shall set forth any portion of a comment that is confidential under law on pages separate from the balance of the comment with each page prominently marked ''confidential'' at the top of the page.

Confidential information will be included in the rulemaking record but will not be disclosed to the public. Any comments containing material that is not confidential under law may be disclosed to the public. In any event, the name of the person submitting a comment is not exempt from disclosure.

C. Submitting Comments

Submit comments in any of three ways (but do not submit the same comments multiple times or by more than one method).

- *Federal eRulemaking Portal:* We strongly recommend that you submit your comments to ATF via the Federal eRulemaking portal. Visit *https://www.regulations.gov* and follow the instructions for submitting comments.

Comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number provided by *https://www.regulations.gov* after you have successfully uploaded your comment.

- *Mail:* Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must appear in minimum 12-point font size (.17 inches), include the commenter's complete first and last name and full mailing address, and be signed. Written comments may be of any length.

D. Request for Hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director of ATF within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

Disclosure

Copies of this proposed rule and the comments received will be available for public inspection through the Federal eRulemaking portal, *https://www.regulations.gov,* or by appointment during normal business hours at the ATF Reading Room, Room 1E–062, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648–8740.

Drafting Information

The author of this document is Shermaine Kenner, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 555

Administrative practice and procedure, Explosives, Freight, Hazardous substances, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, Warehouses.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, the Department of Justice proposes to amend 27 CFR part 555 as follows:

PART 555—COMMERCE IN EXPLOSIVES

■ 1. The authority citation for 27 CFR part 555 continues to read as follows:

Authority: 18 U.S.C. 847.

■ 2. Amend § 555.201, by revising paragraph (f) to read as follows:

§ 555.201 General.

* * * * *

(f) Any person who stores explosive materials shall notify the authority having jurisdiction for fire safety in the locality in which the explosive materials are being stored of the type of explosives, magazine capacity, and location of each site where such explosive materials are stored. Notification shall be made orally before the end of the day on which storage of the explosive materials commenced, and in writing within 48 hours from the time such storage commenced. Thereafter, written notification shall be made once every 12 months following the initial notification, but no later than the end of the month during which the 12-month period is completed, unless the person is no longer storing explosive materials at the relevant site. When a person ceases to store explosive materials at a site, written notification to the authority having jurisdiction for fire safety in the locality in which the explosive materials were stored shall be made within 48 hours of the person discontinuing storage. Each written notification must also contain the name, title, and agency of the fire authority official notified and the date of the written notification. A copy of each written notification must be maintained by the person submitting the notification for five years from the date of notification and made available for examination or inspection by an ATF officer at all reasonable times.

Dated: August 11, 2023.

Merrick B. Garland,

Attorney General.

[FR Doc. 2023–18075 Filed 8–22–23; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2023–0510]

RIN 1625–AA08

Special Local Regulation; Atlantic Intracoastal Waterway, Morehead City, NC

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a special local regulation (SLR) for certain navigable waters of the Atlantic Intracoastal Waterway (AICW) and Beaufort Inlet in Morehead City, North Carolina. This SLR, which would be enforced annually for one weekend each September, would restrict vessel traffic on the AICW and Beaufort Inlet during high-speed boat races. The restriction of vessel traffic movement in the SLR is proposed for the purpose of protecting participants and spectators from the hazards posed by these events. Entry of vessels or persons into this regulated area would be prohibited unless specifically authorized by the Captain of the Port (COTP), North Carolina or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before September 22, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0510 using the Federal Decision-Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Petty Officer Ken Farah, Waterways Management Division, U.S. Coast Guard Sector North Carolina, Wilmington, NC; telephone 910–772–2221, email *ncmarineevents@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

On March 13, 2023, the NC East Sports, Inc organization notified the Coast Guard that it will be hosting the Crystal Coast Grand Prix powerboat race in Morehead City, NC. This high speed boat race will take place from 10 a.m. to 6 p.m. on the waters of the Atlantic Intracoastal Waterway (AICW) and Beaufort Inlet each year on one consecutive Friday, Saturday, and/or Sunday in September. It is anticipated that approximately 60 high speed vessels will be participating. The racecourse encompasses approximately 1.5 square miles and will include all navigable waters of the AICW and

Beaufort Inlet, North Carolina from approximate positions more particularly described in the discussion (paragraph III of this preamble), below. The Captain of the Port, Sector North Carolina (COTP) has determined that the presence of vessels not associated with the race, and anyone else in or transiting the designated area of the AICW and Beaufort Inlet in Morehead City, NC during the high speed vessel race would pose a safety concern to the participating vessels, and to spectators of the event, as well as to others within the designated area. The purpose of this rulemaking is to ensure the safety of vessels, participants, and other persons from the hazards associated with the event.

This proposed rule would modify 33 CFR 100.501 by listing a new recurring marine event in Table 4 to Paragraph (i)(4), which covers the Coast Guard Sector North Caroline—COTP Zone. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70041.

III. Discussion of Proposed Rule

The COTP is proposing to establish a SLR which would be enforced on a portion of the AICW and Beaufort Inlet from 10 a.m. until 6 p.m. each year on one consecutive Friday, Saturday, and/or Sunday in September. The times of enforcement would be broadcast locally over VHF–FM marine radio via a Broadcast Notice to Mariners (BNM), Marine Safety Information Bulletin (MSIB), and Local Notice to Mariners (LNM).

The regulated area would encompass approximately 1.5 square miles and would include all navigable waters of the AICW and Beaufort Inlet, North Carolina, from approximate positions: latitude 34°42′55″N, longitude 076°43′15″W, then east to latitude 34°42′56″N, longitude 076°42′13″W, then east to latitude 34°42′57″N, longitude 076°41′41″W, then east to latitude 34°42′57″N, longitude 076°41′25″W, then south east to latitude 34°42′23″N, longitude 076°40′44″W, then south to latitude 34°41′59″N, longitude 076°40′43″W, then north west to latitude 34°42′32″N, longitude 076°42′14″W, then west to latitude 34°42′32″N, longitude 076°43′15″W, then north to its point of origin.

This SLR provides additional information about areas that would be included within the regulated area, including their definitions. These areas include ''Race Area,'' ''Spectator Area,'' and ''Buffer Zone.''

The size of the regulated area is intended to ensure the safety of life on these navigable waters before, during, and after activities associated with the high speed boat race. The COTP and the Coast Guard Event Patrol Commander (PATCOM) have authority to forbid and control the movement of all vessels and persons, including event participants, in the regulated area. When hailed or signaled by an official patrol, a vessel or person in the regulated area must immediately comply with the directions given by the COTP or Event PATCOM. If a person or vessel fails to follow such directions, the Coast Guard may expel them from the area, issue them a citation for failure to comply, or both.

Except for Crystal Coast Grand Prix race participants and vessels already at berth, a vessel or person would have to get permission from the COTP or Event PATCOM to remain in the regulated area during an enforcement period or to enter the regulated area. Vessel operators would be required to request permission to enter and transit through the regulated area by contacting the Event PATCOM on VHF–FM channel 16. Vessel traffic would be able to safely transit the regulated area once the Event PATCOM deemed it safe to do so. A vessel within the regulated area would have to operate at safe speed that minimized wake. A person or vessel not registered with the event sponsor as a participant or assigned as official patrols would be considered a spectator. Official Patrols would include any vessel assigned or approved by the Commander, Coast Guard Sector North Carolina with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign. Official Patrols enforcing this regulated area can be contacted on VHF–FM channel 16 and channel 22A.

If permission is granted by the COTP or Event PATCOM, a person or vessel would be allowed to enter the regulated area or pass directly through the regulated area as instructed. A spectator vessel would be prohibited from loitering within the Race Zone, Buffer Zone, or other portions of the navigable channel while it was within the regulated area. Official patrol vessels would direct spectators to the designated spectator area. Only participant vessels would be allowed to enter the Race Area, and the Buffer Zone, if necessary.

The proposed duration of this SLR is intended to protect participants and spectators on the navigable waters of the AICW and Beaufort Inlet during the high-speed boat race. Vessels could request permission to pass through the SLR between race heats. No vessel or person would be permitted to enter the SLR without obtaining permission from the COTP North Carolina or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, and duration of the SLR. Vessel traffic would not be allowed to enter or transit a portion of the AICW or Beaufort Inlet during an active race event from 10 a.m. through 6 p.m. each year on the second or last Friday, Saturday, and Sunday in September. The rule would, however, allow vessels to request permission to pass through the regulated area between race heats. The Coast Guard will transmit a BNM via VHF–FM marine channel 16, publish an MSIB, and post a LNM regarding the enforcement period of the SLR.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves an SLR to be enforced during active race events. Normally such actions are categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Memorandum for the Record supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0510 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the proposed rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

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

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

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. In § 100.501, amend table 4 to paragraph (i)(4) by adding a new entry at the end of the table to read as follows:

§ 100.501 Special Local Regulations; Marine Events Within the Fifth Coast Guard District.

* * * * *

(i) * * *

(4) * * *

TABLE 4 TO PARAGRAPH (i)(4)

Event	Regulated area	Enforcement period(s)	Sponsor
*	* * *	* *	*
Crystal Coast Grand Prix Powerboat Race.	All navigable waters of the AICW and Beaufort Inlet, North Carolina from approximate positions: latitude 34°42′55″ N, longitude 076°43′15″ W, then east to latitude 34°42′56″ N, longitude 076°42′13″ W, then east to latitude 34°42′57″ N, longitude 076°41′41″ W, then east to latitude 34°42′57″ N, longitude 076°41′25″ W, then south east to latitude 34°42′23″ N, longitude 076°40′44″ W, then south to latitude 34°41′59″ N, longitude 076°40′43″ W, then north west to latitude 34°42′32″ N, longitude 076°42′14″ W, then west to latitude 34°42′32″ N, longitude 076°43′15″ W, then north to its point of origin. *Race area:* All navigable waters of the AICW and Beaufort Inlet, North Carolina, from approximate positions: latitude 34°42′52″ N, longitude 076°43′16″ W, then east to latitude 34°42′52.2″ N, longitude 076°42′11.04″ W, then east to latitude 34°42′53.76″ N, longitude 076°41′38.04″ W, then southeast to latitude 34°42′10.8″ N, longitude 076°40′44.4″ W, then south to latitude 34°42′4.3″ N, longitude 076°40′48.1″ W, then northwest to latitude 34°42′47.34″ N, longitude 076°41′49″ W, then west to latitude 34°42′50″ N, longitude 076°43′16″ W, then north to the point of origin. *Spectator area:* All waters of the AICW, North Carolina, from approximate positions: latitude 34°42′42″ N, longitude 076°43′15″ W, then east to latitude 34°42′41″ N, longitude 076°42′14″ W, then south to latitude 34°42′32″ N. longitude 076°42′14″ W, then west to latitude 34°42′32″ N, longitude 076°43′15″ W, then north to the point of origin. *Buffer zone:* All waters of the AICW and Beaufort Inlet, North Carolina, from approximate positions: latitude 34°42′55″ N, longitude 076°43′15″ W, then east to latitude 34°42′56″ N, longitude 076°42′13″ W, then east to latitude 34°42′57″ N, longitude 076°41′41″ W, then east to latitude 34°42′57″ N, longitude 076°41′25″ W, then south east to latitude 34°42′23″ N, longitude 076°40′44″ W, then south to latitude 34°41′59″ N, longitude 076°40′43″ W, then north west to latitude 34°42′41″ N, longitude 076°42′05″ W, then west to latitude 34°42′42″ N, longitude 076°43′15″ W, then north to its point of origin.	One consecutive Friday, Saturday, and/or Sunday in September.	NC East Sports, INC.

[1] As noted, the enforcement dates and times for each of the listed events in this table are subject to change. In the event of a change, or for enforcement periods listed that do not allow a specific date or dates to be determined, the Captain of the Port will provide notice to the public by publishing a Notice of Enforcement in the **Federal Register**, as well as, issuing a Broadcaster Notice to Mariner.

Dated: August 14, 2023.

Timothy J. List,

Captain, U.S. Coast Guard, Captain of the Port, Sector North Carolina.

[FR Doc. 2023–18172 Filed 8–22–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0368]

RIN 1625–AA11

Regulated Navigation Area; St. Louis River/Duluth-Superior Harbor, Duluth, MN

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a regulated navigation area for certain waters of the Duluth-Superior Harbor and the St. Louis River in Duluth, MN. This action is necessary to prevent disrupting engineered remedies that are a part of the St. Louis River Area of Concern sediment remediation project. This proposed rulemaking would prohibit anchoring, dredging, laying cable, dragging, seining, bottom fishing, conducting salvage operations, or any other activity which could potentially disturb the riverbed in the designated area unless authorized by the District Commander or the Captain of the Port. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before September 22, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0368 using the Federal Decision Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email LT Joseph R. McGinnis, telephone 218–725–3818, email *DuluthWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

In 2019, the Minnesota Pollution Control Agency (MPCA) began discussions with the Coast Guard and other stakeholders to explore establishing Regulated Navigation Areas for some of the St. Louis River Area of Concern project sites. The purpose of these Regulated Navigation Areas is to prevent disrupting engineered remedies that are a part of the St. Louis River Area of Concern sediment remediation projects from unauthorized human disturbance at several remedial action sites containing contaminated sediment. The Federal Great Lakes Restoration Initiative funded these remedial actions under the Great Lakes Legacy Act provisions in order to improve human and environmental health by reducing exposure to contaminated riverbed sediments via a variety of engineered methods. To prevent future exposure to the contained contaminants, the engineered remedies need protection from disturbance. In 2022, the Minnesota Pollution Control Agency notified the Coast Guard which sites and areas would be appropriate for Regulated Navigation Areas. The Captain of the Port of Duluth (COTP) has determined that protection of these remedies will also protect human and environmental health.

The purpose of this rulemaking is to ensure the protection of the remedies, human health, and the environment in the suggested Regulated Navigation Areas. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

III. Discussion of Proposed Rule

Coast Guard District Nine is proposing to establish the Regulated Navigation Areas in order to mitigate any potential unforeseen disruption to the remediated St. Louis River Area of Concern sites. The Regulated Navigation Areas would cover these six remediation sites: Minnesota Slip, Duluth, MN; Slip 3, Duluth, MN; Slip C, Duluth, MN; Azcon/Duluth Seaway Port Authority Grafield Slip C, Duluth, MN; St. Louis River/Interlake/Duluth Tar, Duluth, MN; U.S. Steel/Spirit Lake, Duluth, MN. Specific coordinates are included in the supplemental regulatory text. All vessels and persons are prohibited from activities that would disturb the integrity of the engineered remedies designed to address contaminated sediments at these sites. Activities may include, but are not limited to: anchoring, dragging, spudding, propeller scouring, or dredging. The regulatory text we are proposing appears at the end of this document.

The creation of the Regulated Navigation Areas will render the need for established safety zones at two sites obsolete, so this rulemaking would also repeal § 165.905 USX Superfund Site Safety Zones: St. Louis River and § 165.927 Safety Zone; St. Louis River, Duluth/Interlake Tar Remediation Site, Duluth, MN.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the necessity to avoid disrupting these remediated St. Louis River Area of Concern sites under most circumstances. Dredging projects for slips in the impacted areas which may need to be dredged in the future require review by state agencies prior to dredging. Thus, there should be little disruption and/or plans to resolve any disturbance to existing remedies prior to dredging projects.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the Regulated Navigation Areas may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have

a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this proposed rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Nothing in this proposed rule will preempt the rights to hunt, fish, and gather granted to Indian tribes under the 1854 Treaty with the U.S. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves all vessels. Normally such actions are categorically excluded from further review under paragraph L[60a] of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0369 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

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

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 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 § 165.945 to read as follows:

§ 165.945 Regulated navigation area; St. Louis River Area of Concern, Duluth, Minnesota

(a) *Location.* The following areas are a regulated navigation area:

TABLE 1 TO PARAGRAPH (a)

Number	Site name	Regulated area (Note: all geographic coordinates expressed in term of latitude and longitude datum are based on WGS 84 coordinates)
1	Minnesota Slip, Duluth, MN	The aquatic area within a polygon connected by the following points: • 46°46′53.4268″ N 092°05′45.2210″ W. • 46°46′53.1146″ N 092°05′46.1287″ W. • 46°46′52.1716″ N 092°05′45.4669″ W. • 46°46′51.8253″ N 092°05′46.6317″ W. • 46°46′52.1940″ N 092°05′46.7526″ W. • 46°47′01.7900″ N 092°05′50.8326″ W. • 46°47′00.8887″ N 092°05′52.4477″ W.
2	Slip 3, Duluth, MN	The aquatic area within a polygon connected by the following points: • 46°46′34.9277″ N 092°06′18.2902″ W. • 46°46′36.8355″ N 092°06′18.7654″ W. • 46°46′38.5299″ N 092°06′21.5290″ W. • 46°46′37.6368″ N 092°06′22.6961″ W.
3	Slip C, Duluth, MN	The aquatic area to the southwest of a line connected by the following points: • 46°46′22.1579″ N 092°06′31.4489″ W. • 46°46′21.0546″ N 092°06′27.9639″ W.
4	Azcon/Duluth Seaway Port Authority Garfield Slip C, Duluth, MN.	The aquatic area within a polygon connected by the following points: • 46°45′41.9081″ N 092°06′11.5069″ W. • 46°45′41.7040″ N 092°06′11.5337″ W. • 46°45′41.2503″ N 092°06′12.6746″ W. • 46°45′40.8467″ N 092°06′12.3733″ W. • 46°45′40.3784″ N 092°06′13.6404″ W. • 46°45′40.1196″ N 092°06′13.7025″ W. • 46°45′39.3277″ N 092°06′13.0539″ W. • 46°45′37.0413″ N 092°06′19.3995″ W. • 46°45′37.8242″ N 092°06′19.9225″ W. • 46°45′38.2401″ N 092°06′19.8461″ W. • 46°45′38.7466″ N 092°06′20.2255″ W.
5	St. Louis River/Interlake/Duluth Tar, Duluth, MN.	The aquatic area north of a line connected by the following points: • 46°43′12.8964″ N 092°10′30.7956″ W. • 46°43′12.1656″ N 092°10′28.1136″ W. • 46°43′09.3576″ N 092°10′26.0256″ W. • 46°43′09.2748″ N 092°10′25.9932″ W. • 46°43′08.8500″ N 092°10′25.6872″ W. • 46°43′08.8320″ N 092°10′21.8352″ W. • 46°43′08.0436″ N 092°10′19.5564″ W. • 46°43′08.4936″ N 092°10′19.0236″ W. • 46°43′09.3828″ N 092°10′21.4140″ W. • 46°43′10.1640″ N 092°10′22.0224″ W. • 46°43′10.8192″ N 092°10′21.6264″ W. and the aquatic area to the north of a line connected by the following points: • 46°43′11.9208″ N 092°10′03.2772″ W. • 46°43′12.1620″ N 092°10′01.6500″ W. • 46°43′07.6872″ N 092°09′48.3840″ W. • 46°43′08.1300″ N 092°09′42.4980″ W. • 46°43′10.2072″ N 092°09′42.4620″ W.
6	U.S. Steel/Spirit Lake, Duluth, MN	The aquatic area to the west of a line connected by the following points: • 46°41′38.8208″ N 092°12′12.7736″ W. • 46°41′39.6166″ N 092°12′08.8750″ W. • 46°41′39.3879″ N 092°12′05.5895″ W. • 46°41′39.2250″ N 092°12′04.3468″ W. • 46°41′39.1231″ N 092°12′02.9108″ W. • 46°41′38.9452″ N 092°12′01.1111″ W. • 46°41′38.6133″ N 092°11′59.4509″ W. • 46°41′38.3046″ N 092°11′57.7306″ W. • 46°41′37.2472″ N 092°11′53.6615″ W. • 46°41′36.1915″ N 092°11′49.7903″ W. • 46°41′34.5164″ N 092°11′45.6293″ W. • 46°41′33.5446″ N 092°11′43.9431″ W. • 46°41′30.8242″ N 092°11′43.9684″ W. • 46°41′30.8278″ N 092°11′39.9806″ W. • 46°41′29.1156″ N 092°11′38.2350″ W. • 46°41′27.0671″ N 092°11′37.5149″ W. • 46°41′25.4408″ N 092°11′36.7605″ W. • 46°41′25.0347″ N 092°11′36.5722″ W. • 46°41′22.7528″ N 092°11′36.0788″ W. • 46°41′20.7010″ N 092°11′35.6137″ W. • 46°41′19.6484″ N 092°11′35.5431″ W. • 46°41′19.6484″ N 092°11′35.5431″ W. • 46°41′18.5660″ N 092°11′35.0700″ W.

TABLE 1 TO PARAGRAPH (a)—Continued

Number	Site name	Regulated area (Note: all geographic coordinates expressed in term of latitude and longitude datum are based on WGS 84 coordinates)
		• 46°41′16.5697″ N 092°11′34.5434″ W. • 46°41′14.4790″ N 092°11′33.9685″ W. • 46°41′12.3306″ N 092°11′33.9221″ W. • 46°41′12.7159″ N 092°11′44.4501″ W. • 46°41′02.1240″ N 092°11′44.4501″ W. • 46°41′01.9943″ N 092°11′40.5819″ W. • 46°41′04.0665″ N 092°11′39.1344″ W. • 46°41′03.8696″ N 092°11′36.2223″ W. • 46°41′02.0724″ N 092°11′34.3605″ W. • 46°40′56.9795″ N 092°11′32.1366″ W. • 46°40′55.9436″ N 092°11′32.3531″ W. • 46°40′53.8981″ N 092°11′32.7804″ W. • 46°40′51.2261″ N 092°11′33.1191″ W. • 46°40′48.9634″ N 092°11′33.1528″ W. • 46°40′46.4928″ N 092°11′32.8907″ W. • 46°40′45.2017″ N 092°11′32.5057″ W. • 46°40′42.1916″ N 092°11′38.3025″ W. • 46°40′38.9992″ N 092°11′44.4501″ W. • 46°40′32.6805″ N 092°11′44.4595″ W. • 46°40′28.8937″ N 092°11′44.7158″ W. • 46°40′27.5301″ N 092°11′46.0856″ W. • 46°40′26.6103″ N 092°11′47.3902″ W. • 46°40′26.2216″ N 092°11′48.4650″ W. • 46°40′25.0613″ N 092°11′51.2108″ W.

(b) *Regulations.* In addition to the general Regulated Navigation Area regulations in §§ 165.10, 165.11, and 165.13:

(1) All vessels and persons are prohibited from activities that would disturb the integrity of engineered remedies designed to address contaminated sediments at the sites identified above that are described in the St. Louis River Area of Concern Remedial Action Plan. Such activities may include, but are not limited to: anchoring, dragging, spudding, propeller scouring, or dredging.

(2) The prohibitions described in paragraph (b)(1) of this section shall not apply to vessels or persons engaged in activities associated with future contaminated sediment remediation projects or other state or federally approved and permitted construction or monitoring projects, provided that the Captain of the Port (COTP), Duluth, is given advance notice of those activities by the local, state, or Federal agencies or by the regulated private entities conducting those activities.

(3) The prohibitions described in paragraph (b)(1) of this section shall not supersede restrictions outlined in executed Records of Decision for Superfund sites.

(4) Vessels may otherwise transit or navigate within this area without reservation.

(c) *Waivers.* Upon written request stating the need for and proposed conditions of the waiver and any proposed precautionary measures, the Captain of the Port (COTP) Duluth may, in consultation with local, state, and Federal agencies or regulated private entities, authorize a waiver from this section if the COTP determines that activity for which the waiver is sought can take place without undue risk to environmental remediation construction, monitoring, and maintenance. Requests for waivers should be submitted in writing to Commander, U.S. Coast Guard Marine Safety Unit, Duluth, 515 West First Street, Room 145, Duluth, MN 55802 to facilitate review by the U.S. Coast Guard.

(d) *Penalties.* Those who violate this section are subject to the penalties set forth in 46 U.S.C. 70036.

(e) *Enforcement period.* This Regulated Navigation Area's requirements are enforceable 24 hours a day as long as this Regulated Navigation Area is in place.

(f) *Contact information.* If you observe violations of the regulations in this section, you may notify the COTP by email, at *DuluthWWM@uscg.mil,* or by phone, 218–725–3818.

Dated: August 17, 2023.

Jonathan P. Hickey,

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

[FR Doc. 2023–18113 Filed 8–22–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2020–0430; FRL–7522–05–OAR]

RIN 2060–AU63

National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Supplemental notice of proposed rulemaking; extension of public comment period.

SUMMARY: On July 24, 2023, the U.S. Environmental Protection Agency (EPA) published a supplemental proposed rule titled ''National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting.'' The EPA is extending the comment period on this proposed rule that currently closes on September 7, 2023, by 15 days. The comment period will now remain open until September 22, 2023, to allow additional time for Tribal Nations and stakeholders to review and comment on the proposal.

DATES: The public comment period for the proposed rule published in the **Federal Register** on July 24, 2023 (88 FR 47415), originally ending September 7, 2023, is being extended by 15 days. Written comments must now be

received on or before September 22, 2023.

ADDRESSES: You may submit comments, identified by Docket ID No. EPA–HQ–OAR–2020–0430, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0430 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2020–0430.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2020–0430, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation 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 and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions about this action, contact Amanda Hansen, Metals and Inorganic Chemicals Group, Sector Policies and Programs Division (D243–02), P.O. Box 12055, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–3165; and email address: *hansen.amanda@epa.gov.*

SUPPLEMENTARY INFORMATION:

Rationale. The EPA received a request for additional time to review and comment on the supplemental proposed rule from a regulated entity (Freeport-McMorRan Miami, Inc.). This request is available in the docket (Docket ID No. EPA–HQ–OAR–2020–0430). They noted that a document in the docket (Docket ID No. EPA–HQ–OAR–2020–0430) contained typographical errors. Specifically, the memorandum that was intended to show the proposed rule edits (in redline strikeout) that would be necessary to incorporate the changes to 40 CFR part 63, subpart QQQ proposed in the action published on July 24, 2023 (88 FR 47415) was inadvertently converted to a clean document before it was posted to the docket. We posted the updated correct document to *https://www.epa.gov/stationary-sources-air-pollution/primary-copper-smelting-national-emissions-standards-hazardous-air,* to replace the previous document (that had the typographical errors). We also added the correct document to the docket, under Docket ID No. EPA–HQ–OAR–2020–0430, which is available at *https://www.regulations.gov,* and notified the entity within 8 days of publication of the supplemental notice. After considering this request, the EPA has decided to extend the public comment period by 15 days to provide all parties with an opportunity to review the updated document. The public comment period will now end on September 22, 2023.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2020–0430. All documents in the docket are listed in *https://www.regulations.gov/.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov*.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2020–0430. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically to *https://www.regulations.gov/* any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted as discussed below.

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

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/.* Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, note the docket ID, mark the outside of the digital storage media as CBI, and identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

Our preferred method to receive CBI is for it to be transmitted electronically

using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.,* Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address *oaqpscbi@epa.gov,* and as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, P.O. Box 12055, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2020–0430. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

Penny Lassiter,

Director, Sector Policies and Programs Division.

[FR Doc. 2023–18117 Filed 8–22–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10–90, 14–58, 09–197, 16–271; RM 11868; FCC 23–60; FR ID 164476]

Connect America Fund: A National Broadband Plan for Our Future High-Cost Universal Service Support; ETC Annual Reports and Certifications; Telecommunications Carriers Eligible To Receive Universal Service Support; Connect America Fund—Alaska Plan; Expanding Broadband Service Through the ACAM Program

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) takes a longer term view and seeks to build a record to help the Commission explore methods for modifying the Universal Service Fund (USF) high-cost program to promote affordable and available broadband services in the years to come.

DATES: Comments are due on or before October 23, 2023, and reply comments are due on or before November 21, 2023.

ADDRESSES: You may submit comments, identified by WC Docket Nos. 10–90, 14–58, 09–197 and 16–271, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *www.fcc.gov/ecfs.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
  - Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
  - Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See* FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, 35 FCC Rcd 2788, 2788–89 (OS 2020).

Interested parties may file comments and reply comments on or before the dates indicated in this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

Comments and reply comments exceeding ten pages must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with § 1.49 and all other applicable sections of the Commission's rules. The Commission directs all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. The Commission also strongly encourages parties to track the organization set forth in the Notice of Inquiry (NOI) or the concurrently adopted Notice of Proposed Rulemaking (NPRM) in order to facilitate its internal review process.

People with Disabilities. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530.

FOR FURTHER INFORMATION CONTACT: For further information, please contact, Jesse Jachman, Telecommunications Access Policy Division, Wireline Competition Bureau, at *Jesse.Jachman@fcc.gov* or Theodore Burmeister, Special Counsel, Telecommunications Access Policy Division, Wireline Competition Bureau, at *Theodore.Burmeister@fcc.gov* or 202–418–7400.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's NOI in WC Docket Nos. 10–90, 14–58, 09–197, 16–271; RM 11868, adopted on July 23, 2023 and released on July 24, 2023. Due to the COVID–19 pandemic, the Commission's headquarters will be closed to the general public until further notice. The full text of this document is available at the following internet address: *https://www.fcc.gov/document/fcc-adopts-plan-bring-reliable-broadband-rural-communities.*

Ex Parte Presentations—Permit-But-Disclose. The proceedings this NOI and concurrently adopted NPRM initiate shall be treated as ''permit-but-disclose'' proceedings in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies).

In light of the Commission's trust relationship with Tribal Nations and its commitment to engage in government-to-government consultation with them, it finds the public interest requires a limited modification of the *ex parte* rules in these proceedings. Tribal Nations, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process consistent with the requirements of the Administrative Procedure Act. However, at the option of the Tribe, *ex parte* presentations made during consultations by elected and appointed leaders and duly appointed representatives of federally recognized Indian Tribes and Alaska Native Villages to Commission decision makers shall be exempt from disclosure in permit-but-disclose proceedings and exempt from the prohibitions during the Sunshine Agenda period. To be clear, while the Commission recognizes

consultation is critically important, it emphasizes that they will rely in its decision-making only on those presentations that are placed in the public record for these proceedings.

Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in these proceedings should familiarize themselves with the Commission's *ex parte* rules.

I. Introduction

1. With the NOI, the Commission takes significant next steps in achieving its goal of ensuring all consumers, even those living in the costliest areas in the nation, have access to affordable and reliable broadband service so that they can work, learn, engage, and obtain essential services no matter where they live. The Commission also focuses on the future and seeks comment on how to reform its high-cost programs so that it can continue to efficiently promote broadband deployment and meaningfully support networks long term in the face of a significantly changing broadband landscape.

II. Notice of Inquiry

2. The NOI seeks to build a record to help the Commission explore methods to ensure universally affordable and available fixed broadband services into the future, in light of section 254(c)(1)'s definition of universal service as an ''evolving level of . . . service, taking into account advances in telecommunications and information technologies and services.'' The Commission seeks comment on whether and how it should modify its USF high-cost support program considering the anticipated deployment in most high-cost areas of robust, scalable, next-generation broadband networks offering a minimum of 100/20 Mbps service made possible through Commission programs, programs created by the Infrastructure Act, and other state and Federal subsidy programs. In the past, the high-cost support program largely sought to incrementally upgrade deployed broadband network speeds in high-cost areas. In areas where robust scalable networks such as fiber are deployed, however, future speed upgrades may be relatively low cost. The Commission's traditional approach, therefore, may no longer be well-suited to a changed broadband landscape. In the *Future of USF Report,* the Commission stated in such landscape, it ''could consider the creation of a process to support operating costs that are not recoverable from revenues earned when prices are set at just, reasonable, and affordable levels and from other sources of income, *e.g.,* governmental grants.'' This NOI explores several options for how this could be accomplished, including through cost modeling, business case analysis, and competitive mechanisms. In addition, given that broadband adoption rates in rural areas still lag considerably behind those in urban areas, the Commission explores whether the high-cost program's focus should be redirected towards a goal of universal broadband adoption and affordability. The Commission seeks comment on these approaches and invites comment on other approaches for how best to further the Commission's universal service goals.

3. The Commission's focus since the *USF/ICC Transformation Order,* 76 FR 73830, November 29, 2011, has been on supporting the deployment of new, robust networks and their associated operational costs for a limited term. However, providers in high-cost areas that already operate such fully deployed networks might not have a business case for continuing to operate those networks and provide services absent ongoing programmatic support that will augment existing revenues. Similarly, providers that receive support under programs such as the Broadband, Equity, Access, and Deployment Program (BEAD) that are designed to kick-start network deployment without providing support for sustained operations may face similar circumstances. Depending on the scope of this problem, lack of funding could threaten the sustainability of these full-service networks in high-cost areas. Accordingly, with the NOI, the Commission will assess the scope of this problem and explore whether it should adopt a mechanism or process to address, including soliciting information about the best methods for determining the support needed by carriers to efficiently maintain these full-service networks. The Commission seeks comment on appropriate methods of measuring and evaluating the future support needs of carriers with full-service networks, particularly where providers have received significant upfront Federal and/or state funding. The Commission seeks comment on whether differences in how providers were previously subsidized should be considered to avoid paying for the same costs twice, and if so, how.

4. The Commission expects this effort will require, at a minimum, determining which networks should be considered full service and thus, potentially eligible for sustainability support, and which full-service networks should be deemed ineligible because their operations are economically viable independent of such support. Further, to assess economic viability of continued operations, the Commission will need to determine capital costs (including the cost of debt and equity), operating costs, and the estimated revenues from network over time, which in turn requires estimates of penetration rates. In estimating expected costs and revenues, the Commission should consider any current or expected support and may need to consider expected inflation rates. In developing a methodology for determining the need for ongoing support for operating expenses, the Commission must also consider how often to recalculate the need for support and how it can ensure that other past, current, and future support are properly considered. The Commission seeks comment on this approach and these considerations against the backdrop of the universal service goals adopted in the *Future of USF Report.*

5. Within its high-cost programs, the Commission has measured successful deployment based on meeting and sustaining certain public interest obligations, including specific service speeds and latency. The Commission expects a support program designed to

sustain operations would meet consumers' service and pricing needs. The Commission seeks comment on what those needs should be. How should the Commission define a full-service network, meaning a network potentially eligible for sustainability support? Should the Commission factor in network performance standards, if any, that the provider was required to meet pursuant to the terms and conditions of other Federal or state funding, and if so, how? Are there other requirements that the Commission should adopt as part of its definition of a full-service network?

6. In addition, to what extent must a full-service network deploy service to residential and business locations within an area? Does the Commission need to factor in businesses that would take mass market service versus ones expected to subscribe to an enterprise service? For example, should the Commission require, as a prerequisite to any funding, that the network can turn on service in a set number of days, *e.g.,* 7–10 days, to each broadband serviceable location identified in the Fabric, which serves as the foundation for availability data in the National Broadband Map? Should the Commission factor in the deployment obligations under other Federal or state programs, and if so, how? Should the Commission require a provider claiming to operate a full-service network to show that it can extend service to any new locations within a defined period? What kinds of information would the Commission ask such providers to submit to make these showings?

7. The Commission also seeks comment on whether the definition of a full-service network should differ for areas outside the contiguous United States or for Tribal lands, and if so, how? How should the Commission define Tribal lands when considering the definition of a full-service network? What unique characteristics of such areas should the Commission consider? Should the Commission evaluate whether, and if so, to what extent, those factors impact the carrier through individualized reporting, or should the Commission presume that these factors generally exist for all carriers serving these areas? For example, the Commission has permitted carriers to use Alaska Plan support to maintain service to existing locations without upgrade if they can demonstrate that they were not able to deploy additional service or upgrade their facilities (usually due to limited access to middle mile facilities). Should the Commission define a full-service network in Alaska or other remote and isolated areas with reference to existing service in those areas? Should there be some minimum deployment requirement or public interest standards?

8. The Commission seeks comment on whether it can or should leverage its existing cost models, or develop a new model, to estimate the monthly costs necessary to sustain a full-service network. If so, what would be the key assumptions about the design of the network and network engineering? For example, the Connect America Cost Model (CAM) assumes a green-field, internet protocol (IP)-based fiber-to-the-premises network capable of providing both voice-grade access and broadband services. The Commission estimates the terminal value of the network at the end of a five-year term determined by the book value of the assets. Should the Commission use the same assumptions, standards, and attributes when referring to a full-service efficient network? What would be the appropriate topology of this network? What other assumptions, standards, and attributes should the Commission use? For example, what is the appropriate geographic unit for evaluating costs and revenue, *e.g.,* census blocks or individual locations?

9. The Commission also seeks comment on how it addresses costs in areas in which locations are served by multiple carriers, but not all locations are served by all carriers. For example, does the Commission need to disaggregate the costs of serving such areas and if so how should it do so? Are there common costs for all locations for a carrier serving an area that must be taken into account even if the carrier is the sole provider for some but not all of the locations in the area?

10. Currently, the Commission models the forward-looking operating costs of an efficient network using a range of data sources organized and aligned with relevant cost drivers, *i.e.,* demand and associated capital investments. The model estimates the annualized total cost (including operating costs) of deploying a network using today's technology to all locations within a specified geographic area less an assumed per-location expected revenue. When adopting this approach, the Commission specifically rejected a proposed model that would limit support to brownfield development because, while a brownfield model accounts for the *cost* of initial upgrades to the extent that the existing network is not up to standard, a brownfield model does not account for replacement capital after an initial capital investment is made. Should the Commission use the same approach here, a modified version of this approach, or a new approach?

11. *Inputs.* What inputs should the Commission use to quantify certain operating and capital costs, and what should those costs be, *e.g.,* costs associated with making networks scalable to consumer demands and needs? In developing the CAM, the Commission took steps to account for a range of operating costs by considering, among other things, network operations expenses (both plant specific and plant non-specific, factoring company size and by density), general and administrative costs (including property tax indices by state), selling and marketing costs, and bad debt. Can this approach be readily adapted to estimate the support necessary to sustain networks that have been full-service? Are there other factors that should be considered when estimating operating costs? Should the Commission adjust the model on a routine basis to account for changes to costs and if so, how often should this be done?

12. The CAM uses Annual Charge Factors (ACFs) to capture the cost of capital investments that are used over time, accounting for depreciation, income taxes, and cost of money. The cost of capital is the cost a firm will incur in raising funds in a competitive capital market based on a firm's overall systematic risk, and is generally estimated as a weighted average of the cost of equity and the cost of debt. In order to adopt final values for ACFs, the Commission must make certain assumptions regarding asset depreciation, income taxes, and the cost of money. For example, CAM determines the terminal value of the network based on ''book value'' calculated as the difference between investment and economic depreciation, which takes into account the economic life of the equipment and infrastructure. To determine a CAM input to capture the cost of money, the Commission used an analytical approach to establish a ''zone of reasonableness,'' and selected an input at the midpoint of that range. What assumptions about each input are relevant here?

13. How should a model supporting full-service networks reflect the carrier's composition of capital? Prior models have not recognized carrier-specific mixes of debt and equity financing, instead reflecting a uniform cost of capital for all carriers subject to a particular model. If the Commission were to adopt a uniform cost of capital, how would it identify that cost and how often should it be reevaluated? Should that evaluation differ, as it does now, between carriers operating in price-cap

areas receiving support through the CAM and rate-of-return carriers receiving support through the Alternative Connect America Cost Model? How should the Commission evaluate the impact of other sources of capital (such as Federal and state grants)? In determining the cost of capital, does it matter whether different carriers have different debt-equity ratios? If a carrier has chosen a relatively expensive form of financing, should the Commission provide support that validates that choice? Would this approach be consistent with treating carriers equally? Are there circumstances in which using a uniform cost of capital would create problems? Are such circumstances common? Could the waiver process resolve such instances?

14. Should capital inputs differ for carriers operating in areas outside the contiguous United States, and if so, how? For the CAM, the Commission incorporated specific factors to generate unique inputs for carriers operating in non-contiguous states and territories (such as the United States Virgin Islands, Puerto Rico, Alaska, and other areas), including those relating to the plant mix, undersea and submarine cable, terrain methodology, state-specific inputs, and company size. Should these same factors be taken into consideration when developing a model for sustaining full-service networks? Should other factors be taken into consideration?

15. *Data sources.* What objective, up-to-date, and available data sources can the Commission use in the development of this cost model? Alternatively, or in addition to such sources, should the Commission require the submission of accounting and financial information to model costs, revenues, past one-off grants, and similar? Should the Commission require submission of information on specific and approved network plans, to the extent there are any, and associated funding? What other kinds of information should the Commission collect to ensure realistic cost model and revenue estimates? And how often should this information be collected? For example, should it be collected periodically (annually or biennially, etc.) or only as current support arrangements come to their end, or some other way? What are the benefits and costs of different information collection timing choices? What would be the benefits of collecting and consolidating such information to supplement or replace other general industry research? What would be the administrative costs and resources required for completing this process? How could the Commission make use of this information while avoiding the pitfalls of rate-of-return regulation?

16. *Revenues.* How would the Commission model the present value of expected revenues of an efficient full-service network? How should the Commission account for the fact that providers receiving current support must set prices to mass market customers that are reasonably comparable to urban rates? For the CAM model, the Commission adopted a funding benchmark that takes into account both assumed expected revenues per subscriber and an assumed subscription rate, and the model calculates support for areas where such assumed revenues do not cover costs up to an extremely high cost threshold consistent with the budget. For full-service networks, should the Commission similarly take into consideration the actual take rate (subscribership) of these networks, particularly in and to areas where subscribership is influenced by regional factors such as limited income, mobile populations, and other factors? How would the Commission measure and account for variable investments, and effectiveness, in marketing? Should expected take rates differ when measuring revenue and costs?

17. How should the Commission account for revenue received from other Federal and state grants that provide support on a one-time basis for deployment or provide continuing support to sustain operations? Where urban broadband providers are unsubsidized and not subject to meeting a rate benchmarks, urban rates can adjust upwards when costs rise. Since rural rates can be set to the urban rate benchmark, could the Commission assume any future rural cost increases could be recovered by accompanying rural price increases? Is there a reason to think that rural costs could rise at rates materially above the rate of increase in urban costs? If so, would the requirement to provide services that are reasonably comparable to urban services in quality and price not allow USF supported providers to fully recover their costs?

18. *Updates.* How often should the Commission consider updates to an ongoing support model? Several commenters in the *Future of USF* proceeding asserted that funding should be made available for network improvements responsive to changes in consumer demands. Such changes could require adjustments to the model and/or model inputs. How would the Commission determine when such changes should or must be made? Could this be achieved, consistent with the Commission's past practice, by setting service standards and subsidy amounts for a set period, in order to grant providers a degree of certainty while allowing periodic adjustment? What would an appropriate support term be to offer certainty to providers while limiting inefficient payments? Should a support term consider the pace of technological development, changing geographic and demographic conditions, or other factors? Should updates to the model similarly consider such changing circumstances?

19. *Alternatives to a model.* The Commission next asks about other alternatives to a model. There may be certain disadvantages to the model-based approach. For example and based on previous experience, it may take some time, several years, to develop and update the model. In addition, a model makes certain assumptions of uniformity among potential support recipients, including uniform assumptions about cost, particularly given terrain and population characteristics, and uniform penetration and expected revenues. The CAM, as currently designed does not take into consideration other sources of support, such as those from the states or Federal agencies. In light of these complications, are there any alternatives to a model that the Commission should consider?

20. Given that the adaption of existing models is likely to require significant time and investment, should the Commission prioritize other approaches? Should the Commission adopt an interim plan for providing support while the cost model is developed? For example, as suggested in one publication, the Commission could measure the need for universal service support by requiring applicants for support to answer certain standard financially-oriented questions, the answers to which would then be fed into a standard financial model. This model would take into account potential sources of finance (including the cost of equity and debt and other possible sources of support), the cost of the initial build-out (or initial network capex), the relative amounts of fixed and success-based capex, the penetration rate and changes in the penetration rate over time, and projected revenues. One advantage of this approach is that it can permit the Commission to take into account the individual characteristics of the applicants for support. The Commission seeks comment on this approach.

21. Since the *USF/ICC Transformation Order,* the Commission has sought to use competitive processes

to determine support levels. The Commission seeks comment on whether it should use such competitive mechanisms going forward to assign universal service support obligations and determine support levels, either in the context of determining ongoing operating support or more generally to achieve its universal service goals. Would it be possible to competitively determine support levels following the BEAD Program, and are there areas where competitive mechanisms could not be used? What obligations should apply to winners of support? One approach for using a competitive mechanism would be to change the focus of the high-cost program from the deployment of networks towards the long-standing universal service goals of universal affordability and adoption. The most recent internet Access Services Report shows that broadband adoption rates in the wealthiest and most dense areas of the country are well above 90 percent, but below 40 percent in some of the least dense and poorest areas of the country. The Commission seeks comment on whether and how the USF high-cost program could be reoriented towards closing these substantial digital equity and affordability gaps. Should the Commission consider reorienting its high-cost programs towards closing the adoption and affordability gaps in high-cost areas?

22. The Commission also asks about *force majeure* events and whether and how a high-cost program focused on providing ongoing operating support should account for these events. Are there events that providers cannot reasonably anticipate, or insure against, that will materially affect the need for universal service support going forward? Are these location-specific events, or is it possible to accommodate support needed in responses to these events equally across the United States and territories? If the USF were to cover certain unforeseeable costs that a carrier could not reasonably anticipate, such as generally rare weather-related events (*e.g.,* hurricanes, volcanic eruptions, tornados, floods), should the Commission establish and administer a separate funding mechanism? Or would it be simpler to incorporate such costs in the broader universal service program? The Commission also seeks information about the role private, commercial or government insurance can play in helping to offset the financial harm caused by these events.

23. *Area eligibility.* The Commission next seeks comment on areas and locations eligible to receive support. When would a full service network be deemed or become economically viable without continuing support, and thus become ineligible for support? Consistent with past Commission policy, it expects to preclude support to any overbuilt locations, *i.e.,* locations where an unsubsidized network provider offers broadband services comparable to those in urban areas at comparable prices and seeks comment on maintaining this policy going forward. What parameters should the Commission place around such a restriction? Should the Commission also preclude support to locations or areas where future overbuild is likely to occur? How would the Commission identify these areas? How would the Commission ensure the overbuild rates would remain comparable to urban rates if the subsidized provider were to exit the market? If the Commission does not provide support in areas with an unsubsidized competitor, how would it ensure the overbuild rates would remain comparable to urban rates if the subsidized provider were to exit the market?

24. The Commission has an obligation to limit support to carriers to no more than necessary and to encourage carriers to be prudent and efficient in their expenditures, including operating as well as capital expenses. First and foremost, the Commission must ensure that its support mechanisms remain responsive to consumer needs by balancing the need for affordable broadband service against the burden on contributors to the USF. How should the Commission determine a budget for ongoing support to sustain operations of a full-service network operating in high-cost areas while protecting the interests of ratepayers? Can the Commission use a cost model to set a budget or should it use some other means, and if so, what should those means be?

25. Further, to ensure that support does not continue for a longer time period than carriers will need such support, the Commission expects that a fixed term for support is necessary to permit the Commission to revisit carriers' support eligibility. A set support term has the advantage of providing firms with good incentives to reduce costs from the start and adds predictability to revenue estimates. Incentives for cost reduction arise because, for the duration of the promised payments, any cost reductions directly increase the provider's profit. The Commission seeks comment on this position.

26. How long should the support term be and what data or assumptions should the Commission use to evaluate term length? Should it be based on predictions regarding how quickly consumer demand will change or on routine evaluations of factors that define high-cost areas, such as population density? How should the Commission coordinate the support term and the schedule for updating the model? Should support terms differ based on the probability of unsubsidized competition developing? Should there be automatic triggers for cutting off funding, perhaps with a glide path, if, for example, population reaches a certain density? Should the Commission reserve the right to revisit ongoing commitments in the light of radical technological change? How should the Commission account for the pace of technological development and how that may end up affecting service demand/expectations, while also balancing the effect that would have potentially on support amounts and contributions?

27. The Commission's current high-cost programs include specific, defined service obligations for deployment and specific reporting requirements. In addition, the Commission requires recipients of high-cost support to participate in performance testing to monitor compliance with speed and latency requirements, which includes conducting, at a minimum, one download test and one upload test per testing hour at each subscriber test location over a week time frame each quarter and to provide that information to the Commission. Performance testing has protected ratepayers' investment and ensured that carriers receiving universal service high-cost support deploy networks that meet the performance standards they promised to deliver. To ensure accountability in the use of support to sustain operation of full-service networks, should the Commission consider adopting similar rules for a future funding mechanism or should it require annual reporting regarding the state of facilities, business operations, and other factors? Should the Commission require annual or quarterly performance testing and if so, what would be the parameters of such testing? If performance testing shows that a provider has failed to meet the requirements imposed for continuing support receipt, should the support be placed on hold until the problems are remediated? What kind of time limit should the Commission impose to remediate? Should the Commission implement any mechanisms similar to those used for other high-cost programs, such as receipt of a letter of credit, that would enable recovery of disbursed support in the event of default? Should

the Commission limit these requirements to service providers that are currently receiving support?

III. Procedural Matters

A. Paperwork Reduction Act

28. The document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

IV. Ordering Clauses

29. *It is further ordered* that, pursuant to the authority contained in sections 4(i), 214, 218–220, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 214, 218–220, 254, 303(r), and 403, and § 1.1 of the Commission's rules, 47 CFR 1.1, this Notice of Inquiry *is adopted*. The Notice of Inquiry will be *effective* upon publication in the **Federal Register**, with comment dates indicated therein.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2023–18084 Filed 8–22–23; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FF09E21000 FXES1111090FEDR 234]

Endangered and Threatened Wildlife and Plants; Nine Species Not Warranted for Listing as Endangered or Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notification of findings.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce findings that nine species are not warranted for listing as endangered or threatened species under the Endangered Species Act of 1973, as amended (Act). After a thorough review of the best available scientific and commercial information, we find that it is not warranted at this time to list the Alexander Archipelago wolf (*Canis lupus ligoni*), Chihuahua catfish (*Ictalurus* sp. 1), Cooper's cave amphipod (*Stygobromus cooperi*), Georgia blind salamander (*Eurycea wallacei*), minute cave amphipod (*Stygobromus parvus*), Morrison's cave amphipod (*Stygobromus morrisoni*), narrow-foot hygrotus diving beetle (*Hygrotus diversipes*), pristine crayfish (*Cambarus pristinus*), and Tennessee heelsplitter (*Lasmigona holstonia*). However, we ask the public to submit to us at any time any new information relevant to the status of any of the species mentioned above or their habitats.

DATES: The findings in this document were made on August 23, 2023.

ADDRESSES: Detailed descriptions of the bases for these findings are available on the internet at *https://www.regulations.gov* under the following docket numbers:

Species	Docket No.
Alexander Archipelago wolf	FWS–R7–ES–2023–0109
Chihuahua catfish	FWS–R2–ES–2023–0110
Cooper's cave amphipod	FWS–R5–ES–2023–0120
Georgia blind salamander	FWS–R4–ES–2023–0117
Minute cave amphipod	FWS–R5–ES–2023–0121
Morrison's cave amphipod	FWS–R5–ES–2023–0122
Narrow-foot hygrotus diving beetle	FWS–R6–ES–2023–0111
Pristine crayfish	FWS–R4–ES–2023–0115
Tennessee heelsplitter	FWS–R4–ES–2023–0116

Those descriptions are also available by contacting the appropriate person as specified under **FOR FURTHER INFORMATION CONTACT**. Please submit any new information, materials, comments, or questions concerning this finding to the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT:

Species	Contact information
Alexander Archipelago wolf	Stewart Cogswell, Field Supervisor, Anchorage Field Office, *Stewart_Cogswell@fws.gov*, 907–271–2888.
Chihuahua catfish	Michael Warriner, Supervisory Fish and Wildlife Biologist, Austin Ecological Services Field Office, *Michael_warriner@fws.gov*, 512–490–0057.
Cooper's cave amphipod, minute cave amphipod, Morrison's cave amphipod.	Jennifer Norris, Field Supervisor, West Virginia Field Office, *jennifer_l_norris@fws.gov*, 304–704–0655.
Georgia blind salamander	Peter Maholland, Field Supervisor, Georgia Ecological Services Field Office, *peter_maholland@fws.gov*, 706–208–7512.
Narrow-foot hygrotus diving beetle	Tyler Abbott, Field Supervisor, Wyoming Field Office, *tyler_abbott@fws.gov*, 307–757–3707.
Pristine crayfish	Dan Elbert, Field Supervisor, Tennessee Field Office, *daniel_elbert@fws.gov*, 571–461–8964.
Tennessee heelsplitter	Janet Mizzi, Field Supervisor, Asheville Ecological Services Field Office, *janet_mizzi@fws.gov*, 828–258–3939x42223.

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:

Background

Under section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*), we are required to make a finding on whether or not a petitioned action is warranted within 12 months after receiving any petition that we have determined contains substantial scientific or commercial information indicating that the petitioned action may be warranted (hereafter a ''12-month finding''). We must make a finding that the petitioned action is: (1) Not warranted; (2) warranted; or (3) warranted but precluded by other listing activity. We must publish a notification of these 12-month findings in the **Federal Register**.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations at part 424 of title 50 of the Code of Federal Regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Lists of Endangered and Threatened Wildlife and Plants (Lists). The Act defines ''species'' as including any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)). The Act defines ''endangered species'' as any species that is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1532(6)), and ''threatened species'' as any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)). Under section 4(a)(1) of the Act, a species may be determined to be an endangered species or a threatened species because of any of the following 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.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself. However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, 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 Act's definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' 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.

In conducting our evaluation of the five factors provided in section 4(a)(1) of the Act to determine whether the Alexander Archipelago wolf, Cooper's cave amphipod, Georgia blind salamander, minute cave amphipod, Morrison's cave amphipod, narrow-foot hygrotus diving beetle, pristine crayfish, and Tennessee heelsplitter meet the Act's definition of ''endangered species'' or ''threatened species,'' we considered and thoroughly evaluated the best scientific and commercial information available regarding the past, present, and future stressors and threats. In conducting our evaluation of the Chihuahua catfish, we determined that it does not meet the definition of a ''species'' under the Act, and, as a result, we conclude that it is not a listable entity. We reviewed the petitions, information available in our files, and other available published and unpublished information for all these species. Our evaluation may include information from recognized experts; Federal, State, and Tribal governments; academic institutions; foreign governments; private entities; and other members of the public.

In accordance with the regulations at 50 CFR 424.14(h)(2)(i), this document announces the not-warranted findings on petitions to list nine species. We have also elected to include brief summaries of the analyses on which these findings are based. We provide the full analyses, including the reasons and data on which the findings are based, in the decisional file for each of the nine actions included in this document. The following is a description of the documents containing these analyses:

The species assessment forms for Alexander Archipelago wolf, Cooper's cave amphipod, Georgia blind salamander, minute cave amphipod, Morrison's cave amphipod, narrow-foot hygrotus diving beetle, pristine crayfish, and Tennessee heelsplitter contain more detailed biological information, a thorough analysis of the listing factors, a list of literature cited, and an explanation of why we determined that

each species does not meet the Act's definition of an ''endangered species'' or a ''threatened species.'' To inform our status reviews, we completed species status assessment (SSA) reports for the Alexander Archipelago wolf, Cooper's cave amphipod, Georgia blind salamander, minute cave amphipod, Morrison's cave amphipod, narrow-foot hygrotus diving beetle, pristine crayfish, and Tennessee heelsplitter. Each SSA report contains a thorough review of the taxonomy, life history, ecology, current status, and projected future status for each species. The species assessment form for the Chihuahua catfish contains more detailed taxonomic information, a list of literature cited, and an explanation of why we determined that the species does not meet the Act's definition of a ''species.'' This supporting information can be found on the internet at *https://www.regulations.gov* under the appropriate docket number (see **ADDRESSES**, above).

Alexander Archipelago Wolf

Previous Federal Actions

On July 15, 2020, we received a petition from the Center for Biological Diversity, Alaska Rainforest Defenders, and Defenders of Wildlife, requesting that the Alexander Archipelago wolf subspecies in Southeast Alaska be listed as a threatened species or an endangered species and critical habitat be designated for this species under the Act. The petitioners requested that we recognize Alexander Archipelago wolves in Southeast Alaska as a distinct population segment (DPS), and evaluate this DPS for listing as threatened or endangered. The petitioners also requested that we evaluate the Alexander Archipelago wolf subspecies for listing where Southeast Alaska constitutes a significant portion of the range. On July 27, 2021, we published a 90-day finding (86 FR 40186) that the petition contained substantial information indicating that listing may be warranted for the species. This document constitutes our 12-month finding on the July 15, 2020, petition to list the Alexander Archipelago wolf under the Act.

We evaluated the Southeast Alaska population of AA wolf under our 1996 DPS policy (61 FR 4722) and found that it met both the discreteness and significance criteria. The population is discrete based on the international governmental boundary between the United States (Alaska) and Canada (British Columbia) within which significant differences in control of exploitation, management of habitat, and regulatory mechanisms exist. The population meets the significance criteria because the loss of the Alexander Archipelago wolves in Southeast Alaska would result in a significant gap in the range of the taxon because an extensive area would be without Alexander Archipelago wolves if the Southeast Alaska population were lost. For a more detailed discussion of our DPS analysis, please see the species assessment form.

Given the best available information related to the DPS Policy's discreteness and significance criteria, we determined that the Southeast Alaska segment of the Alexander Archipelago wolf population meets the DPS Policy criteria for both the discreteness criteria and the significance criteria. Thus, in addition to our listing evaluation and finding on the Alexander Archipelago wolf range-wide, we also evaluated the Southeast Alaska DPS, as requested by the petition.

Summary of Finding for the Alexander Archipelago Wolf

The Alexander Archipelago wolf is a subspecies of gray wolf that occurs along the coastal mainland and islands of Southeast Alaska and British Columbia. Based on the best available information, the current distribution of the species is similar to its historical distribution.

There are gaps in our understanding of the life history of the Alexander Archipelago wolf; thus, when appropriate, we have applied information from gray wolves and other gray wolf subspecies. Alexander Archipelago wolves breed between 22 to 34 months of age, and litters range from 1 to 8 pups. Denning typically occurs from mid-April through early July; throughout the rest of the year Alexander Archipelago wolves are traveling, hunting, or dispersing. Alexander Archipelago wolves are capable of dispersing long distances, both on land and water, although there are many examples of these wolves avoiding water crossings. Pack sizes typically range between 2 and 12 wolves, although much larger groups have been observed. Alexander Archipelago wolves are opportunistic predators that eat a variety of prey species, yet, like gray wolves, ungulates compose most of their diet. Across the range of the species, Sitka black-tailed deer (*Odocoileus hemionus sitkensis*) and moose (*Alces americanus*) make up 75 percent of the wolf's diet. Alexander Archipelago wolves are habitat generalists, typically utilizing whatever habitat their preferred prey use and avoiding areas of intense human activity. Old-growth forests, which Alexander Archipelago wolves select for, make up a majority of home range areas, and areas near freshwater are also selected by wolves during denning.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Alexander Archipelago wolf, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The primary threats affecting the Alexander Archipelago wolf's biological status include timber harvest and associated road development, harvest of wolves, and genetic inbreeding. Although disease and climate change may not be currently impacting the species, the best available information indicates that these factors could have impacts on the species' viability in the future.

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we assessed the current status of the Alexander Archipelago wolf to determine if it meets the definition of an endangered species or threatened species. Our assessment of Alexander Archipelago wolf current viability included the primary threats of timber harvest and associated road development, harvest of wolves, and genetic inbreeding. To evaluate overall current population resiliency of the Alexander Archipelago wolf, we ranked each population into a current condition category (*i.e.,* high, moderately-high, moderate, moderately-low, low, or functionally extirpated) based on estimates of population growth, and the species' needs which include dietary diversity, area of old-growth forest available, and remoteness (*i.e.,* space from human activity; Table 3 of the SSA Report). Despite past and ongoing threats, Alexander Archipelago wolf currently occupies five analysis units that span its historical range, three of which exhibit high resiliency (Northern and Southern Coastal British Columbia and Northern Southeast Alaska), one with moderately high resiliency (Southern Southeast Alaska), and one with moderately low resiliency (Prince of Wales Island Complex). Currently, Alexander Archipelago wolves appear to have high adaptive capacity, and we expect most populations to be able to adapt to near-term changes in their physical and biological environments. The exception to this is the Prince of Wales Island Complex analysis unit.

Within the Prince of Wales Island Complex analysis unit, high levels of inbreeding have been documented, and

ungulate prey is limited compared to the rest of the range. These characteristics limit the adaptive capacity of wolves within this analysis unit. Nonetheless, based on the best available information, the Prince of Wales Island Complex analysis unit demonstrates stable population trends. Overall, the Alexander Archipelago wolf is widely distributed across its current and historical range indicating that it has high redundancy (ability to withstand catastrophic events) and overall high representation (adaptive capacity), contributing to its overall viability. Thus, after assessing the best available information, we conclude that the Alexander Archipelago wolf is not in danger of extinction throughout all of its range.

To assess future viability of the Alexander Archipelago wolf, we considered the foreseeable future out approximately 30 years (to 2050) and projected the influence of three future scenarios that included disease and climate change and the other primary threats included in the assessment of current viability. The Alexander Archipelago wolf is projected to retain high to moderate levels of resiliency within four of the five analysis units, and no significant loss in distribution is predicted across its range. The exception is the Prince of Wales Island Complex analysis unit, which is projected to decline in resiliency under most scenarios, and under one scenario, projections indicate possible extirpation. However, the Prince of Wales Island Complex analysis unit represents a relatively small area (approximately 4.5 percent; Service 2023, p. 110) compared to the overall geographic range of the species, and a relatively small proportion of the rangewide population estimate (17 percent; Service 2023, pp. 90–91). Thus, after assessing the best available information, we conclude that the Alexander Archipelago wolf is not likely to become endangered within the foreseeable future throughout all of its range.

We evaluated the range of the Alexander Archipelago wolf 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. The Prince of Wales Island Complex analysis unit has moderately low resiliency now and ranges from moderate resiliency to functionally extirpated into the future. We found that this analysis unit may have a different status compared to the rest of the range. Within the Prince of Wales Island Complex analysis unit, high levels of old-growth timber harvest, road development, and inbreeding have been documented, and wolf harvest rates (reported and unreported) may also exceed sustainable levels in some years (Service 2023, p. 62). Additionally, ungulate prey is limited to just one species, the Sitka black-tailed deer, limiting adaptive capacity for wolves in this analysis unit. Although other analysis units may also face one or two threats from timber harvest, road development, inbreeding, wolf harvest, or prey availability, the Prince of Wales Island Complex is the only analysis unit that experiences all of these threats.

However, we did not find that the Prince of Wales Island Complex analysis unit represents a significant portion of the range for the Alexander Archipelago wolf. The Prince of Wales Island Complex analysis unit represents approximately 4.5 percent of the overall geographic range of the species (Service 2023, p. 110). Additionally, the Prince of Wales Island Complex analysis unit does not have high-quality habitat relative to the rest of the range. Contiguous patches of old-growth forest (at least 75 square kilometers) have been identified as the preferred habitat for this species and are considered high-quality habitat. The Prince of Wales Island Complex analysis unit contains 10.9 percent of the total preferred old-growth habitat that is available to the species rangewide (Service 2023, p. 110). Lastly, the habitat within the Prince of Wales Island Complex analysis unit is not considered unique for any specific life-history functions (*e.g.,* availability of denning habitat or ungulate prey); the species' preferred denning habitat is found in all other analysis units, and ungulate prey diversity is greater in the other analysis units. Thus, we do not consider the Prince of Wales Island Complex analysis unit to represent a large geographic area relative to the range of the species as a whole, to have higher quality habitat relative to the remaining portions of the range, or to represent uniquely valuable habitat for the species. We do not find that the Prince of Wales Island Complex analysis unit is significant. Therefore, the Prince of Wales Island Complex analysis unit does not represent a significant portion of its range, and we find that the Alexander Archipelago wolf is not in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range.

After assessing the best available information, we conclude that the Alexander Archipelago wolf is not in danger of extinction or likely to become in danger of extinction throughout all of its range or in any significant portion of its range. Therefore, we find that listing the Alexander Archipelago wolf as an endangered species or threatened species under the Act is not warranted.

Summary of Finding for the Southeast Alaska Alexander Archipelago Wolf DPS

The Southeast Alaska Alexander Archipelago wolf DPS occurs along the coastal mainland and islands of Southeast Alaska. Based on the best available information, the current distribution of the species is similar to its historical distribution.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Southeast Alaska Alexander Archipelago wolf DPS, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The primary threats affecting the Southeast Alaska Alexander Archipelago wolf DPS's biological status include timber harvest and associated road development, harvest of wolves, and genetic inbreeding. Although disease and climate change may not be currently impacting the species, the best available information indicates that these factors could have impacts on the species' viability in the future.

Our assessment of the current viability of the Southeast Alaska Alexander Archipelago wolf DPS included the primary threats of timber harvest and associated road development, harvest of wolves, and genetic inbreeding. Currently, one analysis unit exhibits high resiliency (Northern Southeast), one analysis unit exhibits moderately high resiliency (Southern Southeast), and one analysis unit exhibits moderately low resiliency (Prince of Wales Island Complex). Alexander Archipelago wolves in the Northern Southeast Alaska analysis unit and the Southern Southeast Alaska analysis unit appear to have high adaptive capacity, and we expect wolves in these analysis units to be able to adapt to near-term changes in their physical and biological environments. Even though the Southern Southeast Alaska analysis unit exhibits signs of recent and historical inbreeding, there is no evidence of a reduction in fitness related to inbreeding. Additionally, the Southern Southeast Alaska analysis unit has a greater potential for connectivity and therefore, gene flow, with other analysis units on the mainland, and it has a greater diversity of ungulate prey. Within the Prince of Wales Island Complex analysis unit, high levels of

inbreeding have been documented and ungulate prey is limited compared to the rest of the range of the DPS. These characteristics limit the current adaptive capacity of wolves within the Prince of Wales Island Complex analysis unit. However, even with this additional stress, the population estimates for Prince of Wales Island Complex analysis unit indicate it is currently stable. Within the Southeast Alaska Alexander Archipelago wolf DPS, the species is distributed across its current and historical range, indicating that it has high redundancy (ability to withstand catastrophic events) and high representation (adaptive capacity), contributing to its overall viability. Thus, after assessing the best available information, we conclude that the Southeast Alaska Alexander Archipelago wolf DPS is not in danger of extinction throughout its range.

To assess future viability of the Southeast Alaska Alexander Archipelago wolf DPS, we considered the foreseeable future out approximately 30 years (to 2050) and projected the influence of three future scenarios that included disease and climate change, and the other primary threats included in the assessment of current viability. The Southeast Alaska Alexander Archipelago wolf DPS is projected to have high to moderate resiliency within the Northern Southeast Alaska analysis unit, moderately high resiliency in the Southern Southeast Alaska analysis unit, and moderate resiliency to a functionally extirpated status within the Prince of Wales Island Complex analysis unit. However, the Prince of Wales Island Complex analysis unit represents a relatively small percentage of the total geographic area of the Southeast Alaska Alexander Archipelago wolf DPS (approximately 13.2 percent) and approximately 30 percent of the overall Southeast Alexander Archipelago wolf DPS population. Thus, after assessing the best available information, we conclude that the Southeast Alaska Alexander Archipelago wolf DPS is not likely to become endangered within the foreseeable future throughout all of its range.

We then evaluated the range of the Southeast Alaska Alexander Archipelago wolf DPS to determine if the species is in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range. We looked at the entire range of the Southeast Alaska Alexander Archipelago wolf DPS and found that the Prince of Wales Island Complex analysis unit has moderately low resiliency now and ranges from moderately resilient to functionally extirpated into the future. We found that the Prince of Wales Island Complex may have a different status compared to the rest of the DPS range. Within the Prince of Wales Island Complex analysis unit, high levels of old-growth timber harvest, road development, and inbreeding have been documented, and wolf harvest rates (reported and unreported) may exceed sustainable levels in some years (Service 2023, p. 62). Additionally, ungulate prey is limited to just one species, Sitka black-tailed deer, limiting adaptive capacity for wolves in this analysis unit. Although the other analysis units may also face one or two threats from either timber harvest, road development, inbreeding, wolf harvest, or prey availability, the Prince of Wales Island Complex is the only analysis unit that experiences all of these threats. However, we did not find the Prince of Wales Island Complex analysis unit to represent a significant portion of the range of the Southeast Alaska Alexander Archipelago wolf. The Prince of Wales Island Complex analysis unit represents a relatively small portion of the geographic area of the Southeast Alaska Alexander Archipelago wolf DPS (approximately 13.2 percent). Additionally, the Prince of Wales Island Complex analysis unit does not have high-quality habitat relative to the rest of the range. Contiguous patches of old-growth forest have been identified as the preferred habitat for this species and are considered high-quality habitat. The Prince of Wales Island Complex analysis unit contains approximately 22.8 percent of high-quality habitat compared to the rest of the DPS range (Service 2023, p. 110). Lastly, the habitat on the Prince of Wales Island Complex analysis unit is not considered unique for any specific life-history functions (*e.g.,* denning habitat or prey diversity); denning habitat is found in the other analysis units within the DPS, and the other two analysis units have greater ungulate prey diversity compared to the Prince of Wales Island Complex. Thus, we do not consider the Prince of Wales Island Complex analysis unit to represent a large geographic area relative to the range of the DPS, to have higher quality habitat relative to the rest of the DPS, or to represent uniquely valuable habitat for the DPS. Therefore, the Prince of Wales Island Complex analysis unit does not represent a significant portion of the Southeast Alaska Alexander Archipelago wolf DPS range, and the Southeast Alaska Alexander Archipelago wolf DPS is not in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range.

After assessing the best available information, we concluded that the Southeast Alaska Alexander Archipelago wolf DPS is not in danger of extinction or likely to become in danger of extinction throughout all of its range or in any significant portion of its range. Therefore, we find that listing the Southeast Alaska Alexander Archipelago wolf DPS as an endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the Alexander Archipelago wolf species assessment form and other supporting documents at *https://www.regulations.gov* under Docket No. FWS–R7–ES–2023–0109.

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process we solicited independent scientific reviews of the information contained in the Alexander Archipelago wolf SSA report. The Service sent the SSA report to 10 independent peer reviewers and received 4 responses. Results of this structured peer review process can be found at *https://www.regulations.gov* under Docket No. FWS–R7–ES–2023–0109 and *https://www.fws.gov/library/categories/peer-review-plans.* We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

Chihuahua Catfish

Previous Federal Actions

On June 25, 2007, the U.S. Fish and Wildlife Service (Service) received a petition dated June 18, 2007, from Forest Guardians (now WildEarth Guardians) requesting that the Service list 475 species, including the Chihuahua catfish, as threatened or endangered species and designate critical habitat under the Act. All 475 species occur within the Southwest Region and were ranked as G1 or G1G2 species by NatureServe at the time. In a July 11, 2007, letter to the petitioner, the Service acknowledged receipt of the petition and stated that the petition was under review by staff in the Southwest Regional Office. On December 16, 2009, the Service published a partial 90-day finding on the petition, including the Chihuahua catfish and 191 other species, stating that the petition presented substantial scientific information indicating that listing may be warranted for 67 of the 192 species (74 FR 66866).

Summary of Finding

In assessing the best available scientific information for the status of a species, the Service generally relies on information published in peer-reviewed journals and other reports. Particularly related to taxonomic determinations, we defer to the scientific literature and to professional authorities for taxonomical assignments. However, when that information is in question, the Service conducts its own analysis, and we exercise our best scientific judgment.

For a taxon to be listed under the Act, it must be a listable entity; that is, it must be either formally described and accepted as a species or subspecies or there must be credible scientific evidence that the entity should qualify as a valid species or subspecies. The Chihuahua catfish has never been formally described in peer-reviewed literature as a valid taxonomic entity. A draft species description from 1998 proposed to describe the species as distinct but was never finalized. Recent morphological and genetic analyses found no evidence that this putative species exists in New Mexico and Texas.

To date, no peer-reviewed publications have supported a distinct species status of the Chihuahua catfish or provided evidence of its existence. We have reviewed the best available information regarding the taxonomic status of the putative Chihuahua catfish and conclude that there is insufficient credible scientific evidence that the entity qualifies as a valid species or subspecies. Therefore, it is not warranted for listing because we find that there is not credible scientific evidence that the Chihuahuan catfish is a listable entity under Act. A detailed discussion of the basis for this finding can be found in the Chihuahua catfish species assessment form and other supporting documents at *https://www.regulations.gov* under Docket No. FWS–R2–ES–2023–0110.

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in our report titled ''Review of the Chihuahua catfish (*Ictalurus* sp. 1)''. The Service sent the report to seven independent peer reviewers and received four responses. We incorporated the results of these reviews, as appropriate, into the report, which is the foundation for this finding. Results of this structured peer review process can be found at *https://www.regulations.gov* under Docket No. FWS–R2–ES–2023–0110.

Cooper's Cave Amphipod, Minute Cave Amphipod, and Morrison's Cave Amphipod

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, and West Virginia Highlands to list 404 aquatic, riparian, and wetland species, including *Stygobromus cooperi, S. parvus,* and *S. morrisoni* (referred to by the common names ''Cooper's cave amphipod,'' ''minute cave amphipod,'' and ''Morrison's cave amphipod,'' respectively, in the petition), as endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding in which we announced that the petition contained substantial information indicating that listing may be warranted for the species (76 FR 59836). This document constitutes our 12-month finding on the April 20, 2010, petition to list Cooper's, minute, and Morrison's cave amphipods under the Act.

Summary of Finding

Cooper's, minute, and Morrison's cave amphipods are specialized for subterranean karst habitat characterized by relatively stable physiochemical conditions compared to surface environments and have limited or patchily distributed food resources. Karst landscapes are geologic features or landforms characterized by distinctive permeable underground drainage systems, caves, and sinkholes that have been formed through the dissolving of soluble rock, particularly limestone (Simms 2005, p. 678). Due to the absence of light and primary producers in subterranean environments, these species are likely detritivores or omnivores that feed on organic matter (*i.e.,* dead plant and animal material) originating from the surface. Morrison's cave amphipod is restricted to Virginia and West Virginia, and Cooper's cave and minute cave amphipods are restricted to West Virginia, with limited distributions.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Cooper's, minute, and Morrison's cave amphipods, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The primary threats affecting Cooper's, minute, and Morrison's cave amphipods are: (1) groundwater contamination by sediments and toxic compounds, (2) disruption of food supply due to deforestation/surface alteration, and (3) direct modification of habitats due to cave visitation and urban development of karst areas. Protection, management, and conservation measures that may improve the species' viability are summarized below.

After evaluating the best available scientific and commercial information on potential stressors acting individually or in combination, we found no indication that the combined effects are currently causing a population-level decline or degrading the habitat of the Cooper's, minute, or Morrison's cave amphipod, or that the combined effects are likely to do so within a foreseeable future of 20 years, based on the projected species' response to future stressors.

Despite impacts from the primary threats, the best data and information available indicate Cooper's, minute, and Morrison's cave amphipod species have maintained resilient populations throughout their respective ranges. Although we predict some continued impacts from these threats in the future, we anticipate each species will continue, in the foreseeable future (that is roughly 20 years), to maintain resilient populations throughout their ranges that are distributed throughout each of their representative units.

After evaluating threats to the species under the section 4(a)(1) factors listed above and assessing the cumulative effect of the threats of these factors, we evaluated Cooper's, minute, and Morrison's cave amphipod viability to determine if these species meet the definition of an endangered or threatened species. The Cooper's, minute, and Morrison's cave amphipod redundancy and representation are limited due to their narrow ranges; however, this situation is likely similar to historical conditions. We find that the Cooper's, minute, and Morrison's cave amphipods have sufficient resiliency, redundancy, and representation in light of the best available potential stressor data and information, both currently and into the foreseeable future, such that they do not meet the definition of an endangered or threatened species throughout their range.

We evaluated the range of the Cooper's cave amphipod 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. The Cooper's cave amphipod is a narrow endemic that functions as a single, contiguous population and occurs within a very small area of 27 square kilometers (km^2) (10.5 square miles [mi^2]). Thus, there is no biologically meaningful way to break this limited range into portions, and the threats that the species faces affect the species comparably throughout its entire range. As a result, there are no portions of the species' range where the species has a different biological status from its rangewide biological status. Therefore, we conclude that there are no portions of the species' range that warrant further consideration, and the species is not in danger of extinction or likely to become so in the foreseeable future in any significant portion of its range.

We evaluated the range of the minute and Morrison's cave amphipods to determine if the species are in danger of extinction now or likely to become so in the foreseeable future in any portion of their ranges (1,467 km^2 or 566 mi^2 and 2,266 km^2 or 876 mi^2, respectively). 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. For minute and Morrison's cave amphipods, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. We examined the following threats: (1) groundwater contamination, (2) disruption of food supply due to deforestation or surface alteration, and (3) direct modification of habitat due to cave visitation and urban development.

After evaluating the best available scientific and commercial information on potential stressors acting individually or in combination, we found no indication that the combined effects are currently causing a population-level decline or degrading the habitat of the minute or the Morrison's cave amphipods. These factors are not occurring at a substantial level in any portion for either the minute or Morrison's cave amphipods to contribute to the risk of extinction. We found no biologically meaningful portion of the minute or Morrison's cave amphipod ranges where threats are impacting individuals differently from how they are affecting the species elsewhere in its range, or where the biological condition of the species differs from its condition elsewhere in its range such that the status of the species in that portion differs from its status in any other portion of the species' range. Refer to the species assessment form in the docket for this action for additional details.

After assessing the best available information, we concluded that Cooper's, minute, and Morrison's cave amphipods are not in danger of extinction or likely to become in danger of extinction throughout all of their ranges or in any significant portion of their ranges. Therefore, we find that listing the Cooper's, minute, or Morrison's cave amphipods as endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the Cooper's, minute, and Morrison's cave amphipods species assessment form and other supporting documents on *https://www.regulations.gov* under Docket Nos. FWS–R5–ES–2023–0120 (Cooper's cave amphipod), FWS–R5–ES–2023–0121 (minute cave amphipod), and FWS–R5–ES–2023–0122 (Morrison's cave amphipod.

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process we solicited independent scientific reviews of the information contained in the Cooper's, minute, and Morrison's cave amphipod SSA report. The Service sent the SSA report to four independent peer reviewers and received four responses. Results of this structured peer review process can be found at *https://www.regulations.gov* under Docket Nos. FWS–R5–ES–2023–0120 (Cooper's cave amphipod), FWS–R5–ES–2023–0121 (minute cave amphipod), and FWS–R5–ES–2023–0122 (Morrison's cave amphipod). We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

Georgia Blind Salamander

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, and West Virginia Highlands to list 404 aquatic, riparian, and wetland species, including *Eurycea wallacei* (formerly known as, and identified by petitioners as, *Haideotriton wallacei*), as an endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding (76 FR 59836) that the petition contained substantial information indicating that listing may be warranted for the species. This document constitutes our 12-month finding on the April 20, 2010, petition to list the Georgia blind salamander under the Act.

Summary of Finding

The Georgia blind salamander is a relatively small, pinkish-white, blind salamander with visible external gills. Eyes are entirely lacking, except for dark eyespots. The bodies of juveniles exhibit many small pigment spots uniformly distributed along the dorsal and lateral surfaces but are otherwise translucent. Adults are similar in appearance but lack body pigmentation, leaving them almost pure white apart from their gills. Lungs are also absent. Common prey items of the Georgia blind salamander mainly include crustaceans (ostracods, amphipods, copepods, and isopods), though insects and arachnids have also been found in salamander digestive tracts. Habitat of the Georgia blind salamander consists primarily of caves within the Upper Floridan Aquifer System, an extensively karstified aquifer system. Currently, locations where Georgia blind salamander have been found include Jackson County, Florida, as well as Dougherty and Decatur Counties, Georgia, in the Marianna Lowlands-Dougherty Plain physiographic region. The best available science indicates there is a high likelihood of Georgia blind salamander co-occurring with the Dougherty Plain cave crayfish (*Cambarus cryptodytes*), resulting in up to 58 extant sites. It is important to note that the identified sites are only those that are accessible to humans and do not necessarily represent the entire distribution of the species. Also, many sites of co-occurrence are isolated wells, indicating that both species are likely more widely distributed throughout the aquifer and associated springsheds than is evidenced by direct sightings alone. It is likely the species is present in the Dougherty Plain portion of the Upper FAS.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Georgia blind salamander, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. Existing threats related to water quality and water quantity are present, though there are extant sites. In addition, water quantity

currently does not appear to have a large impact on this aquifer, as drawdowns even in drought conditions were not impacting water levels in the aquifer. Since aquifers have relatively stable conditions over space and time, particularly compared to other terrestrial or even aquatic habitats, the species' broad occurrence across the 4.4-million-acre aquifer likely ensures it has adequate representation and redundancy currently.

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we assessed the current status of the Georgia blind salamander to determine if it meets the definition of an endangered species or threatened species. The Georgia blind salamander currently has moderate to high resilience (78 percent of sites); water quality and quantity are the primary factors influencing the species rangewide, although the underlying aquifer has exhibited relatively stable conditions over time, and the species is presumed to occur across the aquifer. There are extant sites where existing threats related to water quality and water quantity still occur, and drawdowns in drought conditions were not impacting water levels in the aquifer. Thus, the threats appear to have low imminence and magnitude such that they are not significantly affecting the species' current viability. Accordingly, we determined that the Georgia blind salamander is not in danger of extinction throughout its range.

We then considered whether the species is likely to become in danger of extinction within the foreseeable future throughout its range. The analysis of future condition to 2070, considered in the SSA report, encompasses the best available information for future projections of land-use change under two different scenarios (worst case—A1B and best case—B2), as well as pollutant discharge permits and effects of climate change (for example, sea level rise and drought). The timeframe considered enabled us to analyze the threats/stressors acting on the species and draw reliable predictions about the species' response to these factors. Land use changes may impact water quality, and thus could influence species viability.

Given the future scenarios, the resiliency of the Georgia blind salamander population is predicted to decline or remain approximately the same in the future. However, given the vast size (4,400,162 acres of surface area) and stability of habitat, as well as the species' broad occurrence across the aquifer, and projected limited future threats, we determined that the scale of impacts projected in the future will not impact the species such that the species is likely to become in danger of extinction within the foreseeable future. Thus, after assessing the best available information, we determined that the Georgia blind salamander is not in danger of extinction now or likely to become so in the foreseeable future throughout all of its range.

We next considered whether the species may be in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range—that is, whether there is any portion of the species' range for which it is true that both (1) the portion is significant and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. 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 contribute to the conservation of the species in a biologically meaningful way. For the Georgia blind salamander, we considered whether the threats or their effects on the species are greater in any portion of the species' range than in other portions such that the species is in danger of extinction now or likely to become so in the foreseeable future in that portion.

Because this species occupies a habitat that is not easily accessible or sampled, with few existing records, it is assumed to be well distributed evenly across its interconnected 4.4 million-acre range. While it is considered one population, we identified sinkhole hotspots around Albany, Georgia, and Marianna, Florida, to be most vulnerable to the threats due to their close proximity to developed areas and potential lingering effects from Superfund sites. These portions of the range are also vulnerable to potential catastrophic chemical spills compared to the overall range. The fact that spills have occurred and the salamander remains in high to moderate condition in these areas indicates that the threats to water quality and quantity are not impacting the species such that it has a different status in these portions compared to the rest of the range. For these reasons, the sinkhole hotspot portions around Albany, GA, and Marianna, FL, were not determined to have a different status now or in the foreseeable future. Further, these portions also comprise a small portion of the total range, and therefore we conclude that these areas are not significant.

After assessing the best available information, we concluded that Georgia blind salamander is not in danger of extinction or likely to become in danger of extinction throughout all of its range or in any significant portion of its range. Therefore, we find that listing the Georgia blind salamander as an endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the Georgia blind salamander species assessment form and other supporting documents at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0117.

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in the Georgia blind salamander SSA report. The Service sent the SSA report to eight independent peer reviewers and received three responses. Results of this structured peer review process can be found at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0117. We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

Narrow-Foot Hygrotus Diving Beetle

Previous Federal Actions

On July 17, 2013, we received a petition from WildEarth Guardians to list the narrow-foot hygrotus diving beetle, henceforth ''diving beetle,'' as an endangered or threatened species under the Act. On January 12, 2016, we published a 90-day finding (81 FR 1368) that the petition contained substantial information indicating that listing may be warranted for the species. On April 21, 2020, WildEarth Guardians filed suit (Case No. 1:20-cv-1035) to compel us to complete a 12-month finding. We subsequently agreed to submit a 12-month finding for the diving beetle to the **Federal Register** by August 15, 2023. This document constitutes our 12-month finding on the July 17, 2013, petition to list the diving beetle under the Act.

Summary of Finding

Narrow-foot hygrotus diving beetles are small aquatic beetles found in central Wyoming within a specific geology of Cody Shale substrates or soils derived from Cody Shale in Fremont, Johnson, Natrona, and Washakie Counties. This beetle has likely never

had a wider distribution than the narrow range it currently occupies.

Diving beetles develop through egg, larval, pupal, and adult stages and rely on small, transitory, saline pools that form during the drying down of ephemeral streams in summer, with all life stages either occurring in or adjacent to these pools. Diving beetles require refugia and prey in pools and hydrologically intact areas surrounding pools, which support higher water quality and seasonally appropriate timing and quantities of water in pools. Diving beetle sites appear to function as a metapopulation, and as such, connectivity among pools is essential for diving beetles. Pools need to be near enough to each other so that, when local conditions in one pool become unsuitable, either adults can fly overland to another pool or individuals at any life stage can flow downstream to another pool with suitable habitat. The frequency across years with which pools are occupied by diving beetles is also important for diving beetles' resiliency. More frequently occupied pools reliably provide for the needs of diving beetles, and while infrequently occupied pools do not support diving beetles in most years, they do support diving beetles in years with extreme weather conditions that make other sites unsuitable.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the diving beetle, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we assessed the current status of the diving beetle to determine if it meets the definition of an endangered species or threatened species. The primary threats affecting the diving beetle's biological status include climate change, inadequate water availability, flooding, anthropogenic disturbance, and insecticide spraying.

Our assessment of current viability included all primary threats to the diving beetle. Despite past and ongoing stressors, the diving beetle has multiple populations in high and moderate condition. To assess future viability of this species, we considered the foreseeable future out to 2050 and projected the influence under three future scenarios of stressors that included climate change, inadequate water availability, flooding, anthropogenic disturbance, and insecticide spraying. Within the SSA, we evaluated the viability of diving beetles, including a review of ongoing and future threats. The best available information indicates that this species' life-history traits are conducive to surviving projected climate changes and other increases in evaluated stressors now and into the foreseeable future.

Diving beetles also have a metapopulation structure with connectivity between sites that supports resiliency among all sites throughout the entire range, and the distribution of the species across three different river basins within central Wyoming helps support redundancy. Therefore, we expect all diving beetle sites to be maintained into the foreseeable future.

We then evaluated the range of the diving beetle 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. 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. For the diving beetle, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. We found no portion of the diving beetle's range where threats are impacting individuals differently from how they are affecting the species elsewhere in its range, or where the biological condition of the species differs from its condition elsewhere in its range such that the status of the species in that portion differs from its status in any other portion of the species' 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; refer to the species assessment form in the docket for this action for additional details.

After assessing the best available information, we concluded that the diving beetle is not in danger of extinction or likely to become in danger of extinction throughout all of its range or in any significant portion of its range. Therefore, we find that listing the diving beetle as an endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the diving beetle species assessment form and other supporting documents at *https://www.regulations.gov* under Docket No. FWS–R6–ES–2023–0111.

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in the diving beetle SSA report. The Service solicited review of the SSA report from six potential peer reviewers and received one review. Results of this structured peer review process can be found at *https://www.regulations.gov* under Docket No. FWS–R6–ES–2023–0111. We incorporated the results of the review, as appropriate, into the SSA report, which is the foundation for this finding.

Pristine Crayfish

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, and West Virginia Highlands Conservancy to list 404 aquatic, riparian, and wetland species, including the pristine crayfish, as an endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding in the **Federal Register** (76 FR 59836) concluding that the petition presented substantial scientific or commercial information indicating that listing may be warranted. This document constitutes our 12-month finding on the April 20, 2010, petition to list pristine crayfish under the Act.

Summary of Finding

The pristine crayfish is a small, freshwater crayfish endemic to the Cumberland Plateau in Tennessee. The species occurs in small- to medium-sized streams and rivers in the Caney Fork and Sequatchie River systems in central Tennessee. Pristine crayfish are known to occur in 27 streams in 8 subwatersheds (HUC12) in the region. Two distinct forms of the pristine crayfish are recognized based on body characteristics and genetics: the Caney Fork form and the Sequatchie form. The Caney Fork form of pristine crayfish occurs in five northern subwatersheds (17 streams), and the Sequatchie form occurs in three southern subwatersheds (10 streams). The pristine crayfish requires good water quality in first- to fourth-order perennial streams with cool water, shallow pools with slow to moderate flow, slab rock substrate with cobble, and low levels of sedimentation.

We have carefully assessed the best scientific and commercial information

available regarding the past, present, and future threats to the pristine crayfish, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we assessed the current status of the pristine crayfish to determine if it meets the definition of an endangered species or threatened species. The threats affecting the pristine crayfish's biological status include habitat destruction or modification, future effects of climate change, disease, and the effect of small, isolated populations. Of these threats, habitat destruction or modification and the future effects of climate change were identified as key drivers of the species' viability. Habitat destruction or modification is currently the primary threat to pristine crayfish viability. Impacts to the pristine crayfish's habitat rangewide are caused by sedimentation, decreased water quality, and the effects of impoundments. These impacts occur at the individual and population levels across the species' distribution, but the best available information indicates that these localized impacts have not affected pristine crayfish at the species level. Climate change has the potential to impact the species through increased magnitude and frequency of drought and increased temperature, and this threat is ongoing and projected to increase in the future. Although drought and increased temperatures may result in a decrease or lack of recruitment in some portions of its range during some years, there have been no documented species-level declines as a result of consecutive years of drought. The threats of disease and small population size may exacerbate the effects of the primary threats but are not expected to affect population resiliency, representation, and redundancy alone.

The best available information indicates that the range of the pristine crayfish has not contracted since described in 1965 and, in fact, its range was recently expanded into an additional river system. The species is naturally patchily distributed within its range and is known to occur in 27 streams across 8 HUC12 analysis units (AUs). Seven of the eight AUs exhibit moderate current resiliency. Although we identified habitat destruction or modification and climate change as the key drivers of species' viability, the species' current condition does not indicate species-level impacts from these or other cumulative factors that have led to reductions in AU resiliency. The species' representation and redundancy are moderate, and the species occurs in multiple analysis units with sufficient resiliency across its historical and current range. Overall, no current threat is acting at an extent or severity such that the pristine crayfish is at risk of extinction throughout all of its range. Thus, after assessing the best available information, we conclude that the pristine crayfish is not in danger of extinction throughout all of its range.

Therefore, we proceed with determining whether the pristine crayfish is likely to become an endangered species within the foreseeable future throughout all of its range. To evaluate the future viability of the pristine crayfish, we considered the relevant threats currently acting on the species, those threats expected to act on the species in the foreseeable future, and the species' response to those threats. The primary threats to the pristine crayfish in the future are habitat destruction or modification and climate change. The three plausible future scenarios we examined included projections of urbanization, land use change (evergreen forest cover), impoundments, the effects of climate change, and the cumulative effect of these threats. Our analysis of the species' condition under future scenarios at two time steps (2036 and 2051) encompasses the best available information for future projections of modeled parameters under a range of plausible threat levels. We selected these time steps based on the pristine crayfish's lifespan of approximately 4 years and the reliability of the data and models used in the future threat projections and analyses. Therefore, we determined 30 years to be the foreseeable future for which we can reasonably predict the threats to the pristine crayfish and the species' response to those threats.

In this timeframe, there are minor projected increases in some threats that may affect the availability of suitable habitat across the species' range. Urbanization is projected to increase an average of 6 to 11 percent over current levels and evergreen forest cover (representing land use change) is projected to decrease by 1 percent in the same timeframes. The pristine crayfish is distributed across eight AUs (HUC12 subwatersheds) and is expected to remain extant in all future scenarios across the AUs. Our future condition analysis projected declines in resiliency in six or seven of the AUs in all scenarios except the increased impact scenario in 2051, when all eight AUs are projected to decline in resiliency. Based on our analysis, the projected effects of climate change and impoundments may have a greater effect on species' resiliency compared to current impacts, but the magnitude and imminence of the threats and the species' responses are more uncertain.

We expect that the species' representation and redundancy will decline slightly but will largely be maintained in moderate condition in the future with all AUs remaining on the landscape in all scenarios. We projected future redundancy as moderate with no AUs projected to be extirpated, and the distribution of the species across the range is projected to remain at the current level. Likewise, representation is expected to remain moderate as both forms of the pristine crayfish are present on the landscape, although some parameters used to assess representation are projected to decline as resiliency declines. Impacts from current and ongoing threats will reduce population resiliency and affect the species' representation and redundancy in the foreseeable future but are not projected to lead to the species' decline such that the pristine crayfish is likely to become in danger of extinction in the modeled scenarios. The best available information does not indicate that the pristine crayfish's viability will decline so much that the species is likely to become an endangered species within the foreseeable future throughout its range.

We then evaluated the range of the pristine crayfish to determine if the species is in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range. Although threats are similar throughout the range of the species, the species' response is more pronounced in the Piney Creek AU. Due to lower current resiliency, threats are having a greater impact in the Piney Creek AU than elsewhere in the range. The Piney Creek AU exhibits low current resiliency driven primarily by a low extent of occupancy (few sites known within the stream) and lack of information regarding reproduction in the species. Given the species' condition within the Piney Creek AU, we have identified the unit as an area that may be in danger of extinction due to the low extent of occupancy and low reproduction/recruitment.

We then proceeded to the significance question, asking whether this portion of the range is significant. Although the Piney Creek AU contributes to the overall species-level representation and redundancy, it does not contain any high-quality or high-value habitat or any habitat or resources unique to that area

and necessary to the pristine crayfish's life history. In addition, only 1 of the 27 known streams with species occurrence is located in the Piney Creek AU. So this area does not contribute substantively to the species' viability. This portion does not make up a large geographic area of the range or contain a high proportion of the species' habitat or populations. Accordingly, we do not find this portion to be a significant portion of its range. Therefore, we find the pristine crayfish is not currently in danger of extinction in a significant portion of its range.

We next considered whether the pristine crayfish may be likely to become an endangered species within the foreseeable future in a significant portion of its range. As discussed above, we determined 30 years to be the foreseeable future for which we can reasonably predict the threats to the pristine crayfish and the species' response to those threats.

Habitat destruction or modification and climate change are the primary factors currently acting on or expected to act on the species in the future at a rangewide scale. The species currently exhibits moderate resiliency in seven of eight AUs and moderate species' level representation and redundancy. Although threats are projected to impact the species similarly across the range, the species' response is more pronounced in some AUs due to lower resiliency where threats are having a greater impact than elsewhere in the range. One AU (Caney Fork River–Clifty Creek) is projected to remain in moderate resiliency in all but the increased impact scenario in 2051. The remaining seven AUs are projected to exhibit low or very low resiliency under scenarios 2 and 3 in 2036 and 2051. We considered whether the seven AUs that are projected to exhibit low or very low resiliency in future scenarios may be a portion of the range that could become in danger of extinction within the foreseeable future. Although the future condition analyses projects overall declines in AU resiliency, stream catchments with species' occurrences are projected to remain in good condition within each AU. Within the high-condition catchments, we expect that habitat conditions will support sufficient pristine crayfish abundance and reproduction. Although projections indicate low or very low future resiliency in seven AUs, the remaining stream catchments in high condition indicate that the pristine crayfish in these AUs will remain on the landscape with sufficient viability. In addition, although some declines in representation and redundancy are projected in the future, we expect that the pristine crayfish will have sufficient adaptive capacity and ability to withstand catastrophic change in the foreseeable future. Accordingly, we determined that the pristine crayfish is not likely to become an endangered species within a significant portion of its range.

We found no portion of the pristine crayfish's range where the biological condition of the species differs from its condition elsewhere in its range such that the status of the species in that portion warrants listing under the Act. 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.

After assessing the best available information, we concluded that the pristine crayfish is not in danger of extinction or likely to become in danger of extinction throughout all of its range or in any significant portion of its range. Therefore, we find that listing the pristine crayfish as an endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the pristine crayfish species assessment form and other supporting documents at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0115.

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in the pristine crayfish SSA report. The Service sent the SSA report to four independent peer reviewers and received one response. Results of this structured peer review process can be found at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0115. We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

Tennessee Heelsplitter

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, and West Virginia Highlands to list 404 aquatic, riparian, and wetland species, including Tennessee heelsplitter (*Lasmigona holstonia*), as endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding (76 FR 59836) that the petition contained substantial information indicating that listing may be warranted for the species. This document constitutes our 12-month finding on the April 20, 2010, petition to list the Tennessee heelsplitter under the Act.

Summary of Finding

The Tennessee heelsplitter is a small freshwater mussel usually less than 50 millimeters (2 inches) long. The species is a freshwater mussel native to the New, Cumberland, and Tennessee River basins in Virginia, Tennessee, Georgia, Alabama, and historically North Carolina. The Tennessee heelsplitter predominantly inhabits spring-fed creeks and small headwater streams with stable substrates and good water quality. The species needs water with low to moderate flow, appropriate temperatures for life-history functions, and presence of fish hosts for successful reproduction.

Resources influencing the successful completion of each life stage for Tennessee heelsplitter individuals include abundant host fish, stable substrate, proximity to breeding individuals, small or headwater streams, water with neutral pH and little to no contaminants, spring-fed streams with low to moderate water flow, and a water temperature range that allows for life-history functions (Service 2016a, p. 12). Successful completion of each life stage affects the ability of populations to withstand stochastic events (resiliency) and the species' ability to withstand catastrophic events (redundancy) as well as adapt to changing environmental conditions by way of genetic exchange or respond to environmental diversity between occupied streams (representation).

The population- and species-level resource needs of the Tennessee heelsplitter include sufficient juvenile and breeding adult abundances with broad distributions, suitable and abundant host fish, and habitat connectivity. Resiliency of Tennessee heelsplitter populations (which we defined as occupied stream reaches within analysis units (AUs)), as well as representation and redundancy of the species, are influenced by access to necessary resources.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Tennessee heelsplitter, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The threats affecting the Tennessee heelsplitter's

biological status include siltation and sedimentation, pollution and toxic spills, drought and floods, aquatic nuisance species, and impoundments. These threats appear to have mostly localized extent and moderate impact. The current risk of extinction is low. Further, the Tennessee heelsplitter's current distribution has not substantially changed from its known historical distribution. Sixty percent of AUs are categorized as ''high'' or ''most'' habitat suitability and these AUs are distributed throughout each river basin. Redundancy is high, as our analysis indicates that suitable habitat exists throughout the range of the Tennessee heelsplitter. Representation is maintained across the range of historical and current occurrence in the Cumberland, New, and Tennessee River basins. Additionally, available information indicates the species' adaptive capacity will ensure survival despite predicted climate impacts, particularly because of the strong association with spring-fed streams that can act as cold-water and drought refugia in the face of climate change. Therefore, after assessing the best available information, we conclude that the Tennessee heelsplitter is not in danger of extinction throughout all of its range.

Based on projected habitat suitability for the two future scenarios, future resiliency for the Tennessee heelsplitter is expected to decrease slightly, but overall there will be 77 percent to 91 percent of suitable habitat available to the species, depending on the modeled scenario. Multiple AUs maintain resiliency, or levels of suitable habitat, in future-condition projections across the range and are likely to help buffer changes in environmental conditions through 2040 and 2060. Further, the concentration of AUs with high resiliency in the southwestern Virginia and northeastern Tennessee strongholds are projected to remain intact. Connectivity of these high resiliency AUs within the upper Tennessee representation unit (RU) bolster the likelihood of persistence into the future.

In the future, stochastic events associated with threats to the species will likely affect population resilience in parts of the range, and these are more likely to occur or be observed in developed areas. However, our future condition projections indicate Tennessee heelsplitter resiliency is sufficient to withstand disturbance and environmental stochasticity, due to prevalent suitable habitat and life-history traits that reduce risk currently and into the future. The Tennessee heelsplitter has several life-history traits that allow it to adapt to changing conditions, such as the capability to transform on a wide variety of common host fish species, occurring in varying stream sizes, as well as tolerance of silty and sandy substrates and depositional areas with low flows. Spring-fed streams where the Tennessee heelsplitter is most frequently located are ubiquitous throughout the species' range and have year-round groundwater contributions with continuous flow and comparatively stable temperature regimes. These characteristics are expected to bolster Tennessee heelsplitter resilience in most AUs throughout the range into the future and withstand projected climate effects. After assessing the best available information, we conclude that the Tennessee heelsplitter is not likely to become an endangered species within the foreseeable future throughout all of its range.

We also evaluated the range of the Tennessee heelsplitter to determine if the species is in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range. We identified the three RUs—Cumberland, New, and Tennessee drainages—for evaluation. As described above, the threats are present across all AUs within the range, but some are localized in effect, though most threats have a low to moderate level of impact on the species. The New and Cumberland RUs currently have large percentages (100 percent and 75 percent, respectively) of suitable habitat, thus these areas have high estimated current resiliency. Our future conditions analysis indicates that none of the AUs in the New RU, and only one of the AUs in the Cumberland RU, is projected to no longer have suitable habitat to support the species. As such, the amount and distribution of suitable habitat in high resiliency AUs are projected to be maintained 40 years in the future in both the New and Cumberland RUs, and we determined that the Tennessee heelsplitter is not in danger of extinction now or likely to become so in the foreseeable future in the New or Cumberland RU.

The Tennessee RU comprises 132 AUs with varying levels of suitable habitat; 57 percent of the AUs have a current condition level of high or most resilience, and 43 percent are in a condition of moderate resilience. Our future conditions analysis indicates that 4 to 14 percent of the AUs in the Tennessee RU could lose habitat suitability within the next 40 years. Despite this potential loss of habitat suitability, between 86 and 96 percent of the AUs are projected to maintain suitable habitat, with widespread distribution throughout the Tennessee RU portion of the range. The Tennessee heelsplitter is expected to have sufficient resiliency in this RU for many decades. Thus, we found that the Tennessee heelsplitter is not in danger of extinction now or likely to become so in the foreseeable future in the Tennessee RU.

After assessing the best available information, we concluded that Tennessee heelsplitter is not in danger of extinction or likely to become in danger of extinction throughout all of its range or in any significant portion of its range. Therefore, we find that listing the Tennessee heelsplitter as an endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the Tennessee heelsplitter species assessment form and other supporting documents at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0116.

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process we solicited independent scientific reviews of the information contained in the Tennessee heelsplitter SSA report. The Service sent the SSA report to five independent peer reviewers and received two responses. Results of this structured peer review process can be found at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0116. We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

New Information

We request that you submit any new information concerning the taxonomy, biology, ecology, or status of, or stressors to, the Alexander Archipelago wolf, Chihuahua catfish, Cooper's cave amphipod, Georgia blind salamander, minute cave amphipod, Morrison's cave amphipod, narrow-foot hygrotus diving beetle, pristine crayfish, or Tennessee heelsplitter to the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**, whenever it becomes available. New information will help us monitor these species and make appropriate decisions about their conservation and status. We encourage local agencies and stakeholders to continue cooperative monitoring and conservation efforts.

References Cited

A list of the references cited in each petition finding is available in the relevant species assessment form, which is available on the internet at *https://www.regulations.gov* in the appropriate docket (see **ADDRESSES**, above) and upon request from the appropriate person (see **FOR FURTHER INFORMATION CONTACT**, above).

Authors

The primary authors of this document are the staff members of the Species Assessment Team, Ecological Services Program.

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Wendi Weber,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–18260 Filed 8–22–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[RTID 0648–XC971]

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Amendment 31

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

ACTION: Notice of availability of proposed fishery management plan amendment; request for comments.

SUMMARY: NMFS announces that the Pacific Fishery Management Council has submitted Amendment 31 to the Pacific Coast Groundfish Fishery Management Plan to the Secretary of Commerce for review. If approved, Amendment 31 would define stocks that are in need of conservation and management, consistent with the provisions and guidelines of the Magnuson-Stevens Fishery Conservation and Management Act. Amendment 31 would define stocks for 14 species within the fishery management unit. These species were prioritized because they had stock assessments in 2021 or will have assessments in 2023. Amendment 31 is necessary for NMFS to make stock status determinations, which in turn will help prevent overfishing, rebuild overfished stocks, and achieve optimum yield. Amendment 31 is administrative in nature and does not change harvest levels or timing and location of fishing, nor does it revise the goals and objectives or the management frameworks of the Pacific Coast Groundfish Fishery Management Plan.

DATES: Comments on Amendment 31 must be received no later than October 22, 2023.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2023–0066, by the following method:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0066 in the Search box. Click the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments must be submitted by the above method to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and NMFS will post for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic Access

This rule is accessible via the internet at the Office of the Federal Register website at *https://www.federalregister.gov.* Background information and documents including an analysis for this action (Analysis), which addresses the statutory requirements of the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) are available from the Pacific Fishery Management Council's website at *https://www.pcouncil.org.*

FOR FURTHER INFORMATION CONTACT: Gretchen Hanshew, Fishery Management Specialist, at 206–526–6147 or *gretchen.hanshew@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fisheries in the exclusive economic zone (EEZ) seaward of Washington, Oregon, and California under the Pacific Coast Groundfish fishery management plan (PCGFMP). The Council prepared and NMFS implemented the PCGFMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* and by regulations at 50 CFR parts 600 and 660. The Magnuson-Stevens Act requires that each regional fishery management council submit any fishery management plan (FMP) or plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP or amendment, immediately publish a notification that the FMP or amendment is available for public review and comment. This *notice of availability* announces that the proposed Amendment 31 to the FMP is available for public review and comment. NMFS will consider the public comments received during the comment period described above in determining whether to approve, partially approve, or disapprove Amendment 31 to the FMP.

Background

Amendment 31 would define stocks that are in need of conservation and management. Amendment 31 would define stocks for 14 species within the fishery management unit (FMU; the jurisdiction of the FMP from 3–200 nautical miles offshore between the U.S. border with Canada and the U.S. border with Mexico, which may also be referred to as ''coastwide'').

At its June 20–27, 2023 meeting in Vancouver, Washington, the Council recommended stock definitions for 14 species of Pacific Coast groundfish after NMFS was unable to make stock status determinations in 2021. NMFS was unable to make stock status determinations because the ''stocks'' for which the Council was expecting status determinations did not exist in the FMP. Currently, the FMP has a list of 80+ species to which it pertains, and does not describe whether each species is a single stock within the fishery management unit or if it is multiple (*e.g.,* regional) stocks.

NMFS requested that the Council undertake Amendment 31 to define stocks at its March 8–14, 2022 meeting in San Jose, California. NMFS advised the Council that it should define the stocks for which stock status determinations were changing in 2021 and 2023, and to add those definitions to the FMP. In particular, NMFS was

seeking clarifications on whether species should have overfished (or not overfished) and subject to overfishing (or not subject to overfishing) status determinations on a scale that is less than coastwide.

The Council prioritized a sub-set of species, because there are 80+ species managed by the FMP, be considered for stock identification in Amendment 31. These species are black, canary, copper, quillback, squarespot, vermilion, and vermilion/sunset rockfishes; Dover, petrale, and rex soles; lingcod, Pacific spiny dogfish, sablefish, and shortspine thornyhead. These species were prioritized because they were subject to stock assessments in 2021 or are subject to stock assessments in 2023, and were therefore the most likely candidates to be the subject of NMFS' forthcoming status determinations, which are often based on new assessments.

Early in the development of Amendment 31, the Council was advised by the Scientific and Statistical Committee (SSC) that indications of population structure within a species should be an indicator of whether stock status should be determined at a finer scale than coastwide. The Council evaluated a literature review of the best scientific and biological information available for each species, which is appended to the main analytical document (Analysis) developed for Amendment 31, available on the Council website (see Electronic Access).

The Analysis considered alternative stock definitions for each species where applicable, as some species only had one stock definition alternative, as explained below. Generally, species with no known population structure, based on the literature review, or with known population structure based on genetic information, were considered under a single stock definition alternative. The rest of the species had known indicators of population structure but were lacking or had conflicting genetic indicators of latitudinal variation and were therefore considered under multiple stock definition alternatives. For species with multiple alternatives, the Analysis assumed each alternative stock definition was adopted, then applied the FMP's harvest specifications framework to each stock to assess some of the biological, socioeconomic, and fishery management trade-offs that might be expected from implementation of future management actions based on the alternative stock definitions. Impacts of these stock definitions are expected to flow from future, subsequent action(s) to set harvest specifications and management measures for the stock(s) but the Analysis provided information for the Council to consider in making its decision. The Council considered these tradeoffs when making its final stock definition recommendations at its June 20–27, 2023 meeting. The following narrative provides species-specific information, in alphabetical order by common name, and rationale for the stock definition for each species that would be implemented by Amendment 31.

Black Rockfish (Sebastes Melanops)

Black rockfish range from Southern California to the Aleutian Islands in Alaska and occur most commonly north of San Francisco, California. Black rockfish are an important target species in Pacific Coast tribal fisheries off the coast of Washington State and in non-tribal commercial and recreational fisheries predominantly north of San Francisco, California. While overall population structure remains poorly understood, there are some indications that the species may have distinct geospatial population structure. Genetic work has indicated three, or perhaps more, populations within the species' range, and larval dispersal and adult movement are limited, to varying degrees, along the coast. All black rockfish assessments (1999 through 2023) have been assessed with multiple, area-specific, models within the FMU due to management considerations and differences in exploitation history. The Council has calculated harvest specifications and managed black rockfish as three state-specific populations since 2017 and defining three stocks of black rockfish is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023, or result in short-term or long-term biological impacts if status is determined at a coastwide scale. This geographic delineation clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing to approve three stocks of black rockfish in the FMP.

Canary Rockfish (Sebastes Pinniger)

Canary rockfish are distributed along the northeastern Pacific coast, and the species is most abundant from British Columbia to central California. Canary rockfish are mostly harvested in sectors of the commercial and recreational non-tribal fisheries within the FMU. While population structure remains poorly understood, there are no known indications that the species has distinct geospatial population structure. The species has been assessed as a single geographic unit within the FMU since its first assessment in 1994, including throughout the period where it was managed under a rebuilding plan (2001–2014). The harvest specifications that are compared to mortality estimates to assess whether the species is subject to overfishing (currently overfishing limits [OFLs] and before 2005 called acceptable biological catches, or ABCs), have been set at a coastwide level throughout the period the species was managed under a rebuilding plan and in its current rebuilt status (2015–present). The Council cooperatively manages this species at a coastwide scale, with allocative sharing agreements between states and fishery sectors decided every 2 years through the harvest specifications and management measures biennial process. Defining canary rockfish as a stock at a coastwide scale is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023, or result in short-term or long-term biological impacts if status is determined at a coastwide scale. The only alternative the Council considered was a coastwide stock definition, as only a single geographic delineation clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing to approve a single stock of canary rockfish in the FMP.

Copper Rockfish (Sebastes Caurinus)

Copper rockfish are distributed from Mexico to Alaska. Within the FMU, copper rockfish are predominantly harvested in recreational fisheries, but are also harvested in nearshore commercial fisheries to varying degrees along the coast. While population structure remains poorly understood, there are some indications that the species may have distinct geospatial population structure. Multiple studies have found genetic differentiation within the species' distribution, likely due to some level of isolation. Isolation could be a result of lack of larval dispersal or adult movement, patchiness of their preferred rocky habitat along parts of the coast, or other factors. Copper rockfish have been managed for years at a less than coastwide scale, and was assessed in 2021 and 2023 using models at a less than coastwide scale. The geographic stratification of the assessment areas is primarily driven by differences in current and historical

harvest intensity. There is no known scientific evidence that there is distinct population structure for copper rockfish between the two assessed areas of the coasts off of Washington and Oregon, or between the two assessed areas off the coast of California. A two stock delineation aligned with the Council's desire to keep the sub-division of management of a species to a minimum, while retaining a geographic delineation aligned with best scientific information available and consistent with past management decisions to manage the species as multiple units. Therefore, the Council recommended and NMFS is proposing to approve two stocks of copper rockfish in the FMP, north and south of 42°00′ N lat.

Dover Sole (Microstomus Pacificus)

Dover sole are distributed from the Bering Sea in Alaska to Baja California and are harvested in the groundfish fishery throughout the FMU, though mostly by the non-tribal bottom trawl fishery off Oregon and Washington. The population structure of Dover sole is largely unknown, though the limited information available does not indicate distinct geospatial population structure. The harvest specifications that are compared to mortality estimates to assess whether the species is subject to overfishing have been set at a coastwide scale, for over 30 years. Dover sole's single, coastwide annual catch limit (ACL) is formally allocated in the FMP between trawl and non-trawl fisheries. Defining Dover sole as a stock at a coastwide scale is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023–24, or result in short-term or long-term biological impacts if status is determined at a coastwide scale. The only alternative the Council considered was a coastwide stock definition, as only a single geographic delineation clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing to approve a single stock of Dover sole in the FMP.

Lingcod (Ophiodon Elongatus)

Lingcod are distributed along the eastern Pacific coast from Baja California to the Gulf of Alaska. Lingcod are harvested in tribal fisheries and all sectors of non-tribal commercial and recreational fisheries. There are known indications that the species has distinct geospatial population structure, including genetic studies and life history characteristics such as differences in growth, longevity, and size at maturity. Lingcod have been assessed and managed as northern and southern geographic units since 2005. The Council manages this species at a less than coastwide scale, with allocative sharing agreements between states and fishery sectors decided every 2 years through the harvest specifications and management measures biennial process. Defining lingcod as a northern stock and a southern stock within the FMU is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023–24, or result in short-term or long-term biological impacts if status is determined at that scale. The only alternative the Council considered was a two-stock definition (lingcod north and lingcod south), as only this geographic delineation clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing two lingcod stocks in the FMP.

Pacific Spiny Dogfish (Squalus Suckleyi)

Pacific spiny dogfish live from the Gulf of Alaska to Baja California, with the highest abundance off the coast of British Columbia and Washington State. There are known indications that the portions of the stock within the FMU has interaction with and overlaps with spiny dogfish observed off British Colombia. There are no known indications of geospatial population structure within the FMU. Pacific spiny dogfish have been assessed and managed as a coastwide population since it was first assessed in 2011. The OFLs have been set at a coastwide level since the species was removed from the Other Fish complex in 2015; prior to 2015, the species' OFLs contributed to the coastwide OFL for the Other Fish complex. Allocative sharing agreements between states and fishery sectors for spiny dogfish have not been necessary to date. Defining spiny dogfish as a stock at a coastwide scale is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023–24, or result in short-term or long-term biological impacts if status is determined at a coastwide scale. The only alternative the Council considered was a coastwide stock definition, as only a single geographic delineation clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing a single stock of spiny dogfish in the FMP.

Petrale Sole (Eopsetta Jordani)

Petrale sole are distributed along the northeastern Pacific coast from the Gulf of Alaska to northern Baja California and their abundance is predominantly distributed by depth rather than latitude, with known seasonal depth migration patterns. Most petrale sole harvest in the FMU come from commercial bottom trawl gear, and fisheries harvesting petrale sole exhibit spatial and seasonal patterns. Population structure along this species' range is poorly understood, but there are no known indications that the species has distinct geospatial population structure. At the recommendation of the stock assessment review panel of 2006, the species has been assessed as a single geographic unit within the fishery management unit since 2009, including throughout the period where it was managed under a rebuilding plan (2009–2014). Similar to canary rockfish, the harvest specifications to assess whether the species is subject to overfishing have been set at a coastwide level for over 30 years, including throughout the period the species was managed under a rebuilding plan. A large majority of the coastwide harvestable surplus is allocated to trawl fisheries, with the allocation being decided every 2 years through the biennial harvest specifications and management measures process. Defining petrale sole as a stock at a coastwide scale is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023–24, or result in short-term or long-term biological impacts if status is determined at a coastwide scale. The only alternative the Council considered was a coastwide stock definition, as only a single geographic delineation clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing to approve a single stock of petrale sole in the FMP.

Quillback Rockfish (Sebastes Maliger)

Quillback rockfish are distributed in the northeastern Pacific Ocean from Southern California to the Gulf of Alaska. Within the FMU, Quillback rockfish are predominantly harvested in recreational fisheries, but are also harvested in nearshore commercial fisheries to varying degrees along the coast. While population structure

remains poorly understood, there are some indications that the species may have distinct geospatial population structure within the FMU. While there has been limited genetic work on this species, adults in multiple sites within the species range show high site fidelity with limited adult movement. There are known, albeit limited, differences in growth along the coast, and abundance trends are also estimated to differ regionally. Quillback rockfish have been managed for many years at a less than coastwide scale, and was assessed in 2021 using models at a less than coastwide scale. The geographic stratification of the assessment areas on a state-specific scale is primarily driven by differences in current and historical harvest intensity, but also aligns with the state-specific approaches to fishery management of nearshore species and is consistent with the best scientific information available. Therefore, the Council recommended and NMFS is proposing to approve three state-specific stocks of quillback rockfish in the FMP (*i.e.,* Quillback Rockfish—Washington, Quillback Rockfish—Oregon, and Quillback Rockfish—California).

Rex Sole (Glyptocephalus Zachirus)

Rex sole are distributed along the northeastern Pacific coast from Alaska to southern California. Rex sole are commonly caught in trawl fisheries within the FMU. While population structure remains poorly understood, there are no known indications that the species has distinct geospatial population structure. The species has been assessed as a single geographic unit within the FMU since its first assessment in 2013. The OFLs for rex sole contribute to the Other Flatfish stock complex OFLs, which are compared to mortality estimates of all the species in the complex to assess whether the stock complex is subject to overfishing. Other Flatfish OFLs have been set at a coastwide level since at least 2005. The Other Flatfish complex, including rex sole, is managed by the Council at a coastwide scale and formal or informal sharing agreements between states or fishery sectors have been unnecessary to date. Defining rex sole as a stock at a coastwide scale is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023–24, or result in short-term or long-term biological impacts if status is determined at a coastwide scale. The only alternative the Council considered was a coastwide stock definition, as only a single geographic delineation clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing to approve a single stock of rex sole in the FMP.

Sablefish (Anoplopoma Fimbria)

Sablefish are distributed along the northern Pacific coast from the coast of Japan, through the Bering Sea in Alaska, and south to the southern tip of Baja California. Sablefish is a highly attained and important commercial fishery component of both tribal and non-tribal West Coast groundfish fisheries. While population structure remains poorly understood, there are few known indications that the species has distinct geospatial population structure within the FMU. Research has indicated geospatially distinctive growth rates and different maximum sizes for this species within the FMU, however recruitment trends do not show the same geospatial differentiation. Sablefish within the FMU has been assessed as a single geographic unit and for over 30 years the harvest specifications to assess whether sablefish is subject to overfishing have been set at a coastwide level. Sablefish are formally allocated in the FMP and the Council manages sablefish harvest at a less than coastwide scale, reflective of the geospatial differences in maximum size and regional fishery characteristics. The formal allocation is both geographic, north and south of 36° N lat., and also establishes sharing among user groups, including two different individual fishing quota fisheries and tribal fisheries. Defining sablefish as a stock at a coastwide scale is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023–24, or result in short-term or long-term biological impacts if status is determined at a coastwide scale. The only alternative the Council considered was a coastwide stock definition, as only a single geographic delineation clearly aligned well with past and recent harvest specifications and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing to approve a single stock of sablefish in the FMP. This action does not change the Council's ability to set multiple ACLs for sablefish and makes no changes to the formal sablefish allocation structure described in the FMP.

Shortspine Thornyhead (Sebastolobus Alascanus)

Shortspine thornyhead are distributed in the waters of the northeastern Pacific coast from the Bering Sea to Baja California. Historically, shortspine thornyhead were mostly harvested in non-tribal fisheries with trawl gear, but since the mid-1990s, harvest of shortspine thornyhead with non-trawl gears like longlines have steadily increased. While population structure remains poorly understood, there are no known indications that the species has distinct geospatial population structure within the FMU. The species has been assessed as a single, coastwide stock throughout the FMU since 2005. For over 20 years the overfishing limits, which are compared to mortality estimates to assess whether shortspine thornyhead is subject to overfishing, have been set for a single geographic unit within the FMU. Shortspine thornyhead are formally allocated in the FMP and the Council manages shortspine thornyhead at a less than coastwide scale, reflective of the differences in regional fishery characteristics. The formal allocation is both geographic, north and south of 34°27′ N lat., and also establishes sharing among user groups, including allocations to the trawl individual fishing quota fishery. Defining shortspine thornyhead as a single stock at a coastwide scale is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023–24, or result in short-term or long-term biological impacts if status is determined at a coastwide scale. The only alternative the Council considered was a coastwide stock definition, as only a single geographic delineation clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing to approve a single stock of shortspine thornyhead in the FMP. This action does not change the Council's ability to set multiple ACLs for shortspine thornyhead and makes no changes to the formal shortspine thornyhead allocation structure described in the FMP.

Squarespot Rockfish (Sebastes Hopkinsi)

Squarespot rockfish are distributed from southern Oregon to Mexico with their highest densities in southern California. Squarespot rockfish are not typically targeted due to their small size, but are caught in both commercial and recreational fisheries off the coast of California. While population structure remains poorly understood, there are no known indications that the species has distinct geospatial population structure

(*e.g.,* that it is multiple stocks). The species was assessed for the first time in 2021 as a single stock, using all available data within the FMU. The resulting 2021 assessment was only informative of the portion of the population off the coast of California. The OFLs for squarespot rockfish contribute to the Shelf Rockfish stock complex OFLs, which are compared to mortality estimates of all the species in the complex combined to assess whether the stock complex is subject to overfishing. Shelf Rockfish overfishing status has been assessed north and south of 40°10′ N lat. (Cape Mendocino, in northern California) for over 30 years. However, squarespot rockfish contributes extremely small biomass to the complex harvest specifications north of 40°10′ N lat. due to its relatively sparse distribution and historically minimal harvest in that region. The Shelf Rockfish complex both north and south of 40°10′ N lat. is managed by the Council with allocative sharing agreements between fishery sectors decided every 2 years through the harvest specifications and management measures biennial process. Defining squarespot rockfish as a single stock within the FMU is not expected to trigger future allocative actions, increase management burden during the next biennial cycle compared to 2023–24, or result in short-term or long-term negative biological impacts if status is determined at a coastwide scale. A single geographic delineation clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available. Therefore, the Council recommended and NMFS is proposing to approve a single stock of squarespot rockfish in the FMP.

Vermilion Rockfish (Sebastes Miniatus)

Vermilion rockfish are distributed in the waters of the northeastern Pacific from Alaska to Baja California, with highest abundance from central Oregon south into Mexico. Vermilion rockfish are harvested in all sectors of the commercial and recreational fisheries within the FMU. There are known indications that the species has distinct geospatial population structure, including low-average larval dispersal and high site fidelity in adults, which has led to genetic differentiation within the FMU. Vermilion rockfish throughout the FMU were originally considered a single species; however, in southern California it is found as part of a pair of cryptic species, vermilion rockfish and sunset rockfish. For this reason, this cryptic species pair are considered together in the areas of the coast where sunset rockfish is known to be more prevalent.

In the areas of the coast where sunset rockfish are not known to be present, the Council recommended and NMFS is proposing a single stock of vermilion rockfish in the area of the FMU north of 42° N lat. due to a lack of scientific evidence of distinct population structure off the coasts of Washington and Oregon. This geographic delineation for vermilion rockfish clearly aligned well with past and recent fishery management and policy decisions for the species as well as best scientific information available.

Vermilion/Sunset Rockfish (Sebastes Miniatus and Sebastes Crocotulus)

The primary biomass of sunset rockfish appears to be in the Southern California Bight, though their range does extend somewhat north of Point Conception, California to an unknown extent. The two species lack morphological distinctions and can only be differentiated with genetic testing. Therefore, they are treated in assessments and fishery management as a single cryptic species pair in the areas of the coast with known sunset rockfish presence. In the areas of the coast where sunset rockfish are present and contributing biomass to a vermilion/sunset rockfish cryptic species pair in the assessments and fisheries, the Council recommended and NMFS is proposing a single stock of vermilion/sunset rockfish in the area of the FMU south of 42° N lat. due to a lack of scientific evidence of distinct population structure off the coast of California and the uncertainty in the northern extent of the range of sunset rockfish. A single geographic delineation for vermilion/sunset rockfish clearly aligned well with past and recent fishery management and policy decisions for the cryptic species pair as well as best scientific information available.

Summary

The Council recommended defining 20 stocks for 14 species within the over 80 managed groundfish species within the FMU, as described in Table 1. The Council also recognized the need for, and is scheduled to begin in 2023, a comprehensive effort to define all remaining groundfish species in the FMP.

TABLE 1—GROUNDFISH STOCKS WITHIN THE FISHERY MANAGEMENT UNIT (FMU) OF THE PACIFIC COAST GROUNDFISH FMP AND THEIR BOUNDARIES, AS PROPOSED TO BE AMENDED THROUGH AMENDMENT 31

Stock	Species scientific name	Stock boundaries
Elasmobranchs:		
Pacific Spiny Dogfish	*Squalus suckleyi*	Pacific West Coast FMU.
Roundfish:		
Lingcod *North*	*Ophiodon elongatus*	North of 40°10′ N lat.
Lingcod *South*	*Ophiodon elongatus*	South of 40°10′ N lat.
Sablefish	*Anoplopoma fimbria*	Pacific West Coast FMU.
Rockfish:		
Black Rockfish—*Washington*	*Sebastes melanops*	North of 46°16′ N lat.
Black Rockfish—*Oregon*	*S. melanops*	46°16′ N lat. to 42° N lat.
Black Rockfish—*California*	*S. melanops*	South of 42° N lat.
Canary Rockfish	*S. pinniger*	Pacific West Coast FMU.
Copper Rockfish *North*	*S. caurinus*	North of 42° N lat.
Copper Rockfish *South*	*S. caurinus*	South 42° N lat.
Quillback Rockfish–*Washington*	*S. maliger*	North of 46°16′ N lat.
Quillback Rockfish—*Oregon*	*S. maliger*	46°16' N lat. to 42° N lat.
Quillback Rockfish—*California*	*S. maliger*	South of 42° N lat.
Squarespot Rockfish	*S. hopkinsi*	Pacific West Coast FMU.
Vermilion Rockfish	*S. miniatus*	North of 42° N lat.
Vermilion/Sunset Rockfish	*S. miniatus/S. crocotulus*	South 42° N lat.

TABLE 1—GROUNDFISH STOCKS WITHIN THE FISHERY MANAGEMENT UNIT (FMU) OF THE PACIFIC COAST GROUNDFISH FMP AND THEIR BOUNDARIES, AS PROPOSED TO BE AMENDED THROUGH AMENDMENT 31—Continued

Stock	Species scientific name	Stock boundaries
Shortspine Thornyhead	*Sebastolobus alascanus*	Pacific West Coast FMU.
Flatfish:		
Dover Sole	*Microstomus pacificus*	Pacific West Coast FMU.
Petrale Sole	*Eopsetta jordani*	Pacific West Coast FMU.
Rex Sole	*Glyptocephalus zachirus*	Pacific West Coast FMU.

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

Dated: August 17, 2023.

Kelly Denit,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–18089 Filed 8–22–23; 8:45 am]

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Notices

Federal Register

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Wednesday, August 23, 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 22, 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.

National Institute of Food and Agriculture

Title: Small Business Innovation Research (SBIR) Funding Agreement Certificates.

OMB Control Number: 0524—New.

Summary of Collection: The Small Business Innovation Research (SBIR)/Small Business Technology Transfer (STTR) programs at the U.S. Department of Agriculture (USDA) make competitively awarded grants to qualified small businesses to support high quality, advanced concepts research related to important scientific problems and opportunities in agriculture that could lead to significant public benefit if successful.

The USDA SBIR/STTR Programs are administered by the National Institute of Food and Agriculture (NIFA). NIFA oversees the policies and procedures governing SBIR/STTR grants awarded to the U.S. small business community, representing approximately 3.2% of the USDA extramural R/R&D budget. This represents approximately $140M in Phase II grants awarded to the U.S. small business community from 2012 to 2020. In 1982, the Small Business Innovation Research (SBIR) Grants Program was authorized, Public Law 97–219, and in 2022, the SBIR and STTR Extension Act of 2022 reauthorized the SBIR and Small Business Technology Transfer (STTR) programs through September 30, 2025.

Need and Use of the Information: The Funding Certification form is used by USDA to ensure small business concerns meet specific eligibility requirements for an SBIR/STTR award. The form asks applicants to certify a series of ten statements in order to ensure the grantee is complying with specific program requirements during the life of the funding agreement. Information collected includes program participant certifications regarding: the awardee meets ownership, control, size, and organization requirements; U.S. citizen or permanent resident alien status is met; all statements made within forms and documents are true and correct; all certifications are continuing in nature; agreement of no misrepresentation of small business status; the signatory on the form is an authorized representative of the awardee.

If NIFA were unable to collect this data, then the USDA SBIR/STTR program would be unable to comply with the Small Business Administration program and reporting requirements that apply to all SBIR and STTR awardees to ensure program requirements are being met during the life of the Funding Agreement.

Description of Respondents: Individuals.

Number of Respondents: 115.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 58.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–18155 Filed 8–22–23; 8:45 am]

BILLING CODE 3410–09–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 22, 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.

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Animal Plant and Health Inspection Service

Title: Swine Health Protection.

OMB Control Number: 0579–0065.

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 AHPA is contained in Title X, Subtitle E, Sections 10401–18 of P.O. 107–171, May 13, 2002, the Farm Security and Rural Investment Act of 2002. Veterinary Services, a program with the Animal and Plant Health Inspection Service (APHIS), is responsible for administering regulations intended to prevent the dissemination of animal diseases within the United States. Garbage is one of the primary media through which numerous infections or communicable diseases of swine are transmitted. Because of the serious threat to the U.S. swine industry, Congress passed Public Law 96–468 ''Swine Health Protection Act'' on October 17, 1980. This law requires USDA to ensure that all garbage is treated prior to its being fed to swine that are intended for interstate or foreign commerce or that substantially affect such commerce. The Act and the regulations will allow only operators of garbage treatment facilities, which meet certain specification to utilize garbage for swine feeding. APHIS will use various forms to collect information.

Need and Use of the Information: APHIS collects information from persons desiring to obtain a permit (license) to operate a facility to treat garbage. Prior to issuance of a license, an inspection will be made of the facility by an authorized representative to determine if it meets all requirements of the regulations. Periodic inspections will be made to determine if licenses are meeting the standards for operation of their approved facilities. Upon receipt of the information from the Animal Health Officials, the information is used by Federal or State animal health personnel to determine whether the waste collector is feeding garbage to swine, whether it is being treated, and whether the feeder is licensed or needs to be licensed.

Description of Respondents: Business or other for profit; State, Local or Tribal Government.

Number of Respondents: 15,500.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 1,742,601.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–18144 Filed 8–22–23; 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 22, 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 information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

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Food and Nutrition Service

Title: USDA Professional Standards Training Tracker Tool (PSTTT).

OMB Control Number: 0584–0626.

Summary of Collection: Section 306 of the Healthy Hunger-Free Kids Act of 2010 (HHFKA) requires Professional Standards for state and local school district nutrition professionals. In addition to hiring standards, mandatory annual training will be required for all individuals involved in preparing school meals. To meet the training requirements and assist in keeping track of training and training courses, FNS has developed a web-based application tool with a SQL-server database which is available to local educational agencies and school food authorities through the FNS public website. While training requirements are mandatory, using the USDA PSTTT to track the training is voluntary. State and local school district nutrition professionals can use any method to track and manage their trainings. These resources facilitate compliance with HHFKA requirements and are provided at no cost to the state, district, or school nutrition professionals.

Need and Use of the Information: State and school nutrition professionals can use the PSTTT to keep track of their training courses, learning objectives, and training hours, in accordance with HHFKA requirements. State reviewers can run reports from the PSTTT that they can use in preparation for Administrative Reviews that are conducted onsite at the school food authorities.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 10,006.

Frequency of Respondents: Reporting: On occasion; Quarterly; Annually; Weekly; Monthly.

Total Burden Hours: 17,090.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–18157 Filed 8–22–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0028]

Swine Vesicular Disease Status of the Regions of Tuscany and Umbria, Italy

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that we are proposing to recognize the regions of Tuscany and Umbria, Italy as being free of swine vesicular disease. This proposed recognition is based on a risk evaluation we have prepared in connection with this action, which we are making available for review and comment.

DATES: We will consider all comments that we receive on or before October 23, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Enter APHIS–2023–0028 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–2023–0028, 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: Dr. Chip Wells, Senior Veterinary Medical Officer, Regionalization Evaluation Services (RES), Strategy & Policy, Veterinary Services, APHIS, 4700 River Road, Unit 38, Riverdale, MD 20737–1231; (301) 851–3317; email: *AskRegionalization@usda.gov.*

SUPPLEMENTARY INFORMATION: The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation of certain animals and animal products into the United States in order to prevent the introduction of various animal diseases, including swine vesicular disease (SVD). This is a dangerous and communicable disease of swine.

Within part 94, § 94.12 contains requirements governing the importation of pork or pork products from regions where SVD exists. Section 94.14 prohibits the importation of domestic swine that are moved from or transit any region in which SVD is known to exist.

In accordance with § 94.12(a)(1), the Animal and Plant Health Inspection Service (APHIS) maintains a web-based list of regions which the Agency considers free of SVD. Paragraph (a)(2) of this section states that APHIS will add a region to this list after it conducts an evaluation of the region and finds that SVD is not present.

The regulations in § 92.2 contain requirements for requesting the recognition of the animal health status of a region (as well as for the approval of the export of a particular type of animal or animal product to the United States from a foreign region). If, after review and evaluation of the information submitted in support of the request, APHIS believes the request can be safely granted, APHIS will make its evaluation available for public comment through a document published in the **Federal Register**. Following the close of the comment period, APHIS will review all comments received and will make a final determination regarding the request that will be detailed in another document published in the **Federal Register**.

The Government of Italy has requested that APHIS evaluate the SVD disease status of the regions of Tuscany and Umbria. In response to Italy's request, we have prepared an evaluation, titled ''APHIS Evaluation of Toscana and Umbria, Italy for Swine Vesicular Disease'' (November 2022).[1] Based on the evaluation, we have determined that the regions of Tuscany and Umbria, Italy are free of SVD. APHIS has also determined that the surveillance, prevention, and control measures implemented by Italy are sufficient to minimize the likelihood of introducing SVD into the United States via imports of species or products susceptible to these diseases. Our determination supports adding the regions of Tuscany and Umbria, Italy to the web-based list of regions that APHIS considers free of SVD.

Therefore, in accordance with § 92.2(g), we are announcing the availability of our evaluation of the SVD status of the regions of Tuscany and Umbria, Italy for public review and comment. We are also announcing the availability of an environmental assessment (EA), which has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provision of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). The evaluation and EA may be viewed on the *Regulations.gov* website or in our reading room. (Instructions for accessing *Regulations.gov* and information on the location and hours of the reading room are provided under the heading ADDRESSES at the beginning of this notice.) The documents are also available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Information submitted in support of Italy's request is available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

After reviewing any comments we receive, we will announce our decision regarding the disease status of the regions of Tuscany and Umbria, Italy with respect to SVD in a subsequent notice.

Authority: 7 U.S.C. 1633, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 17th day of August 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–18112 Filed 8–22–23; 8:45 am]

BILLING CODE 3410–34–P

[1] Tuscany and Toscana are equivalent.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0044]

Addition of the Republic of Ecuador and the Republic of Peru to the List of Regions Affected With Highly Pathogenic Avian Influenza

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that we added the Republic of Ecuador and the Republic of Peru to the list of regions that the Animal and Plant Health Inspection Service considers to be affected by highly pathogenic avian influenza (HPAI). These actions follow our imposition of HPAI-related restrictions on avian commodities originating from or transiting the Republic of Ecuador and the Republic of Peru, as a result of the confirmation of HPAI in these countries.

DATES: The Republic of Ecuador and the Republic of Peru were added to the list of regions APHIS considers to be affected with HPAI, effective respectively on December 3, 2022, and December 12, 2022.

FOR FURTHER INFORMATION CONTACT: Dr. La'Toya Lane, APHIS Veterinary

Services, Regionalization Evaluation Services, 920 Main Campus Drive, Suite 300, Raleigh, NC 27606; phone: (301) 550–1671; email: *AskRegionalization@usda.gov.*

SUPPLEMENTARY INFORMATION: The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation of certain animals and animal products into the United States to prevent the introduction of various animal diseases, including Newcastle disease and highly pathogenic avian influenza (HPAI). The regulations prohibit or restrict the importation of live poultry, poultry meat, and other poultry products from regions where these diseases are considered to exist.

Section 94.6 of the regulations contains requirements governing the importation into the United States of carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds from regions of the world where HPAI exists or is reasonably believed to exist. HPAI is an extremely infectious and potentially fatal form of avian influenza in birds and poultry that, once established, can spread rapidly from flock to flock. The Animal and Plant Health Inspection Service (APHIS) maintains a list of restricted regions it considers affected with HPAI of any subtype on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-and-animal-product-import-information/animal-health-status-of-regions.*

APHIS receives notice of HPAI outbreaks from veterinary officials of the exporting country, from the World Organization for Animal Health (WOAH),[1] or from other sources the Administrator determines to be reliable.

On November 28, 2022, the veterinary authorities of the Republic of Ecuador reported to the WOAH the occurrence of HPAI in that country. On December 3, 2022, after confirming that HPAI occurred in commercial birds and poultry, APHIS added the Republic of Ecuador to the list of regions where HPAI exists. On that same day, APHIS issued an import alert notifying stakeholders that APHIS imposed import restrictions on poultry, commercial birds, ratites, avian hatching eggs, unprocessed avian products and byproducts, and certain fresh poultry commodities from the Republic of Ecuador to mitigate risk of HPAI introduction into the United States.

On December 2, 2022, the veterinary authorities of the Republic of Peru reported to the WOAH the occurrence of HPAI in that country. On December 12, 2022, after confirming that the HPAI occurred in commercial birds or poultry, APHIS added the Republic of Peru to the list of regions where HPAI exists. On that same day, APHIS issued an import alert notifying stakeholders that APHIS imposed import restrictions on poultry, commercial birds, ratites, avian hatching eggs, unprocessed avian products and byproducts, and certain fresh poultry commodities from the Republic of Peru to mitigate risk of HPAI introduction into the United States.

With the publication of this notice, we are informing the public that we added: The Republic of Ecuador to the list of regions APHIS considers affected with HPAI of any subtype, effective December 3, 2022; and the Republic of Peru to the list of regions APHIS considers affected with HPAI of any subtype, effective December 12, 2022. This notice serves as an official record and public notification of these actions.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this action as not a major rule, as defined by 5 U.S.C. 804(2).

Authority: 7 U.S.C. 1633, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 15th day of August 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–18073 Filed 8–22–23; 8:45 am]

BILLING CODE 3410–34–P

[1] The World Organization for Animal Health internationally follows a British English spelling of ''organisation' in its name; also, 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.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2022–0038]

Notice of Availability of a Pest Risk Analysis for the Importation of Fresh Table Beet Root (Beta vulgaris L.) for Consumption From the United Kingdom Into the Continental United States, Hawaii, Puerto Rico, and the U.S. Virgin Islands

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that we have prepared a pest risk analysis that evaluates the risks associated with importation of fresh table beet root (*Beta vulgaris* L.) for consumption from the United Kingdom into the continental United States, Hawaii, Puerto Rico, and the U.S. Virgin Islands. Based on the analysis, we have determined that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of fresh table beet root from the United Kingdom. We are making the pest risk analysis available to the public for review and comment.

DATES: We will consider all comments that we receive on or before October 23, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Enter APHIS–2022–0038 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–2022–0038, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *www.regulations.gov* or in our reading room, which is located in room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Ms. Claudia Ferguson, Senior Regulatory Policy Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1231; (301) 851–2352; *Claudia.Ferguson@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart L–Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–12, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into or disseminated within the United States.

Section 319.56–4 contains a performance-based process for approving the importation of fruits and vegetables that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the five designated phytosanitary measures listed in paragraph (b) of that section.

APHIS received a request from the national plant protection organization (NPPO) of the United Kingdom to allow the importation of fresh table beet root (*Beta vulgaris* L.) for consumption from the United Kingdom into the continental United States, Hawaii, Puerto Rico, and the U.S. Virgin Islands. As part of our evaluation of the United Kingdom's request, we have prepared a pest risk assessment to identify the pests of quarantine significance that could follow the pathway of the importation of fresh table beet root for consumption into the United States and specified territories from the United Kingdom. Based on the pest risk assessment, a risk management document (RMD) was prepared to identify phytosanitary measures that could be applied to fresh table beet root to mitigate the pest risk.

Therefore, in accordance with § 319.56–4(c), we are announcing the availability of our pest risk assessment and RMD for public review and comment. Those documents, as well as a description of the economic considerations associated with the importation of fresh table beet root from the United Kingdom, may be viewed on the *Regulations.gov* website or in our reading room (see **ADDRESSES** above for a link to *Regulations.gov* and information on the location and hours of the reading room). You may request paper copies of the pest risk assessment and RMD by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the subject of the analysis you wish to review when requesting copies.

After reviewing any comments we receive, we will announce our decision regarding the import status of fresh table beet root from the United Kingdom in a subsequent notice. If the overall conclusions of our analysis and the Administrator's determination of risk remain unchanged following our consideration of the comments, then we will authorize the importation of fresh table beet root (*Beta vulgaris* L.) for consumption from the United Kingdom into the ccontinental United States, Hawaii, Puerto Rico, and the U.S. Virgin Islands subject to the requirements specified in the RMD.

Authority: 7 U.S.C. 1633, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 17th day of August 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–18111 Filed 8–22–23; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

[Docket No. RUS–23–ELECTRIC–0011]

60-Day Notice of Proposed Information Collection: RUS Specification for Quality Control and Inspection of Timber Products; OMB Control No.: 0572–0076

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the United States Department of Agriculture (USDA) Rural Utilities Service (RUS or Agency) announces its' intention to request an extension of a currently approved information collection and invites comments on this information collection.

DATES: Comments on this notice must be received by October 23, 2023 to be assured of consideration.

ADDRESSES: Comments may be submitted by the Federal eRulemaking Portal: Go to *http://www.regulations.gov* and, in the ''Search Field'' box, labeled ''Search for dockets and documents on agency actions,'' enter the following docket number: (RUS–23–ELECTRIC–0011). To submit or view public comments, click the ''Search'' button, select the ''Documents'' tab, then select the following document title: ''RUS Specification for Quality Control and Inspection of Timber Products'' from the ''Search Results,'' and select the ''Comment'' button. Before inputting your comments, you may also review the ''Commenter's Checklist'' (optional). Insert your comments under the ''Comment'' title, click ''Browse'' to attach files (if available). Input your email address and select ''Submit Comment.'' Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''FAQ'' link.

FOR FURTHER INFORMATION CONTACT: Kimble Brown, Rural Development Innovation Center—Regulations Management Division, USDA, 1400 Independence Avenue SW, Room 4227, South Building, Washington, DC 20250–1522. Telephone: (202) 720–6780. Email *kimble.brown@usda.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies the following information collection that RHS is submitting to OMB as an extension to an existing collection with Agency adjustment.

Title: RUS Specification for Quality Control and Inspection of Timber Products.

OMB Control Number: 0572–0076.

Expiration Date of Approval: February 29, 2024.

Type of Request: Extension of a currently approved collection.

Estimate of Burden: This collection of information is estimated to average 1.01 hour per response.

Respondents: Not-for-profit institutions; Business or other for profit.

Estimated Number of Respondents: 25.

Estimated Number of Responses per Respondent: 800.

Estimated Total Number of Responses: 20,000.

Estimated Annual Reporting Burden on Respondents: 20,000 hours.

Estimated Annual Recordkeeping Burden on Respondents: 333.25 hours.

Estimated Total Annual Burden on Respondents: 20,333.25 hours.

Abstract: RUS Bulletin 1728H–702 and 7 CFR 1728.202 describe the responsibilities and procedures pertaining to the quality control by producers and pertaining to inspection of timber products produced in accordance with RUS specifications. To ensure the security of loan funds, adequate quality control of timber products is vital to loan security on electric power systems where hundreds of thousands of wood poles and cross-arms are used. Since RUS and its borrowers do not have the expertise or manpower to quickly determine imperfections in the wood products or their preservatives treatments, they must obtain service of an inspection agency to ensure that the specifications for wood poles and cross-arms are being met. Copies of test reports on various preservatives must accompany each load of poles treated at the same time in a pressure cylinder (charge) as required by 7 CFR 1728.202(i). RUS feels the importance of safety concerns are

enough to justify requiring test reports so that the purchaser, inspectors, and RUS will be able to spot check the general accuracy and reliability of the tests.

Comments are invited on:

(a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.

(b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used.

(c) ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) ways to minimize the burden of the collection of information on respondents, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Copies of this information collection can be obtained from Kimble Brown, Innovation Center—Regulations Management Division, at (202) 720–2825. Email: *kimble.brown@usda.gov.*

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.

Andrew Berke,

Administrator, Rural Utilities Service.

[FR Doc. 2023–18095 Filed 8–22–23; 8:45 am]

BILLING CODE 3410–XV–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Connecticut Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of public meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Connecticut Advisory Committee (Committee) to the U.S. Commission on Civil Rights will convene a briefing on Thursday, September 7, 2023, at 10:00 a.m. (ET), at the Legislative Office Building, Room 1C, 300 Capitol Avenue, Hartford, CT 06106. The purpose of the briefing is for the committee to hear from panelists on the topic of voting rights for incarcerated persons in Connecticut.

DATES: Thursday, September 7, 2023; 10:00 a.m. (ET).

ADDRESSES: Legislative Office Building, Room 1C, 300 Capitol Avenue, Hartford, CT 06106.

FOR FURTHER INFORMATION CONTACT: Barbara Delaviez, Designated Federal Official at *bdelaviez@usccr.gov* or 202–381–8915.

SUPPLEMENTARY INFORMATION: If other persons who plan to attend the meeting require other accommodations, please contact Evelyn Bohor at *ebohor@usccr.gov* at least ten (10) working days before the scheduled date of the meeting.

Time will be set aside at the end of the meeting so that members of the public may address the Committee after the briefing during the open comment session. This meeting is available to the public by attendance in person. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Barbara Delaviez at *bdelaviez@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–312–353–8311. Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Connecticut Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *ebohor@usccr.gov.*

Agenda

I. Welcome and Roll Call
II. Briefing on Voting Rights for Incarcerated Persons in Connecticut
III. Public Comment
IV. Discuss Next Steps
V. Adjournment

Dated: August 18, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–18166 Filed 8–22–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the North Carolina Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the North Carolina Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom at 12:00 p.m. ET on Thursday, October 5, 2023. The purpose of this meeting is to discuss post-report activities for their project on Legal Financial Obligations as well as civil rights topics for the Committee's next study.

DATES: Thursday, October 5, 2023, from 12:00 p.m.–1:30 p.m. Eastern Time.

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1601425291.

Join by Phone (Audio Only): (833) 435–1820 USA Toll-Free; Meeting ID: 160 142 5291.

FOR FURTHER INFORMATION CONTACT: Victoria Moreno, Designated Federal Officer, at *vmoreno@usccr.gov* or (434) 515–0204.

SUPPLEMENTARY INFORMATION: This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning

impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Victoria Moreno at *vmoreno@usccr.gov*. Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, North Carolina Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov*.

Agenda

I. Welcome & Roll Call
II. Committee Discussion on Post-Report Activities
III. Committee Discussion on a New Civil Rights Topic
IV. Public Comment
V. Next Steps
VI. Adjournment

Dated: August 18, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–18171 Filed 8–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–155–2023]

Foreign-Trade Zone 29; Application for Subzone; BlueOval SK LLC; Glendale, Kentucky

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Louisville & Jefferson County Riverport Authority, grantee of FTZ 29, requesting subzone status for the facility of BlueOval SK LLC, located in Glendale, Kentucky. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on August 18, 2023.

The proposed subzone (1424.7 acres) is located at 2022 Battery Park Drive, Glendale, Kentucky. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 29.

In accordance with the FTZ Board's regulations, Juanita Chen of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov*. The closing period for their receipt is October 2, 2023. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to October 17, 2023.

A copy of the application will be available for public inspection in the ''Online FTZ Information Section'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz*.

For further information, contact Juanita Chen at *juanita.chen@trade.gov*.

Dated: August 18, 2023.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2023–18163 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–560–839]

Mattresses From Indonesia: Initiation of Countervailing Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable August 17, 2023.

FOR FURTHER INFORMATION CONTACT: Natasia Harrison and Harrison Tanchuck, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1240 or (202) 482–7421, respectively.

SUPPLEMENTARY INFORMATION:

The Petition

On July 28, 2023, the U.S. Department of Commerce (Commerce) received a countervailing duty (CVD) petition concerning imports of mattresses from Indonesia filed in proper form on behalf of the petitioners,[1] U.S. producers of mattresses and certified unions that represent workers engaged in the domestic production of mattresses.[2] The CVD petition (the Petition) was accompanied by antidumping duty (AD) petitions concerning imports of mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan.[3]

On August 1, 2, and 8, 2023, Commerce requested supplemental information pertaining to certain aspects of the Petition.[4] On August 7 and 9, 2023, the petitioners filed timely responses to these requests for additional information.[5]

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (the Act), the petitioners allege that the Government of Indonesia (GOI) is providing countervailable subsidies, within the meaning of sections 701 and 771(5) of the Act, to producers of mattresses in Indonesia, and that such

[1] Brooklyn Bedding; Carpenter Co.; Corsicana Mattress Company; Future Foam Inc.; FXI, Inc.; Kolcraft Enterprises Inc.; Leggett & Platt, Incorporated; Serta Simmons Bedding Inc.; Southerland, Inc.; Tempur Sealy International; the International Brotherhood of Teamsters; and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, the petitioners).

[2] *See* Petitioners' Letter, ''Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Indonesia, Italy, Kosovo, Mexico, Philippines, Poland, Slovenia, Spain, and Taiwan: Antidumping and Countervailing Duty Petitions,'' dated July 28, 2023 (the Petition).

[3] *Id.*

[4] *See* Commerce's Letters, ''Petitions for the Imposition of Antidumping Duties on Imports of Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan and Countervailing Duties on Imports from Indonesia: Supplemental Questions,'' dated August 1, 2023 (First General Issues Supplemental Questionnaire); ''Petition for the Imposition of Countervailing Duties on Imports of Mattresses from Indonesia: Supplemental Questions,'' dated August 2, 2023; and ''Petitions for the Imposition of Antidumping Duties on Imports of Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Slovenia, Spain, and Taiwan and Countervailing Duties on Imports from Indonesia: Supplemental Questions,'' dated August 8, 2023 (Second General Issues Supplemental Questionnaire).

[5] *See* Petitioners' Letters, ''Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Indonesia, Italy, Kosovo, Mexico, Philippines, Poland, Slovenia, Spain, and Taiwan: Responses to Petition Supplemental Questionnaires,'' dated August 7, 2023 (General Issues 1SQR); ''Mattresses from Indonesia: Mattress Petitioners' Response to the Department of Commerce's Supplemental Questions,'' dated August 7, 2023; and ''Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, Philippines, Slovenia, Spain, and Taiwan: Responses to the Department's Second General Issues Supplemental Questionnaire,'' dated August 9, 2023 (General Issues 2SQR).

imports are materially injuring, or threatening material injury to, the domestic industry producing in the United States. Consistent with section 702(b)(1) of the Act and 19 CFR 351.202(b), for those alleged programs on which we are initiating a CVD investigation, the Petition is supported by information reasonably available to the petitioners.

Commerce finds that the petitioners filed the Petition on behalf of the domestic industry because the petitioners are interested parties as defined in sections 771(9)(C) and (D) of the Act.[6] Commerce also finds that the petitioners demonstrated sufficient industry support with respect to the initiation of the requested CVD investigation.[7]

Period of Investigation

Because the Petition was filed on July 28, 2023, the period of investigation (POI) for Indonesia is January 1, 2022, through December 31, 2022.[8]

Scope of the Investigation

The products covered by this investigation are mattresses from Indonesia. For a full description of the scope of this investigation, *see* the appendix to this notice.

Comments on Scope of the Investigation

On August 1 and 8, 2023, Commerce requested further information and clarification from the petitioners regarding the proposed scope to ensure that the scope language in the Petition is an accurate reflection of the products for which the domestic industry is seeking relief.[9] On August 7 and 9, 2023, the petitioners revised the scope.[10] The description of merchandise covered by this investigation, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for parties to raise issues regarding product coverage (*i.e.,* scope).[11] Commerce will consider all scope comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determination. If scope comments include factual information, all such factual information should be limited to public information.[12] To facilitate preparation of its questionnaires, Commerce requests that scope comments be submitted by 5:00 p.m. Eastern Time (ET) on September 6, 2023, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on September 18, 2023, which is the next business day after 10 calendar days from the initial comment deadline.[13]

Commerce requests that any factual information that the parties consider relevant to the scope of the investigation be submitted during that time period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigation may be relevant, the party may contact Commerce and request permission to submit the additional information. All scope comments must also be filed on the record of each of the concurrent AD and CVD investigations.

Filing Requirements

All submissions to Commerce must be filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[14] An electronically-filed document must be received successfully in its entirety by the time and date it is due.[15]

Consultations

Pursuant to sections 702(b)(4)(A)(i) and (ii) of the Act, Commerce notified the GOI of the receipt of the Petition and provided it an opportunity for consultations with respect to the Petition.[16] Commerce held consultations with the GOI on August 15, 2023.[17]

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC must apply the same statutory definition regarding the domestic like product,[18] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product,

[6] *See* Petitions at Volume I (pages 6–8). Brooklyn Bedding LLC, Carpenter Co., Corsicana Mattress Company, Future Foam, Inc., FXI, Inc., Kolcraft Enterprises, Inc., Leggett & Platt, Incorporated, Serta Simmons Bedding, LLC, Southerland, Inc., and Tempur Sealy International are interested parties as defined in section 771(9)(C) of the Act. The International Brotherhood of Teamsters and USW are interested parties as defined in section 771(9)(D) of the Act.

[7] *See* ''Determination of Industry Support for the Petitions'' section, *infra.*

[8] *See* 19 CFR 351.204(b)(2).

[9] *See* First General Issues Supplemental Questionnaire at 3–4; *see also* Second General Issues Supplemental Questionnaire at 3.

[10] *See* General Issues 1SQR at 4 and Exhibit 3; *see also* General Issues 2SQR at 1 and Exhibit 2.

[11] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*); *see also* 19 CFR 351.312.

[12] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[13] *See* 19 CFR 351.303(b)(1) (''For both electronically filed and manually filed documents, if the applicable due date falls on a non-business day, the Secretary will accept documents that are filed on the next business day.''). The initial deadline for rebuttal comments falls on September 16, 2023, which is a Saturday.

[14] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014), for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[15] *See* 19 CFR 351.303(b)(1).

[16] *See* Commerce's Letter, ''Invitation for Consultations to Discuss the Countervailing Duty Petition,'' dated July 28, 2023.

[17] *See* Memorandum, ''Consultations with Officials from the Government of Indonesia,'' dated August 16, 2023.

[18] *See* section 771(10) of the Act.

such differences do not render the decision of either agency contrary to law.[19]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioners do not offer a definition of the domestic like product distinct from the scope of the investigation.[20] Based on our analysis of the information submitted on the record, we have determined that mattresses, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[21]

In determining whether the petitioners have standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of the Investigation,'' in the appendix to this notice. To establish industry support, the petitioners provided the total 2022 shipments of the domestic like product for the supporters of the Petition, and compared this to the estimated total 2022 shipments of the domestic like product for the entire domestic industry.[22] Because total industry production data for the domestic like product for 2022 are not reasonably available to the petitioners, and the petitioners have established that shipments are a reasonable proxy for production data,[23] we have relied on the data provided by the petitioners for purposes of measuring industry support.[24]

Our review of the data provided in the Petition, the General Issues 1SQR, the General Issues 2SQR, and other information readily available to Commerce indicates that the petitioners have established industry support for the Petition.[25] First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (*e.g.,* polling).[26] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act, because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product.[27] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition.[28] Accordingly, Commerce determines that the Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.[29]

Injury Test

Because Indonesia is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from Indonesia materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

The petitioners allege that imports of the subject merchandise are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the U.S. industry producing the domestic like product. In addition, the petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[30]

The petitioners contend that the industry's injured condition is illustrated by a significant and increasing volume of subject imports; declining market share; underselling and price suppression; lost sales and revenues; and adverse impact on the domestic industry's operations, capacity utilization, production, commercial shipment volumes, employment variables, and financial performance.[31] We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation.[32]

Initiation of CVD Investigation

Based upon the examination of the Petition and supplemental responses, we find that they meet the requirements of section 702 of the Act. Therefore, we are initiating a CVD investigation to determine whether imports of mattresses from Indonesia benefit from countervailable subsidies conferred by the GOI. In accordance with section 703(b)(1) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determination no later than 65 days after the date of this initiation. Based on our review of the Petition, we find that there is sufficient information to initiate a CVD investigation on five of the nine programs alleged by the petitioner. For a full discussion of the basis for our decision to initiate an investigation of each program, *see* the Indonesia CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

Respondent Selection

The petitioners identified 24 companies in Indonesia as producers and/or exporters of mattresses.[33] Commerce intends to follow its standard

[19] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[20] *See* Petition at Volume I (pages I–19 through I–23); *see also* General Issues 1SQR at 2 and Exhibit 1.

[21] For a discussion of the domestic like product analysis as applied to this case and information regarding industry support, *see* Indonesia CVD Initiation Checklist at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Indonesia, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan (Attachment II).

[22] *See* Petition at Volume I (pages I–7 through I–8 and Exhibit I–6); *see also* General Issues 1SQR at 5–7 and Exhibits 4–8; and General Issues 2SQR at 2–3 and Exhibits 3–5.

[23] *See* Petition at Volume I (pages I–7 through I–8 and Exhibit I–6); *see also* General Issues 1SQR at 5–6.

[24] *See* Petition at Volume I (pages I–7 through I–8 and Exhibit I–6); *see also* General Issues 1SQR at 5–7 and Exhibits 4–8; and General Issues 2SQR at 2–3 and Exhibits 3–5.

[25] *See* Attachment II of the Indonesia CVD Initiation Checklist.

[26] *Id.; see also* section 702(c)(4)(D) of the Act.

[27] *See* Attachment II of the Indonesia CVD Initiation Checklist.

[28] *Id.*

[29] *Id.*

[30] *See* Petition at Volume I (page I–24 and Exhibit I–12).

[31] *Id.* at Volume I (pages I–24 through I–52 and Exhibits I–2 through I–5 and I–9 through I–16); *see also* General Issues 1SQR at 2, 7 and Exhibit 1.

[32] *See* Indonesia CVD Initiation Checklist at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Indonesia Italy, Kosovo, Mexico, Philippines, Poland, Slovenia, Spain, and Taiwan.

[33] *See* Petition at Volume I (Exhibit I–10).

practice in CVD investigations and calculate company-specific subsidy rates in this investigation. In the event that Commerce determines that the number of companies is large, and it cannot individually examine each company based upon Commerce's resources, where appropriate, Commerce intends to select mandatory respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports of mattresses from Indonesia during the POI under the appropriate Harmonized Tariff Schedule of the United States subheadings listed in the ''Scope of the Investigation'' in the appendix.

On August 11, 2023, Commerce released CBP data on U.S. imports of mattresses from Indonesia under administrative protective order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment on the CBP data and/or respondent selection must do so within three business days after the publication date of the notice of initiation of this investigation.[34] Comments must be filed electronically using ACCESS. An electronically-filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to the GOI via ACCESS. Furthermore, to the extent practicable, Commerce will attempt to provide a copy of the public version of the Petition to each exporter named in the Petition, as provided under 19 CFR 351.203(c)(2).

ITC Notification

Commerce will notify the ITC of its initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petition was filed, whether there is a reasonable indication that imports of mattresses from Indonesia are materially injuring, or threatening material injury to, a U.S. industry.[35] A negative ITC determination will result in the investigation being terminated.[36] Otherwise, this CVD investigation will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted [37] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[38] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in this investigation.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301.[39] For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; Commerce will grant untimely filed requests for the extension of time limits only in limited cases where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review Commerce's regulations concerning factual information prior to submitting factual information in this investigation.[40]

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[41] Parties must use the certification formats provided in 19 CFR 351.303(g).[42] Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305. Parties wishing to participate in this investigation should ensure that they meet the requirements of 19 CFR 351.103(d) (*e.g.,* by filing the required letters of appearance). Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[43]

This notice is issued and published pursuant to sections 702 and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: August 17, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Investigation

The products covered by this investigation are all types of youth and adult mattresses. The term ''mattress'' denotes an assembly of materials that at a minimum includes a ''core,'' which provides the main support system of the mattress, and may consist of innersprings, foam, other resilient filling, or a combination of these materials. Mattresses also may contain: (1) ''upholstery,'' the

[34] *See* Memorandum, ''Release of U.S. Customs and Border Protection Data,'' dated August 11, 2023.

[35] *See* section 703(a)(1) of the Act.

[36] *Id.*

[37] *See* 19 CFR 351.301(b).

[38] *See* 19 CFR 351.301(b)(2).

[39] *See* 19 CFR 351.302.

[40] *See* 19 CFR 301; *see also Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013), available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm.*

[41] *See* section 782(b) of the Act.

[42] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[43] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

material between the core and the top panel of the ticking on a single-sided mattress, or between the core and the top and bottom panel of the ticking on a double-sided mattress; and/or (2) ''ticking,'' the outermost layer of fabric or other material (*e.g.,* vinyl) that encloses the core and any upholstery, also known as a cover.

The scope of this investigation is restricted to only ''adult mattresses'' and ''youth mattresses.'' ''Adult mattresses'' are frequently described as ''twin,'' ''extra-long twin,'' ''full,'' ''queen,'' ''king,'' or ''California king'' mattresses. ''Youth mattresses'' are typically described as ''crib,'' ''toddler,'' or ''youth'' mattresses. All adult and youth mattresses are included regardless of size and size description or how they are described (*e.g.,* frameless futon mattress and tri-fold mattress).

The scope encompasses all types of ''innerspring mattresses,'' ''non-innerspring mattresses,'' and ''hybrid mattresses.'' ''Innerspring mattresses'' contain innersprings, a series of metal springs joined together in sizes that correspond to the dimensions of mattresses. Mattresses that contain innersprings are referred to as ''innerspring mattresses'' or ''hybrid mattresses.'' ''Hybrid mattresses'' contain two or more support systems as the core, such as layers of both memory foam and innerspring units.

''Non-innerspring mattresses'' are those that do not contain any innerspring units. They are generally produced from foams (*e.g.,* polyurethane, memory (viscoelastic), latex foam, gel infused viscoelastic (gel foam), thermobonded polyester, polyethylene) or other resilient filling.

Mattresses covered by the scope of this investigation may be imported independently, as part of furniture or furniture mechanisms (*e.g.,* convertible sofa bed mattresses, sofa bed mattresses imported with sofa bed mechanisms, corner group mattresses, day-bed mattresses, roll-away bed mattresses, high risers, trundle bed mattresses, crib mattresses), or as part of a set (in combination with a ''mattress foundation''). ''Mattress foundations'' are any base or support for a mattress. Mattress foundations are commonly referred to as ''foundations,'' ''boxsprings,'' ''platforms,'' and/or ''bases.'' Bases can be static, foldable, or adjustable. Only the mattress is covered by the scope if imported as part of furniture, with furniture mechanisms, or as part of a set, in combination with a mattress foundation.

Excluded from the scope of this investigation are ''futon'' mattresses. A ''futon'' is a bi-fold frame made of wood, metal, or plastic material, or any combination thereof, that functions as both seating furniture (such as a couch, love seat, or sofa) and a bed. A ''futon mattress'' is a tufted mattress, where the top covering is secured to the bottom with thread that goes completely through the mattress from the top through to the bottom, and it does not contain innersprings or foam. A futon mattress is both the bed and seating surface for the futon.

Also excluded from the scope are airbeds (including inflatable mattresses) and waterbeds, which consist of air- or liquid-filled bladders as the core or main support system of the mattress.

Also excluded is certain multifunctional furniture that is convertible from seating to sleeping, regardless of filler material or components, where such filler material or components are upholstered, integrated into the design and construction of, and inseparable from, the furniture framing, and the outermost layer of the multifunctional furniture converts into the sleeping surface. Such furniture may, and without limitation, be commonly referred to as ''convertible sofas,'' ''sofabeds,'' ''sofa chaise sleepers,'' ''futons,'' ''ottoman sleepers,'' or a like description.

Also excluded from the scope of this investigation are any products covered by the existing antidumping duty orders on uncovered innerspring units from the People's Republic of China, South Africa, and the Socialist Republic of Vietnam. *See Uncovered Innerspring Units from the People's Republic of China, South Africa, and Socialist Republic of Vietnam: Continuation of Antidumping Duty Orders,* 84 FR 55285 (October 16, 2019).

Also excluded from the scope of this investigation are bassinet pads with a nominal length of less than 39 inches, a nominal width of less than 25 inches, and a nominal depth of less than 2 inches.

Additionally, also excluded from the scope of this investigation are ''mattress toppers.'' A ''mattress topper'' is a removable bedding accessory that supplements a mattress by providing an additional layer that is placed on top of a mattress. Excluded mattress toppers have a height of four inches or less.

The products subject to this investigation are currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 9404.21.0010, 9404.21.0013, 9404.21.0095, 9404.29.1005, 9404.29.1013, 9404.29.1095, 9404.29.9085, 9404.29.9087, and 9404.29.9095. Products subject to this investigation may also enter under HTSUS subheadings: 9401.41.0000, 9401.49.0000, and 9401.99.9081. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this investigation is dispositive.

[FR Doc. 2023–18164 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–820]

Certain Small Diameter Seamless Carbon and Alloy Standard, Line and Pressure Pipe From Germany: Continuation of Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on certain small diameter seamless carbon and alloy standard, line and pressure pipe (seamless pipe) from Germany would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of this AD order.

DATES: Applicable August 16, 2023.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5760.

SUPPLEMENTARY INFORMATION:

Background

On August 3, 1995, Commerce published the AD order on seamless pipe from Germany.[1] On January 3, 2023, the ITC instituted, and Commerce initiated, the fifth sunset review of the *Order,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] Commerce conducted an expedited (120-day) sunset review of the *Order,* pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2). As a result of its review, Commerce determined that revocation of the *Order* would likely lead to the continuation or recurrence of dumping, and therefore, notified the ITC of the magnitude of the margins of dumping likely to prevail should the *Order* be revoked.[3]

On August 16, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Order* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[4]

[1] *See Notice of Antidumping Duty Order and Amended Final Determination: Certain Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Germany,* 60 FR 39704 (August 3, 1995) (*Order*).

[2] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Germany; Institution of a Five-Year Review,* 88 FR 110 (January 3, 2023); and *Initiation of Five-Year (Sunset) Reviews,* 88 FR 63, 64 (January 3, 2023).

[3] *See Certain Small Diameter Seamless Carbon and Alloy Standard, Line and Pressure Pipe from Germany: Final Results of Expedited Fifth Sunset Review of the Antidumping Duty Order,* 88 FR 29890 (May 9, 2023), and accompanying Issues and Decision Memorandum.

[4] *See Certain Small Diameter Seamless Carbon and Alloy Standard, Line and Pressure Pipe from Germany; Determinations,* 88 FR 55721 (August 16, 2023).

Scope of the Order

The scope of this *Order* covers certain small diameter seamless carbon and alloy standard, line and pressure pipes produced to the ASTM A–335, ASTM A–106, ASTM A–53 and API 5L specifications and meeting the physical parameters described below, regardless of application. The scope of the *Order* also includes all products used in standard, line, or pressure pipe applications and meeting the physical parameters below, regardless of specification.

For purposes of the *Order,* seamless pipes are seamless carbon and alloy (other than stainless) steel pipes, of circular cross-section, not more than 114.3 mm (4.5 inches) in outside diameter, regardless of wall thickness, manufacturing process (hot-finished or cold-drawn), end finish (plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish. These pipes are commonly known as standard pipe, line pipe or pressure pipe, depending upon the application. They may also be used in structural applications. Pipes produced in nonstandard wall thicknesses are commonly referred to as tubes.

The merchandise subject to the *Order* is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7304.19.1020, 7304.19.5020, 7304.31.6050, 7304.3900.16, 7304.3900.20, 7304.39.0024, 7304.39.0028, 7304.39.0032, 7304.51.5005, 7304.51.5060, 7304.59.6000, 7304.59.8010, 7304.59.8015, 7304.59.8020, and 7304.59.8025.

The following information further defines the scope of the *Order,* which covers pipes meeting the physical parameters described above:

Specifications, Characteristics, and Uses: Seamless pressure pipes are intended for the conveyance of water, steam, petrochemicals, chemicals, oil products, natural gas and other liquids and gasses in industrial piping systems. They may carry these substances at elevated pressures and temperatures and may be subject to the application of external heat. Seamless carbon steel pressure pipe meeting the American Society for Testing and Materials (ASTM) standard A–106 may be used in temperatures of up to 1000 degrees Fahrenheit, at various American Society of Mechanical Engineers (ASME) code stress levels. Alloy pipes made to ASTM standard A–335 must be used if temperatures and stress levels exceed those allowed for A–106 and the ASME codes. Seamless pressure pipes sold in the United States are commonly produced to the ASTM A–106 standard.

Seamless standard pipes are most commonly produced to the ASTM A–53 specification and generally are not intended for high temperature service. They are intended for the low temperature and pressure conveyance of water, steam, natural gas, air and other liquids and gasses in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses. Standard pipes (depending on type and code) may carry liquids at elevated temperatures but must not exceed relevant ASME code requirements.

Seamless line pipes are intended for the conveyance of oil and natural gas or other fluids in pipe lines. Seamless line pipes are produced to the API 5L specification. Seamless pipes are commonly produced and certified to meet ASTM A–106, ASTM A–53 and API 5L specifications. Such triple certification of pipes is common because all pipes meeting the stringent A–106 specification necessarily meet the API 5L and ASTM A–53 specifications. Pipes meeting the API 5L specification necessarily meet the ASTM A–53 specification. However, pipes meeting the A–53 or API 5L specifications do not necessarily meet the A–106 specification. To avoid maintaining separate production runs and separate inventories, manufacturers triple certify the pipes. Since distributors sell the vast majority of this product, they can thereby maintain a single inventory to service all customers.

The primary application of ASTM A–106 pressure pipes and triple certified pipes is in pressure piping systems by refineries, petrochemical plants and chemical plants. Other applications are in power generation plants (electrical-fossil fuel or nuclear), and in some oil field uses (on shore and off shore) such as for separator lines, gathering lines and metering runs. A minor application of this product is for use as oil and gas distribution lines for commercial applications. These applications constitute the majority of the market for the subject seamless pipes. However, A–106 pipes may be used in some boiler applications.

The scope of the *Order* includes all seamless pipe meeting the physical parameters described above and produced to one of the specifications listed above, regardless of application, and whether or not also certified to a non-covered specification. Standard, line and pressure applications and the above-listed specifications are defining characteristics of the scope of the *Order.* Therefore, seamless pipes meeting the physical description above, but not produced to the A–335, A–106, A–53, or API 5L standards shall be covered if used in a standard, line or pressure application.

For example, there are certain other ASTM specifications of pipe which, because of overlapping characteristics, could potentially be used in A–106 applications. These specifications generally include A–162, A–192, A–210, A–333, and A–524. When such pipes are used in a standard, line or pressure pipe application, such products are covered by the scope of the *Order.*

Specifically excluded from the *Order* are boiler tubing and mechanical tubing, if such products are not produced to A–335, A–106, A–53 or API 5L specifications and are not used in standard, line or pressure applications. In addition, finished and unfinished oil country tubular goods (OCTG) are excluded from the scope of the *Order,* if covered by the scope of another AD order from the same country. If not covered by such an OCTG order, finished and unfinished OCTG are included in the scope when used in standard, line or pressure applications. Finally, also excluded from the *Order* are redraw hollows for cold-drawing when used in the production of cold-drawn pipe or tube.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the *Order* is dispositive.

Continuation of the Order

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, Commerce hereby orders the continuation of the *Order.* U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the *Order* is August 16, 2023.[5] Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year review of the *Order* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the

[5] *Id.*

return/destruction or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of the APO is a sanctionable violation.

Notification to Interested Parties

This five-year (sunset) review and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i) of the Act, and 19 CFR 351.218(f)(4).

Dated: August 17, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–18162 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Section Membership Opportunities to the United States-India CEO Forum

AGENCY: International Trade Administration (ITA), Department of Commerce.

ACTION: Notice.

SUMMARY: This notice announces an additional opportunity to apply for appointment to the U.S. Section of the U.S.-India CEO Forum (''Forum'') previously recruited via the notices published in the **Federal Register** February 18, 2022 and March 23, 2022. Effective from this notice, the U.S. Section membership cap has increased from 20 to approximately 25 members. The U.S. Section currently has 18 members; thus, the Department is soliciting applications for up to approximately seven vacancies.

DATES: ITA will accept nominations for membership on the Forum for terms that will begin upon appointment and will expire on December 31, 2024. Applications are due on September 12, 2023.

ADDRESSES: For inquiries and an application, please contact Noor Sclafani, International Trade Specialist, Office of South Asia, U.S. Department of Commerce, by email at *noor.sclafani@trade.gov.*

FOR FURTHER INFORMATION CONTACT: Noor Sclafani, International Trade Specialist, Office of South Asia, U.S. Department of Commerce, telephone: (202) 482–1421.

SUPPLEMENTARY INFORMATION: Established in 2005, the U.S.-India CEO Forum brings together leaders of the respective business communities of the United States and India to discuss issues of mutual interest, particularly ways to strengthen the economic and commercial ties between the two countries, and to communicate their joint recommendations to the U.S. and Indian governments.

The Forum has U.S. and Indian public and private sector co-chairs. The Secretary of Commerce serves as a public sector co-chair. Other senior U.S. Government officials may also participate in the Forum.

The Forum includes U.S. and Indian private sector members, who are divided into two sections. The U.S. Section consists of approximately 25 members representing the views and interests of the private sector in the United States. Each government appoints the members to its respective Section. The Secretary of Commerce appoints the U.S. Section and the U.S. Section's private sector co-chair. The Forum allows the private sector to develop and provide joint recommendations to the two governments that reflect private sector views, needs, concerns, and suggestions about the creation of an environment in which their respective private sectors can partner, thrive, and enhance bilateral commercial ties to expand trade and economic links between the United States and India. The Forum works in tandem with, and provides input to, the U.S.-India Commercial Dialogue.

Candidates are currently being sought for membership in the U.S. Section. Each candidate must be the Chief Executive Officer, President, or equivalent chief executive of a company that is (1) U.S.-owned or controlled, (2) incorporated in or has its main headquarters or principal place of business in the United States, and (3) currently conducting business in both countries. Candidates must be U.S. citizens or otherwise legally authorized to work in the United States and be generally able to travel to India and locations in the United States to attend Forum meetings, as well as U.S. Section meetings. Travel and in-person activities are contingent upon the safety and health conditions in the United States and India. Should safety or health conditions not be appropriate for travel and/or in-person activities, a meeting may be postponed or a virtual meeting may be scheduled instead. The candidate may not be a registered foreign agent, nor required to be registered, with the Department of Justice under the Foreign Agents Registration Act (FARA) of 1938, as amended.

Applications for membership in the U.S. Section by eligible individuals will be evaluated based on the following criteria:

(1) A demonstrated commitment by the individual's company to the Indian market either through exports or investment.

(2) A demonstrated strong interest in India and its economic development.

(3) The ability to offer a broad perspective and business experience to the discussions.

(4) The ability to address cross-cutting issues that affect the entire business community.

(5) The ability to initiate and be responsible for activities in which the Forum will be active.

(6) A demonstrated commitment by the individual and/or the individual's company, particularly through activities in India, to:

- support inclusive economic growth;
- uphold worker rights and labor standards in its global supply chain;
- strengthen the resiliency of U.S. supply chains;
- advance environmental sustainability; and
- address climate change.

The U.S. Section of the Forum should include members who represent a diversity of business sectors. Applications from individuals representing companies in all sectors and of all sizes will be considered.

ITA notes that the following sectors are the subject of on-going U.S.-India government engagements and is particularly seeking applicants representing:

- Healthcare in the context of tackling current and future public health emergencies and bolstering public health efforts; and
- Critical and emerging technologies that are the focus of the U.S.-India initiative on Critical and Emerging Technologies (iCET), announced by President Biden and Prime Minister Modi in May 2022 to elevate and expand the strategic technology partnership and defense industrial cooperation between the governments, businesses, and academic institutions of the United States and India.

The Department of Commerce is committed to achieving diversity in the membership of the U.S. Section of the

Forum to the maximum extent permitted by law and consistent with the need for balanced industry representation. Where possible, the Department of Commerce will also consider the ethnic, racial, and gender diversity of the United States.

U.S. Section members will receive no compensation for their participation in Forum-related activities. Individual members will be responsible for all travel and related expenses associated with their participation, including attendance at Forum and Section meetings. At the meetings, the U.S. and Indian Sections will be expected to offer recommendations to the U.S. and Indian governments. Only appointed members may participate in official Forum meetings; substitutes and alternates may not participate. U.S. Section members will serve until December 31, 2024. Members serve at the discretion of the Secretary.

This notice supersedes the notices announcing membership opportunities for appointment, or reappointment, to the U.S. Section of the Forum published in the **Federal Register** on February 18, 2022 (87 FR 9318) and March 23, 2022 (87 FR 16455).

To be considered for membership in the U.S. Section, please submit the following information as instructed in the **ADDRESSES** and **DATE** captions above: Name and title of the applicant; the applicant company's name, place of incorporation, main headquarters address, and principal place of business address (if different); size of the company; size of company's export trade, investment, and nature of operations or interest in India; and a brief statement describing the candidate's qualifications that should be considered, including information about the candidate's ability to initiate and be responsible for activities in which the Forum will be active. The application should also include sufficient information to demonstrate the applicant's company is U.S.-owned or controlled, which may include, for example, an affirmation from the company that a majority of its voting stock is owned by U.S. citizens or other U.S. entities, an affirmation that a majority of its board of directors are U.S. citizens, or other indicia of U.S. ownership or control. Candidates who applied under a previous notice will need to submit a new application if they want to be considered. All candidates will be notified once selections have been made.

Dated: August 17, 2023.

Valerie Dees,

Director of the Office of South Asia.

[FR Doc. 2023–18076 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–HE–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–979, C–570–980]

Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Scope Determination and Final Affirmative Determinations of Circumvention With Respect to Cambodia, Malaysia, Thailand, and Vietnam

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that, except as noted below, imports of certain crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells and modules), that have been completed in the Kingdom of Cambodia (Cambodia), Malaysia, the Kingdom of Thailand (Thailand), or the Socialist Republic of Vietnam (Vietnam), using parts and components produced in the People's Republic of China (China), as specified below, that are then subsequently exported from Cambodia, Malaysia, Thailand, or Vietnam to the United States are circumventing the antidumping duty (AD) and countervailing duty (CVD) orders on solar cells and modules from China.

DATES: Applicable August 23, 2023.

FOR FURTHER INFORMATION CONTACT: Jose Rivera, Peter Shaw, or Toni Page (Cambodia and Malaysia) and Jeff Pedersen or Paola Aleman Ordaz (Thailand and Vietnam), Offices VII and IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0842, (202) 482–1398, (202) 482–0697, (202) 482–2769, and (202) 482–4031, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 2022, Commerce published the preliminary determinations [1] of the circumvention inquiries of the AD and CVD orders on solar cells and modules from China. The circumvention inquiries concern solar cells and modules which were completed in Cambodia, Malaysia, Thailand, or Vietnam using parts and components manufactured in China.[2] We invited parties to comment on the *Preliminary Determinations.*

On December 23, 2022, Sonali Energees USA LLC (Sonali) filed a Scope Ruling Application in which it requested that Commerce determine that the solar modules that it imports into the United States from Cambodia are outside the scope of the *Orders.*[3] On January 20, 2023, Commerce notified all interested parties that it would address Sonali's scope ruling request in the circumvention inquiry covering Cambodia.[4]

A summary of events that occurred since Commerce published the *Preliminary Determinations,* as well as a full discussion of the issues raised by parties for these final determinations, may be found in the Issues and Decision Memoranda.[5] Commerce conducted the

[1] *See Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Affirmative Determinations of Circumvention With Respect to Cambodia, Malaysia, Thailand, and Vietnam,* 87 FR 75221 (December 8, 2022) (*Preliminary Determinations*), and accompanying Preliminary Decision Memoranda (PDM).

[2] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 77 FR 73018 (December 7, 2012) (*AD Order*); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Countervailing Duty Order,* 77 FR 73017 (December 7, 2012) (*CVD Order*) (collectively, *Orders*).

[3] *See* Sonali's Letter, ''Sonali Energees USA LLC's Scope Ruling Application for Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Request for Scope Ruling on Certain Solar Modules and Cells Manufactured in Cambodia,'' dated December 23, 2022.

[4] *See* Memorandum, ''Sonali Scope Inquiry,'' dated January 20, 2023.

[5] *See* Memoranda, ''Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Issues and Decision Memorandum for the Circumvention Inquiry With Respect to the Kingdom of Cambodia'' (Cambodia IDM); ''Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Issues and Decision Memorandum for the Circumvention Inquiry With Respect to Malaysia''; ''Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Issues and Decision Memorandum for the Circumvention Inquiry With Respect to the

Continued

scope inquiry in accordance with 19 CFR 351.225(c) and (h) and these circumvention inquiries in accordance with section 781(b) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.226.

Scope of the Orders

The products subject to the *Orders* are solar cells and modules. For a full description of the scope of the *Orders, see* the Issues and Decision Memoranda.[6]

Scope Ruling

The scope ruling covers certain solar modules that have been completed in Cambodia, using wafers from China, that are subsequently exported from Cambodia to the United States.

Merchandise Subject to the Circumvention Inquiries

The circumvention inquiries cover certain solar cells and modules that have been completed in Cambodia, Malaysia, Thailand, or Vietnam, using parts and components from China, as specified below, that are subsequently exported from Cambodia, Malaysia, Thailand, or Vietnam to the United States (inquiry merchandise).

Specifically, these circumvention inquiries cover: (A) crystalline silicon photovoltaic cells that meet the physical description of crystalline silicon photovoltaic cells in the scope of the underlying *Orders,* subject to the exclusions therein, whether or not partially or fully assembled into other products, that were produced in Cambodia, Malaysia, Thailand, or Vietnam, from wafers produced in China; and (B) modules, laminates, and panels consisting of crystalline silicon photovoltaic cells, subject to the exclusions for certain panels in the scope of the underlying orders, whether or not partially or fully assembled into other products, that were produced in Cambodia, Malaysia, Thailand, or Vietnam from wafers produced in China and where more than two of the following components in the module/laminate/panel were produced in China: (1) silver paste; (2) aluminum frames; (3) glass; (4) backsheets; (5) ethylene vinyl acetate sheets; and (6) junction boxes.

If modules, laminates, and panels consisting of crystalline silicon photovoltaic cells do not meet both of the conditions in item (B) above, then these circumvention inquiries do not cover the modules, laminates, and panels, or the crystalline silicon photovoltaic cells within the modules, laminates, and panels, even if those crystalline silicon photovoltaic cells were produced in Cambodia, Malaysia, Thailand, or Vietnam from wafers produced in China. Wafers produced outside of China with polysilicon sourced from China are not considered to be wafers produced in China for purposes of these circumvention inquiries.

Methodology

Commerce made the final scope determination in accordance with 19 CFR 351.225. Commerce made these final circumvention findings in accordance with section 781(b) of the Act and 19 CFR 351.226.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by parties in these inquiries are addressed in the Issues and Decision Memoranda. Commerce did not receive any comments on Sonali's Scope Ruling Application. A list of topics included in the Issues and Decision Memoranda are included as Appendix I to this notice. The Issues and Decision Memoranda are public documents and are on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, complete versions of the Issues and Decision Memoranda can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Scope Ruling

As detailed in the Cambodia IDM, we find that the merchandise described in Sonali's Scope Ruling Application is not covered by the scope of the *Orders.* However, Sonali's merchandise is subject to Commerce's determination in the circumvention inquiry involving Cambodia.

Final Determinations of Circumvention

As detailed in the Issues and Decision Memoranda for Cambodia, Malaysia, and Vietnam, and in the *Preliminary Determination* for Thailand, with the exception of certain U.S. imports from the exporters identified in Appendix III to this notice, we determine that U.S. imports of inquiry merchandise are circumventing the *Orders* on a country-wide basis. As a result, we determine that this merchandise is covered by the *Orders.*

We determine, pursuant to section 781(b) of the Act and 19 CFR 351.225(g), that solar cells/solar modules exported from, and produced in, Malaysia, or Vietnam by the entities listed for each of those countries in Appendix III to this notice, using wafers produced in China that were exported by specific companies are not circumventing the *Orders.*

After considering comments from interested parties, we determine to not apply adverse facts available to Vietnam Sunergy Joint Stock Company.[7]

See the ''Suspension of Liquidation and Cash Deposit Requirements'' section below for details regarding suspension of liquidation and cash deposit requirements. *See* the ''Certification'' and ''Certification Requirements'' section below for details regarding the use of certifications.

Use of Adverse Facts Available

In the *Preliminary Determinations,* we relied on the facts available under section 776(a) of the Act, including facts available with adverse inferences under section 776(b) of the Act, where appropriate. In particular, we requested information from certain companies in each of the examined countries, including the quantity and value (Q&V) of their exports during the inquiry period for purposes of respondent selection. In the Q&V questionnaire, Commerce explained that, if the company to which Commerce issued the questionnaire fails to respond to the questionnaire, or fails to provide the requested information, Commerce may find that the company failed to cooperate by not acting to the best of its ability to comply with the request for information, and may use an inference that is adverse to the company's interests in selecting from the facts otherwise available. Certain companies to which Commerce issued the Q&V questionnaire in the Malaysia, Thailand, and Vietnam inquiries received, but failed to timely respond to, the Q&V questionnaire.[8]

Additionally, New East Solar Energy (Cambodia) Co., Ltd.[9] and Vina Solar Technology Co., Ltd.[10] refused to participate in verification.

Kingdom of Thailand''; and ''Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Issues and Decision Memorandum for the Circumvention Inquiry With Respect to the Socialist Republic of Vietnam'' (Vietnam IDM); all dated concurrently with, and hereby adopted by, this notice (collectively, Issues and Decision Memoranda).

[6] *Id.*

[7] *See* Vietnam IDM at Comment 8.

[8] *See* Appendix II for a list of companies that failed to respond to Commerce's request for Q&V information.

[9] *See* Cambodia IDM at Comment 9.

[10] *See* Memorandum, ''Verification of Vina Solar Technology Company Limited,'' dated April 12, 2023.

Therefore, we find that necessary information is not available on the record and that the companies that failed to timely respond to the Q&V questionnaire withheld requested information, failed to provide requested information by the deadline or in the form and manner requested, significantly impeded these inquiries, and that the companies that refused to be verified significantly impeded these inquiries and provided information that could not be verified, within the meaning of sections 776(a)(2)(A)–(D) of the Act. Moreover, we find that these companies failed to cooperate to the best of their ability to provide the requested information, within the meaning of section 776(b) of the Act, because they either did not provide a timely response to Commerce's Q&V questionnaire or did not allow their submitted information to be verified. Consequently, we have used adverse inferences with respect to these companies in selecting from among the facts otherwise available on the record, pursuant to sections 776(a) and (b) of the Act.

Based on the adverse facts available used, we determine that the companies listed in Appendix II to this notice exported inquiry merchandise and that U.S. entries of that merchandise are circumventing the *Orders.* As noted above, we are no longer applying adverse facts available to Vietnam Sunergy Joint Stock Company and this company has been removed from the list in Appendix II.[11] Additionally, with the exception of the ''Applicable Entries'' certification, which is described in the ''Certifications'' section below, we are precluding the companies listed in Appendix II to this notice from participating in the certification programs that we are establishing for exports of solar cells and modules from Cambodia, Malaysia, Thailand, and Vietnam.

U.S. entries of inquiry merchandise made on or after April 1, 2022, that are ineligible for certification based on the failure of the companies listed in Appendix II to cooperate, or for other reasons, shall remain subject to suspension of liquidation until final assessment instructions on those entries are issued, whether by automatic liquidation instructions, or by instructions pursuant to the final results of an administrative review. After considering comments from interested parties, we determined that interested parties that wish to have their suspended non-''Applicable Entries,'' if any, reviewed, and/or their ineligibility for the certification program re-evaluated, should request an administrative review of the relevant suspended entries during the next anniversary month of these *Orders* (*i.e.,* December 2023).[12] The requestor should note in the request for an administrative review that: (1) it believes that all the imported merchandise from the company identified in Appendix II would meet the certification requirements in Appendix VI of this **Federal Register** notice; and (2) that the requestor is seeking a review in order for Commerce to reconsider the exporter/producer's eligibility to certify to that fact.

Suspension of Liquidation and Cash Deposit Requirements

On June 6, 2022, the President of the United States signed *Presidential Proclamation 10414,* ''Declaration of Emergency and Authorization for Temporary Extensions of Time and Duty-Free Importation of Solar Cells and Modules from Southeast Asia.'' [13] In *Presidential Proclamation 10414,* the President directed the Secretary of Commerce (the Secretary) to:

> consider taking appropriate action under section 1318(a) of title 19, United States Code, to permit, until 24 months after the date of this proclamation or until the emergency declared herein has terminated, whichever occurs first, under such regulations and under such conditions as the Secretary may prescribe, the importation, free of the collection of duties and estimated duties, if applicable, under sections 1671, 1673, 1675, and 1677j of title 19, United States Code, {(sections 701, 731, 751 and 781 of the Act)} of certain solar cells and modules exported from the Kingdom of Cambodia, Malaysia, the Kingdom of Thailand, and the Socialist Republic of Vietnam, and that are not already subject to an antidumping or countervailing duty order as of the date of this proclamation . . .

On September 12, 2022, Commerce added Part 362 to its regulations to implement *Presidential Proclamation 10414.* Pursuant to 19 CFR 362.103(b)(1)(i), Commerce will direct U.S. Customs and Border Protection (CBP) to discontinue the suspension of liquidation and collection of cash deposits that were ordered based on Commerce's initiation of these circumvention inquiries. In addition, pursuant to 19 CFR 362.103(b)(1)(ii) and (iii), Commerce will not direct CBP to suspend liquidation, and require cash deposits, of estimated ADs and CVDs based on these affirmative determinations of circumvention on, any ''Applicable Entries.'' However, Commerce will direct CBP to suspend liquidation, and collect cash deposits, of estimated ADs and CVDs based on these affirmative determinations of circumvention on, imports of ''Southeast Asian-Completed cells and modules'' that are not ''Applicable Entries.''

Pursuant to 19 CFR 362.102, 'Southeast Asian-Completed Cells and Modules'' are:

> crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells and modules), which are completed in the Kingdom of Cambodia, Malaysia, the Kingdom of Thailand, or the Socialist Republic of Vietnam using parts and components manufactured in the People's Republic of China, and subsequently exported from Cambodia, Malaysia, Thailand, or Vietnam to the United States. These are cells and modules subject to the Solar Circumvention Inquiries. Southeast Asian-Completed Cells and Modules does not mean solar cells and modules that, on June 6, 2022, the date Proclamation 10414 was signed, were already subject to Certain Solar Orders.[14]

''Applicable Entries means the entries of Southeast Asian-Completed Cells and Modules that are entered into the United States, or withdrawn from warehouse, for consumption before the Date of Termination and, for entries that enter after November 15, 2022, are used in the United States by the Utilization Expiration Date.'' [15] The ''Date of Termination'' is ''June 6, 2024, or the date the emergency described in *Presidential Proclamation 10414* has been terminated, whichever occurs first.'' [16] The ''Utilization Expiration Date'' is ''the date 180 days after the Date of Termination.'' [17] ''Utilization and utilized means the Southeast Asian-Completed Cells and Modules will be used or installed in the United States. Merchandise which remains in inventory or a warehouse in the United States, is resold to another party, is subsequently exported, or is destroyed after importation is not considered utilized for purposes of'' the provisions in Part 362 of the regulations.[18]

[11] *See* Vietnam IDM at Comment 8.

[12] *See* Issues and Decisions Memoranda at the Comment entitled ''Whether Commerce Should Reconsider Certification Eligibility in Changed Circumstances Reviews.''

[13] *See Proclamation No. 10414, Declaration of Emergency and Authorization for Temporary Extensions of Time and Duty-Free Importation of Solar Cells and Modules from Southeast Asia,* 87 FR 35067 (June 9, 2022) (*Proclamation 10414*).

[14] ''Certain Solar Orders'' refers to the following orders: (1) *Solar Cells AD Order;* (2) *Solar Cells CVD Order;* and (3) *Certain Crystalline Silicon Photovoltaic Products from Taiwan: Antidumping Duty Order,* 80 FR 8596 (February 18, 2015).

[15] *See* 19 CFR 362.102.

[16] *Id.*

[17] *Id.*

[18] *Id.*

Therefore, based on these affirmative determinations of circumvention, Commerce will direct CBP to continue to suspend liquidation of, and collect cash deposits of the applicable estimated ADs and CVDs on, U.S. imports of Southeast Asian-completed solar cells and solar modules that are not ''Applicable Entries'' that were entered, or withdrawn from warehouse, for consumption on or after April 1, 2022, the date of publication of initiation of these circumvention inquiries in the **Federal Register**,[19] but prior to the Date of Termination of *Presidential Proclamation 10414.* Specifically, with the exception of the entries for which the importer and exporter have met the requirements of the relevant certifications described in the ''Certified Entries'' section of this notice below, Commerce will direct CBP to implement the following cash deposit requirements for U.S. entries of ''Southeast Asian-completed cells and modules'' that are not ''Applicable Entries'': (1) for exporters of the solar cells or solar modules that have a company-specific cash deposit rate under the *AD Order* and/or *CVD Order,* the cash deposit rate will be the company-specific AD and/or CVD cash deposit rate established for that company in the most recently-completed segment of the solar cells proceedings; (2) for exporters of the solar cells or solar modules that do not have a company-specific cash deposit rate under the *AD Order* and/or *CVD Order,* the cash deposit rate will be the company-specific cash deposit rate established under the *AD Order* and/or *CVD Order* for the company in China that exported the wafers to the producer/exporter in the relevant third country (*i.e.,* Cambodia, Malaysia, Thailand, or Vietnam) that were incorporated in the imported solar cells or solar modules; and (3) if neither the exporter of the solar cells or solar modules nor the exporter of the wafers described in item (2) above has a company-specific cash deposit rate, the AD cash deposit rate will be the China-wide rate (238.95 percent), and the CVD cash deposit rate will be the all-others rate (15.24 percent). Commerce has established the following third-country case numbers in the Automated Commercial Environment (ACE) for such entries: Cambodia—A–555–902–000/C–555–903–000; Malaysia—A–557–988–000/C–557–989–000; Thailand—A–549–988–000/C–549–989–000; and Vietnam—A–552–988–000/C–552–989–000. If the exporter of the wafers described in the cash deposit requirements above has its own company-specific cash deposit rate under the *Orders,* the importer, producer, or exporter of inquiry merchandise containing those wafers may file a request in ACCESS on the record of the applicable proceeding segment that Commerce establish a case number in ACE for the *Orders* for the applicable third-country that is specific to the Chinese wafer exporter. CBP may also submit such a request to Commerce through the ACE AD/CVD Portal Inquiry System.

Entries on or After Termination of Presidential Proclamation 10414

Upon termination of the *Presidential Proclamation 10414,* Commerce will issue instructions to CBP that are described in 19 CFR 362.103(b)(2). Further, consistent with 19 CFR 362.103(b)(3), after the *Preliminary Determinations,* Commerce issued instructions to CBP pursuant to 19 CFR 362.103(b)(3).[20]

Certified Entries

Entries prior to the Date of Termination for which the importer and exporter have met the certification requirements described below and in Appendix IV, V, or VI to this notice, and entries on or after the Date for Termination for which the importer and exporter have met the certification requirements described below and in Appendix V or VI to this notice, will not be subject to suspension of liquidation, or the cash deposit requirements described above. Failure to comply with the applicable requisite certification requirements may result in the merchandise being subject to ADs and CVDs.

Certifications

In order to administer these country-wide affirmative determinations of circumvention, and the company-specific negative determinations of circumvention, and to implement *Presidential Proclamation 10414,* Commerce has established the following types of certifications: (1) importer and exporter certifications that specific entries meet the regulatory definition of ''Applicable Entries'' (*see* Appendix IV to this notice); (2) importer and exporter certifications that specific entries are not subject to suspension of liquidation or the collection of cash deposits based on the negative circumvention determinations with respect to the exporters listed in Appendix III to this notice in combination with certain wafer exporters (*see* Appendix V to this notice); and (3) importer and exporter certifications that specific entries of solar cells or solar modules from Cambodia, Malaysia, Thailand, or Vietnam are not subject to suspension of liquidation or the collection of cash deposits pursuant to these country-wide affirmative determinations of circumvention because the merchandise meets the component content requirements described in the certification (*see* Appendix VI to this notice). The non-cooperative companies listed in Appendix II are not eligible to use the certification described in items (2) or (3) above for the relevant inquiry country.[21]

Importers and exporters that claim that: (1) an entry of ''Southeast Asian-completed cells and modules'' is an ''Applicable Entry''; (2) an entry of solar cells or solar modules is not subject to suspension of liquidation or the collection of cash deposits based on the negative circumvention determination with respect to one of the companies listed in Appendix III; or (3) the entry of solar cells or solar modules is not subject to suspension of liquidation or the collection of cash deposits based on the inputs used to manufacture such merchandise, must complete the applicable certification and meet the certification and documentation requirements described below, as well as the requirements identified in the applicable certification.

Certification Requirements

Importers are required to complete and maintain the applicable importer certification, and maintain a copy of the applicable exporter certification, and retain all supporting documentation for both certifications. For entries of inquiry merchandise more than 14 days after the date of publication of the notice of Commerce's *Preliminary Determinations* of circumvention in the **Federal Register**, the applicable importer certification must be completed and signed by the time the entry summary is filed for the relevant entry. For entries

[19] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Initiation of Circumvention Inquiry on the Antidumping Duty and Countervailing Duty Orders,* 87 FR 19071 (April 1, 2022).

[20] *See Preliminary Determinations,* 87 FR at 75224.

[21] *See Preliminary Determinations* PDM at the section titled ''Use of Facts Available with an Adverse Inference''; and, *e.g., Anti-circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order,* 63 FR 18364, 18366 (April 15, 1998), unchanged in *Anti-Circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 63 FR 54672, 54675–76 (October 13, 1998).

of inquiry merchandise during the period April 1, 2022, (the date of initiation of these circumvention inquiries) through the 14th day after the date of publication of the notice of Commerce's *Preliminary Determinations* of circumvention in the **Federal Register**, where the entry has not been liquidated (and entries for which liquidation has not become final), the applicable importer certification should have been completed and signed by no later than 45 days after the date of publication of the notice of Commerce's *Preliminary Determinations* of circumvention in the **Federal Register**. For entries of inquiry merchandise during the period April 1, 2022, through the 14th day after the date of publication of the notice of Commerce's *Preliminary Determinations* of circumvention in the **Federal Register**, importers have the option to complete a blanket certification covering multiple entries, individual certifications for each entry, or a combination thereof.

The importer, or the importer's agent, must submit both the importer's certification and the exporter's certification to CBP as part of the entry process by uploading them into the document imaging system (DIS) in ACE. Where the importer uses a broker to facilitate the entry process, it should obtain the entry summary number from the broker. Agents of the importer, such as brokers, however, are not permitted to certify on behalf of the importer.

Exporters are required to complete and maintain the applicable exporter certification and provide the importer with a copy of that certification and all supporting documentation (*e.g.,* invoice, purchase order, production records, *etc.*). For shipments of inquiry merchandise more than 14 days after the date of publication of the notice of Commerce's *Preliminary Determinations* of circumvention in the **Federal Register**, the applicable exporter certification must be completed and signed, and a copy of the certification provided to the importer, on, or prior to, the date of shipment. For entries during the period April 1, 2022, (the date of initiation of these circumvention inquiries) through the 14th day after the date of publication of the notice of Commerce's *Preliminary Determinations* of circumvention in the **Federal Register**, the applicable exporter certification should have been completed and signed, and a copy of the certification provided to the importer, by no later than 45 days after the date of publication of the notice of Commerce's *Preliminary Determinations* of circumvention in the **Federal Register**. For shipments of inquiry merchandise during the period April 1, 2022, through the 14th day after the date of publication of the notice of Commerce's *Preliminary Determinations* of circumvention in the **Federal Register**, exporters have the option to complete a blanket certification covering multiple entries, individual certifications for each entry, or a combination thereof.

The exporter certification should be completed by the party selling the solar cells or solar modules to the United States that were manufactured in Cambodia, Malaysia, Thailand, or Vietnam.

Additionally, the claims made in the certifications and any supporting documentation are subject to verification by Commerce and/or CBP. Importers and exporters are required to maintain the certifications and supporting documentation for the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

For unliquidated entries (and entries for which liquidation has not become final) of solar cells and solar modules that were declared as non-AD/CVD type entries (*e.g.,* type 01) and were entered, or withdrawn from warehouse, for consumption in the United States during the period April 1, 2022, (the date of initiation of these circumvention inquiries) through the date of publication of the *Preliminary Determinations* in the **Federal Register**, for which none of the above certifications may be made, importers must file a Post Summary Correction with CBP, in accordance with CBP's regulations, regarding conversion of such entries from non-AD/CVD type entries to AD/CVD type entries (*e.g.,* type 01 to type 03). Importers should report those AD/CVD type entries using the following third-country case numbers: Cambodia—A–555–902–000/C–555–903–000; Malaysia—A–557–988–000/C–557–989–000; Thailand—A–549–988–000/C–549–989–000; and Vietnam—A–552–988–000/C–552–989–000. Other third-country case numbers may be established following the process described above. The importer should pay cash deposits on those entries consistent with the regulations governing post summary corrections that require payment of additional duties.

If it is determined that an importer and/or exporter has not met the certification and/or related documentation requirements for certain entries, Commerce intends to instruct CBP to suspend, pursuant to these country-wide affirmative determinations of circumvention and the *Orders,*[22] all unliquidated entries for which these requirements were not met and require the importer to post applicable AD and CVD cash deposits equal to the rates noted above.

Administrative Protective Order

This notice will serve as the only reminder to all parties subject to an administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

These determinations are issued and published in accordance with section 781(b) of the Act and 19 CFR 351.226(g)(2).

Dated: August 17, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

APPENDICES

Appendix No.	Appendix name
I	List of Topics Discussed in the Issues and Decision Memoranda
II	List of Companies to Which Commerce Applied AFA
III	List of Companies Found Not To Be Circumventing
IV	Certification for ''Applicable Entries''
V	Certification for Entries of Inquiry Merchandise From Companies Found Not To Be Circumventing
VI	Certification Regarding Chinese Components

Appendix I

List of Topics Discussed in the Issues and Decision Memoranda

Cambodia

I. Summary
II. Background
III. Merchandise Subject to the Scope Inquiry
IV. Scope of the *Orders*
V. Regulatory Framework for Scope Inquiry
VI. Interested Party Scope Comments
VII. Scope Determination
VIII. Scope of the Circumvention Inquiry
IX. Period of the Circumvention Inquiry

[22] *See Orders.*

Appendix II—List of Companies to Which Commerce Applied AFA

Cambodia

1. New East Solar Energy (Cambodia) Co., Ltd.

Malaysia

1. AMC Cincaria Sdn Bhd
2. Flextronic Shah Alam Sdn. Bhd.
3. Funing Precision Component Co., Ltd.
4. Samsung Sds Malaysia Sdn. Bhd.
5. Vina Solar Technology Co., Ltd.

Thailand

1. Celestica (Thailand) Limited
2. Green Solar Thailand Co., Ltd.
3. Lightup Creation CO., Ltd.
4. Thai Master Frame Co., Ltd.
5. Three Arrows (Thailand) Co., Ltd.
6. Yuan Feng New Energy
7. Solar PPM.
8. Sunshine Electrical Energy Co., Ltd.

Vietnam

1. Cong Ty Co Phan Cong Nghe Nang (Global Energy)
2. GCL System Integration Technology
3. Green Wing Solar Technology Co., Ltd.
4. HT Solar Vietnam Limited Company
5. Irex Energy Joint Stock Company
6. S-Solar Viet Nam Company Limited
7. Venergy Solar Industry Company
8. Red Sun Energy Co., Ltd.
9. Vina Solar Technology Co., Ltd.

Appendix III—List of Companies Found Not To Be Circumventing

Malaysia

1. Hanwha Q CELLS Malaysia Sdn. Bhd.
2. Jinko Solar Technology Sdn. Bhd./Jinko Solar (Malaysia) Sdn. Bhd.

Vietnam

1. Boviet Solar Technology Co., Ltd.

Appendix IV

Certification for ''Applicable Entries'' Under 19 CFR Part 362 Importer Certification

I hereby certify that:

(A) My name is {IMPORTING COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF IMPORTING COMPANY}, located at {ADDRESS OF IMPORTING COMPANY}.

(B) I have direct personal knowledge of the facts regarding importation of the solar cells and solar modules produced in {SELECT ONE OF THE FOLLOWING COUNTRIES: KINGDOM OF CAMBODIA, MALAYSIA, THE KINGDOM OF THAILAND, OR THE SOCIALIST REPUBLIC OF VIETNAM } that were entered into the Customs territory of the United States under the entry summary number(s) identified below which are covered by this certification. ''Direct personal knowledge'' refers to the facts the certifying party is expected to have in its own records. For example, the importer should have direct personal knowledge of the exporter and/or seller's identity and location.

(C) If the importer is acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

The solar cells and/or solar modules covered by this certification were imported by {NAME OF IMPORTING COMPANY} on behalf of {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER}.

If the importer is not acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

{NAME OF IMPORTING COMPANY} is not acting on behalf of the first U.S. customer.

(D) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM THE MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(E) I have personal knowledge of the facts regarding the production and exportation of the solar cells and modules identified below. ''Personal knowledge'' includes facts obtained from another party, (*e.g.,*

correspondence received by the importer (or exporter) from the producer of the imported products regarding production).

(F) The imported solar cells and/or solar modules covered by this certification:

1. Were produced in {SELECT ONE OF THE FOLLOWING COUNTRIES: KINGDOM OF CAMBODIA, MALAYSIA, THE KINGDOM OF THAILAND, OR THE SOCIALIST REPUBLIC OF VIETNAM} using parts and components manufactured in the People's Republic of China;

2. Were exported to the United States from {SELECT ONE OF THE FOLLOWING COUNTRIES: KINGDOM OF CAMBODIA, MALAYSIA, THE KINGDOM OF THAILAND, OR THE SOCIALIST REPUBLIC OF VIETNAM} without further assembly in another country;

3. Absent the affirmative determination of circumvention, are not covered by the antidumping duty or countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China;

4. Are not covered by the antidumping duty order on certain crystalline silicon photovoltaic products from Taiwan;

5. Were entered into the United States, or were withdrawn from warehouse, for consumption before 06/06/2024, or before the date the emergency described in *Presidential Proclamation 10414* is terminated, whichever occurs first; and

6. If entered, or withdrawn from warehouse, after November 15, 2022, the solar cells and/or solar modules will be utilized in the United States by no later than 180 days after the earlier of 06/06/2024, or the date the emergency described in *Presidential Proclamation 10414* is terminated. Utilized means the solar cells or solar modules will be used or installed in the United States. Solar cells or solar modules which remain in inventory or in a warehouse in the United States, are resold to another party, are subsequently exported, or are destroyed after importation are not considered utilized.

(G) This certification applies to the following entries (repeat this block as many times as necessary):

Entry Summary #:
Applicable Line Item # of the Entry Summary:
Foreign Seller:
Foreign Seller's Address:
Foreign Seller's Invoice #:
Applicable Line Item # on the Foreign Seller's Invoice:
Producer:
Producer's Address:

(H) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(I) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of the exporter's certification (attesting to information regarding the production and/or exportation of the imported merchandise identified above), and any supporting documentation provided to the importer by the exporter, until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(J) I understand that {NAME OF IMPORTING COMPANY} is required to provide U.S. Customs and Border Protection (CBP) and/or the U.S. Department of Commerce (Commerce) with the importer certification, and any supporting documentation, and a copy of the exporter's certification, and any supporting documentation provided to the importer by the exporter, upon the request of either agency.

(K) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(L) I understand that failure to maintain the required certifications and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all entries to which this certification applies are not ''Applicable Entries.'' I understand that such a finding may result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping duty and countervailing duty cash deposits determined by Commerce; and

(iii) the importer no longer being allowed to participate in the certification process.

(M) I understand that agents of the importer, such as brokers, are not permitted to make this certification.

(N) This certification was completed and signed on, or prior to, the date of the entry summary if the entry date is more than 14 days after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the entry date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**, this certification was completed and signed by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(O) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature _____
{NAME OF COMPANY OFFICIAL}
{TITLE OF COMPANY OFFICIAL}
Date _____

Exporter Certification

The party that made the sale to the United States should fill out the exporter certification.

I hereby certify that:

(A) My name is {COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF FOREIGN COMPANY THAT MADE THE SALE TO THE UNITED STATES}, located at {ADDRESS OF FOREIGN COMPANY THAT MADE THE SALE TO THE UNITED STATES};

(B) I have direct personal knowledge of the facts regarding the production and exportation of the solar cells and solar modules for which sales are identified below. ''Direct personal knowledge'' refers to facts the certifying party is expected to have in its own records. For example, an exporter should have direct personal knowledge of the producer's identity and location.

(C) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(D) The solar cells and/or solar modules covered by this certification:

1. Were produced in {SELECT ONE OF THE FOLLOWING COUNTRIES: KINGDOM OF CAMBODIA, MALAYSIA, THE KINGDOM OF THAILAND, OR THE SOCIALIST REPUBLIC OF VIETNAM} using parts and components manufactured in the People's Republic of China;

2. Were exported to the United States from {SELECT ONE OF THE FOLLOWING COUNTRIES: KINGDOM OF CAMBODIA, MALAYSIA, THE KINGDOM OF THAILAND, OR THE SOCIALIST REPUBLIC OF VIETNAM} without further assembly in another country;

3. Absent the affirmative determination of circumvention, are not covered by the antidumping duty or countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China; and

4. Are not covered by the antidumping duty order on certain crystalline silicon photovoltaic products from Taiwan.

(E) This certification applies to the following sales to {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER} (repeat this block as many times as necessary):

of the Foreign Seller's Invoice to the U.S. Customer:
Applicable Line Item # of the Foreign Seller's Invoice to the U.S. Customer:
Producer Name:
Producer's Address:
Invoice # of the Producer's Invoice to the Foreign Seller (if the foreign seller and the producer are the same party, report ''NA'' here):

(F) I understand that {NAME OF FOREIGN COMPANY THAT MADE THE SALE TO THE UNITED STATES} is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in

the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, customer specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(G) I understand that {NAME OF FOREIGN COMPANY THAT MADE THE SALE TO THE UNITED STATES} is required to provide the U.S. importer with a copy of this certification and is required to provide U.S. Customs and Border Protection (CBP) and/or the U.S. Department of Commerce (Commerce) with a copy of this certification, and any supporting documents, upon the request of either agency.

(H) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(I) I understand that failure to maintain the required certification and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all sales to which this certification applies are sales of merchandise that was not entered into the United States in ''Applicable Entries.'' I understand that such a finding may result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping and countervailing duty cash deposits determined by Commerce; and

(iii) the seller/exporter no longer being allowed to participate in the certification process.

(J) I understand that agents of the seller/exporter, such as freight forwarding companies or brokers, are not permitted to make this certification.

(K) This certification was completed and signed, and a copy of the certification was provided to the importer, on, or prior to, the date of shipment if the shipment date is more than 14 days after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the shipment date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**, this certification was completed and signed, and a copy of the certification was provided to the importer, by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(L) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature _____

{NAME OF COMPANY OFFICIAL}

{TITLE OF COMPANY OFFICIAL}

Date _____

Appendix V

Certification for Entries of Inquiry Merchandise From Companies Found Not To Be Circumventing

Company Name: Boviet Solar Technology Co., Ltd.

Importer Certification

I hereby certify that:

(A) My name is {IMPORTING COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF IMPORTING COMPANY}, located at {ADDRESS OF IMPORTING COMPANY}.

(B) I have direct personal knowledge of the facts regarding importation of the solar cells and solar modules produced in Vietnam that were entered into the Customs territory of the United States under the entry summary number(s) identified below which are covered by this certification. ''Direct personal knowledge'' refers to the facts the certifying party is expected to have in its own records. For example, the importer should have direct personal knowledge of the exporter and/or seller's identity and location.

(C) If the importer is acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

The solar cells and/or solar modules covered by this certification were imported by {NAME OF IMPORTING COMPANY} on behalf of {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER}.

If the importer is not acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

{NAME OF IMPORTING COMPANY} is not acting on behalf of the first U.S. customer.

(D) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM THE MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(E) I have personal knowledge of the facts regarding the production and exportation of the solar cells and modules identified below. ''Personal knowledge'' includes facts obtained from another party, (*e.g.,* correspondence received by the importer (or exporter) from the producer of the imported products regarding production).

(F) The solar cells and/or solar modules covered by this certification were:

1. Sold to the United States by Boviet Solar Technology Co., Ltd.

2. Exported to the United States by Boviet Solar Technology Co., Ltd.

3. Produced in Vietnam by Boviet Solar Technology Co., Ltd., using wafers manufactured in the People's Republic of China that were exported to Vietnam by Ningbo Kyanite International Trade Co., Ltd.

(G) The U.S. Department of Commerce (Commerce) found that solar cells and/or solar modules produced by Boviet Solar Technology Co., Ltd., using wafers manufactured in China that were exported by the wafer supplier listed in item F above, and exported by Boviet Solar Technology Co., Ltd. are not circumventing the antidumping duty and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.

(H) This certification applies to the following entries (repeat this block as many times as necessary):

Entry Summary #:

Applicable Line Item # of the Entry Summary:

Foreign Seller's Invoice #:

Applicable Line Item # on the Foreign Seller's Invoice:

(I) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(J) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of the exporter's certification (attesting to information regarding the production and/or exportation of the imported merchandise identified above), and any supporting documentation provided to the importer by the exporter, until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(K) I understand that {NAME OF IMPORTING COMPANY} is required to provide U.S. Customs and Border Protection (CBP) and/or Commerce with the importer certification, and any supporting documentation, and a copy of the exporter's certification, and any supporting documentation provided to the importer by the exporter, upon the request of either agency.

(L) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(M) I understand that failure to maintain the required certifications and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all entries to which this certification applies are entries of merchandise that is covered by the scope of the antidumping and countervailing duty orders on solar cells and solar modules from China. I understand that such a finding will result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping duty and countervailing duty cash deposits determined by Commerce; and

(iii) the importer no longer being allowed to participate in the certification process.

(N) I understand that agents of the importer, such as brokers, are not permitted to make this certification.

(O) This certification was completed and signed on, or prior to, the date of the entry summary if the entry date is more than 14 days after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the entry date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**, this certification was completed and signed by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(P) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature

NAME OF COMPANY OFFICIAL
TITLE OF COMPANY OFFICIAL
Date

Exporter Certification

Certification for Entries of Inquiry Merchandise From Companies Found Not To Be Circumventing

Company Name: Boviet Solar Technology Co., Ltd.

The party that made the sale to the United States should fill out the exporter certification.

I hereby certify that:

(A) My name is {COMPANY OFFICIAL'S NAME} and I am an official of Boviet Solar Technology Co., Ltd., located at B5, B6, Song Khe Industrial Zone, Noi Hoang District Bac Giang Province, Vietnam;

(B) I have direct personal knowledge of the facts regarding the production and exportation of the solar cells and solar modules for which sales are identified below. ''Direct personal knowledge'' refers to facts the certifying party is expected to have in its own records. For example, an exporter should have direct personal knowledge of the producer's identity and location.

(C) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(D) The solar cells and/or solar modules covered by this certification were:

1. Sold to the United States by Boviet Solar Technology Co., Ltd.

2. Exported to the United States by Boviet Solar Technology Co., Ltd.

3. Produced in Vietnam by Boviet Solar Technology Co., Ltd. using wafers manufactured in the People's Republic of China (China) that were exported to Vietnam by Ningbo Kyanite International Trade Co., Ltd.

(E) The U.S. Department of Commerce (Commerce) found that solar cells and/or solar modules produced by Boviet Solar Technology Co., Ltd., using wafers manufactured in China that were exported by the wafer supplier listed in item D above, and exported by Boviet Solar Technology Co., Ltd. are not circumventing the antidumping duty and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.

(F) This certification applies to the following sales to {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER} (repeat this block as many times as necessary):

of the Foreign Seller's Invoice to the U.S. Customer: Applicable Line Item # of the Foreign Seller's Invoice to the U.S. Customer:

(G) I understand that Boviet Solar Technology Co., Ltd. is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, customer specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(H) I understand that Boviet Solar Technology Co., Ltd. is required to provide the U.S. importer with a copy of this certification and is required to provide U.S. Customs and Border Protection (CBP) and/or Commerce with a copy of this certification, and any supporting documents, upon the request of either agency.

(I) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(J) I understand that failure to maintain the required certification and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all sales to which this certification applies are sales of merchandise that is covered by the scope of the antidumping and countervailing duty orders on solar cells and solar modules from China. I understand that such a finding will result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping and countervailing duty cash deposits determined by Commerce; and

(iii) the seller/exporter no longer being allowed to participate in the certification process.

(K) I understand that agents of the exporter, such as freight forwarding companies or brokers, are not permitted to make this certification.

(L) This certification was completed and signed, and a copy of the certification was provided to the importer, on, or prior to, the date of shipment if the shipment date is more than 14 days after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the shipment date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**, this certification was completed and signed, and a copy of the certification was provided to the importer, by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(M) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature

{NAME OF COMPANY OFFICIAL}
{TITLE OF COMPANY OFFICIAL}
Date

Certification for Entries of Inquiry Merchandise From Companies Found Not To Be Circumventing

Company Name: Hanwha Q CELLS Malaysia Sdn. Bhd.

Importer Certification

I hereby certify that:

(A) My name is {IMPORTING COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF IMPORTING COMPANY}, located at {ADDRESS OF IMPORTING COMPANY}.

(B) I have direct personal knowledge of the facts regarding importation of the solar cells and solar modules produced in Malaysia that were entered into the Customs territory of the United States under the entry summary number(s) identified below which are covered by this certification. ''Direct personal knowledge'' refers to the facts the certifying party is expected to have in its own records. For example, the importer should have direct personal knowledge of the exporter and/or seller's identity and location.

(C) If the importer is acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

The solar cells and/or solar modules covered by this certification were imported by {NAME OF IMPORTING COMPANY} on behalf of {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER}.

If the importer is not acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

{NAME OF IMPORTING COMPANY} is not acting on behalf of the first U.S. customer.

(D) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM THE MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(E) I have personal knowledge of the facts regarding the production and exportation of the solar cells and modules identified below. ''Personal knowledge'' includes facts obtained from another party, (*e.g.,* correspondence received by the importer (or exporter) from the producer of the imported products regarding production).

(F) The solar cells and/or solar modules covered by this certification were:

1. Sold to the United States by Hanwha Q CELLS Malaysia Sdn. Bhd.

2. Exported to the United States by Hanwha Q CELLS Malaysia Sdn. Bhd.

3. Produced in Malaysia by Hanwha Q CELLS Malaysia Sdn. Bhd., using wafers manufactured in the People's Republic of China that were exported to Malaysia by: {CHECK THE RELEVANT WAFER EXPORTERS BELOW} (we have afforded business proprietary information (BPI) treatment to the names of the wafer exporters; for a table of the names of the wafer exporters, which must be included as part of this paragraph in the certificate submitted to CBP—please refer to the proprietary version of this certification on ACCESS).

(G) The U.S. Department of Commerce (Commerce) found that solar cells and/or solar modules produced by Hanwha Q CELLS Malaysia Sdn. Bhd., using wafers manufactured in China that were exported by the wafer supplier(s) listed in item F above, and exported by Hanwha Q CELLS Malaysia Sdn. Bhd. are not circumventing the antidumping duty and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.

(H) This certification applies to the following entries (repeat this block as many times as necessary):

Entry Summary #:
Applicable Line Item # of the Entry Summary:
Foreign Seller's Invoice #:
Applicable Line Item # on the Foreign Seller's Invoice:

(I) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(J) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of the exporter's certification (attesting to information regarding the production and/or exportation of the imported merchandise identified above), and any supporting documentation provided to the importer by the exporter, until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(K) I understand that {NAME OF IMPORTING COMPANY} is required to provide U.S. Customs and Border Protection (CBP) and/or Commerce with the importer certification, and any supporting documentation, and a copy of the exporter's certification, and any supporting documentation provided to the importer by the exporter, upon the request of either agency.

(L) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(M) I understand that failure to maintain the required certifications and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all entries to which this certification applies are entries of merchandise that is covered by the scope of the antidumping and countervailing duty orders on solar cells and solar modules from China. I understand that such a finding will result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping duty and countervailing duty cash deposits determined by Commerce; and

(iii) the importer no longer being allowed to participate in the certification process.

(N) I understand that agents of the importer, such as brokers, are not permitted to make this certification.

(O) This certification was completed and signed on, or prior to, the date of the entry summary if the entry date is more than 14 days after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the entry date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**, this certification was completed and signed by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(P) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature _____
{NAME OF COMPANY OFFICIAL}
{TITLE OF COMPANY OFFICIAL}
Date _____

Exporter Certification

Certification for Entries of Inquiry Merchandise From Companies Found Not To Be Circumventing

Company Name: Hanwha Q CELLS Malaysia Sdn. Bhd.

The party that made the sale to the United States should fill out the exporter certification.

I hereby certify that:

(A) My name is {COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF COMPANY}, located at {ADDRESS OF COMPANY}.

(B) I have direct personal knowledge of the facts regarding the production and exportation of the solar cells and solar modules for which sales are identified below. ''Direct personal knowledge'' refers to facts the certifying party is expected to have in its own records. For example, an exporter should have direct personal knowledge of the producer's identity and location.

(C) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(D) The solar cells and/or solar modules covered by this certification were:

1. Sold to the United States by Hanwha Q CELLS Malaysia Sdn. Bhd.

2. Exported to the United States by Hanwha Q CELLS Malaysia Sdn. Bhd.

3. Produced in Malaysia by Hanwha Q CELLS Malaysia Sdn. Bhd. using wafers manufactured in the People's Republic of China (China) that were exported to Malaysia by: {CHECK THE RELEVANT WAFER EXPORTERS BELOW} (we have afforded business proprietary information (BPI) treatment to the names of the wafer exporters; for a table of the names of the wafer exporters, which must be included as part of this paragraph in the certificate submitted to CBP—please refer to the proprietary version of this certification on ACCESS).

(E) The U.S. Department of Commerce (Commerce) found that solar cells and/or solar modules produced by Hanwha Q CELLS Malaysia Sdn. Bhd., using wafers manufactured in China that were exported by the wafer supplier(s) listed in item D above, and exported by Hanwha Q CELLS Malaysia Sdn. Bhd. are not circumventing the antidumping duty and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.

(F) This certification applies to the following sales to {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER} (repeat this block as many times as necessary):

of the Foreign Seller's Invoice to the U.S. Customer:
Applicable Line Item # of the Foreign Seller's Invoice to the U.S. Customer:

(G) I understand that Hanwha Q CELLS Malaysia Sdn. Bhd. is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, customer specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(H) I understand that Hanwha Q CELLS Malaysia Sdn. Bhd. is required to provide the U.S. importer with a copy of this certification and is required to provide U.S. Customs and Border Protection (CBP) and/or Commerce with a copy of this certification, and any supporting documents, upon the request of either agency.

(I) I understand that the claims made herein, and the substantiating

documentation, are subject to verification by CBP and/or Commerce.

(J) I understand that failure to maintain the required certification and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all sales to which this certification applies are sales of merchandise that is covered by the scope of the antidumping and countervailing duty orders on solar cells and solar modules from China. I understand that such a finding will result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping and countervailing duty cash deposits determined by Commerce; and

(iii) the seller/exporter no longer being allowed to participate in the certification process.

(K) I understand that agents of the exporter, such as freight forwarding companies or brokers, are not permitted to make this certification.

(L) This certification was completed and signed, and a copy of the certification was provided to the importer, on, or prior to, the date of shipment if the shipment date is more than 14 days after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the shipment date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**, this certification was completed and signed, and a copy of the certification was provided to the importer, by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(M) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature

{NAME OF COMPANY OFFICIAL}

{TITLE OF COMPANY OFFICIAL}

Date

Certification for Entries of Inquiry Merchandise From Companies Found Not To Be Circumventing

Company Name: Jinko Solar Technology Sdn. Bhd.; and Jinko Solar (Malaysia) Sdn. Bhd.

Importer Certification

I hereby certify that:

(A) My name is {IMPORTING COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF IMPORTING COMPANY}, located at {ADDRESS OF IMPORTING COMPANY}.

(B) I have direct personal knowledge of the facts regarding importation of the solar cells and solar modules produced in Malaysia that were entered into the Customs territory of the United States under the entry summary number(s) identified below which are covered by this certification. ''Direct personal knowledge'' refers to the facts the certifying party is expected to have in its own records. For example, the importer should have direct personal knowledge of the exporter and/or seller's identity and location.

(C) If the importer is acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

The solar cells and/or solar modules covered by this certification were imported by {NAME OF IMPORTING COMPANY} on behalf of {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER}.

If the importer is not acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

{NAME OF IMPORTING COMPANY} is not acting on behalf of the first U.S. customer.

(D) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM THE MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(E) I have personal knowledge of the facts regarding the production and exportation of the solar cells and modules identified below. ''Personal knowledge'' includes facts obtained from another party, (*e.g.,* correspondence received by the importer (or exporter) from the producer of the imported products regarding production).

(F) The solar cells and/or solar modules covered by this certification were:

1. Sold to the United States by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd.

2. Exported to the United States by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd.

3. Produced in Malaysia by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd.}, using wafers manufactured in the People's Republic of China that were exported to Malaysia by: {CHECK THE RELEVANT WAFER EXPORTERS BELOW}

Jinko Solar Co., Ltd.	
Jinko Solar Import and Export Co., Ltd.	
Jinko Solar (Chuzhou) Co., Ltd.	
Jinko Solar (Shangrao) Co., Ltd.	
Yuhuan Jinko Solar Co., Ltd.	
JINKOSOLAR MIDDLE EAST DMCC.	

(G) The U.S. Department of Commerce (Commerce) found that solar cells and/or solar modules produced by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd., using wafers manufactured in China that were exported by the wafer supplier(s) identified in item F above, and exported by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd. are not circumventing the antidumping duty and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.

(H) This certification applies to the following entries (repeat this block as many times as necessary):

Entry Summary #:

Applicable Line Item # of the Entry Summary:

Foreign Seller's Invoice #:

Applicable Line Item # on the Foreign Seller's Invoice:

(I) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(J) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of the exporter's certification (attesting to information regarding the production and/or exportation of the imported merchandise identified above), and any supporting documentation provided to the importer by the exporter, until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(K) I understand that {NAME OF IMPORTING COMPANY} is required to provide U.S. Customs and Border Protection (CBP) and/or Commerce with the importer certification, and any supporting documentation, and a copy of the exporter's certification, and any supporting documentation provided to the importer by the exporter, upon the request of either agency.

(L) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(M) I understand that failure to maintain the required certifications and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all entries to which this certification applies are entries of merchandise that is covered by the scope of the antidumping and countervailing duty orders on solar cells and solar modules from China. I understand that such a finding will result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping duty and countervailing duty cash deposits determined by Commerce; and

(iii) the importer no longer being allowed to participate in the certification process.

(N) I understand that agents of the importer, such as brokers, are not permitted to make this certification.

(O) This certification was completed and signed on, or prior to, the date of the entry summary if the entry date is more than 14 days after the date of publication of the

notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the entry date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**, this certification was completed and signed by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(P) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature

{NAME OF COMPANY OFFICIAL}

{TITLE OF COMPANY OFFICIAL}

Date

Exporter Certification

Certification for Entries of Inquiry Merchandise From Companies Found Not To Be Circumventing

Company Name: Jinko Solar Technology Sdn. Bhd.; and Jinko Solar (Malaysia) Sdn. Bhd.

The party that made the sale to the United States should fill out the exporter certification.

I hereby certify that:

(A) My name is {COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF COMPANY}, located at {ADDRESS OF COMPANY}.

(B) I have direct personal knowledge of the facts regarding the production and exportation of the solar cells and solar modules for which sales are identified below. ''Direct personal knowledge'' refers to facts the certifying party is expected to have in its own records. For example, an exporter should have direct personal knowledge of the producer's identity and location.

(C) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(D) The solar cells and/or solar modules covered by this certification were:

1. Sold to the United States by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd.

2. Exported to the United States by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd.

3. Produced in Malaysia by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd. using wafers manufactured in the People's Republic of China (China) that were exported to Malaysia by: {CHECK THE RELEVANT WAFER EXPORTERS BELOW}

Jinko Solar Co., Ltd.	
Jinko Solar Import and Export Co., Ltd.	
Jinko Solar (Chuzhou) Co., Ltd.	
Jinko Solar (Shangrao) Co., Ltd.	
Yuhuan Jinko Solar Co., Ltd.	
JINKOSOLAR MIDDLE EAST DMCC.	

(E) The U.S. Department of Commerce (Commerce) found that solar cells and/or solar modules produced by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd., using wafers manufactured in China that were exported by the wafer supplier(s) identified in item D above, and exported by Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd. are not circumventing the antidumping duty and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.

(F) This certification applies to the following sales to {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER} (repeat this block as many times as necessary):

of the Foreign Seller's Invoice to the U.S. Customer:

Applicable Line Item # of the Foreign Seller's Invoice to the U.S. Customer:

(G) I understand that Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd. are required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, customer specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(H) I understand that Jinko Solar Technology Sdn. Bhd. or Jinko Solar (Malaysia) Sdn. Bhd. are required to provide the U.S. importer with a copy of this certification and is required to provide U.S. Customs and Border Protection (CBP) and/or Commerce with a copy of this certification, and any supporting documents, upon the request of either agency.

(I) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(J) I understand that failure to maintain the required certification and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all sales to which this certification applies are sales of merchandise that is covered by the scope of the antidumping and countervailing duty orders on solar cells and solar modules from China. I understand that such a finding will result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping and countervailing duty cash deposits determined by Commerce; and

(iii) the seller/exporter no longer being allowed to participate in the certification process.

(K) I understand that agents of the exporter, such as freight forwarding companies or brokers, are not permitted to make this certification.

(L) This certification was completed and signed, and a copy of the certification was provided to the importer, on, or prior to, the date of shipment if the shipment date is more than 14 days after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the shipment date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register** this certification was completed and signed, and a copy of the certification was provided to the importer, by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(M) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature

{NAME OF COMPANY OFFICIAL}

{TITLE OF COMPANY OFFICIAL}

Date

Appendix VI

Certification Regarding Chinese Components

Importer Certification

I hereby certify that:

(A) My name is {IMPORTING COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF IMPORTING COMPANY}, located at {ADDRESS OF IMPORTING COMPANY}.

(B) I have direct personal knowledge of the facts regarding importation of the solar cells and solar modules produced in {COUNTRY} that were entered into the Customs territory of the United States under the entry summary number(s) identified below which are covered by this certification. ''Direct personal knowledge'' refers to the facts the certifying party is expected to have in its own records. For example, the importer should have direct personal knowledge of the exporter and/or seller's identity and location.

(C) If the importer is acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

The solar cells and/or solar modules covered by this certification were imported by {NAME OF IMPORTING COMPANY} on behalf of {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER}.

If the importer is not acting on behalf of the first U.S. customer, include the following sentence as paragraph C of this certification:

{NAME OF IMPORTING COMPANY} is not acting on behalf of the first U.S. customer.

(D) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM THE MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(E) I have personal knowledge of the facts regarding the production and exportation of the solar cells and modules identified below.

''Personal knowledge'' includes facts obtained from another party, (*e.g.,* correspondence received by the importer (or exporter) from the producer of the imported products regarding production).

(F) If the imported products covered by this certification are solar cells that are not in solar modules or products that contain solar cells that are not in a solar module, then the importer certifies that the solar cells produced in {COUNTRY} that are covered by this certification were not manufactured using wafers produced in China, regardless of whether sourced directly from a Chinese producer or from a downstream supplier.

(G) If the imported products covered by this certification are solar modules or products that contain solar modules, then the importer certifies that the solar modules produced in {COUNTRY} that are covered by this certification were not manufactured using wafers produced in China, regardless of whether sourced directly from a Chinese producer or from a downstream supplier, *or* the solar modules produced in {COUNTRY} that are covered by this certification were manufactured using wafers produced in China but *no more than two* of the following inputs that were used to manufacture the solar modules were produced in China, regardless of whether sourced directly from a Chinese producer or from a Chinese downstream supplier:

a. Silver Paste
b. Aluminum Frames
c. Glass
d. Backsheets
e. Ethylene-Vinyl Acetate
f. Junction Boxes

(H) The solar cells and/or solar modules covered by this certification: (a) absent the affirmative determination of circumvention, are not covered by the antidumping duty or countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China; and (b) are not covered by the antidumping duty order on certain crystalline silicon photovoltaic products from Taiwan.

(I) This certification applies to the following entries (repeat this block as many times as necessary):

Entry Summary #:
Applicable Line Item # of the Entry Summary:
Foreign Seller:
Foreign Seller's Address:
Foreign Seller's Invoice #:
Applicable Line Item # on the Foreign Seller's Invoice:
Producer:
Producer's Address:

(J) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(K) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of the exporter's certification (attesting to information regarding the production and/or exportation of the imported merchandise identified above), and any supporting documentation provided to the importer by the exporter, until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(L) I understand that {NAME OF IMPORTING COMPANY} is required to provide U.S. Customs and Border Protection (CBP) and/or the U.S. Department of Commerce (Commerce) with the importer certification, and any supporting documentation, and a copy of the exporter's certification, and any supporting documentation provided to the importer by the exporter, upon the request of either agency.

(M) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(N) I understand that failure to maintain the required certifications and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all entries to which this certification applies are entries of merchandise that is covered by the scope of the antidumping and countervailing duty orders on solar cells and solar modules from China. I understand that such a finding will result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping duty and countervailing duty cash deposits determined by Commerce; and

(iii) the importer no longer being allowed to participate in the certification process.

(O) I understand that agents of the importer, such as brokers, are not permitted to make this certification.

(P) This certification was completed and signed on, or prior to, the date of the entry summary if the entry date is more than 14 days after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the entry date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**, this certification was completed and signed by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(Q) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature

{NAME OF COMPANY OFFICIAL}
{TITLE OF COMPANY OFFICIAL}
Date

Exporter Certification

The party that made the sale to the United States should fill out the exporter certification.

I hereby certify that:

(A) My name is {COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF FOREIGN COMPANY THAT MADE THE SALE TO THE UNITED STATES}, located at {ADDRESS OF FOREIGN COMPANY THAT MADE THE SALE TO THE UNITED STATES};

(B) I have direct personal knowledge of the facts regarding the production and exportation of the solar cells and solar modules for which sales are identified below. ''Direct personal knowledge'' refers to facts the certifying party is expected to have in its own records. For example, an exporter should have direct personal knowledge of the producer's identity and location.

(C) The solar cells and/or solar modules covered by this certification were shipped to {NAME OF PARTY IN THE UNITED STATES TO WHOM MERCHANDISE WAS FIRST SHIPPED}, located at {U.S. ADDRESS TO WHICH MERCHANDISE WAS SHIPPED}.

(D) If the exported products covered by this certification are solar cells that are not in solar modules or products that contains solar cells that are not in a solar module, then the seller certifies that the solar cells produced in {COUNTRY} that are covered by this certification were not manufactured using wafers produced in China, regardless of whether sourced directly from a Chinese producer or from a downstream supplier.

(E) If the exported products covered by this certification are solar modules or products that contain solar modules, then the seller certifies that the solar modules produced in {COUNTRY} that are covered by this certification were not manufactured using wafers produced in China, regardless of whether sourced directly from a Chinese producer or from a downstream supplier, or the solar modules produced in {COUNTRY} that are covered by this certification were manufactured using wafers produced in China but *no more than two* of the following inputs that were used to manufacture the solar modules were produced in China, regardless of whether sourced directly from a Chinese producer or from a Chinese downstream supplier:

a. Silver Paste
b. Aluminum Frames
c. Glass
d. Backsheets
e. Ethylene-Vinyl Acetate
f. Junction Boxes

(F) The solar cells and/or solar modules covered by this certification: (a) absent the affirmative determination of circumvention, are not covered by the antidumping duty or countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China; and (b) are not covered by the antidumping duty order on certain crystalline silicon photovoltaic products from Taiwan.

(G) This certification applies to the following sales to {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER} (repeat this block as many times as necessary):

of the Foreign Seller's Invoice to the U.S. Customer:
Applicable Line Item # of the Foreign Seller's Invoice to the U.S. Customer:
Producer Name:
Producer's Address:
Invoice # of the Producer's Invoice to the Foreign Seller (if the foreign seller and the producer are the same party, report ''NA'' here):

(H) I understand that {NAME OF FOREIGN COMPANY THAT MADE THE SALE TO THE UNITED STATES} is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, product specification sheets, customer specification sheets, production records, invoices, *etc.*) until the later of: (1) the date that is five years after the latest entry date of the entries covered by the certification; or (2) the date that is three years after the conclusion of any litigation in United States courts regarding such entries.

(I) I understand that {NAME OF FOREIGN COMPANY THAT MADE THE SALE TO THE UNITED STATES} is required to provide the U.S. importer with a copy of this certification and is required to provide U.S. Customs and Border Protection (CBP) and/or the U.S. Department of Commerce (Commerce) with a copy of this certification, and any supporting documents, upon the request of either agency.

(J) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(K) I understand that failure to maintain the required certification and supporting documentation, or failure to substantiate the claims made herein, or not allowing CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all sales to which this certification applies are sales of merchandise that is covered by the scope of the antidumping and countervailing duty orders on solar cells and solar modules from China. I understand that such a finding will result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the importer being required to post the antidumping and countervailing duty cash deposits determined by Commerce; and

(iii) the seller/exporter no longer being allowed to participate in the certification process.

(L) I understand that agents of the seller/exporter, such as freight forwarding companies or brokers, are not permitted to make this certification.

(M) This certification was completed and signed, and a copy of the certification was provided to the importer, on, or prior to, the date of shipment if the shipment date is more than 14 days after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**. If the shipment date is on or before the 14th day after the date of publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**, this certification was completed and signed and a copy of the certification was provided to the importer, by no later than 45 days after publication of the notice of Commerce's preliminary determination of circumvention in the **Federal Register**.

(N) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make materially false statements to the U.S. government.

Signature

{NAME OF COMPANY OFFICIAL}
{TITLE OF COMPANY OFFICIAL}
Date

[FR Doc. 2023–18161 Filed 8–22–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–893–002, A–487–001, A–546–001, A–533–919, A–475–845, A–803–001, A–201–859, A–565–804, A–455–807, A–856–002, A–469–826, A–583–873]

Mattresses From Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan: Initiation of Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable August 17, 2023.

FOR FURTHER INFORMATION CONTACT: Amaris Wade (Bosnia and Herzegovina), TJ Worthington (Bulgaria), Paul Gill (Burma), Steven Seifert (India), Caroline Carroll (Italy), Sean Carey (Kosovo), Benjamin Blythe (Mexico), Emily Halle (the Philippines), Dakota Potts (Poland), Benjamin A. Luberda (Slovenia), Matthew Palmer (Spain), and Paul Gill (Taiwan), AD/CVD Operations, Offices II, III, IV, V, VII, and IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6334, (202) 482–4567, (202) 482–5673, (202) 482–3350, (202) 482–4948, (202) 482–3964, (202) 482–3457, (202) 482–0176, (202) 482–0223, (202) 482–2185, (202) 482–1678, and (202) 482–5673, respectively.

SUPPLEMENTARY INFORMATION:

The Petitions

On July 28, 2023, the U.S. Department of Commerce (Commerce) received antidumping duty (AD) petitions concerning imports of mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan, filed in proper form on behalf of the petitioners,[1] U.S. producers of mattresses and certified unions that represent workers engaged in the domestic production of mattresses.[2] These AD petitions were accompanied by a countervailing duty (CVD) petition concerning imports of mattresses from Indonesia.[3]

On August 1, 8, and 9, 2023, Commerce requested supplemental information pertaining to certain aspects of the Petitions.[4] Additionally, on August 7, 9, and 10, 2023, the petitioners filed timely responses to these requests for additional information.[5]

[1] Brooklyn Bedding; Carpenter Co.; Corsicana Mattress Company; Future Foam Inc.; FXI, Inc.; Kolcraft Enterprises Inc.; Leggett & Platt, Incorporated; Serta Simmons Bedding Inc.; Southerland, Inc.; Tempur Sealy International; the International Brotherhood of Teamsters; and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, the petitioners).

[2] *See* Petitioners' Letter, ''Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Indonesia, Italy, Kosovo, Mexico, Philippines, Poland, Slovenia, Spain and Taiwan: Antidumping and Countervailing Duty Petitions,'' dated July 28, 2023 (Petitions).

[3] *Id.*

[4] *See* Commerce's Letters, ''Petitions for the Imposition of Antidumping Duties on Imports of Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Slovenia, Spain, and Taiwan and Countervailing Duties on Imports from Indonesia: Supplemental Questions,'' dated August 1, 2023 (General Issues Supplemental); Country-Specific Supplemental Questionnaires: Bosnia Supplemental; Bulgaria Supplemental; Burma Supplemental; Burma Supplemental; India Supplemental; Italy Supplemental; Kosovo Supplemental; Mexico Supplemental; the Philippines Supplemental; Slovenia Supplemental; Spain Supplemental; and Taiwan Supplemental, dated August 1, 2023; ''Petitions for the Imposition of Antidumping Duties on Imports of Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Slovenia, Spain, and Taiwan and Countervailing Duties on Imports from Indonesia: Supplemental Questions,'' dated August 8, 2023 (Second General Issues Supplemental); *see also* Memoranda, ''Phone Call with Counsel to the Petitioners,'' dated August 9, 2023.

[5] *See* Petitioners' Letters, ''Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, Philippines, Slovenia, Spain, and Taiwan: Responses to Petition Supplemental Questionnaires,'' dated August 7, 2023, at Volume I (First General Issues Supplement) and Volume II (Country-Specific AD Supplements); ''Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, Philippines, Slovenia,

Continued

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the Act), the petitioners allege that imports of mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan are being, or are likely to be, sold in the United States at less than fair value (LTFV) within the meaning of section 731 of the Act, and that imports of such products are materially injuring, or threatening material injury to, the mattresses industry in the United States. Consistent with section 732(b)(1) of the Act, the Petitions are accompanied by information reasonably available to the petitioners supporting their allegations.

Commerce finds that the petitioners filed the Petitions on behalf of the domestic industry, because the petitioners are interested parties, as defined in sections 771(9)(C) and (D) of the Act. Commerce also finds that the petitioners demonstrated sufficient industry support for the initiation of the requested AD investigations.[6]

Periods of Investigation

Because the Petitions were filed on July 28, 2023, pursuant to 19 CFR 351.204(b)(1), the periods of investigation (POI) for the Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan AD investigations are July 1, 2022, through June 30, 2023.

Scope of the Investigations

The products covered by these investigations are mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan. For a full description of the scope of these investigations, *see* the appendix to this notice.

Comments on the Scope of the Investigations

On August 1 and 8, 2023, Commerce requested further information and clarification from the petitioners regarding the proposed scope to ensure that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.[7] On August 7 and 9, 2023, the petitioners revised the scope.[8] The description of the merchandise covered by these investigations, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period of time for interested parties to raise issues regarding product coverage (*i.e.,* scope).[9] Commerce will consider all comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information,[10] all such factual information should be limited to public information. To facilitate preparation of its questionnaires, Commerce requests that all interested parties submit such comments by 5:00 p.m. Eastern Time (ET) on September 6, 2023, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on September 18, 2023, which is the next business day after 10 calendar days from the initial comment deadline.[11]

Commerce requests that any factual information that parties consider relevant to the scope of the investigations be submitted during that period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party may contact Commerce and request permission to submit the additional information. All such submissions must be filed simultaneously on the records of the concurrent AD and CVD investigations.

Filing Requirements

All submissions to Commerce must be filed electronically using Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[12] An electronically-filed document must be received successfully in its entirety by the time and date it is due.[13]

Comments on Product Characteristics

Commerce is providing interested parties an opportunity to comment on the appropriate physical characteristics of mattresses to be reported in response to Commerce's AD questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to report the relevant costs of production (COP) accurately, as well as to develop appropriate product comparison criteria where appropriate.

Subsequent to the publication of this notice, Commerce intends to release a proposed list of physical characteristics and product-comparison criteria, and interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) general product characteristics; and (2) product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, although there may be some physical product characteristics utilized by manufacturers to describe mattresses, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, Commerce attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaires, all product characteristics comments must be filed by 5:00 p.m. ET on September 6, 2023, which is 20 calendar days from

Spain, and Taiwan: Responses to the Department's Second General Issues Supplemental Questionnaire,'' dated August 9, 2023 (Second General Issues Supplement); ''Mattresses from Mexico: Mattress Petitioners' Response to the Department of Commerce's Second Supplemental Questionnaire,'' dated August 10, 2023; and ''Mattresses from India: Mattress Petitioners' Response to the Department of Commerce's Second Supplemental Questionnaire,'' dated August 10, 2023.

[6] *See* the section on ''Industry Support for the Petitions,'' *infra.*

[7] *See* General Issues Supplemental Questionnaire at 3–4; *see also* Second General Issues Supplemental Questionnaire at 3.

[8] *See* First General Issues Supplement at 4 and Exhibit 3; *see also* Second General Issues Supplement at 1 and Exhibit 2.

[9] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[10] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[11] *See* 19 CFR 351.303(b)(1) (''For both electronically filed and manually filed documents, if the applicable due date falls on a non-business day, the Secretary will accept documents that are filed on the next business day.''). The initial deadline for rebuttal comments falls on September 16, 2023, which is a Saturday.

[12] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on help using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[13] *See* 19 CFR 351.303(b)(1).

the signature date of this notice. Any rebuttal comments must be filed by 5:00 p.m. ET on September 18, 2023, which is the next business day after ten calendar days from the initial comment deadline.[14] All comments and submissions to Commerce must be filed electronically using ACCESS, as explained above, on the record of each of the AD investigations.

Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC must apply the same statutory definition regarding the domestic like product,[15] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[16]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioners do not offer a definition of the domestic like product distinct from the scope of the investigations.[17] Based on our analysis of the information submitted on the record, we have determined that mattresses, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[18]

In determining whether the petitioners have standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the ''Scope of the Investigations,'' in the appendix to this notice. To establish industry support, the petitioners provided the total 2022 shipments of the domestic like product for the supporters of the Petitions, and compared this to the estimated total shipments of the domestic like product for the entire domestic industry.[19] Because total industry production data for the domestic like product for 2022 are not reasonably available to the petitioners, and the petitioners have established that shipments are a reasonable proxy for production data,[20] we have relied on the data provided by the petitioners for purposes of measuring industry support.[21]

Our review of the data provided in the Petitions, the First General Issues Supplement, the Second General Issues Supplement, and other information readily available to Commerce indicates that the petitioners have established industry support for the Petitions.[22] First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (*e.g.,* polling).[23] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[24] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act, because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions.[25] Accordingly, Commerce determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.[26]

Allegations and Evidence of Material Injury and Causation

The petitioners allege that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at LTFV. In addition, with regard to Burma, Kosovo, Mexico, and Taiwan, the petitioners allege that

[14] *See* 19 CFR 351.303(b)(1) (''For both electronically filed and manually filed documents, if the applicable due date falls on a non-business day, the Secretary will accept documents that are filed on the next business day.''). The initial deadline for rebuttal comments falls on September 16, 2023, which is a Saturday.

[15] *See* section 771(10) of the Act.

[16] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[17] *See* Petitions at Volume I (pages I–19 through I–23); *see also* First General Issues Supplement at 2 and Exhibit 1.

[18] For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, *see* Antidumping Duty Initiation Checklists: Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan, dated concurrently with this notice (Country-Specific AD Initiation Checklists), at Attachment II (Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Indonesia, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan).

[19] *See* Petitions at Volume I (pages I–7 through I–8 and Exhibit I–6); *see also* First General Issues Supplement at 5–7 and Exhibits 4–8; and Second General Issues Supplement at 2–3 and Exhibits 3–5.

[20] *See* Petitions at Volume I (pages I–7 through I–8 and Exhibit I–6); *see also* First General Issues Supplement at 5–6.

[21] *See* Petitions at Volume I (pages I–7 through I–8 and Exhibit I–6); *see also* First General Issues Supplement at 5–7 and Exhibits 4–8; and Second General Issues Supplement at 2–3 and Exhibits 3–5.

[22] *Id.*

[23] *See* Country-Specific AD Initiation Checklists at Attachment II; *see also* section 732(c)(4)(D) of the Act.

[24] *See* Country-Specific AD Initiation Checklists at Attachment II.

[25] *Id.*

[26] *Id.*

subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[27] With regard to Bosnia and Herzegovina, Bulgaria, India, Italy, the Philippines, Poland, Slovenia, and Spain, while the allegedly dumped imports from each of these countries do not individually exceed the statutory requirements for negligibility, the petitioners provided data demonstrating that the aggregate import share from these eight countries is 12.30 percent, which exceeds the seven percent threshold established by the exception in section 771(24)(A)(ii) of the Act.[28]

The petitioners contend that the industry's injured condition is illustrated by the significant and increasing volume of subject imports; declining market share; underselling and price suppression; lost sales and revenues; and adverse impact on the domestic industry's operations, capacity utilization, production, commercial shipment volumes, employment variables, and financial performance.[29] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[30]

Allegations of Sales at LTFV

The following is a description of the allegations of sales at LTFV upon which Commerce based its decision to initiate AD investigations of imports of mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan. The sources of data for the deductions and adjustments relating to U.S. price and normal value (NV) are discussed in greater detail in the Country-Specific AD Initiation Checklists.

U.S. Price

For Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan, the petitioners based export price (EP) on POI average unit values (AUVs) derived from official U.S. import statistics for imports of mattresses produced in and exported from each country.[31] The petitioners did not make any adjustments to U.S. price to calculate a net ex-factory U.S. price.[32]

Normal Value [33]

For Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan, the petitioners based NV on home market prices obtained through market research for mattresses produced in and sold, or offered for sale, in each country during the applicable time period.[34] The petitioners made certain adjustments to home market price to calculate a net ex-factory home market price, where appropriate.[35]

Fair Value Comparisons

Based on the data provided by the petitioners, there is reason to believe that imports of mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan, are being, or are likely to be, sold in the United States at LTFV. Based on comparisons of EP to NV in accordance with sections 772 and 773 of the Act, the estimated dumping margins for mattresses for each of the countries covered by this initiation are as follows: (1) Bosnia and Herzegovina—217.38 percent; (2) Bulgaria—106.27 percent; (3) Burma—181.71 percent; (4) India—42.76 percent; (5) Italy—257.06 percent; (6) Kosovo—654.67 percent, (7) Mexico—61.97 percent; (8) the Philippines—538.23 percent; (9) Poland—330.71 percent; (10) Slovenia—744.81 percent; (11) Spain—280.28 percent; and (12) Taiwan—624.50 percent.[36]

Initiation of LTFV Investigations

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 732 of the Act. Therefore, we are initiating AD investigations to determine whether imports of mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan are being, or are likely to be, sold in the United States at LTFV. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 140 days after the date of these initiations.

Respondent Selection

In the Petitions, the petitioners identified four companies in Bosnia and Herzegovina, eight companies in Bulgaria, four companies in Burma, 39 companies in India, 39 companies in Italy, three companies in Kosovo, 36 companies in Mexico, nine companies in the Philippines, 19 companies in Poland, six companies in Slovenia, 24 companies in Spain, and 98 companies in Taiwan as producers/exporters of mattresses.[37] Following standard practice in AD investigations involving market economy countries, in the event Commerce determines that the number of exporters or producers is large such that Commerce cannot individually examine each company based on its resources, where appropriate, Commerce intends to select mandatory respondents in these cases based on U.S. Customs and Border Protection (CBP) data for U.S. imports under the appropriate Harmonized Tariff Schedule of the United States subheadings listed in the ''Scope of the Investigations,'' in the appendix.

On August 14, 2023, Commerce released CBP data on imports of mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan under administrative protective order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment on CBP data and/or respondent selection must do so within three business days of the publication date of the notice of initiation of these investigations.[38] Comments must be

[27] *See* Petitions at Volume I (pages I–24 through I–25 and Exhibit I–12).

[28] *Id.*

[29] *See* Petitions at Volume I (pages I–24 through I–52 and Exhibits I–1 through I–5 and I–9 through I–16); *see also* First General Issues Supplement at 7 and Exhibit 1.

[30] *See* Country-Specific AD Initiation Checklists at Attachment III (Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Indonesia, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan).

[31] *See* Country-Specific AD Initiation Checklists.

[32] *Id.*

[33] In accordance with section 773(b)(2) of the Act, for these investigations, Commerce will request information necessary to calculate the constructed value and COP to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the COP of the product.

[34] *See* Country-Specific AD Initiation Checklists.

[35] *Id.*

[36] *Id.* for details of the calculations.

[37] *See* First General Issues Supplement at 2–4 and Exhibit 2.

[38] *See* Memoranda, ''Antidumping Duty Petition on Imports of Mattresses from Bosnia and Herzegovina: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023; ''Antidumping Duty Petition on Imports of Mattresses from Bulgaria: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023; ''Antidumping Duty Petition on Imports of Mattresses from Burma: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023; ''Antidumping Duty Petition on Imports of Mattresses from India: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023; ''Antidumping Duty Petition on Imports of Mattresses from Italy: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023;

filed electronically using ACCESS. An electronically-filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at *https://access.trade.gov/Resources/Administrative_Protective_Order.aspx.*

Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the Petitions have been provided to the governments of Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan via ACCESS. To the extent practicable, we will attempt to provide a copy of the public version of the AD Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

ITC Notification

Commerce will notify the ITC of its initiation, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petitions were filed, whether there is a reasonable indication that imports of mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and/or Taiwan, are materially injuring, or threatening material injury to, a U.S. industry.[39] A negative ITC determination for any country will result in the investigation being terminated with respect to that country.[40] Otherwise, these AD investigations will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted [41] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[42] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

Particular Market Situation Allegation

Section 773(e) of the Act addresses the concept of particular market situation (PMS) for purposes of CV, stating that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act, nor 19 CFR 351.301(c)(2)(v), sets a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of a respondent's initial response to section D of Commerce's AD questionnaire.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301. For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, standalone submission; under limited circumstances, Commerce will grant untimely filed requests for the extension of time limits, where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review Commerce's regulations concerning the extension of time limits and the *Time Limits Final Rule* prior to submitting factual information in these investigations.[43]

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[44] Parties must use the certification formats provided in 19 CFR 351.303(g).[45] Commerce intends to

''Antidumping Duty Petition on Imports of Mattresses from Kosovo: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023. ''Antidumping Duty Petition on Imports of Mattresses from Mexico: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023; ''Antidumping Duty Petition on Imports of Mattresses from the Philippines: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023; ''Antidumping Duty Petition on Imports of Mattresses from Poland: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023; ''Antidumping Duty Petition on Imports of Mattresses from Slovenia: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023; ''Antidumping Duty Petition on Imports of Mattresses from Spain: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023; and ''Antidumping Duty Petition on Imports of Mattresses from Taiwan: Release of U.S. Customs and Border Protection Data,'' dated August 14, 2023.

[39] *See* section 733(a) of the Act.

[40] *Id.*

[41] *See* 19 CFR 351.301(b).

[42] *See* 19 CFR 351.301(b)(2).

[43] *See* 19 CFR 351.302; *see also, e.g., Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013) (*Time Limits Final Rule*), available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm.*

[44] *See* section 782(b) of the Act.

[45] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*). Answers to frequently asked questions regarding the *Final Rule* are available at

Continued

reject factual submissions if the submitting party does not comply with the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (*e.g.,* by filing the required letter of appearance). Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[46]

This notice is issued and published pursuant to sections 732(c)(2) and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: August 17, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—Scope of the Investigations

The products covered by these investigations are all types of youth and adult mattresses. The term ''mattress'' denotes an assembly of materials that at a minimum includes a ''core,'' which provides the main support system of the mattress, and may consist of innersprings, foam, other resilient filling, or a combination of these materials. Mattresses also may contain: (1) ''upholstery,'' the material between the core and the top panel of the ticking on a single-sided mattress, or between the core and the top and bottom panel of the ticking on a double-sided mattress; and/or (2) ''ticking,'' the outermost layer of fabric or other material (*e.g.,* vinyl) that encloses the core and any upholstery, also known as a cover.

The scope of these investigations is restricted to only ''adult mattresses'' and ''youth mattresses.'' ''Adult mattresses'' are frequently described as ''twin,'' ''extra-long twin,'' ''full,'' ''queen,'' ''king,'' or ''California king'' mattresses. ''Youth mattresses'' are typically described as ''crib,'' ''toddler,'' or ''youth'' mattresses. All adult and youth mattresses are included regardless of size and size description or how they are described (*e.g.,* frameless futon mattress and tri-fold mattress).

The scope encompasses all types of ''innerspring mattresses,'' ''non-innerspring mattresses,'' and ''hybrid mattresses.'' ''Innerspring mattresses'' contain innersprings, a series of metal springs joined together in sizes that correspond to the dimensions of mattresses. Mattresses that contain innersprings are referred to as ''innerspring mattresses'' or ''hybrid mattresses.'' ''Hybrid mattresses'' contain two or more support systems as the core, such as layers of both memory foam and innerspring units.

''Non-innerspring mattresses'' are those that do not contain any innerspring units. They are generally produced from foams (*e.g.,* polyurethane, memory (viscoelastic), latex foam, gel infused viscoelastic (gel foam), thermobonded polyester, polyethylene) or other resilient filling.

Mattresses covered by the scope of these investigations may be imported independently, as part of furniture or furniture mechanisms (*e.g.,* convertible sofa bed mattresses, sofa bed mattresses imported with sofa bed mechanisms, corner group mattresses, day-bed mattresses, roll-away bed mattresses, high risers, trundle bed mattresses, crib mattresses), or as part of a set (in combination with a ''mattress foundation''). ''Mattress foundations'' are any base or support for a mattress. Mattress foundations are commonly referred to as ''foundations,'' ''boxsprings,'' ''platforms,'' and/or ''bases.'' Bases can be static, foldable, or adjustable. Only the mattress is covered by the scope if imported as part of furniture, with furniture mechanisms, or as part of a set, in combination with a mattress foundation.

Excluded from the scope of these investigations are ''futon'' mattresses. A ''futon'' is a bi-fold frame made of wood, metal, or plastic material, or any combination thereof, that functions as both seating furniture (such as a couch, love seat, or sofa) and a bed. A ''futon mattress'' is a tufted mattress, where the top covering is secured to the bottom with thread that goes completely through the mattress from the top through to the bottom, and it does not contain innersprings or foam. A futon mattress is both the bed and seating surface for the futon.

Also excluded from the scope are airbeds (including inflatable mattresses) and waterbeds, which consist of air- or liquid-filled bladders as the core or main support system of the mattress.

Also excluded is certain multifunctional furniture that is convertible from seating to sleeping, regardless of filler material or components, where such filler material or components are upholstered, integrated into the design and construction of, and inseparable from, the furniture framing, and the outermost layer of the multifunctional furniture converts into the sleeping surface. Such furniture may, and without limitation, be commonly referred to as ''convertible sofas,'' ''sofabeds,'' ''sofa chaise sleepers,'' ''futons,'' ''ottoman sleepers,'' or a like description.

Also excluded from the scope of these investigations are any products covered by the existing antidumping duty orders on uncovered innerspring units from the People's Republic of China, South Africa, and the Socialist Republic of Vietnam. *See Uncovered Innerspring Units from the People's Republic of China, South Africa, and Socialist Republic of Vietnam: Continuation of Antidumping Duty Orders,* 84 FR 55285 (October 16, 2019).

Also excluded from the scope of these investigations are bassinet pads with a nominal length of less than 39 inches, a nominal width of less than 25 inches, and a nominal depth of less than 2 inches.

Additionally, also excluded from the scope of these investigations are ''mattress toppers.'' A ''mattress topper'' is a removable bedding accessory that supplements a mattress by providing an additional layer that is placed on top of a mattress. Excluded mattress toppers have a height of four inches or less.

The products subject to these investigations are currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 9404.21.0010, 9404.21.0013, 9404.21.0095, 9404.29.1005, 9404.29.1013, 9404.29.1095, 9404.29.9085, 9404.29.9087, and 9404.29.9095. Products subject to these investigations may also enter under HTSUS subheadings: 9401.41.0000, 9401.49.0000, and 9401.99.9081. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to these investigations is dispositive.

[FR Doc. 2023–18165 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–DS–P

https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.

[46] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Final Revised Management Plan for the He'eia National Estuarine Research Reserve

AGENCY: Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice of approval for the final revised management plan for the He'eia National Estuarine Research Reserve.

SUMMARY: Notice is hereby given that the Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce approves the revised management plan for the He'eia National Estuarine Research Reserve in Hawai'i. In accordance with the Coastal Zone Management Act and its implementing regulations. The University of Hawai'i Institute of Marine Biology revised the reserve's management plan, which replaces the management plan previously approved in 2016.

ADDRESSES: The revised management plan can be downloaded or viewed at *https://heeianerr.org/resources/.* The document is also available by sending a written request to the point of contact identified below.

FOR FURTHER INFORMATION CONTACT: Leah Keller of NOAA's Office for

Coastal Management, *leah.keller@noaa.gov,* (808) 465–2720.

SUPPLEMENTARY INFORMATION: Pursuant to 15 CFR 921.33(c), Hawai'i must revise the management plan for the He'eia National Estuarine Research Reserve at least every five years. Major changes to a reserve's management plan may be made only after receiving written approval from NOAA. NOAA approves changes to management plans via notice in the **Federal Register**. On July 22, 2022 NOAA issued a notice in the **Federal Register** announcing a thirty-day public comment period for the proposed revision of this management plan (87 FR 43790).

Appendix D of the plan contains a summary of written and oral comments received, and an explanation of how comments were incorporated.

The management plan outlines the reserve's strategic goals and objectives; administrative structure; programs for conducting research and monitoring, education, and training; resource protection, restoration, and manipulation plans; public access and visitor use plans; consideration for future land acquisition; and facility development to support reserve operations. Since 2016, this research reserve has supported community-led ahupua'a scale restoration in the He'eia estuary with the removal of 20 acres (80,000 square meters) of invasive mangroves and plants, replacing them with native plant species; agroforestry and lo'i cultivation; produced publications on Native Hawaiian land and sea management practices; and restored the He'eia fishpond.[1] As a newly established reserve, the reserve hired staff consisting of a reserve manager, research coordinator, education coordinator, coastal training program coordinator, and research technician. These staff play an important role in building community-supported education, research, stewardship, and training programming across the He'eia community. The reserve also installed and launched monitoring equipment across the ahupua'a to monitor water quality, abiotic and biotic features, and changes related to sea level rise and coastal inundation; completed needs assessments for education and training needs in He'eia; and supported various graduate assistants, fellows, and research interns. The revised management plan will serve as the guiding document for the 1,385-acre (5.6-square kilometer) He'eia National Estuarine Research Reserve for the next five years.

NOAA reviewed the environmental impacts of the revised management plan and determined that this action is categorically excluded from further analysis under the National Environmental Policy Act, as amended, 42 U.S.C. 4321 *et seq.,* and the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500–1508 (2022)), consistent with NOAA Administrative Order 216–6A.

Authority: 16 U.S.C. 1451 *et seq.;* 15 CFR 921.33.

Keelin S. Kuipers,

Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2023–18177 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–22–P

[1] An ahupua'a is a Hawaiian conceptualization of community that typically extends from the mountains to the ocean, and includes zones for forest, various forms of Indigenous agro-ecology and aquaculture, as well as nearshore zones for fisheries management.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD259]

South Atlantic 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 South Atlantic Fishery Management Council (Council) will hold meetings of the following: Mackerel Cobia Committee, Habitat Protection and Ecosystem-Based Management (Habitat) Committee, Southeast Data, Assessment and Review (SEDAR) Committee, and the Snapper Grouper Committee. The meeting week will also include a formal public comment session and a meeting of the Full Council.

DATES: The Council meeting will be held from 8:30 a.m. on Monday, September 11, 2023, until 12 p.m. on Friday, September 15, 2023.

ADDRESSES: *Meeting address:* The meeting will be held at the Town and Country Inn, 2008 Savannah Highway, Charleston, SC 29407; phone: (843) 571–1000. The meeting will also be available via webinar. See **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone: (843) 302–8440 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: Meeting information, including agendas, overviews, and briefing book materials will be posted on the Council's website at: *http://safmc.net/safmc-meetings/council-meetings/.* Webinar registration links for the meeting will also be available from the Council's website.

Public comment: Public comment on agenda items may be submitted through the Council's online comment form available from the Council's website at: *http://safmc.net/safmc-meetings/council-meetings/.* Written comments will be accepted from August 25, 2023, until September 15, 2023. These comments are accessible to the public, part of the Administrative Record of the meeting, and immediately available for Council consideration. A formal public comment session will also be held during the Council meeting.

The items of discussion in the individual meeting agendas are as follows:

Council Session I, Monday, September 11, 2023, 8:30 a.m. Until 5 p.m.

The Council will receive reports from state agencies, Council liaisons, NOAA Office of Law Enforcement, and the U.S. Coast Guard. The Council will review public hearing comments on the Joint Commercial Electronic Logbook Amendment and consider approving the amendment for Secretarial review. The Council will receive updates on East Coast Climate Change Scenario Planning, the Council's Allocation Review Process, the Southeast Reef Fish Monitoring Survey (SERFS), and the Southeast Area Monitoring and Assessment Program (SEAMAP). The Council will receive information on a Marine Recreational Information Program pilot study on the recreational Fishing Effort Survey design. The Council will also discuss the National Marine Fisheries Service (NMFS) Draft Procedural Directive providing guidance on Council authority for stocks that may extend across the geographic areas of more than one Council.

Mackerel Cobia Committee, Tuesday, September 12, 2023, 8:30 a.m. Until 10 a.m.

The Committee will review options for Amendment 13 to the Coastal Migratory Pelagics Fishery Management Plan addressing catch level adjustments for Spanish mackerel. The Committee will also receive an update on plans for conducting port meetings for the mackerel fishery.

Habitat Committee, Tuesday, September 12, 2023, 10 a.m. Until 3 p.m.

The Committee will receive a report from the May 2023 meeting of the Habitat Advisory Panel addressing plans for the 5-year Essential Fish Habitat Review and revisions to Council's policies addressing Beach Renourishment and Offshore Wind Energy Development, receive comments from the Scientific and Statistical Committee (SSC) on a coral distribution model, and review and consider approval of the Council's Habitat Blueprint. The Committee will also review topics to be addressed at the next meeting of the Habitat Advisory Panel.

SEDAR Committee, Tuesday, September 12, 2023, 3 p.m. Until 5 p.m. (Partially Closed Session)

The Committee will receive a report from the April 2023 meeting of the SEDAR Steering Committee, an update on SEDAR projects, and approve the Statements of Work for 2026 Assessments. The Committee will then meet in Closed Session to address appointments of SSC members to SEDAR Panels.

Snapper Grouper Committee, Wednesday, September 13, 2023, 8:30 a.m. Until 3:45 p.m., and Thursday, September 14, 2023, 8:30 a.m. Until 12 p.m.

The Committee will review the following amendments that are under development to the Snapper Grouper Fishery Management Plan: Amendment 48 addressing wreckfish management; Amendment 44 addressing yellowtail snapper management; and Amendment 46 addressing recreational permits for the snapper grouper fishery, including recommendations from the Recreational Permitting and Reporting Technical Advisory Panel for Amendment 46. The Committee will review public scoping comments received on Amendment 55 addressing management measures for scamp and yellowmouth grouper, consider SSC recommendations, and discuss rebuilding timelines, ecosystem component designation, and application of the Allocations Decision Tool as it pertains to Amendment 55. The Committee will also discuss potential actions to include in Amendment 56 addressing Black Sea Bass management after receiving recommendations from the SSC on requested projections and catch levels, and a report from the On-Demand Gear Workshop. The Committee will receive updates from the System Management Plan (SMP) Workgroup and Best Fishing Practices Outreach, and review topics for the next meeting of the Snapper Grouper Advisory Panel.

Formal Public Comment, Wednesday, June 13, 2023, 4 p.m..—Public comment will be accepted from individuals attending the meeting in person and via webinar on all items on the Council meeting agenda. The Council Chair will determine the amount of time provided to each commenter based on the number of individuals wishing to comment.

Council Session II, Thursday, September 14, 2023, 1:30 p.m. Until 5 p.m. and Friday, September 15, 2023, 8:30 a.m. Until 12 p.m.

The Council will present awards, receive a litigation brief if needed, and receive a staff report. The Council will review topics for upcoming meetings of the Dolphin Wahoo and Outreach and Education Advisory Panels; receive a report from NOAA Fisheries Southeast Regional Office, including a briefing on ongoing system issues at the NMFS' Southeast Permits Office and updates on Biological Opinions for Dolphin, Wahoo, and Shrimp; and a report from the Southeast Fisheries Science Center. The Council will receive Committee reports, review its workplan, review upcoming meetings, and take action as necessary. The Council will discuss any other business as needed.

Documents regarding these issues are available from the Council office (see **ADDRESSES**).

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: August 18, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–18158 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD267]

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's is convening its Scientific and Statistical Committee (SSC) 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 hybrid meeting will be held on Friday, September 8, 2023, beginning at 9:30 a.m.

ADDRESSES:

Meeting address: The meeting will be held at the Hilton Garden Inn, 100 Boardman Street, Boston, MA 02128; telephone: (617) 567–6789.

Webinar registration information: *https://attendee.gotowebinar.com/register/6781933288682361437.*

Call in information: +1 (415) 655–0052, Access Code: 211–296–770.

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 Scientific and Statistical Committee will meet to: review recent stock assessment information and additional information provided by the Council's Groundfish Plan Development Team and recommend the overfishing limits (OFLs) and acceptable biological catches (ABCs) for Georges Bank yellowtail flounder for fishing years 2024 and 2025; white hake for fishing years 2024 and 2025, including feedback on the white hake rebuilding plan options and Gulf of Maine haddock

for fishing years 2024 and 2025. They will discuss other business, to include giving feedback to the Council on expected SSC tasks for 2024 and discussing plans for the 8th meeting of the CCC Scientific Coordination Subcommittee.

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 18, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–18159 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Middle Mile Grant Program

AGENCY: National Telecommunications and Information Administration (NTIA), 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 the submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before October 23, 2023.

ADDRESSES: Interested persons are invited to submit written comments by mail to Arica Cox, Deputy Director, Grants Management, Administration, and Compliance, Office of internet Connectivity and Growth, National Telecommunication and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4626, Washington, DC 20230, or by email to *broadbandusa@ntia.gov.* Please reference OMB Control 0660–0052 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 Arica Cox, Deputy Director, Grants Management Administration, and Compliance, Office of internet Connectivity and Growth, National Telecommunication and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4626, Washington, DC 20230, via telephone at (202) 209–3011, or email at *acox@ntia.gov; broadbandusa@ntia.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

NTIA seeks approval under the Paperwork Reduction Act (PRA) to add 11 questions regarding equipment purchases to the Enabling Middle Mile Broadband Infrastructure Program (Middle Mile) Bi-Annual Performance Reports (OMB No. 0660–0052). This collection of questions will be added to the Middle Mile Bi-Annual Performance Reports as a supplement referred to as the Middle Mile Reports Addendum.

The Middle Mile Grant Program, authorized by Section 60401 of the Infrastructure Investment and Jobs Act of 2021, Public Law 117–58, 135 Stat. 429 (November 15, 2021) (Infrastructure Act or Act), provides funding for the construction, improvement, or acquisition of middle mile infrastructure. The Middle Mile Grant Program will make up to $980,000,000 available for federal assistance to the following eligible entities: a State, political subdivision of a State, Tribal government, technology company, electric utility, utility cooperative, public utility district, telecommunications company, telecommunications cooperative, nonprofit foundation, nonprofit corporation, nonprofit institution, nonprofit association, regional planning council, Native entity, economic development authority, or any partnership of two (2) or more of these entities. The purpose of the grant program is to expand and extend middle mile infrastructure to reduce the cost of connecting areas that are unserved or underserved to the internet backbone.

On May 13, 2022, NTIA published the program's Notice of Funding Opportunity (NOFO) on *internetforAll.gov* to describe the requirements under which it will award grants for the Middle Mile Grant Program. *See* Enabling Middle Mile Broadband Infrastructure Program Notice of Funding Opportunity (NOFO) (May 13, 2022), *https://www.internetforall.gov/program/enabling-middle-mile-broadband-infrastructure-program.* The NOFO requires award recipients to submit bi-annual performance reports, financial reports, and a final report as a part of the grant close-out process. Award recipients must follow the reporting requirements described in Sections A.01, Reporting Requirement, of the Department of Commerce Financial Assistance Standard Terms and Conditions (dated November 12, 2020). Additionally, in accordance with 2 CFR part 170, all recipients of a federal award made on or after October 1, 2010, must comply with reporting requirements under the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282).

Modifying the Middle Mile Bi-Annual Performance Reports and Final Report to include NTIA's requested questions regarding equipment purchases on the Middle Mile Report Addendum will enable the Commerce Department and NTIA to ensure recipient compliance with the Build America, Buy America Act (''BABA'') and facilitate NTIA's ability to collect data to comply with BABA reporting requirements. NTIA will also use the information collected to effectively administer and monitor the grant program to ensure the achievement of the Middle Mile Grant Program purposes and account for the expenditure of federal funds to deter waste, fraud, and abuse.

II. Method of Collection

Award recipients will submit the Middle Mile Reports Addendum as part of the Bi-Annual Performance Reports for the periods ending March 31st and September 30th of each year. NTIA will

collect data through electronic submission.

The report addendum shall discuss the six-month period immediately preceding the report date, in a manner that:

(1) Lists the Buyer.

(2) Describes the Category of the Purchase.

(3) Describes where the Purchase will be located and how it will be used.

(4) Quantifies the number being purchased.

(5) Asks the country from which the Purchase is sourced.

(6) If a foreign source, describes the efforts made to source domestically.

(7) Lists the Manufacturer.

(8) Lists the Purchase Price.

(9) Lists the Purchase Date.

(10) Lists the Estimated Delivery Date.

(11) Lists the Actual Delivery Date.

Recipients must maintain sufficient records to substantiate all information above upon request.

III. Data

OMB Control Number: 0660–0052.

Form Number(s): TBD.

Type of Review: Revision of a current information collection.

Affected Public: Recipients of funding under the Middle Mile Grant Program. Recipients might include States, political subdivisions of a State, Tribal governments, technology companies, electric utilities, utility cooperatives, public utility districts, telecommunications companies, telecommunication cooperatives, nonprofit foundations, nonprofit corporations, nonprofit institutions, nonprofit associations, regional planning councils, Native entities, economic development authorities, or any partnership of two (2) or more of these entities.

Estimated Number of Respondents: 40.

Estimated Time per Response: 43.72 hours.

Estimated Total Annual Burden Hours: 7,621.17.

Estimated Total Annual Cost to Public: $363,758.29.

Respondent's Obligation: Mandatory.

Legal Authority: Section 60401of the Infrastructure Investment and Jobs Act of 2021, Public Law 117–58, 135 Stat. 429 (November 15, 2021).

IV. Request for Comments

We are soliciting public comments to permit the Department 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. 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 of Economic Affairs, Commerce Department.

[FR Doc. 2023–18178 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Agency Information Collection Activities; Submission for OMB Review; Comment Request; NTIA internet Use Survey

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on June 2, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Telecommunications and Information Administration, (NTIA), Commerce.

Title: NTIA internet Use Survey.

OMB Control Number: 0660–0021.

Form Number(s): None.

Type of Request: Revision of a current information collection.

Number of Respondents: 50,000 households.

Average Hours per Response: 1/6 hour (10 minutes).

Burden Hours: 8,334.

Needs and Uses: Data from the NTIA internet Use Survey will be used to help inform federal policies related to digital equity and other internet-related issues. As required by law, 47 U.S.C. 1723(d)(3)(A)(i), certain estimates from this data collection will be used as inputs into the State Digital Equity Capacity Grant Program funding formula. More generally, NTIA will use the data both in relevant publications and to help inform policymakers. Additionally, a public use dataset that protects respondent confidentiality will be created by the Census Bureau and made available by both agencies for use by researchers and other members of the public.

Affected Public: Individuals and households.

Frequency: Biennial.

Respondent's Obligation: Voluntary.

Legal Authority: 47 U.S.C. 902(b)(2)(M), (P).

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0660–0021.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–18079 Filed 8–22–23; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Prepare An Environmental Impact Statement for Expansion of Childcare Servicing the Area North of the Eglin Test and Training Complex, Eglin Air Force Base, Florida

AGENCY: Department of Defense, Department of the Air Force.

ACTION: Notice of intent.

SUMMARY: The Department of the Air Force (DAF) is issuing this Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) assessing the potential social, economic, and environmental impacts associated with the Department of the Army (DoA) constructing and operating a new childcare center on Camp Bull Simons, Eglin Air Force Base (AFB), Florida; and the Department of the Air Force (DAF) constructing and operating one or more additional childcare centers in the area north of the Eglin Test and Training Complex (ETTC), Eglin AFB, Florida. DoA is a tenant of Eglin AFB on Camp Bull Simons. The purpose of the Proposed Action is to provide childcare capacity to support the needs of the DoA personnel assigned to Camp Bull Simons as well as DAF personnel living north of the ETTC. The Proposed Action is needed to address the current childcare deficiencies and hardships experienced by DoA and DAF military families residing north of the ETTC. The distance to the existing child development centers (CDCs) on Eglin Main and Hurlburt Field is too great to support these military families where they live and work. The DoA is proposing to provide childcare at a location to be determined on Camp Bull Simons. DAF is proposing to provide childcare at one or more of four alternative locations to include State Road (SR) 85 and Rattlesnake Bluff Road, Crestview West, Crestview Central, and Crestview East. None of the alternative locations are currently under the ownership or control of the federal government.

DATES: A public scoping period will take place starting from the date of this NOI publication in the **Federal Register** and will last for 30 days. This scoping period will be conducted in compliance with the National Environmental Policy Act (NEPA) and the National Historic Preservation Act pursuant to *Code of Federal Regulations* title 36, section 800.2(d), which will also fulfill the section 106 requirements for public notification. Identification of potential alternatives, information, and analyses relevant to the Proposed Action are requested and will be accepted at any time during the EIS process. To ensure DAF has sufficient time to consider public input in the preparation of the Draft EIS, scoping comments should be submitted to *96CEG.CEIEA.NEPAPublicComments@us.af.mil* within the scoping period. The Draft EIS is anticipated in Winter 2024, which will include a public hearing held in the city of Crestview as part of the 45-day comment period. The Final EIS is anticipated in Summer 2024. The Record of Decision would be approved and signed no earlier than 30 days after the Final EIS.

ADDRESSES: The Eglin public website (*https://www.eglin.af.mil/About-Us/Eglin-Documents/*) provides information on the EIS and the scoping process (*e.g.,* environmental documents, maps/figures, project details, etc.) as well as a downloadable comment form to complete and return either electronically or by mail. Scoping comments may also be submitted to Ms. Ilka Cole, 96th Test Wing Public Affairs, 101 West D Avenue, Room 238, Eglin AFB, FL 32542 or by email to *96CEG.CEIEA.NEPAPublicComments@us.af.mil.* EIS inquiries and requests for digital or print copies of scoping materials are available upon request at the email or mailing address provided. For printed material requests, the standard U.S. Postal Service shipping timeline will apply. Members of the public who want to receive future mailings informing them about the availability of the Draft and Final EIS are encouraged to submit a comment that includes their name and email or postal mailing address.

FOR FURTHER INFORMATION CONTACT: Ms. Ilka Cole, 96th Test Wing Public Affairs, 101 West D Avenue, Room 238, Eglin AFB, FL 32542; Telephone: (850) 882–2936; or email: *96CEG.CEIEA.NEPAPublicComments@us.af.mil.*

SUPPLEMENTARY INFORMATION: DAF proposes to construct one or more CDCs, each of which could accommodate up to 305 children, The CDC on Camp Bull Simons is expected to accommodate 232 children who cannot be accommodated by current facilities. The new facilities would measure up to 37,600 square feet (SF) plus an additional 75,000 SF parking lot and access roads. Each new facility would require a minimum of 14 acres to accommodate antiterrorism/force protection standoff measures. Six alternatives, including a no action alternative, have been identified by the 96th Civil Engineer Group and the 7th Special Forces Group as potential sites for a permanent CDC facility:

1. No Action—A CDC would not be constructed within the areas north of the ETTC. This alternative services as a benchmark against which the other alternatives can be compared.

2. Alternative 1, Camp Bull Simons—Construct a new CDC on Camp Bull Simons in the northern portion of the ETTC.

3. Alternative 2, SR 85 and Rattlesnake Bluff Road—Construct a new CDC in the northern portion of the ETTC near the intersection of SR 85 and Rattlesnake Bluff Road. As part of this alternative, the DAF would need to construct a traffic overpass.

4. Alternative 3, Crestview West—Under this alternative, the DAF would acquire approximately 14.1 acres of commercially available real estate property between Whitehurst Lane and Point Center Road within the city of Crestview to construct a CDC.

5. Alternative 4, Crestview Central—Under this alternative, the DAF would acquire approximately 38.5 acres of commercially available real estate property located on Retta Lane within the city of Crestview to construct a CDC.

6. Alternative 5, Crestview East—Under this alternative, the DAF would acquire approximately 30 acres of commercially available real estate property located on Retta Lane and adjacent to Raspberry Road within the city of Crestview to construct a CDC.

Resource areas being analyzed for impacts in the EIS include air quality, water resources, geological resources, cultural resources, biological resources, land use, noise, infrastructure, hazardous materials and wastes, socioeconomics, environmental justice, and safety. The DAF will consult with appropriate regulatory agencies and federally-recognized Native American Tribes to determine the potential for significant impacts. Consultation will be incorporated into the preparation of the EIS and will possibly include, but not be limited to, consultation under section 7 of the Endangered Species Act, and consultation under section 106 of the National Historic Preservation Act. A federal Coastal Zone Management Act determination will be conducted and coordinated with the Florida State Clearinghouse to determine consistency of the action with the Florida Coastal Management Program. Specific environmental permits will be identified as part of the Clearinghouse review. At a minimum, the DAF anticipates permits associated with the Clean Air Act and Clean Water Act will be required. An Environmental Resource Permit will also be required

from the state of Florida for any potential wetland impacts and/or stormwater drainage modifications.

Lead and Cooperating Agency Status: The DAF is the lead federal agency for this EIS action. Both the U.S. Army and the city of Crestview are participating in the DAF EIS process as cooperating agencies.

Scoping and Agency Coordination: To define the full range of issues to be evaluated in the EIS effectively, the DAF will determine the scope of the analysis by soliciting comments from interested local, state, and federal elected officials and agencies, federally recognized Native American Tribes, as well as interested members of the public and others.

Implementation of the Proposed Action to expand childcare services in the area north of the ETTC at Eglin AFB, FL would potentially impact wetlands and/or floodplains and would therefore be subject to Executive Order (E.O.) 11990, ''Protection of Wetlands,'' and E.O. 11988, ''Floodplain Management.'' Regulatory agencies with special expertise in wetlands and floodplains, such as the U.S. Army Corps of Engineers, will be contacted and asked to comment. Consistent with E.O. 11988 and E.O. 11990, this NOI initiates early public review of the alternatives and invites public comments and identification of other potential alternatives. Implementation of the Proposed Action also has the potential to impact historic properties. Consultation with the appropriate State Historic Preservation Officer and federally-recognized Native American Tribes will occur as part of this process. The completion of consultations and any required cultural resources fieldwork will comply with section 106 of the National Historic Preservation Act, and this compliance will assist with the development and selection of alternatives by assessing ways to avoid, minimize, or mitigate any adverse effects to historic properties. The documents produced during the section 106 process will be included in the NEPA document, as an appendix. Concurrent with the publication of this NOI, public scoping notices will be announced locally inviting the public to identify and submit comments on potential alternatives, information, and analyses relevant to the Proposed Action as part of the EIS process.

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–18107 Filed 8–22–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, September 20, 2023; 1:00 p.m. to 5:00 p.m. MDT.

ADDRESSES: This hybrid meeting will be open to the public in person and via WebEx. To attend virtually, please contact the Northern New Mexico Citizens Advisory Board (NNMCAB) Executive Director (below) no later than 5:00 p.m. MDT on Friday, September 15, 2023.

Hotel Don Fernando de Taos, 1005 Paseo del Pueblo Sur, Taos, New Mexico 87571

FOR FURTHER INFORMATION CONTACT: Menice B. Santistevan, NNMCAB Executive Director, by Phone: (505) 699–0631 or Email: *menice.santistevan@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

- Presentation on Aggregate Areas at Los Alamos National Laboratory
- Agency Updates

Public Participation: The in-person/online virtual hybrid meeting is open to the public in person or virtually, via WebEx. Written statements may be filed with the Board no later than 5:00 p.m. MDT on Friday, September 15, 2023, or within seven days after the meeting by sending them to the NNMCAB Executive Director at the aforementioned email address. Written public comments received prior to the meeting will be read into the record. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to submit public comments should follow as directed above.

Minutes: Minutes will be available by emailing or calling Menice Santistevan, NNMCAB Executive Director, at *menice.santistevan@em.doe.gov* or at (505) 699–0631.

Signed in Washington, DC, on August 17, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–18115 Filed 8–22–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–527–000]

Northern Utilities, Inc. D/B/A Unitil; Notice of Application and Establishing Intervention Deadline

Take notice that on August 7, 2023, Northern Utilities Inc. D/B/A Unitil (Northern), Six Liberty Lane West, Hampton, NH 03842–1720, filed an application under section 7(f) of the Natural Gas Act (NGA), and part 157 of the Commission's regulations requesting authorization for its Service Territory Determination (Project). Northern respectfully requests that the Commission grant it a determination of a service area within which Northern may: (i) operate a minimal amount of piping across the New Hampshire-Massachusetts border in order to distribute and deliver natural gas to New Hampshire retail customers, and (ii) without further Commission authorization, enlarge or expand its facilities in its Salem, New Hampshire service territory. This determination will allow Northern to transport natural gas through a distribution line that receives gas in New Hampshire, crosses the Massachusetts State line into the town of Methuen, Massachusetts and then crosses back to New Hampshire for distribution to ultimate consumers in New Hampshire. Northern serves no consumers in Massachusetts through the distribution facilities at issue, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*www.ferc.gov*) using the ''eLibrary''

link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room. For assistance, contact the Federal Energy Regulatory Commission at *FercOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY (202) 502–8659.

Any questions regarding the proposed project should be directed to Randall S. Rich, Pierce Atwood LLP, 1875 K Street NW, Suite 700, Washington, DC 20006 by phone at 202–530–6424, or by email at *rrich@piereatwood.com.*

Pursuant to section 157.9 of the Commission's Rules of Practice and Procedure,[1] within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file comments on the project, you can protest the filing, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on September 7, 2023. How to file protests, motions to intervene, and comments is explained below.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections, to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be.

Protests

Pursuant to sections 157.10(a)(4)[2] and 385.211[3] of the Commission's regulations under the NGA, any person[4] may file a protest to the application. Protests must comply with the requirements specified in section 385.2001[5] of the Commission's regulations. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

To ensure that your comments or protests are timely and properly recorded, please submit your comments on or before September 7, 2023.

There are three methods you can use to submit your comments or protests to the Commission. In all instances, please reference the Project docket number CP23–527–000 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments or protests electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov)* under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments or protests by mailing them to the following address below. Your written comments must reference the Project docket number (CP23–527–000).

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. *However, the filing of a comment alone will not serve to make the filer a party to the proceeding.* To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,[6] has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure[7] and the regulations under the NGA[8] by the intervention deadline for the project, which is September 7, 2023. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://*

[1] 18 CFR (Code of Federal Regulations) 157.9.

[2] 18 CFR 157.10(a)(4).

[3] 18 CFR 385.211.

[4] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[5] 18 CFR 385.2001.

[6] 18 CFR 385.102(d).

[7] 18 CFR 385.214.

[8] 18 CFR 157.10.

www.ferc.gov/resources/guides/how-to/intervene.asp.

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP23–527–000 in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov)* under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Intervention.'' The eFiling feature includes a document-less intervention option; for more information, visit *https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf;* or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below. Your motion to intervene must reference the Project docket number CP23–527–000.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail or email at: Randall S. Rich, Pierce Atwood LLP, 1875 K Street NW, Suite 700, Washington, DC 20006 or at *rrich@piereatwood.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online. Service can be via email with a link to the document.

All timely, unopposed [9] motions to intervene are automatically granted by operation of Rule 214(c)(1).[10] Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.[11] A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Intervention Deadline: 5:00 p.m. Eastern Time on September 7, 2023.

Dated: August 17, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–18128 Filed 8–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5596–020]

Town of Bedford, Virginia; Notice of Intent To Prepare an Environmental Assessment

On April 30, 2021, the Town of Bedford, Virginia filed an application for a new major license for the 5.0-megawatt Bedford Hydroelectric Project (Bedford Project or project; FERC No. 5596). The Bedford Project is located on the James River, near the Town of Bedford, in Bedford and Amherst counties, Virginia.

In accordance with the Commission's regulations, on May 31, 2023, Commission staff issued a notice that the project was ready for environmental analysis (REA notice). Based on the information in the record, including comments filed on the REA notice, staff does not anticipate that licensing the project would constitute a major federal action significantly affecting the quality of the human environment. Therefore, staff intends to prepare an Environmental Assessment (EA) on the application to license the Bedford Project.

The EA will be issued and circulated for review by all interested parties. All comments filed on the EA will be analyzed by staff and considered in the Commission's final licensing decision.

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues EA.	January 2024.[1]
Comments on EA	February 2024.

Any questions regarding this notice may be directed to Andy Bernick at (202) 502–8660 or *andrew.bernick@ferc.gov.*

Dated: August 17, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–18127 Filed 8–22–23; 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: EC23–112–000.

Applicants: Elliott Associates, L.P., Elliott International, L.P., The Liverpool Limited Partnership.

Description: Amendment to August 11, 2023, Joint Application for Authorization Under Section 203 of the Federal Power Act of Elliott Associates, L.P., et al.

Filed Date: 8/15/23.

Accession Number: 20230815–5177.

Comment Date: 5 p.m. ET 9/5/23.

Docket Numbers: EC23–118–000.

Applicants: Yellow Pine Solar, LLC, Yellow Pine Solar Interconnect, LLC.

[9] The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

[10] 18 CFR 385.214(c)(1).

[11] 18 CFR 385.214(b)(3) and (d).

[1] The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) (2022) require that EAs be completed within 1 year of the federal action agency's decision to prepare an EA. *See* National Environmental Policy Act, 42 U.S.C. 4321 *et seq., as amended by* section 107(g)(1)(B)(iii) of the Fiscal Responsibility Act of 2023, Public Law 118–5, section 4336a, 137 Stat. 42.

Description: Errata to August 10, 2023, Joint Application for Authorization Under Section 203 of the Federal Power Act of Yellow Pine Solar, LLC, et al.

Filed Date: 8/14/23.

Accession Number: 20230814–5285.

Comment Date: 5 p.m. ET 8/31/23.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–259–000.

Applicants: Wildflower Solar 2 LLC.

Description: Wildflower Solar 2 LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.

Filed Date: 8/17/23.

Accession Number: 20230817–5088.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: EG23–260–000.

Applicants: Wildflower Solar 3 LLC.

Description: Wildflower Solar 3 LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.

Filed Date: 8/17/23.

Accession Number: 20230817–5091.

Comment Date: 5 p.m. ET 9/7/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER18–92–004.

Applicants: Carroll County Energy LLC.

Description: Compliance filing: Informational Filing Regarding Transfer of Ownership to be effective N/A.

Filed Date: 8/17/23.

Accession Number: 20230817–5066.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER23–1372–003.

Applicants: Gaucho Solar LLC.

Description: Compliance filing: Informational Filing Pursuant to Schedule 2 of the PJM OATT & Request for Waiver to be effective N/A.

Filed Date: 8/17/23.

Accession Number: 20230817–5123.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER23–2040–001.

Applicants: New York Independent System Operator, Inc.

Description: Tariff Amendment: NYISO Deficiency Response re: DER and Aggregation Market Rule Changes to be effective 12/31/9998.

Filed Date: 8/17/23.

Accession Number: 20230817–5079.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER23–2391–001.

Applicants: Public Service Company of New Mexico.

Description: Tariff Amendment: Supplemental Filing to PNM CAISO Phase 2 Enhancements to be effective 7/1/2023.

Filed Date: 8/17/23.

Accession Number: 20230817–5097.

Comment Date: 5 p.m. ET 8/28/23.

Docket Numbers: ER23–2492–001.

Applicants: Gunvor USA LLC.

Description: Tariff Amendment: Amendment to 1 to be effective 9/24/2023.

Filed Date: 8/17/23.

Accession Number: 20230817–5110.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER23–2638–000.

Applicants: NRG Business Marketing LLC.

Description: Baseline eTariff Filing: Notice of Succession and Request for Waiver to be effective 8/16/2023.

Filed Date: 8/16/23.

Accession Number: 20230816–5142.

Comment Date: 5 p.m. ET 9/6/23.

Docket Numbers: ER23–2639–000.

Applicants: NRG Business Marketing LLC.

Description: Compliance filing: Notice of Succession and Request for Waiver to be effective 8/16/2023.

Filed Date: 8/16/23.

Accession Number: 20230816–5145.

Comment Date: 5 p.m. ET 9/6/23.

Docket Numbers: ER23–2640–000.

Applicants: NorthWestern Corporation.

Description: NorthWestern Corporation submits Average System Cost Filing for Sales of Electric Power to the Bonneville Power Administration, FY 2024–2025.

Filed Date: 8/11/23.

Accession Number: 20230811–5187.

Comment Date: 5 p.m. ET 9/1/23.

Docket Numbers: ER23–2641–000.

Applicants: NRG Power Marketing LLC.

Description: Tariff Amendment: Notice of Cancellation and Request for Waiver to be effective 8/1/2023.

Filed Date: 8/16/23.

Accession Number: 20230816–5147.

Comment Date: 5 p.m. ET 9/6/23.

Docket Numbers: ER23–2642–000.

Applicants: NRG Power Marketing LLC.

Description: Tariff Amendment: Notice of Cancellation and Request for Waiver to be effective 8/1/2023.

Filed Date: 8/16/23.

Accession Number: 20230816–5150.

Comment Date: 5 p.m. ET 9/6/23.

Docket Numbers: ER23–2643–000.

Applicants: Portland General Electric Company.

Description: Portland General Electric Company submits Average System Cost Rate Filing for Sales of Electric Power to the Bonneville Power Administration, FY 2024–2025.

Filed Date: 8/11/23.

Accession Number: 20230811–5188.

Comment Date: 5 p.m. ET 9/1/23.

Docket Numbers: ER23–2644–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Notice of Cancellation of WMPA, Service Agreement No. 5666; Queue No. AF1–033 to be effective 10/16/2023.

Filed Date: 8/17/23.

Accession Number: 20230817–5026.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER23–2645–000.

Applicants: Public Service Company of New Hampshire.

Description: § 205(d) Rate Filing: First Amend—Engineering Design Procurement Agreement—NECEC Transmission LLC to be effective 8/18/2023.

Filed Date: 8/17/23.

Accession Number: 20230817–5029.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER23–2646–000.

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: Hecate Energy Cedar Springs Solar LGIA Filing to be effective 8/7/2023.

Filed Date: 8/17/23.

Accession Number: 20230817–5054.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER23–2647–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7042; Queue No. AE1–245 to be effective 7/18/2023.

Filed Date: 8/17/23.

Accession Number: 20230817–5100.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER23–2648–000.

Applicants: Carroll County Energy LLC.

Description: Request for Limited Waiver of Carroll County Energy LLC.

Filed Date: 8/17/23.

Accession Number: 20230817–5103.

Comment Date: 5 p.m. ET 9/7/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, 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 17, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–18109 Filed 8–22–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[CERCLA–02–2023–2003; FRL–11171–01–R2]

Proposed CERCLA Cost Recovery Settlement for the Frankfort Asbestos Superfund Site, Village of Frankfort, Herkimer County, New York

AGENCY: Environmental Protection Agency.

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), notice is hereby given by the U.S. Environmental Protection Agency (''EPA''), Region 2, of a proposed cost recovery settlement agreement (''Settlement'') pursuant to CERCLA, with Crown Container Transfer Station Co., Inc. (''Settling Party'') for the Frankfort Asbestos Superfund Site (''Site''), located in the Village of Frankfort, Herkimer County, New York.

DATES: Comments must be submitted on or before September 22, 2023.

ADDRESSES: Requests for copies of the proposed Settlement and submission of comments must be via electronic mail. Comments should reference the Frankfort Asbestos Superfund Site, Frankfort, Herkimer County, New York, Index No. CERCLA–02–2023–2003. For those unable to communicate via electronic mail, please contact the EPA employee identified below.

FOR FURTHER INFORMATION CONTACT: Jocelyn Scott, Attorney, Office of Regional Counsel, New York/Caribbean Superfund Branch, U.S. Environmental Protection Agency, 290 Broadway, 17th Floor, New York, NY 10007–1866. Email: *scott.jocelyn@epa.gov* Telephone: 212–637–3179.

SUPPLEMENTARY INFORMATION: The Settling Party will pay $55,000 to the EPA Hazardous Substance Superfund in partial reimbursement of EPA's past response costs paid in connection with the Site. This payment shall be made within 30 days of the Effective Date of the Settlement. The Settlement includes a covenant by EPA not to sue or to take administrative action against the Settling Party pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), with regard to EPA's past response costs as provided in the Settlement. For thirty (30) days following the date of publication of this notice, EPA will receive written comments relating to the Settlement. EPA will consider all comments received and may modify or withdraw its consent to the Settlement if comments received disclose facts or considerations that indicate that the proposed Settlement is inappropriate, improper, or inadequate. EPA's response to any comments received will be available for public inspection at EPA Region 2, 290 Broadway, New York, New York 10007–1866.

Pasquale Evangelista,

Director, Superfund & Emergency Management Division U.S. Environmental Protection Agency Region 2.

[FR Doc. 2023–18097 Filed 8–22–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0967; FR ID 164365]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before October 23, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

OMB Control No.: 3060–0967.

Title: Section 79.2, Accessibility of Programming Providing Emergency Information, and Emergency Information; Section 79.105, Audio Description and Emergency Information Accessibility Requirements for All Apparatus; Section 79.106, Audio Description and Emergency Information Accessibility Requirements for Recording Devices.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households; Business or other for-profit; Not-for-profit institutions; and State, Local, or Tribal Government.

Number of Respondents and Responses: 158 respondents; 261 responses.

Estimated Time per Response: 0.5 to 5 hours.

Frequency of Response: Annual and on occasion reporting requirements;

Recordkeeping requirement; Third party disclosure requirement.

Obligation to Respond: Voluntary. The statutory authority for the collection is contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303, 330(b), 613, and 617.

Total Annual Burden: 275 hours.

Annual Cost Burden: $15,300.

Needs and Uses: In 2000, the Commission adopted rules to require video programming distributors (VPDs) to make emergency information provided in the audio portion of the programming accessible to viewers who have hearing disabilities. *Second Report and Order,* MM Docket No. 95–176, FCC 00–136. Later that year, to ensure that televised emergency information is accessible to viewers who are blind or visually impaired, the Commission modified its rules to require VPDs to make emergency information audible when provided in the video portion of a regularly scheduled newscast or a newscast that interrupts regular programming, and to provide an aural tone when emergency information is provided visually during regular programming (*e.g.,* through screen crawls or scrolls). *Report and Order,* MM Docket No. 99–339, FCC 00–258.

In 2013, the Commission adopted rules related to accessible emergency information and apparatus requirements for emergency information and video description. *Report and Order and Further Notice of Proposed Rulemaking,* MB Docket Nos. 12–107 and 11–43, FCC 13–45. Specifically, the Commission's rules require that VPDs and video programming providers (VPPs) (including program owners) make emergency information accessible to individuals who are blind or visually impaired by using a secondary audio stream to convey televised emergency information aurally, when such information is conveyed visually during programming other than newscasts. The Commission's rules also require certain apparatus that receive, play back, or record video programming to make available audio description services and accessible emergency information.

In 2015, the Commission adopted rules to require the following: (1) apparatus manufacturers must provide a mechanism that is simple and easy to use for activating the secondary audio stream to access audible emergency information; and (2) starting no later than July 10, 2017, multichannel video programming distributors (MVPDs) must pass through the secondary audio stream containing audible emergency information when it is provided on linear programming accessed on second screen devices (*e.g.,* tablets, smartphones, laptops and similar devices) over their networks as part of their MVPD services. *Second Report and Order and Second Further Notice of Proposed Rulemaking,* MB Docket No. 12–107, FCC 15–56.

Finally, in 2020, the Commission adopted rules that included modernizing the term ''video description'' in the subject rules to the more widely understood ''audio description.'' *Report and Order,* MB Docket No. 11–43, FCC 20–155. These rules are codified at 47 CFR 79.2, 79.105, and 79.106.

Information Collection Requirements

(a) Complaints alleging violations of the emergency information rules.

Section 79.2(c) of the Commission's rules provides that a complaint alleging a violation of § 79.2 of its rules, may be transmitted to the Consumer and Governmental Affairs Bureau by any reasonable means, such as the Commission's online informal complaint filing system, letter, facsimile transmission, telephone (voice/TRS/TTY), internet email, audio-cassette recording, Braille, or some other method that would best accommodate the complainant's disability. After the Commission receives the informal complaint, the Commission notifies the VPD or VPP of the complaint, and the VPD or VPP has 30 days to reply.

(b) Complaints alleging violations of the apparatus emergency information and audio description requirements.

Complaints alleging violations of the rules containing apparatus emergency information and audio description requirements, 47 CFR 79.105–79.106, may be transmitted to the Consumer and Governmental Affairs Bureau by any reasonable means, such as the Commission's online informal complaint filing system, letter in writing or Braille, facsimile transmission, telephone (voice/TRS/TTY), email, or some other method that would best accommodate the complainant's disability. Given that the population intended to benefit from the rules adopted will be blind or visually impaired, if a complainant calls the Commission for assistance in preparing a complaint, Commission staff will document the complaint in writing for the consumer. The Commission will forward such complaints, as appropriate, to the named manufacturer or provider for its response, as well as to any other entity that Commission staff determines may be involved, and may request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violations of Commission rules.

(c) Requests for Commission determination of technical feasibility of emergency information and audio description apparatus requirements.

The requirements pertaining to apparatus designed to receive or play back video programming apply only to the extent they are ''technically feasible.'' Parties may raise technical infeasibility as a defense when faced with a complaint alleging a violation of the apparatus requirements or they may file a request for a ruling under section 1.41 of the Commission's rules as to technical infeasibility before manufacturing or importing the product.

(d) Requests for Commission determination of achievability of emergency information and audio description apparatus requirements.

The requirements pertaining to certain apparatus designed to receive, play back, or record video programming apply only to the extent they are achievable. Manufacturers of apparatus that use a picture screen of less than 13 inches in size and of recording devices may petition the Commission, pursuant to 47 CFR 1.41, for a full or partial exemption from the audio description and emergency information requirements before manufacturing or importing the apparatus. Alternatively, manufacturers may assert that a particular apparatus is fully or partially exempt as a response to a complaint, which the Commission may dismiss upon a finding that the requirements of this section are not achievable. A petition for exemption or a response to a complaint must be supported with sufficient evidence to demonstrate that compliance with the requirements is not achievable (meaning with reasonable effort or expense), and the Commission will consider four specific factors when making such a determination.

(e) Petitions for purpose-based waivers of emergency information and audio description apparatus requirements.

The Commission may waive emergency information and audio description apparatus requirements for any apparatus or class of apparatus that is (a) primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound, or (b) designed for multiple purposes, capable of receiving or playing video programming transmitted

simultaneously with sound but whose essential utility is derived from other purposes. The Commission will address any requests for a purpose-based waiver on a case-by-case basis, and waivers will be available prospectively for manufacturers seeking certainty prior to the sale of a device.

(f) Submission and review of consumer eligibility to receive an accessible set-top box.

The Commission granted DIRECTV a waiver with respect to the set-top box models on which it is not able to implement audio functionality for emergency information, but conditioned such relief by requiring DIRECTV to provide, upon request and at no additional cost to customers who are blind or visually impaired, a set-top box model that is capable of providing aural emergency information. DIRECTV may require customers who are blind or visually impaired to submit reasonable documentation of disability to DIRECTV as a condition to providing the box at no additional cost.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–18091 Filed 8–22–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 23–267; DA 23–678; FR ID 165332]

Designating Applications To Renew Low Power Television Stations Licensed to Jennifer Juarez

AGENCY: Federal Communications Commission.

ACTION: Notice; Hearing Designation Order/Order to Show Cause

SUMMARY: In this document, the Media Bureau of the Federal Communications Commission commences a hearing proceeding to determine, among other things, if the named licensee, Jennifer Juarez, and Antonio Cesar Guel, former licensee through his ownership of Hispanic Christian Community Network, Inc. (HCCN): lacked candor and misrepresented material facts to the Commission; abused FCC processes by engaging in a sham assignment of stations that apparently allowed Guel's improper and continued control of them; possess the requisite character qualifications to be a Commission licensee and, as a result, whether the stations' renewal applications should be denied/dismissed and the stations cancelled or revoked, whether to impose forfeitures against the parties, and whether to issue an order directing Guel/HCCN to cease and desist from violating provisions of Commission rules and the Communications Act of 1934, as amended.

DATES: Each party to the proceeding (except for the Chief, Enforcement Bureau), in person or by counsel, shall file with the Commission, by August 31, 2023, a written appearance stating the party will appear on the date fixed for hearing and present evidence on the issues specified herein.

FOR FURTHER INFORMATION CONTACT: Dana E. Leavitt, Video Division, Media Bureau at (202) 418–1317 or *Dana.Leavitt@fcc.gov.* For additional information concerning the Paperwork Reduction Act (PRA) information collection requirements contained in this document, contact Cathy Williams at 202–418–2918, or *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Bureau's HDO in MB Docket No. 23–267, DA 23–678, adopted and released on August 10, 2023. The full text of this document is available for download at *https://docs.fcc.gov/public/attachments/DA-23-678A1.pdf.* To request materials in accessible formats (braille, large print, computer diskettes, or audio recordings), please send an email to *FCC504@fcc.gov* or call the Consumer & Government Affairs Bureau at (202) 418–0530 (VOICE), (202) 418–0432 (TTY).

Synopsis

Hearing Designation Order to Determine, Inter Alia, Whether HCCN and/or Antonio Cesar Guel are Real Parties in Interest in Pending Applications to Renew Authorizations for Low-Power Television Stations Licensed to Jennifer Juarez; Whether the Parties Engaged in a Sham Transaction to Allow HCCN/Guel Continued Control of the Stations and Abused Commission Processes; Whether the Parties Engaged in Misrepresentation and/or Lack of Candor Before the Commission; Whether the Parties Possess the Requisite Character Qualifications to be Licensees; and Whether Forfeitures Should be Imposed and a Cease and Desist Order Should be Issued Against HCCN and/or Guel

In this *Order to Show Cause Why A Cease and Desist Order Should Not Be Issued, Order to Show Cause Why an Order of Revocation Should Not Be Issued, Hearing Designation Order, Notice of Opportunity for Hearing, and Notice of Apparent Liability for Forfeiture* (HDO), the Media Bureau (Bureau) of the Federal Communications Commission (Commission or FCC) asks the ALJ to determine the character qualifications of the three designated entities, Hispanic Christian Community Network, Inc., Antonio Cesar Guel, and Jennifer Juarez and whether they possess the requisite character qualifications to hold broadcast licenses, whether to cancel or revoke 7 low power TV (LPTV) stations, and whether to issue a cease and desist order against HCCN and Antonio Cesar Guel to stop violating the Act and our rules. The HDO is the result of an investigation that began in 2018 to explore the extent to which Hispanic Christian Community Network, Inc. (HCCN), Antonio Cesar Guel (Guel), and Jennifer Juarez (Juarez) may have violated provisions of the Communications Act of 1934, as amended (the Act), and our rules pertaining to foreign ownership limits, unauthorized transfers of control/real-party-in-interest issues, and truthful statements made to the FCC. The HDO also provides notice of apparent liability against the entities for their respective violations and failures to disclose material information in their assignment application, and lack of candor and misrepresentation of material facts in responding to Bureau inquiries.

1. Background

The Parties: Jennifer Juarez, aka ''Jenifer'' Juarez, is the named licensee of the Stations. Juarez states she had no broadcast experience when she agreed in 2010 to acquire the stations from HCCN, which was 100% directly owned by Antonio Cesar Guel, her uncle. She avers that ''Antonio Cesar Guel helps us with keeping the stations on air. He provides programming from some of the churches or pastors that he knows and is also our representative with some advertising agencies.'' Juarez further avers she has no personnel but that Guel ''provides a lot of the technical assistance and advice I need'' and she receives ''a great deal of help from my uncle in getting help with contacts in the industry, contracts, programming, building the stations, moving the stations, etc.'' Juarez also states that she relies on and receives a great deal of help from her cousin Maria and some help from her cousin Ana (Antonio Guel's daughters), ''as they also are in the broadcast business. As a result, I have not really had to put much time into the stations.'' Juarez further avers she receives ''a great deal of help from my attorney and outside engineer,'' neither of whom she names.

Guel has been a broadcast licensee since 2005. He was the 100% owner of HCCN, which applied for and bought

and sold dozens of LPTV and LPFM construction permits and stations since 2005. In addition to purchasing stations, Guel has also served as a consultant to several other LPTV and LPFM licensees, particularly those involving Hispanic religious broadcasters. Guel and HCCN were defendants in at least two civil law suits involving the sale of broadcast construction permits and promising to build the stations but failing to do so. Those cases appear to have served as triggers for Guel's/HCCN's actions regarding the sale of the stations to Juarez.

For example, in the earlier case, *Unidad,* Guel, HCCN, et al., were alleged to have defrauded a church regarding the sale of broadcast stations. *See Unidad de Fe y Amor Corporation* v. *Iglesia Jesucristo Es Mi Refugio, Inc., Robert Gomez, HCCN, Inc., Antonio Cesar Guel,* No. C 08–4910 RS, 2009 WL 1813998 (N.D. Cal. June 25, 2009) (*Unidad*). The parties in that case ultimately settled the suit in 2009 and required Guel/HCCN, et al., to make monthly payments. In February 2010, however, the plaintiffs grew concerned that Guel/HCCN and the other defendants might default on payments, so the plaintiffs petitioned the court to enforce the settlement. This lawsuit appears to have spurred Guel/HCCN to sell LPTV stations to Juarez, because the very next month, Guel and Juarez executed an agreement for her to buy 17 stations from Guel/HCCN. Although Juarez claims that Guel told her he was struggling financially due to the economy and ''offered to sell us some television channels [sic] and also offered us financing [sic] the channels through his company,'' it is unclear how Guel would have financed Juarez's purchase of the stations if he were struggling financially.

The HCCN-Juarez Transaction: On March 12, 2010, Guel, as president of HCCN, and Juarez executed an asset purchase agreement (APA) whereby she agreed to pay HCCN $320,000 to purchase 16 of its LPTV stations (including the 7 at issue in the HDO) pursuant to a payment plan identified at Schedule 2.1. It was later discovered that Juarez apparently was a minor in March 2010. (Under Texas law, a minor is typically ineligible to enter into such a contract.)

On March 15, 2010, HCCN filed with the Commission an application to assign 16 of its LPTV stations to ''Jenifer'' Juarez (which is not the legal spelling of her first name). Guel/HCCN and Juarez (Parties) attached the APA to the assignment application (Application) as an exhibit.

The Application required each Party to certify to the FCC that ''the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith. I acknowledge that all certifications and attached Exhibits are considered material representations.'' It also cautioned them that willful false statements are ''punishable by fine and/or imprisonment (U.S. Code, title 18, section 1001), and/or revocation of any station license or construction permit (U.S. Code, title 47, section 312(a)(1)), and/or forfeiture (U.S. code, title 47, section 503).'' Guel's signature on the Application affirmatively represented that the Parties' agreements complied fully with FCC rules and policies; that the documents provided ''embody the complete and final understanding between'' the Parties; and that HCCN had provided copies of all agreements for the sale/transfer of the stations, except for Schedule 2.1, which he represented contained ''private financial information, and was properly redacted pursuant to Commission policy established in LUJ, Inc.'' Juarez made a similar certification.

The Parties further agreed to comply with any condition imposed on it by the FCC with respect to its consent to the transaction. Guel, as 100% stockholder and president of HCCN, was apparently represented by attorney Dan Alpert. It does not appear that Juarez was represented by counsel in this transaction.

The Commission consented to the assignment based on the Parties' certifications that the transaction complied with FCC rules and policies (Grant). This Grant informed the Parties, in relevant part, that consummation of their transaction ''shall be completed within 90 days from the date'' of the Grant (*i.e.,* no later than July 25, 2010) and that ''notice in letter form thereof shall promptly be furnished to the Commission by the seller or buyer showing the date the acts necessary to effect the transaction were completed.'' The Grant further informed the Parties that the FCC would consider the sale complete upon the filing of the notice, at which point Juarez could begin operating the stations as the licensee. As specified in the APA, the closing was scheduled to take place no later than June 25, 2010.

In granting the assignment, however, the FCC was unaware of several material facts that the Parties had failed to disclose. For example, Juarez certified she had ''sufficient net liquid assets [] on hand or are available from committed sources to consummate the transaction and operate the station(s) for three months.'' It is unclear how an apparent teenager with no broadcast experience could finance that purchase, and the Parties did not disclose that Guel purportedly was financing Juarez's purchase of all the stations on a payment plan described in Schedule 2.1 of the APA, which they withheld by characterizing it as private financial information that could be excluded from the Application pursuant to FCC precedent. (To this day, Guel/HCCN and Juarez have not produced a copy of Schedule 2.1, and it is not clear if such a document ever existed or if the claim in the Application about Schedule 2.1 was false.) In fact, this type of seller financing of a broadcast transaction is not ''private financial information,'' but rather was required to be included in the Application because it was directly relevant to the issue of whether the transaction complies with the Rules, particularly the Rule prohibiting a seller from having a reversionary interest in a broadcast station. The Parties also did not disclose the terms of an unwritten side agreement, whereby payments for the Stations would be made after ''consummating'' the sale, and Guel would hold the closing papers and not file the requisite consummation notice until some unspecified time after ''payments were made.''

The Parties did not file the requisite notice (or the requisite ownership report) within 30 days of purportedly consummating the transaction. They instead waited four years, when HCCN's counsel, Alpert, filed the notice on November 10, 2014, certifying that HCCN and Juarez had closed the sale on July 25, 2010, the deadline indicated in the Grant. The same counsel obtained an FCC Registration Number (FRN), required to conduct business with the FCC, for Juarez on December 1, 2014. In the spring of 2016, Juarez filed applications to renew the licenses of three of the captioned stations, two of which remain pending. In 2021, Juarez filed applications to renew the licenses of four of the captioned stations, and in 2022 she filed an application to renew the seventh station; these applications are likewise pending.

HCCN Continued Filing Applications Post-Consummation. If the Parties had in fact closed the sale in July 2010, as required by their agreement and specified in the Grant, Juarez should have assumed control of the stations on July 25, 2010, and the Parties should have notified the Commission no later than August 24, 2010, via the requisite consummation notice. Yet actions taken by HCCN between July 2010 and November 2014 suggest that HCCN, not Juarez, continued to control and operate

the stations. Specifically, HCCN continued to hold itself out to the public as the licensee of the stations by filing with the FCC scores of applications or reports between July 25, 2010 and November 10, 2014, to wit: two biennial ownership reports; one change-of-address notice; and over 30 applications affecting the stations purportedly assigned to Juarez in July 2010. For example:

• On April 1, 2013, HCCN filed a renewal application for WESL–LP, one of the stations Juarez was presumably operating. That application was signed by ''Cesar A. Guel,'' president of HCCN, and certified that HCCN complied with statutory limits on foreign ownership.

• On December 20, 2013, HCCN filed a biennial ownership report for 40 stations, including those purportedly sold to Juarez. This report certified that, as of October 1, 2013, Antonio Guel was no longer an officer or director of HCCN but retained 100% direct ownership of the voting and equity rights for HCCN's outstanding stock. Cesar certified that he was HCCN's sole officer and director and that Guel was a U.S. citizen. Cesar also certified that he and Guel were not related as parent/child. The Commission subsequently learned that Cesar Antonio Guel is the son of Antonio Cesar Guel.

• On April 1, 2014, HCCN filed applications to renew the licenses of stations KZAB–LP and KJTN–LP. Cesar signed the applications, certifying that HCCN complied with statutory foreign ownership limits. HCCN, however, did not timely withdraw or amend these applications that remained pending after the purported May 19, 2014 realization that Guel, as a non-U.S. citizen, could not hold a direct interest greater than 20% in a corporate FCC licensee such as HCCN.

Most notably, in August 2014, HCCN filed applications to transfer all of the stations purportedly sold to Juarez in 2010 to another entity; HCCN described the sale as a ''corporate reorganization to another corporation'' for which no consideration was being paid. Guel/HCCN planned to sell the stations to Hispanic Family Christian Network, Inc. (HFCN), a company that Guel founded in 2007. Guel at some later date apparently transferred ownership of HFCN to family members, including Juarez. Documents submitted to the FCC indicate that Maria C. Guel, HFCN's president, notified the Texas Secretary of State that Juarez had been named a director as of February 5, 2010, and would serve as HFCN's treasurer. Juarez's term as a member of HFCN's board of directors would run through May 5, 2013. Various documents filed with the FCC echo this, with HFCN reporting that Juarez held a one-third voting interest in HFCN in 2010 continuing through at least 2021.

In June and September 2014, the FCC received petitions objecting to the renewal and assignment of the stations that HCCN had purportedly sold to Juarez in 2010. The petitions were filed by Michael Couzens, an attorney who represented pastors a 2014 civil case in which Guel and HCCN were eventually adjudged to have defrauded the plaintiff pastors based on Guel/HCCN's and other defendants' false promises to sell and construct LPTV stations in California. *See Jose Gonzalez et al.* v. *Iglesia Jesucristo Es Mi Refugio, Inc., HCCN, and Antonio Cesar Guel,* No. BC 501688, Los Angeles County Superior Court) (default judgment issued Feb. 26, 2016). As a result of that litigation, petitioner Couzens learned that Guel was not a natural born citizen of the United States, had not become a naturalized U.S. citizen and, therefore, was not, at that time, a U.S. citizen. The petitioner shared that information with the FCC and argued that, as a non-U.S. citizen and 100% owner of HCCN, Guel had falsely certified compliance with statutory limits on foreign ownership in dozen of filings with the FCC and had no legal right to hold or assign the stations. After that disclosure to the FCC, Guel/HCCN filed the four-years' delinquent notice that the Parties had closed the sale of stations to Juarez on July 25, 2010. On the following day, November 11, 2014, HCCN filed for bankruptcy protection.

The Investigation. As a result of allegations raised in the petitions, coupled with HCCN's conflicting filings and the fact that the Parties hadn't filed a timely consummation notice, the Media Bureau issued a pre-hearing designation letter (1.88 Letter) advising Juarez that the Bureau needed to evaluate potential statutory and/or FCC rule violations. Accordingly, the Bureau instructed Juarez to provide a written response, under penalty of perjury, to nine inquiries and explain, inter alia, the delay in filing the consummation notice and why HCCN had continued filing applications if Juarez had assumed control of the stations in July 2010. It instructed her to provide evidence that she controlled the policies governing the Stations' programming, personnel, and finances. It also instructed Juarez to provide documentary evidence supporting her responses and an affidavit, signed under penalty of perjury, stating that since July 25, 2010, she had been ''the licensee and in control of the day-to-day operations of the stations in a manner that is consistent with Commission rules and precedent; each station has operated pursuant to the parameters authorized in its license; and at no time has any station been silent for a consecutive twelve month period. To the extent such statements cannot be provided, please provide a detailed explanation.''

The 1.88 Response. Juarez filed a timely response on April 23, 2018 (Response). To describe the closing and explain the delinquent consummation notice, Juarez avers that ''the Closing papers were first prepared in May 2010 and were signed July [sic] 2010. The understanding I had with HCCN was that it would hold onto the papers and that the consummation notice would be filed as soon as payments were made for the stations.'' Juarez neither provides the date in July 2010 she claims to have signed the closing papers, nor explains why the closing certificates she provided were signed but undated and had retained the blank space to indicate when in May 2010 the Parties had signed the certificates. To explain why the Parties created this arrangement, Juarez referred the Bureau to a declaration from Guel that she included in her Response. Therein, Guel avers that HCCN's assets were ''under attack'' due to a lawsuit against him and HCCN, which purportedly led to HCCN's bankruptcy. He also averred that, as a result of the lawsuit, ''it was realized for the first time'' in 2014 that he was unqualified to be an FCC licensee as he was not a U.S. citizen. Guel further avers that one of his last acts before filing for HCCN's bankruptcy was to complete the transactions to ensure that assignees such as Juarez became the ''officially recognized licensees at the FCC.'' Guel adds that he had entered ''verbal arrangements'' whereby the assignees such as Juarez ''could run the stations, but HCCN would remain officially the named licensee with the FCC until such time as the majority of the amounts owed was paid.''

In the Response, Juarez and Guel both disclose that they had an oral agreement to delay filing the consummation notice until Juarez paid for the stations, but she could operate them in the interim. The Parties had not revealed this arrangement in the Application or APA, despite their respective certifications that the APA embodied the parties full agreement and complied with FCC rules and the Act. Additionally, neither Guel nor Juarez provided details explaining exactly how Guel ''financed'' her purchase of the stations, which the Parties also had failed to disclose in the APA. Juarez did not provide any evidence of payments or terms of such

financing. Further, Juarez does not provide any contemporaneous evidence to support her claim that she controlled the stations' personnel, finances, or programming since July 25, 2010, and the evidence she did provide of her purported control of the stations since November 2014 does not sufficiently support her claim.

Juarez further averred she held no stations other than those she purportedly acquired from Guel/HCCN in 2010.

2. Applicable Statutes and Rules

License Renewal Standard. Juarez's applications to renew the stations are currently pending before the Commission. Section 309(k) of the Act provides that the FCC is to grant a license renewal application if it finds, with respect to that station, during the previous license term (a) the station has served the public interest, convenience, and necessity, (b) there have been no serious violations by the licensee of the Act or the Rules, and (c) there have been no other violations of the Act or Rules which, taken together, would constitute a pattern of abuse. If the Commission is unable to make such a determination, it may deny the renewal application or grant it on such terms and conditions as are appropriate, including a short-term renewal. Prior to denying a renewal application, the Commission must provide notice and opportunity for a hearing conducted in accordance with section 309(e) of the Act and consider whether any mitigating factors justify the imposition of lesser sanctions. Allegations of misrepresentation are material considerations in a license renewal review.

Character Qualifications. The character of an applicant is among those factors that the FCC considers in determining whether an applicant has the requisite qualifications to be a Commission licensee. Section 312(a)(2) of the Act provides that the FCC may revoke any license if ''conditions com[e] to the attention of the Commission which would warrant it in refusing to grant a license or permit on the original application.'' Because the character of the applicant is among those factors the FCC considers in its review of applications to determine whether the applicant has the requisite qualifications to operate the station for which authority is sought, a character defect that would warrant the Commission's refusal to grant a license in the original application would likewise support a Commission determination to revoke a license or permit.

Misrepresentation and Lack of Candor. As court's have noted, ''applicants before the FCC are held to a high standard of candor and forthrightness.'' The Commission licenses tens of thousands of radio and television stations in the public interest, and therefore relies heavily on the completeness and accuracy of the submissions made to it. Thus, ''applicants . . . have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.'' The FCC ''refuse[s] to tolerate deliberate misrepresentations'' and may also premise a finding of lack of candor on omissions, the core of which is ''a failure to be completely forthcoming in the provision of information which could illuminate a decisional matter.''

Misrepresentation is a false statement of fact made with intent to deceive the Commission and is proscribed by our Rules. Section 1.17(a)(1) of the Rules states that no person shall, in any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading. Similarly, lack of candor (a concealment, evasion, or other failure to be fully informative, accompanied by an intent to deceive the Commission) is within the scope of the rule. A necessary element of both misrepresentation and lack of candor is intent to deceive. Fraudulent intent can be found from ''the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity.'' Intent can also be found from motive or a logical desire to deceive. False statements knowingly made to the Commission can be a basis for revocation of a license or construction permit.

Section 1.17(a)(2) of the Rules further requires that no person may provide, in any written statement of fact, ''material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.'' Thus, even absent an intent to deceive, a false statement may constitute an actionable violation of § 1.17 of the Rules if provided without a reasonable basis for believing that the material factual information it contains is correct and not misleading.

When reviewing FCC-related misconduct in the licensing context, the Commission evaluates whether the licensee will likely be forthright in future dealings with the Commission and will operate its station consistent with the requirements of the Act, the Rules and FCC policies. Indeed, the FCC's Character Qualifications Policy Statement acknowledges that, in assessing character qualifications in broadcasting matters, the relevant character traits the Commission is concerned with ''are those of 'truthfulness' and 'reliability.' '' Thus, misrepresentation would also demonstrate a lack of candor under the FCC's character qualifications policy. Because the FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing, courts have recognized that an applicant who deliberately makes misrepresentations or lacks candor may engage in disqualifying conduct. The FCC also has recognized that ''any violations of the Communications Act, Commission rules or Commission policies can be said to have a potential bearing on character qualifications.'' It therefore is appropriate to consider ''any violation of any provision of the Act, or of our Rules or policies, as possibly predictive of future conduct and, thus, as possibly raising concerns over the licensee's future truthfulness and reliability.'' Such violations also can be a basis for revocation of a license or construction permit.

Unauthorized Transfer of Control. Section 310(d) of the Act states that no ''station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control . . . to any person except upon application to the Commission and a Commission finding that the public interest, convenience, and necessity will be served thereby.'' Thus, under section 310(d) of the Act, the FCC prohibits *de facto,* as well as *de jure,* transfers of control of a station license, or any rights thereunder, without prior Commission consent.

In determining whether an entity has de facto control of a broadcast applicant or licensee, we have traditionally looked beyond legal title and financial interests to determine who holds operational control of the station. The FCC, in particular, looks to whether the entity in question establishes the policies governing station programming, personnel, and finances, and has long held that a licensee may delegate day-to-day operations regarding those three areas without surrendering *de facto* control, so long as the licensee continues to set the policies governing

those operations. The FCC will consider other factors, such as whether someone other than the licensee holds themselves out to station staff and/or the public as one who controls station affairs.

Act and Rule Violations by Non-licensees. With respect to HCCN and Guel (currently non-licensees), section 312(b) of the Act authorizes the FCC to order a person who ''has violated or failed to observe any of the provisions of this chapter,'' or ''has violated or failed to observe any rule or regulation of the Commission authorized by this chapter,'' to cease and desist from such activity. The process is laid out in section 312(c), which specifies that, prior to issuing such a cease and desist order, the Commission ''shall serve upon the licensee, permittee, or person involved an order to show cause why . . . a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said . . . person to appear before the Commission.'' Courts have specifically rejected the argument that the FCC lacks authority to sanction non-licensees for violating the Act and Commission rules after notice and an opportunity for hearing, stating that ''such a result would make little sense. If a person who should have a license but did not obtain one were to start doing what only a licensee can do, why should the Commission not be able to issue a cease and desist order against that person?'' Moreover, the Act expressly authorizes the FCC to issue a monetary sanction ''against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof'' where a non-licensee engages in activities for which a license, permit, certificate, or other authorization is required. Thus, although HCCN and Guel do not currently hold licenses, they nevertheless are subject to the Act by virtue of the fact that both satisfy the definition of a ''person'' and have apparently violated and/or failed to observe the requirements of section 301 of the Act. This is eminently sensible since, in the alternative, individuals could continue to violate FCC rules with impunity.

Real Party in Interest and Abuse of Process. Because the FCC must determine whether a potential licensee meets statutory requirements to hold and operate broadcast stations, parties who intend to assign authorizations are required to disclose the ''real party in interest'' purchasing the stations at issue and must certify that they have disclosed all material information requested in the application. The Commission has noted that the phrase ''real party in interest'' usually applies to parties to pending applications, while ''*de facto*'' control is normally applied to persons controlling existing authorizations. The concern in either context is whether an applicant is, or will be, controlled in a manner that differs from the proposal before, or approved by, the Commission. Thus, a real party in interest is an undisclosed applicant that ''has an ownership interest or is or will be in a position to actually or potentially control the operation of the station.'' Given the concealment from the FCC of a party controlling an applicant, real parties in interest are deemed to exercise *de facto* control over a station in a manner that, ''by its very nature, is a basic qualifying issue in which the element of deception is necessarily subsumed.''

Further, it is an abuse of Commission processes to attempt to achieve a result our licensing processes were not designed or intended to permit, or to attempt to subvert the underlying purpose of the licensing process. As the Commission has noted, ''both the potential for deception and the failure to submit material information can undermine the Commission's essential licensing functions.'' Thus, false certifications subvert our licensing process. Moreover, filing an application in the name of a surrogate is deceptive and denies the Commission and the public the opportunity to review the qualifications of the real party who will control and operate a station; it also constitutes an abuse of process. Classic abuse-of-process cases involving surrogate applicants include sisters who served as fronts for their brother to claim a preference once available to female-owned businesses, or deceased relatives whose names were used by licensees that had reached the limit on the number of authorizations that could be issued in their names.

Foreign Ownership Limitations. Section 310(b) of the Act limits foreign holdings of broadcast licenses. The statute limits direct foreign ownership of broadcast licensees to 20%, while allowing for certain indirect holdings of such interests by foreign persons or entities. Specifically, the statute states in relevant part:

No broadcast . . . station license shall be granted to or held by—

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country.

3. Discussion

Guel avers he directly held 100% voting rights of HCCN until 2013. Guel was not a U.S. citizen during that time; he was—and apparently still is—a citizen of Mexico. There is nothing in the record to indicate that HCCN was owned by any other corporation. Thus, at the time of Guel's direct ownership of HCCN, the company was subject to section 310(b)(3) of the Act, which limits direct foreign ownership by non-U.S. citizens to no more than one-fifth of the capital stock. The FCC therefore could not have granted a broadcast license to HCCN consistent with the Act because of Guel's 100% direct stock ownership in HCCN. The record indicates that Guel, through HCCN, repeatedly falsely certified to the FCC his citizenship and/or HCCN's compliance with statutory limits on foreign ownership.

Guel, currently a non-licensee, does not appear to hold any broadcast licenses. Nevertheless, the record indicates that HCCN and/or Guel exercised, and may continue to exercise, improper *de facto* and unauthorized control over the stations, in apparent violation of statutory requirements. There are substantial and material questions of fact as to the duration and extent of such control, and whether it continues to the present. We also find that there are substantial and material questions of fact as to whether HCCN and Guel should be considered one and the same entity for purposes of this proceeding.

There also are substantial and material questions of fact as to whether the Parties lacked candor or misrepresented material facts in the assignment Application, when they each certified their agreement complied with FCC rules and embodied the Parties full agreement. There are substantial and material questions of fact as to whether the Parties consummated the sale of stations from HCCN to Juarez in 2010 or ever. There are substantial and material questions of fact as to when and whether Juarez assumed legal control of the stations.

Finally, there are material and substantial questions as to whether the Parties lacked candor or misrepresented facts in statements made in the Response filed with the Bureau in 2018. For example, Guel averred he only discovered in 2014 that his 100% ownership of HCCN precluded him/HCCN from holding broadcast licenses,

and that he had relied on advice of counsel in certifying HCCN's compliance with foreign ownership limits. Guel nowhere claims ignorance as to his actual citizenship, however, and his declaration offers no excuse for false certifications that he was a U.S. citizen. Moreover, licensees are responsible for the actions of their agents and shifting blame for a licensee's statutory violations does not exculpate the licensee. Indeed, the record indicates that as early as 2005, Guel had filed applications with the Commission to acquire a station in Yuma, Arizona, wherein Guel falsely represented HCCN's compliance with section 310(b)(3) of the Act, at a time when he stated he was not represented by counsel. It thus appears that Guel lacked candor and/or misrepresented facts in his declaration. As for Juarez, she averred in her Response that she controlled the stations since July 2010. But she provided no contemporaneous documents to support that statement, and the historical record indicates that Guel/HCCN controlled the stations until at least August 2014. She also averred that ''[t]here are no other stations owned or controlled by me.'' Multiple documents, filed over many years, contradict this, as her cousin Maria Guel repeatedly certified in public FCC filings and other official documents that Juarez has held, since 2010, a 33% attributable interest in HFCN.

Based on the totality of the record, there are substantial and material questions of fact as to: (1) whether Juarez abused Commission processes by filing a sham application to enable HCCN or Guel to continue operating and controlling the stations despite non-compliance with the foreign ownership limitations of section 310(b)(3), and by secretly agreeing to delay indefinitely filing the requisite consummation notice; (2) whether and when Juarez acquired control of and began operating the Stations consistent with the Act and/or the Rules and, based on that, whether Juarez engaged in an unauthorized transfer of control in violation of section 310 of the Act by either operating the stations without legitimate authority or by ceding control of the stations to HCCN; (3) whether Juarez lacked candor and/or misrepresented facts to the Commission, including in the Assignment Application and in her 1.88 Letter Response; and (4) whether Juarez has the qualifications to be and remain a licensee. As a result, we issue this Order to Show Cause Why an Order of Revocation Should Not Be Issued, Hearing Designation Order, Notice of Opportunity for Hearing, and Notice of Apparent Liability for Forfeiture to determine whether (a) the licenses of the stations should be revoked; (b) whether the captioned applications for renewal of the licenses of the stations should be granted, dismissed or denied; and/or (c) whether a forfeiture order should be issued to Juarez.

With respect to HCCN and its former 100% direct stockholder Guel, there are substantial and material questions of fact as to whether HCCN and Guel should be considered one and the same entity for purposes of this proceeding. There are also substantial and material questions of fact as to whether HCCN and/or Guel have exercised and continue to exercise de facto control over the stations. Accordingly, we issue an Order to Show Cause Why a Cease and Desist Order Should Not be Issued, Notice of Opportunity for Hearing, and Notice of Apparent Liability for Forfeiture against HCCN and Guel to cease and desist from violating Commission Rules and the Act, including making willfully inaccurate, incomplete, evasive, false, or misleading statements before the Commission in violation of § 1.17 of FCC rules and engaging in unauthorized control and operation of broadcast stations in violation of section 301, 308, and 310 of the Act and to determine and whether a forfeiture should be issued to HCCN and Guel. Moreover, we find that there are substantial and material questions of fact as to whether HCCN and/or Guel: (1) have misrepresented material information to the Commission and lacked candor; (2) have abused Commission processes first by filing an assignment application that lacked bona fides while maintaining de facto control of the stations, and then by impermissibly and intentionally bifurcating ownership of the stations for years by not timely filing the requisite consummation notice; and (3) are fit to be Commission licensees in light of these apparent violations, abuses, and lack of candor and/or misrepresentation of facts to the Commission. Accordingly, we issue an Order to Show Cause Why a Cease and Desist Order Should Not be Issued, Notice of Opportunity for Hearing, and Notice of Apparent Liability for Forfeiture against HCCN and Guel to cease and desist from operating, controlling, managing, or providing any assistance to any stations; from preparing and/or filing applications or other documents regarding HCCN with the Commission; and, to the extent HCCN or Guel is allowed to assist any other licensee/permittee/applicant in any way with the operation or construction of any station, or to provide any assistance or input in any way in preparing or filing any application with the Commission, from doing so without also providing a copy of any order issued in this proceeding that finds he lacks the character to be a Commission licensee in any and all filings with the Commission in every matter in which he participates in any way.

4. Ordering Clauses

1. Accordingly, *it is ordered* that, pursuant to sections 308, 309(d), 309(e), 309(k), and 312(a)–(c) of the Act, 47 U.S.C. 308, 309(d), 309(e), 309(k), and 312(a)–(c), the above-captioned applications and licenses *are designated for hearing* before an FCC administrative law judge, at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Jennifer Juarez abused Commission processes by misrepresentation, concealment, or otherwise.

(b) To determine whether Jennifer Juarez abused Commission processes by entering into an undisclosed agreement to delay indefinitely the filing notice of the Parties' purported consummation.

(c) To determine when and whether Jennifer Juarez is and/or has been exercising affirmative control of KHDE-LD, KJTN-LP, KZAB-LP, KZTE-LD, KTEQ-LP, KRPO-LD, and WESL-LP.

(d) To determine whether Antonio Cesar Guel and Hispanic Christian Community Network, Inc. is (and/or has been, during the most recent license term) a real-party-in-interest to the captioned applications for Stations KHDE-LD, KJTN-LP, KZAB-LP, KZTE-LD, KTEQ-LP, KRPO-LD, and WESL-LP.

(e) To determine whether there has been a *de facto* transfer of control of KHDE-LD, KJTN-LP, KZAB-LP, KZTE-LD, KTEQ-LP, KRPO-LD, and WESL-LP to Antonio Cesar Guel or Hispanic Christian Community Network, Inc. in violation of section 310(d) of the Act, 47 U.S.C. 310(d) and §§ 73.1150(a), (b), and 73.3540 of the Commission's rules, 47 CFR 73.1150(a), (b), and 73.3540.

(f) To determine whether Jennifer Juarez engaged in misrepresentation and/or lack of candor in applications and communications with the Commission or otherwise violated §§ 1.17, 1.65, and 73.1015 of the Commission's rules involving KHDE–LD, KJTN–LP, KZAB–LP, KZTE–LD, KTEQ–LP, KRPO–LD, and WESL–LP.

(g) To determine, in light of the evidence adduced regarding issues (a)–(f) and (i)–(j), whether the captioned license renewal applications should be granted with such terms and conditions

as are appropriate, including renewal for a term less than the maximum otherwise permitted, or denied due to failure to satisfy the requirements of section 309(k)(1) of the Act, 47 U.S.C. 309(k)(1), and the licenses cancelled.

(h) To determine, in light of evidence adduced regarding the foregoing issues (a)–(f) and (i)–(j) whether Jennifer Juarez possesses the character qualifications to be or remain a Commission licensee and whether the licenses for KHDE–LD, KJTN–LP, KZAB–LP, KZTE–LD, KTEQ–LP, KRPO–LD, and WESL–LP should be revoked.

(i) To determine whether Antonio Cesar Guel and Hispanic Christian Community Network, Inc. should, for purposes of this proceeding, be considered one and the same entity.

(j) To determine whether Antonio Cesar Guel and/or Hispanic Christian Community Network, Inc. have exercised and continue to exercise *de facto* control over KHDE–LD, KJTN–LP, KZAB–LP, KZTE–LD, KTEQ–LP, KRPO–LD, and WESL–LP.

(k) To determine whether Antonio Cesar Guel and/or Hispanic Christian Community Network, Inc. have misrepresented material information to the Commission and/or lacked candor.

(l) To determine whether Antonio Cesar Guel and/or Hispanic Christian Community Network, Inc. have abused Commission processes first by filing an assignment application that lacked bona fides while maintaining *de facto* control of the KHDE–LD, KJTN–LP, KZAB–LP, KZTE–LD, KTEQ–LP, KRPO–LD, and WESL–L, and then by impermissibly and intentionally bifurcating ownership of KHDE–LD, KJTN–LP, KZAB–LP, KZTE–LD, KTEQ–LP, KRPO–LD, and WESL–LP for years by not timely filing the requisite consummation notice.

(m) To determine, in light of evidence adduced regarding issues (i), (k), and (l), whether Antonio Cesar Guel and/or Hispanic Christian Community Network, Inc. shall be ordered to cease and desist from violating Commission Rules and the Act, including making willfully inaccurate, incomplete, evasive, false, or misleading statements before the Commission in violation of § 1.17 of the Commission's rules, 47 CFR 1.17, and engaging in unauthorized control and operation of broadcast stations in violation of sections 301, 308, and 310 of the Act, 47 U.S.C. 301, 308, and 310.

(n) To determine, in light of evidence adduced regarding issues (i), (k), and (l), whether Antonio Cesar Guel and/or Hispanic Christian Community Network, Inc. shall be ordered to cease and desist from operating, controlling, managing or providing any assistance to any stations;

(o) To determine, in light of evidence adduced regarding issues (i), (k), and (l), whether Antonio Cesar Guel and/or Hispanic Christian Community Network, Inc. shall be ordered to cease and desist from preparing and/or filing applications or other documents regarding Hispanic Christian Community Network, Inc. with the Commission;

(p) To determine, in light of evidence adduced regarding issues (i), (k), and (l), whether Antonio Cesar Guel and/or Hispanic Christian Community Network, Inc., to the extent Antonio Cesar Guel or and/or Hispanic Christian Community Network, Inc. is allowed to assist any other licensee/permittee/applicant in any way with the operation or construction of any station, or to provide any assistance or input in any way in preparing or filing any application with the Commission, shall be ordered to cease and desist from doing so without also providing a copy of any order issued in this proceeding that finds Hispanic Christian Community Network, Inc. or Antonio Cesar Guel lacks the character to be a Commission licensee in any and all filings with the Commission in every matter in which he participates in any way.

(q) To determine, in light of evidence adduced regarding issues (i), (k), and (l), whether Antonio Cesar Guel and and/or Hispanic Christian Community Network, Inc. possesses the character qualifications to be Commission licensees.

1. *It is further ordered* that, pursuant to sections 312(b) and (c) of the Act, 47 U.S.C. 312 (b) and (c), and §§ 1.91 and 1.92 of the Commission's rules, 47 CFR 1.91, 1.92, Antonio Cesar Guel and Hispanic Christian Community Network, Inc. *are directed to show cause why they should not be ordered to cease and desist:*

(a) from violating Commission Rules and the Act, including making willfully inaccurate, incomplete, evasive, false, or misleading statements before the Commission in violation of § 1.17 of the Commission's rules, 47 CFR 1.17, and engaging in unauthorized control and operation of broadcast stations in violation of sections 301, 308, and 310 of the Act, 47 U.S.C. 301, 308, and 310;

(b) from operating, controlling, managing or providing any assistance to any stations;

(c) from preparing and/or filing applications or other documents regarding Hispanic Christian Community Network, Inc. with the Commission; and

(d) to the extent Antonio Cesar Guel or Hispanic Christian Community Network, Inc. is allowed to assist any other licensee/permittee/applicant in any way with the operation or construction of any station, or to provide any assistance or input in any way in preparing or filing any application with the Commission, from doing so without also providing a copy of any order issued in this proceeding that finds Antonio Cesar Guel or Hispanic Christian Community Network, Inc., lacks the character to be a Commission licensee in any and all filings with the Commission in every matter in which he participates in any way.

2. *It is further ordered* that, pursuant to section 312(c) of the Communications Act of 1934, as amended, 47 U.S.C. 312(c), and §§ 1.91(b) and (c) of the Commission's rules, 47 CFR 1.91(b) and (c), to avail themselves of the opportunity to be heard and to present evidence at a hearing in this proceeding, Antonio Cesar Guel and Hispanic Christian Community Network, Inc., in person or by an attorney, *shall file* with the Commission, within twenty (20) days of the mailing of this Order to Show Cause Why A Cease and Desist Order Should Not Be Issued, Order to Show Cause Why an Order of Revocation Should Not Be Issued, Hearing Designation Order, Notice of Opportunity for Hearing, and Notice of Apparent Liability for Forfeiture, a written appearance stating that he will appear at the hearing and present evidence on the issues specified above at a hearing. If Antonio Cesar Guel or Hispanic Christian Community Network, Inc. waive their rights to a hearing pursuant to § 1.92(a)(1) or (a)(3) of the Rules, 47 CFR 1.92(a)(1) or (a)(3), they may submit a timely written statement denying or seeking to mitigate or justify the circumstances or conduct complained of in the order to show cause.

3. *It is further ordered* that, pursuant to §§ 1.91 and 1.92 of the Commission's rules, 47 CFR 1.91 and 1.92, that if Antonio Cesar Guel or Hispanic Christian Community Network, Inc. fails to file a written appearance within the time specified above, or has not filed prior to the expiration of that time a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days, the right to a hearing shall be deemed waived. Where a hearing is waived, the Administrative Law Judge shall issue an order terminating the hearing proceeding and certifying the case to the Commission.

4. *It is further ordered* that, in addition to the resolution of the foregoing issues, it shall be determined, pursuant to section 503(b)(1) of the Act, 47 U.S.C. 503(b)(1), whether an *order of forfeiture* should be issued against Jennifer Juarez in an amount not to exceed the statutory limit for the willful and/or repeated violation of each rule section above, including §§ 1.17, 1.65, 73.1015, 73.1150, and 73.3540 of the Commission's rules, 47 CFR 1.17, 1.65, 73.1015, 73.1150, and 73.3540, and each statutory provision noted above, including sections 310(b) and (d) of the Act, 47 U.S.C. 310(b) and (d), for which the statute of limitations in section 503(b)(6) of the Act, 47 U.S.C. 503(b)(6), has not lapsed.

5. *It is further ordered* that, irrespective of the resolution of the foregoing issues, it shall be determined, pursuant to sections 503(b)(1) of the Act, 47 U.S.C. 503(b)(1), whether an *order of forfeiture* should be issued against Antonio Cesar Guel and/or Hispanic Christian Community Network, Inc. in an amount not to exceed the statutory limit for the willful and/or repeated violation of each rule section above, including § 1.17 of the Commission's rules, 47 CFR 1.17, and each statutory provision noted above, including sections 301 and 308 of the Act, 47 U.S.C. 301 and 308, for which the statute of limitations in section 503(b)(6) of the Act, 47 U.S.C. 503(b)(6), has not lapsed.

6. *It is further ordered* that, pursuant to sections 309(d) and 312(c) of the Act, 47 U.S.C. 309(d), 312(c), and §§ 1.91(c), and 1.221(c) of the Commission's rules, 47 CFR 1.91(c) and 1.221(c), to avail herself of the opportunity to be heard and to present evidence at a hearing in this proceeding, Jennifer Juarez, in person or by an attorney, *shall file* with the Commission, within twenty (20) days of the mailing of this Order to Show Cause Why A Cease and Desist Order Should Not Be Issued, Order to Show Cause Why an Order of Revocation Should Not Be Issued, Hearing Designation Order, Notice of Opportunity for Hearing, and Notice of Apparent Liability for Forfeiture, a written appearance stating that she will appear at the hearing and present evidence on the issues specified above.

7. *It is further ordered* that, pursuant to § 1.221(c) of the Commission's rules, 47 CFR 1.221(c), if Jennifer Juarez fails to file within the time specified above a written appearance, a petition to dismiss without prejudice, or a petition to accept for good cause shown an untimely written appearance, the captioned applications shall be dismissed with prejudice for failure to prosecute.

8. *It is further ordered*, pursuant to §§ 1.91 and 1.92 of the Commission's rules, 47 CFR 1.91 and 1.92, that if Jennifer Juarez fails to file a written appearance within the time specified above, or has not filed prior to the expiration of that time a petition to dismiss without prejudice, or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days, the right to a hearing shall be deemed waived. Where a hearing is waived, the Administrative Law Judge shall issue an order terminating the hearing proceeding and certifying the case to the Commission. If Jennifer Juarez waives her right to a hearing pursuant to § 1.92(a)(1) or (a)(3), 47 CFR 1.92(a)(1) or (a)(3), she may submit a timely written statement denying or seeking to mitigate or justify the circumstances or conduct complained of in the order to show cause.

9. *It is further ordered* that the Chief, Enforcement Bureau, shall be made a party to this proceeding without the need to file a written appearance.

10. *It is further ordered* that, in accordance with section 312(d) of the Act, 47 U.S.C. 312(d), and § 1.91(d) of the Commission's rules, 47 CFR 1.91(d), the *burden of proceeding* with the introduction of evidence and the *burden of proof* with respect to the issues (h), (i), and (k)–(q) of Paragraph 113, above, *shall be* upon the Commission's Enforcement Bureau.

11. *It is further ordered* that, pursuant to section 309(e) of the Act, 47 U.S.C. 309(e), and § 1.254 of the Commission's rules, 47 CFR 1.254, the *burden of proceeding* with the introduction of evidence and the *burden of proof* shall be upon Jennifer Juarez as to issues (a)–(g) and (j) at Paragraph 113 above.

12. *It is further ordered* that, in accordance with section 312(d) of the Act, 47 U.S.C. 312(d), and § 1.91(d) of the Commission's rules, 47 CFR 1.91(d), the *burden of proceeding* with the introduction of evidence and the *burden of proof* shall be upon the Commission as to issues (a)–(d) at Paragraph 114 above.

13. *It is further ordered* that a copy of each document filed in this proceeding subsequent to the date of adoption of this document *shall be served* on the counsel of record appearing on behalf of the Chief, Enforcement Bureau. Parties may inquire as to the identity of such counsel by calling the Investigations & Hearings Division of the Enforcement Bureau at (202) 418–1420. Such service copy *shall be addressed* to the named counsel of record, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, 45 L Street NE, Washington, DC 20554.

14. *It is further ordered* that the parties to the captioned application shall, pursuant to section 311(a)(2) of the Act, 47 U.S.C. 311(a)(2), and § 73.3594 of the Commission's rules, 47 CFR 73.3594, GIVE NOTICE of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the satisfaction of such requirements as mandated by § 73.3594 of the Commission's rules, 47 CFR 73.3594.

15. *It is further ordered* that copies of this Order to Show Cause Why A Cease and Desist Order Should Not Be Issued, Order to Show Cause Why an Order of Revocation Should Not Be Issued, Hearing Designation Order, Notice of Opportunity for Hearing, and Notice of Apparent Liability for Forfeiture shall be sent via Certified Mail, Return Receipt Requested, and by regular first-class mail to:

Antonio Cesar Guel, 2605 Hyacinth Drive, Mesquite, TX 75181;

Hispanic Christian Community Network, Inc., 8500 N Stemmons Freeway, Suite 5050, Dallas, TX 75247;

Jennifer Juarez, 1138 N Tillery Avenue, Dallas, TX 75211; and

Dan J. Alpert, Esq., The Law Office of Dan J. Alpert, 2120 N. 21st Road, Arlington, VA 22201.

16. *It is further ordered* that the Secretary of the Commission shall cause to have this Order to Show Cause Why A Cease and Desist Order Should Not Be Issued, Order to Show Cause Why an Order of Revocation Should Not Be Issued, Hearing Designation Order, and Notice of Opportunity for Hearing, and Notice of Apparent Liability for Forfeiture or a summary thereof published in the **Federal Register**.

Federal Communications Commission.

Thomas Horan

Chief of Staff, Media Bureau.

[FR Doc. 2023–18230 Filed 8–22–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1053; FR ID 164698]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as

required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before October 23, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

OMB Control Number: 3060–1053.

Title: Misuse of internet Protocol Captioned Telephone Service (IP CTS); Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket Nos. 13–24 and 03–123.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit; Individuals or households.

Number of Respondents and Responses: 187,173 respondents; 673,980 responses.

Estimated Time per Response: 0.1 hours (6 minutes) to 40 hours.

Frequency of Response: Annual, every five years, monthly, and ongoing reporting requirements; Recordkeeping requirements; Third party disclosure requirements.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for the information collection requirements is found at Sec. 225 [47 U.S.C. 225] Telecommunications Services for Hearing-Impaired Individuals; The Americans with Disabilities Act of 1990, (ADA), Public Law 101–336, 104 Stat. 327, 366–69, enacted on July 26, 1990.

Total Annual Burden: 342,103 hours.

Total Annual Cost: $72,000.

Needs and Uses: On August 1, 2003, the Commission released *Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CC Docket No. 98–67, Declaratory Ruling, 68 FR 55898, September 28, 2003, clarifying that one-line captioned telephone voice carry over (VCO) service is a type of telecommunications relay service (TRS) and that eligible providers of such services are eligible to recover their costs from the Interstate TRS Fund (Fund) in accordance with section 225 of the Communications Act.

On July 19, 2005, the Commission released *Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CC Docket No. 98–67 and CG Docket No. 03–123, Order, 70 FR 54294, September 14, 2005, clarifying that two-line captioned telephone VCO service, like one-line captioned telephone VCO service, is a type of TRS eligible for compensation from the Fund.

On January 11, 2007, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CG Docket No. 03–123, Declaratory Ruling, 72 FR 6960, February 14, 2007, granting a request for clarification that internet Protocol (IP) captioned telephone relay service (IP CTS) is a type of TRS eligible for compensation from the Fund.

On August 26, 2013, the Commission issued *Misuse of internet Protocol Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CG Docket Nos. 13–24 and 03–123, Report and Order, 78 FR 53684, August 30, 2013, to regulate practices relating to the marketing of IP CTS, impose certain requirements for the provision of this service, and mandate registration and certification of IP CTS users.

On June 8, 2018, the Commission issued *Misuse of internet Protocol Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CG Docket Nos. 13–24 and 03–123, Report and Order and Declaratory Ruling, 83 FR 30082, June 27, 2018 (*2018 IP CTS Modernization Order*), to facilitate the Commission's efforts to reduce waste, fraud, and abuse and improve its ability to efficiently manage the IP CTS program through regulating practices related to the marketing of IP CTS, generally prohibiting the provision of IP CTS to consumers who do not genuinely need the service, permitting the provision of IP CTS in emergency shelters, and approving the use of automatic speech recognition to generate captions without the assistance of a communications assistant.

On February 15, 2019, the Commission issued *Misuse of internet Protocol Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CG Docket Nos. 13–24 and 03–123, Report and Order, and Order, 84 FR 8457, March 8, 2019 (*2019 IP CTS Program Management Order*), requiring the submission of IP CTS user registration information to the telecommunications relay service (TRS) User Registration Database (Database) so that the Database administrator can verify IP CTS users to reduce the risk of waste, fraud, and abuse in the IP CTS program.

On June 30, 2022, the Commission issued *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program; Misuse of internet Protocol Captioned Telephone Service,* CG Docket Nos. 03–123, 10–51, and 13–24, Report and Order, published at 87 FR 57645, September 21, 2022 (*Registration Grace Period Order*), allowing IP CTS and Video Relay Service (VRS) providers to provide compensable service to a new user for up to two weeks after submitting the user's information to the Database if the user's identity is verified within that period, in order to offer more efficient service to IP CTS and VRS users without risk of waste, fraud, and abuse to the Fund.

On September 30, 2022, the Commission released the *Accessible Carceral Communications Order, Rates for Interstate Inmate Calling Services,*

WC Docket No.12–375, Fourth Report and Order, published at 87 FR 75496, December, 9, 2022, (*Accessible Carceral Communications Order*), requiring inmate calling services providers to provide incarcerated TRS-eligible users the ability to access any relay service eligible for TRS Fund support. To facilitate the registration of IP CTS users in carceral facilities, the Commission amended the registration and verification requirements for individual users. The programmatic changes in information collection burdens that apply to VRS and IP Relay due to the *Accessible Carceral Communications Order* are addressed separately in modifications to information collection No. 3060–1089.

This notice and request for comments pertains to the programmatic changes in information collection burdens that apply to IP CTS due to the *Accessible Carceral Communications Order.*

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–18092 Filed 8–22–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

[Docket No. FMC–2023–0017]

Agency Information Collection Activities: 60-Day Public Comment Request

AGENCY: Federal Maritime Commission.

ACTION: Sixty-day notice; request for comments.

SUMMARY: The Federal Maritime Commission (Commission) invites comments on the information collection related to ocean common carrier and marine terminal operator agreements subject to the Shipping Act of 1984 as part of our continuing effort to reduce paperwork and respondent burden required by the Paperwork Reduction Act of 1995. This notice announces a renewal of an existing collection and includes an update to FMC–150.

DATES: Written comments must be submitted on or before October 23, 2023.

ADDRESSES: The Commission will collect comments on this notice through the Federal eRulemaking Portal at *www.regulations.gov.* A copy of the notice and supporting materials can be found at *https://www.regulations.gov/* under Docket No. FMC–2023–0017. The FMC will summarize any comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: William Cody, Secretary; Phone: (202) 523–5725; Email: *mailto:secretary@fmc.gov.*

SUPPLEMENTARY INFORMATION:

Request for Comments

As part of its continuing effort to reduce paperwork and respondent burden, the Commission invites the general public and other Federal agencies to comment on the continuing information collection listed in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments. We invite comments on: (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Information Collection Open for Comment

Title: 46 CFR 535—Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984.

OMB Approval Number: 3072–0045 (Expires August 31, 2023).

Abstract: Section 4 of the Shipping Act of 1984, 46 U.S.C. 40301 (a)–(c), identifies certain agreements by or among ocean common carriers (carriers) and marine terminal operators (MTOs) that fall within the jurisdiction of that Act. Section 5 of the Act, 46 U.S.C. 40302, requires that carriers and MTOs file those agreements with the Federal Maritime Commission. Section 6 of the Act, 46 U.S.C. 40304, 40306, and 41307 (b)–(d), specifies the Commission actions that may be taken with respect to filed agreements, including requiring the submission of additional information. Section 15 of the Act, 46 U.S.C. 40104, authorizes the Commission to require that carriers and MTOs, among other persons, file periodic or special reports. Requests for additional information and the filing of periodic or special reports are meant to assist the Commission in fulfilling its statutory mandate of overseeing the activities of the ocean transportation industry. These reports are necessary so that the Commission can monitor agreement parties' activities to determine how or if their activities will have an impact on competition.

This update includes a revised FMC–150 form, which is collected upon agreement filing for a subset of agreements under 46 CFR part 535. The Commission intends that filers will have a choice between using the existing FMC–150 or the revised FMC–150 pending any other changes in Part 535 through rulemaking. This update also includes an increase in the number of responses received. The total estimated burden hours has decreased.

Current Actions: Revision of Form 150.

Type of Review: Extension.

Needs and Uses: The Commission uses the information filed by agreement parties to monitor their activities as required by the Shipping Act. Under 46 U.S.C. 41307, the Commission must determine whether an agreement will have, or has resulted in, a substantial reduction in competition within the prevailing market leading to an unreasonable reduction in transportation service or an unreasonable increase in transportation costs ''or to substantially lessen competition in the purchasing of certain covered services.'' In such cases, the Commission would take action to seek to enjoin the agreement in the U.S. District Court for the District of Columbia.

Frequency: This information will be collected as required by the regulations at Part 535.

Type of Respondents: The types of respondents are marine terminal operators, vessel-operating common carriers, and other parties to FMC-filed agreements.

Number of Annual Respondents: The 2019 notice stated that the number of respondents was 334. This number erroneously counted the number of VOCCs and MTOs as the number of respondents. The adjusted number accounts for the number of filings of agreements and monitoring information, as well as those subject to recordkeeping, under the regulations at Part 535. Some MTOs and VOCCs are not required to submit any information, some are subject only to the recordkeeping, and a relatively small subset are parties to multiple agreements and therefore file multiple types of information under this

collection with different periodicity. The agency will consider these separate respondents for the purpose of this collection. The total number is 2,887.

Estimated Time per Response:

Responses associated with Agreement filings under Part 535:

- The average time per response to file an Agreement that includes Form FMC–150 is 75 hours.
- The average time per response to file an Agreement that does not require FMC–150 is 6 hours.
- The time to file an Agreement termination averages 0.25 hours.

Responses associated with Monitoring Requirements under Part 535:

- The average time for meeting minutes is 2 hours.
- The average time for filing quarterly monitoring reports for VOCC rate discussion agreements is 50 hours.
- The average time for filing FMC–151 (filed by alliance parties) is 160 hours.
- Other reporting requirements average 10 hours.
- Recordkeeping for optionally filed agreements is estimated at 0.25 hours.

Total Annual Burden:

Associated with Agreement filings under Part 535:

- *Filing an Agreement that includes Form FMC–150:* 15 responses × 75 hours = 1,125 person-hours.
- *Filing an Agreement that does not require FMC–150:* 60 responses × 6 hours = 360 person-hours.
- *Termination of Agreements:* 36 responses × 0.25 hours = 9 person-hours.

Associated with Monitoring Requirements under Part 535:

- *Filing meeting minutes:* 850 responses × 2 hours = 1,700 person-hours.
- *Reporting for VOCC rate discussion agreements:* 40 × 50 = 2,000 person-hours.
- *Reporting on FMC–151 (filed by Alliance parties):* 36 × 160 = 5,760 person-hours.
- *Other reporting requirements* = 300 × 10 = 3,000 person-hours.
- *Recordkeeping for optionally filed agreements* = 1,300 × 0.25 = 325 person-hours.

Total burden equals 14,279 hours.

William Cody,

Secretary.

[FR Doc. 2023–18167 Filed 8–22–23; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

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 the BHC Act (12 U.S.C. 1842(c)).

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 September 22, 2023.

A. Federal Reserve Bank of St. Louis (Holly A. Rieser, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Liberty Bancorporation, Inc., Liberty, Illinois;* to merge with North Adams Bancshares, Inc., and thereby indirectly acquire North Adams State Bank, both of Ursa, Illinois.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–18150 Filed 8–22–23; 8:45 am]

BILLING CODE 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 September 7, 2023.

A. 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. *Greg Remus, Sara Remus, Alexander Remus and Zachary Remus, all of Oconomowoc, Wisconsin;* to form the Remus Family Control Group, a group acting in concert, to retain voting shares of Westbury Bancorp, Inc., and thereby indirectly retain voting shares of Westbury Bank, both of Waukesha, Wisconsin.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–18153 Filed 8–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–40B and CMS–10102]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by October 23, 2023.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–40B Application for Enrollment in Medicare Part B (Medical Insurance)

CMS–10102 National Implementation of the Hospital Consumer Assessment of Healthcare Providers and Systems (HCAHPS) Survey

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires Federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Application for Enrollment in Medicare Part B (Medical Insurance); *Use:* Medicare Part B is a voluntary program, financed from premium payments by enrollees, together with contributions from funds appropriated by the Federal government. The Social Security Act (the Act) at section 226(a) provides that individuals who are age 65 or older and eligible for, or entitled to, Social Security or Railroad Retirement Board (RRB) benefits shall be entitled to premium-free Part A upon filing an application for such benefits. Section 1836 of the Act permits individuals with Medicare premium-free Part A to enroll in Part B.

The CMS–40B provides the necessary information to determine eligibility and to process the beneficiary's request for enrollment for Medicare Part B coverage. This form is only used for enrollment by beneficiaries who already have Part A, but not Part B. Form CMS–40B is completed by the person with Medicare or occasionally by an SSA representative using information provided by the Medicare enrollee during an in-person interview. The form is owned by CMS, but not completed by CMS staff. SSA processes Medicare enrollments on behalf of CMS. *Form Number:* CMS–40B (OMB control number: 0938–1230); *Frequency:* Once; *Affected Public:* Individuals or households; *Number of Respondents:* 1,132,000; *Number of Responses:* 1,132,000; *Total Annual Hours:* 192,440. (For policy questions regarding this collection, contact Candace Carter at 410–786–8466.)

2. *Type of Information Collection Request:* Extension without change of currently approved collection; *Title of Information Collection:* National Implementation of the Hospital Consumer Assessment of Healthcare Providers and Systems (HCAHPS) Survey; *Use:* The HCAHPS (Hospital Consumer Assessment of Healthcare Providers and Systems) Survey is the first national, standardized, publicly reported survey of patients' perspectives of their hospital care. HCAHPS is a 29-item survey instrument and data collection methodology for measuring patients' perceptions of their hospital experience. Since 2008, HCAHPS has allowed valid comparisons to be made across hospitals locally, regionally and nationally.

Three broad goals have shaped HCAHPS. First, the standardized survey and implementation protocol produce data that allow objective and meaningful comparisons of hospitals on topics that are important to consumers. Second, public reporting of HCAHPS results creates new incentives for hospitals to improve quality of care. Third, public reporting enhances accountability in health care by increasing transparency of the quality of hospital care provided in return for the public investment. *Form Number:* CMS–10102 (OMB control number: 0938–0981); *Frequency:* Occasionally; *Affected Public:* Private Sector, Business or other for-profits, Not-for-profits institutions; *Number of Respondents:*

2,304,450; *Number of Responses:* 2,304,450; *Total Annual Hours:* 282,366. (For policy questions regarding this collection, contact William G. Lehrman at 410–786–1037.)

Dated: August 18, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–18151 Filed 8–22–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10809]

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 22, 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:* New collection (Request for a new OMB control number); *Title of Information Collection:* Ambulatory Surgical Center Covered Procedures List (ASC CPL); *Use:* The ASC CPL (Ambulatory Surgical Center Covered Procedures List) was authorized in accordance with section 1833(i)(1) of the Social Security Act, which requires the Secretary to specify surgical procedures which are appropriately performed on an inpatient basis in a hospital but which also can be performed safely on an ambulatory basis in an ASC, critical access hospital, or hospital outpatient department. The statute also requires the Secretary to regularly review and update the ASC CPL.

During rulemaking, CMS receives surgical procedure code nominations from a variety of external interested parties and evaluates them for inclusion to the CPL in the OPPS/ASC proposed rule. After reviewing the nominations and evaluating them against the criteria, CMS proposes the list of procedures that they will add to the CPL for the following calendar year. The public has 60 days to comment on the proposals, CMS takes these perspectives into account, and the final list of procedure nominations are finalized in the OPPS/ASC final rule.

The information collected in this request will be used by CMS annually to determine what covered surgical procedures should be added to the ASC CPL. Specifically, the policy analysts and medical officers in the Division of Outpatient Care will individually review each procedure nomination, as well as any supporting evidence (clinical studies, literature, data or letters of support) submitted. The agency will use this information to propose a list of covered surgical procedures for the OPPS/ASC Proposed Rule starting with the CY 2025 Proposed Rule. *Form Number:* CMS–10809 (OMB control number: 0938–New); *Frequency:* Yearly; *Affected Public:* Private Sector, Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 15; *Total Annual Responses:* 100; *Total Annual Hours:* 50. (For policy questions regarding this collection contact Nate Vercauteren at *Nathan.Vercauteren@cms.hhs.gov.*)

Dated: August 18, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–18154 Filed 8–22–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–2462]

Workshop To Enhance Clinical Study Diversity; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing a public workshop entitled ''Workshop To Enhance Clinical Study Diversity.'' This public workshop will satisfy a mandate of the Food and Drug Omnibus Reform Act of 2022 (FDORA) for FDA to convene one

or more public workshops to solicit input from various stakeholders on enhancing diversity in clinical studies.The public workshop will be convened and supported by a cooperative agreement between FDA and the Clinical Trials Transformation Initiative and will solicit input from interested parties on increasing the enrollment of historically underrepresented populations in clinical studies and encouraging clinical study participation that reflects the prevalence or incidence of the disease or condition among demographic subgroups, where appropriate.

DATES: The public workshop will be held virtually on November 29, 2023, from 10 a.m. to 2 p.m., Eastern Time and November 30, 2023, from 10 a.m. to 2 p.m., Eastern Time. Following the workshop, a public comment period will be established to receive comments related to the topics addressed during the public workshop. Either electronic or written comments on this public workshop must be submitted by January 29, 2024. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public workshop will be held virtually using the Zoom platform. The link for the public workshop will be sent to registrants upon registration.

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 on January 29, 2024. 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–2462 for ''Workshop To Enhance Clinical Study Diversity.'' 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: Dat Doan, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 3334, Silver Spring, MD 20993, 240–402–8962, *Dat.Doan@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 3603 of the FDORA requires FDA to convene one or more public workshops to solicit input from various stakeholders on increasing diversity in clinical studies. To meet the FDORA requirement, FDA will convene a workshop with key participants, including drug and device sponsors, clinical research organizations, academia, patients and patient advocates, study site investigators, and the public, to gather input on how to enhance clinical study diversity by discussing ways to (1) increase enrollment of historically underrepresented populations in clinical studies and (2) encourage clinical study participation that reflects the prevalence of the disease or condition among demographic subgroups, where appropriate. The public workshop scheduled for November 29, 2023, and November 30, 2023, will fulfill the requirement to convene a public workshop no later than 1 year after the date of the enactment of FDORA.

II. Topics for Discussion at the Public Workshop

At the public workshop, FDA plans to solicit input from participants on increasing the enrollment of historically underrepresented populations in clinical studies and encouraging clinical study participation that reflects disease prevalence or incidence data, including but not limited to:

1. The collection and presentation of disease prevalence and incidence data by demographic group.

2. The dissemination of information to the public on clinical study enrollment demographic data.

3. The establishment of goals for clinical study enrollment, including the relevance of disease prevalence and incidence.

4. The approaches to include underrepresented populations and encourage participation that reflects the population expected to use the drug or device, if approved, including:

A. The establishment of inclusion and exclusion criteria for certain subgroups, such as pregnant and lactating women and individuals with disabilities, including intellectual or developmental disabilities or mental illness.

B. The considerations regarding informed consent with respect to individuals with intellectual or developmental disabilities or mental illness, including ethical and scientific considerations.

C. The appropriate use of decentralized trials or digital health tools, clinical endpoints, biomarker selection, and studying analysis.

III. Participating in the Public Workshop

Registration: To register for the public workshop, please visit the following website: *https://duke.zoom.us/meeting/register/tJcrceuhqjgvE9zGjDNOURONoJZvxrpK4Rvi#/registration.* Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone.

Registration is free, and persons interested in attending this public workshop must register to receive a link to the meeting. Registrants will receive a confirmation email after they register.

If you need special accommodations due to a disability, please contact Sabrena Mervin-Blake, 919–724–0715, *sabrena.mervin-blake@duke.edu* no later than November 15, 2023. Please note, closed captioning and American Sign Language will be available automatically.

Dated: August 18, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–18149 Filed 8–22–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Eunice Kennedy Shriver National Institute of Child Health and Human Development Special Emphasis Panel; PS/Member Conflict.

Date: October 5, 2023.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Eunice Kennedy Shriver National Institute of Child Health and Human Development, 6710B Rockledge Drive, Room 2137B, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Vera A. Cherkasova, Ph.D., Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health, and Human Development National Institutes of Health, 6710B Rockledge Drive, Room 2137B, Bethesda, MD 20892, (240) 478–4580, *vera.cherkasova@nih.gov.*

Name of Committee: Eunice Kennedy Shriver National Institute of Child Health and Human Development Special Emphasis Panel; Ruth L. Kirschstein National Research Service Award (NRSA) Institutional Research Training Grant Review.

Date: November 2–3, 2023.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: North Bethesda Marriott Hotel and Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Christiane M. Robbins, Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Room 2125D, Bethesda, MD 20892, (301) 451–4989, *crobbins@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.865, Research for Mothers and Children, National Institutes of Health, HHS)

Dated: August 18, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–18145 Filed 8–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; External Quality Assurance Program Oversight Laboratory (EQAPOL), RFP: 75N93022R00034.

Date: September 15, 2023.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21B, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Robert C. Unfer, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21B, Rockville, MD 20852, 240–669–5035. *unferrc@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: August 18, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–18147 Filed 8–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of Intramural Research Notice of Charter Renewal

In accordance with title 41 of the U.S. Code of Federal Regulations, section 102–3.65(a), notice is hereby given that the Charter for the Advisory Committee to the Deputy Director for Intramural Research, National Institutes of Health was renewed for an additional two-year period on August 15, 2023.

It is determined that the Advisory Committee to the Deputy Director for Intramural Research, National Institutes of Health is in the public interest in connection with the performance of duties imposed on the National Institutes of Health by law, and that these duties can best be performed through the advice and counsel of this group.

Inquiries may be directed to Claire Harris, Director, Office of Federal Advisory Committee Policy, Office of the Director, National Institutes of Health, 6701 Democracy Boulevard, Suite 1000, Bethesda, Maryland 20892 (Mail Stop Code 4875), Telephone (301) 496–2123, or *harriscl@mail.nih.gov.*

Dated: August 18, 2023.

David W Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–18192 Filed 8–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–NWRS–2023–N067; FXGO1664091HCC0–FF09D00000–190]

Hunting and Wildlife Conservation Council Virtual Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of virtual meeting.

SUMMARY: The U.S. Fish and Wildlife Service (Service) gives notice of a virtual meeting of the Hunting and Wildlife Conservation Council (HWCC), in accordance with the Federal Advisory Committee Act.

DATES: *Meeting:* The HWCC will meet on Tuesday, September 12, 2023, from 1 p.m. to 5 p.m. (eastern daylight time).

Registration: The registration deadline is Tuesday, September 5, 2023. To register, please contact the Designated Federal Officer (DFO) (see **FOR FURTHER INFORMATION CONTACT**).

Public Comment: If you wish to provide oral public comment or provide a written comment for the HWCC to consider, contact the DFO (see **FOR FURTHER INFORMATION CONTACT**) no later than Tuesday, September 5, 2023.

Accessibility: The deadline for accessibility accommodation requests is Tuesday, September 5, 2023. For more information, please see *Accessibility Information* below.

ADDRESSES: The meeting will be held via a virtual meeting platform. To register and receive the meeting link or telephone number for participation, contact the DFO (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Douglas Hobbs, Designated Federal Officer (DFO), by email at *doug_hobbs@fws.gov,* or by telephone at 703–358–2336. 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: The Hunting and Wildlife Conservation Council (HWCC) was established to further the provisions of the Fish and Wildlife Act of 1956 (16 U.S.C. 742a *et seq.*), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701–1785), the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–ee), other statutes applicable to specific Department of the Interior bureaus, and Executive Order 13443 (August 16, 2007), ''Facilitation of Hunting Heritage and Wildlife Conservation.'' The HWCC's purpose is to provide recommendations to the Federal Government, through the Secretary of the Interior and the Secretary of Agriculture, regarding policies and endeavors that (a) benefit wildlife resources; (b) encourage partnership among the public; sporting conservation organizations; and Federal, State, Tribal, and territorial governments; and (c) benefit fair-chase recreational hunting and safe recreational shooting sports.

Meeting Agenda

The meeting will include discussion of and potential recommendations related to the process of considering the future use of lead ammunition on National Wildlife Refuge System lands; possible reports by Council subcommittees; and other business. The HWCC will also hear public comment if members of the public request to comment. The final agenda and other related meeting information will be posted on the HWCC website, *https://www.fws.gov/program/hwcc.*

Public Input

Depending on the number of people who want to comment and the time available, the amount of time for individual oral comments may be limited. Interested parties should contact the DFO, in writing (see **FOR FURTHER INFORMATION CONTACT**), for placement on the public speaker list for this meeting. Requests to address the HWCC during the meeting will be accommodated in the order the requests are received. Registered speakers who wish to expand upon their oral statements, or those who had wished to speak but could not be accommodated on the agenda, may submit written statements to the DFO up to 30 days following the meeting.

Accessibility Information

Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. Please contact the DFO (**FOR FURTHER INFORMATION CONTACT**) no later than Tuesday, September 5, 2023, to give the Service sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information, 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: 5 U.S.C. ch. 10.

Matthew Huggler,

Acting Assistant Director—Office of Communications.

[FR Doc. 2023–18176 Filed 8–22–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036443; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Arizona State Museum, University of Arizona, Tucson, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Arizona State Museum (ASM), University of Arizona, intends to repatriate certain cultural items that meet the definition of unassociated funerary objects and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Santa Barbara County, CA.

DATES: Repatriation of the cultural items in this notice may occur on or after September 22, 2023.

ADDRESSES: Cristin Lucas, Repatriation Coordinator, Arizona State Museum, 1013 E University Boulevard, Tucson, AZ 85721–0026, telephone (520) 626–0320, email *lucasc@arizona.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the ASM. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the ASM.

Description

On an unknown date in 1925, 70 cultural items were removed from LOMPOC:1:2(GP) in Santa Barbara County, CA. The cultural items were collected by Frank McCoy, owner of the Santa Maria Inn, and were said to have come from a burial. Catalog records indicate that archeologist Harold S. Gladwin acquired the items from McCoy in 1925. Gladwin was a resident of Santa Barbara before founding the Gila Pueblo Archaeology Foundation in Globe, AZ, in the late 1920s. Gladwin lived at the Foundation off and on throughout its active years until he dissolved the institution in the late-1940s. In 1951, most of the Foundation's collections, including the 70 cultural items listed here, were transferred to ASM. The 70 unassociated funerary objects are one projectile point, one biface, 66 ground stone ornaments, one shell ring, and one shark tooth.

On an unknown date prior to 1936, one cultural item was removed from an unknown site north of Santa Barbara, Santa Barbara County, CA. The cultural item was collected by Carl Miller and is noted to have been recovered from ''Burial 24.'' In 1936, the item was donated to ASM by Mr. and Mrs. Wetmore Hodges in 1936, who presumably had received it from Miller. The one unassociated funerary object is a shell necklace.

In the mid-1920s, three cultural items were removed from a site designated as Santa Barbara:13(GP), a site recorded by the Gila Pueblo Archaeological Foundation. The original documentation of the site recorded its name as ''Amolomal'' and ''Burton Mound,'' and described its location as being ''at the foot of Chapala St., on the site once occupied by the Potter Hotel.'' Harrington (1928) lists *Syujtun* (also *Syuxtun* [Gamble 2008]) as the indigenous name for the Burton Mound site, while Rogers (1929) describes *Siuhtun, Burton Mound,* and *Amolomol* as separate sites. Recent publications (Gamble 2008; McDaniel Wilcox 2013) use the site number CA–SBA–28 for the mound and recognize it as having been the location of *Syuxtun.* The original catalog card for these items is undated, but the early catalog number suggests that they were likely collected in the mid-1920s by archeologist Harold S. Gladwin, who founded the Gila Pueblo Archaeology Foundation. In 1951, most of the Foundation's collections, including the three items listed here, were transferred to ASM. The three unassociated funerary objects are one fossil, one crystal, and one shell, all unmodified.

In 1926, one cultural item was removed from a site designated as Santa Barbara:4(GP), a site recorded by the Gila Pueblo Archaeological Foundation. The catalog card describes the site as a village located on Higgins Ranch, southeast of Carpinteria and adjoining the Carpinteria tar-pit, between the Coast Highway and the beach. The item was collected in 1926 by archeologist Harold S. Gladwin, who founded the Gila Pueblo Archaeology Foundation. In 1951, most of the Foundation's collections, including the one item listed here, were transferred to ASM. The one unassociated funerary object is a bifacial tool.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, geographical, and historical.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the ASM has determined that:

- The 75 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after September 22, 2023. If competing requests for repatriation are received, the ASM must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The ASM is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, § 10.10, and § 10.14.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18141 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036435; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: San Francisco State University Native American Graves Protection and Repatriation Act Program, San Francisco, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the San Francisco State University NAGPRA Program intends to repatriate certain cultural items that meet the definition of unassociated funerary objects and objects of cultural patrimony and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Humboldt County, CA.

DATES: Repatriation of the cultural items in this notice may occur on or after September 22, 2023.

ADDRESSES: Zay D. Latt, San Francisco State NAGPRA Program, 1600 Holloway Avenue, San Francisco, CA 94132, telephone (415) 405–3545, email *zlatt@sfsu.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the San Francisco State NAGPRA Program. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the San Francisco State NAGPRA Program.

Description

Eight objects of cultural patrimony were donated to the Tregenza Museum at San Francisco State University in the 1960s and 1970s. When the Treganza Anthropology Museum closed in 2012, all the Native American items were transferred to the San Francisco State University NAGPRA Program. The objects of cultural patrimony are eight Wiyot baskets from the Northwest California Coast. They consist of two round bowl baskets and one twined eating bowl donated by Elsa Korbel in 1968; one twined gift basket, one twin with knob lid, one twined open gift basket, and one twined cooking bowl donated by M. Molarsky; and one twined gift basket donated by the San Mateo Historical Society.

In 1966, 45 unassociated funerary objects were removed by Robert Ostrovsky and Robert Schenk from sites CA–HUM–207, CA–HUM–208, CA–HUM–211, CA–HUM–213, CA–HUM–214, CA–HUM–215, CA–HUM–216, and CA–HUM-Butler Valley as part of archeological site documentation in an area along Butler Valley Reservoir, in Humboldt County, CA. These cultural items were stored in the San Francisco State College Anthropology Collection and subsequently became part of the archeological collection of the Treganza Anthropology Museum at San Francisco State University (TAM). Upon closure of TAM in 2012, the objects were transferred to the San Francisco State University NAGPRA program. The 45 unassociated funerary objects are one spatulate hammer stone, one possible metate fragment, two shell fragments, and three worked chert pieces from CA–HUM–207; one stone mano from CA–HUM–208; one hopper mortar pestle from CA–HUM–211; one small hammer stone, one hopper mortar, and one small milling stone from CA–HUM–213; one small round stone, nine chert pieces, one possible bowl mortar fragment, one small hammer stone, one small mano, and one mano-hammer stone from CA–HUM–214; three soapstone pieces, one grey chert scraper, and 11 chert scrapers from CA–HUM–215; one worked red chert and one red chert scrapper from CA–HUM–216; and two groundstones from CA-Hum-Butler Valley.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, geographical, historical, and other relevant information or expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the San Francisco State NAGPRA Program has determined that:

- The 45 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- The eight cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Bear River Band of the Rohnerville Rancheria, California.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after September 22, 2023. If competing requests for repatriation are received, the San Francisco State NAGPRA Program must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of cultural items are considered a single request and not competing requests. The San Francisco State NAGPRA Program is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18134 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036442; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Arizona State Museum, University of Arizona, Tucson, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Arizona State Museum (ASM), University of Arizona, has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were removed from Santa Barbara County, CA.

DATES: Repatriation of the human remains in this notice may occur on or after September 22, 2023.

ADDRESSES: Cristin Lucas, Repatriation Coordinator, Arizona State Museum, 1013 E University Boulevard, Tucson, AZ 85721–0026, telephone (520) 626–0320, email *lucasc@arizona.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the ASM. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the ASM.

Description

Human remains representing, at minimum, one individual were removed from Santa Barbara County, CA. Catalog records on file at ASM indicate the human remains were removed from ''an Indian burial ground'' on Santa Rosa Island, CA, by C.W. Smith circa 1920. Smith worked on the island as a ranch superintendent when the land was privately owned by Arizona ranchers Walter L. Vail and J.V. Vickers. The human remains were later brought to the Arizona State Museum in 1920 by E.L. Vail, a descendant of Walter L. Vail. The human remains, represented by a mandible, belong to an adult male. No associated funerary objects are present.

Cultural Affiliation

The human remains in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, biological, folkloric, geographical, and historical.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Arizona State Museum has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- There is a relationship of shared group identity that can be reasonably traced between the human remains described in this notice and the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after September 22, 2023. If competing requests for repatriation are received, the Arizona State Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The ASM is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18140 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036438; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: The Fort Ticonderoga Association, Ticonderoga, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), The Fort Ticonderoga Association has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Addison County, VT.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after September 22, 2023.

ADDRESSES: Margaret Staudter, The Fort Ticonderoga Association, 30 Fort Ti Rd, Ticonderoga, NY 12883, telephone (518) 585–1015, email *mstaudter@fort-ticonderoga.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of The Fort Ticonderoga Association. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by The Fort Ticonderoga Association.

Description

Human remains representing, at minimum, one individual were removed from the Chipman's Point site (VT–AD–004) in Addison County, VT. In July of 1938, archeologist John Bailey and the Champlain Valley Archaeological Society led an excavation of a rock shelter at Chipman's Point. The human remains (FT HR–02), and associated

funerary objects removed during the excavations were brought to Fort Ticonderoga. The 24 associated funerary objects are one abrader, one abrader/hammerstone, one lot consisting of antler fragments, one modified antler, two anvil/hammerstones, one lot consisting of stone bifaces, one lot consisting of modified bones, one lot consisting of unmodified bones, one chisel, one lot consisting of core/hammerstone fragments, one lot consisting of stone debitage, one dog skeleton, one lot consisting of groundstones, one lot consisting of hammerstones, one hematite paint stone, one nut, one lot consisting of projectile points, one lot consisting of scrapers, one lot consisting of shells, one lot consisting of sherds, one stone, one lot consisting of faunal teeth, and one whetstone.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes. The following types of information were used to reasonably trace the relationship: archeological, geographical, historical, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, The Fort Ticonderoga Association has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- The 24 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Cayuga Nation; Oneida Indian Nation; Oneida Nation; Onondaga Nation; Saint Regis Mohawk Tribe; Seneca Nation of Indians; Seneca-Cayuga Nation; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca; and the Tuscarora Nation.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 22, 2023. If competing requests for repatriation are received, the Fort Ticonderoga Association must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The Fort Ticonderoga Association is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18136 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036439; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion Amendment: University of Tennessee, Knoxville, Department of Anthropology, Knoxville, TN

AGENCY: National Park Service, Interior.

ACTION: Notice; amendment.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of Tennessee, Knoxville, Department of Anthropology (UTK) has amended a Notice of Inventory Completion in the **Federal Register** on December 21, 2018. This notice amends the number of associated funerary objects in a collection removed from Stewart County, TN.

DATES: Disposition of the human remains and associated funerary objects in this notice may occur on or after September 22, 2023.

ADDRESSES: Dr. Ozlem Kilic, University of Tennessee, Office of the Provost, 527 Andy Holt Tower, Knoxville, TN 37996–0152, telephone (865) 974–2454, email *okilic@utk.edu* and *vpaa@utk.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of UTK. The National Park Service is not responsible for the determinations in this notice. Additional information on the amendments and determinations in this notice, including the results of consultation, can be found in the inventory or related records held by UTK.

Amendment

This notice amends the determinations published in a Notice of Inventory Completion in the **Federal Register** (83 FR 65722–65724, December 21, 2018). Disposition of the items in the original Notice of Inventory Completion has not occurred. An additional five associated funerary objects, from 40SW47, the Allen site, in Stewart County, TN, were discovered after publication of the notice. The 24 associated funerary objects (previously identified as 19) are two lots consisting of faunal remains, two lots consisting of lithics, one lot consisting of ceramics, one chert biface fragment, one chert core fragment, one chert drill fragment, one flint blade or knife, one granite nutting stone or bipolar anvil, seven chert projectile points, two chert uniface scrapers, four chert unutilized flakes (one primary; one secondary; two tertiary/thinning), and one chert flake or angular shatter.

Determinations (as Amended)

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, UTK has determined that:

- The human remains represent the physical remains of two individuals of Native American ancestry.
- The 24 objects are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- No relationship of shared group identity can be reasonably traced between the human remains and associated funerary objects and any Indian Tribe.

• The human remains and associated funerary objects described in this notice were removed from the aboriginal land of the Cherokee Nation; Eastern Band of Cherokee Indians; The Chickasaw Nation; and the United Keetoowah Band of Cherokee Indians in Oklahoma.

Requests for Disposition

Written requests for disposition of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 22, 2023. If competing requests for disposition are received, UTK must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary objects are considered a single request and not competing requests. UTK is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.11, and 10.13.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18137 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036436; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Item: University of Michigan, Ann Arbor, MI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of Michigan intends to repatriate a certain cultural item that meets the definition of a sacred objects and that has a cultural affiliation with the Indian Tribes in this notice. The cultural item was removed from an unknown county within the Rio Grande Valley, TX, or NM.

DATES: Repatriation of the cultural item in this notice may occur on or after September 22, 2023.

ADDRESSES: Dr. Ben Secunda, NAGPRA Office Manager, University of Michigan, Office of Research, Suite G269A, Lane Hall, Ann Arbor, MI 48109–1274, telephone (734) 615–8936, email *bsecunda@umich.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the University of Michigan. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the University of Michigan.

Description

The one cultural item was removed from an unknown county within the Rio Grande Valley, TX, or NM, by Volney Jones, former Curator of Ethnology, University of Michigan Museum of Anthropological Archaeology (UMMAA). Prior to 1931, Jones conducted fieldwork with the Isleta Pueblo in and around New Mexico and El Paso, TX. Jones completed his Master's Thesis for the University of New Mexico on Isleta Pueblo ethnobotany. The cultural item is one lot of botanicals.

Cultural Affiliation

The cultural item in this notice is connected to one or more identifiable earlier groups, Tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, Tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, folklore, geographical, historical, oral tradition, other relevant information, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the University of Michigan has determined that:

• The one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.

• There is a relationship of shared group identity that can be reasonably traced between the cultural item and the Pueblo of Isleta, New Mexico, and the Ysleta del Sur Pueblo.

Requests for Repatriation

Additional, written requests for repatriation of the cultural item in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural item in this notice to a requestor may occur on or after September 22, 2023. If competing requests for repatriation are received, the University of Michigan must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural item are considered a single request and not competing requests. The University of Michigan is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18135 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036440; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion Amendment: University of California, Riverside, Riverside, CA

AGENCY: National Park Service, Interior.

ACTION: Notice; amendment.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the

University of California, Riverside has amended a Notice of Inventory Completion published in the **Federal Register** on May 2, 2003. This notice amends the number of associated funerary objects in a collection removed from Riverside County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after September 22, 2023.

ADDRESSES: Megan Murphy, University of California, Riverside, 900 University Avenue, Riverside, CA 92517–5900, telephone (951) 827–6349, email *megan.murphy@ucr.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the University of California, Riverside. The National Park Service is not responsible for the determinations in this notice. Additional information on the amendments and determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the University of California, Riverside.

Amendment

This notice amends the determinations published in a Notice of Inventory Completion in the **Federal Register** (68 FR 23495, May 2, 2003). Repatriation of the items in the original Notice of Inventory Completion has not occurred. This amendment is being made to reflect the identification of newly discovered associated funerary objects for the archeological collection CA–RIV–1180 (accession 89). The original notice only listed human remains, but tribal representatives have reviewed the remaining objects in the collection and have identified funerary objects. The 3,917 objects include 3,628 animal bones, one bone bead, 219 ceramic sherds, 45 lithic materials, 12 flaked stone tools, two ground stones, one battered stone, and nine shell beads.

Determinations (as Amended)

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the University of California, Riverside has determined that:

- The human remains described in this amended notice represent the physical remains of one individual of Native American ancestry.
- The 3,917 objects described in this amended notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California; Augustine Band of Cahuilla Indians, California; Cabazon Band of Cahuilla Indians (*Previously* listed as Cabazon Band of Mission Indians, California); Cahuilla Band of Indians; Los Coyotes Band of Cahuilla and Cupeno Indians, California; Morongo Band of Mission Indians, California; Ramona Band of Cahuilla, California; Santa Rosa Band of Cahuilla Indians, California; and the Torres Martinez Desert Cahuilla Indians, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 22, 2023. If competing requests for repatriation are received, the {1. University of California, Riverside} must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The {1. University of California, Riverside} is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, 10.13, and 10.14.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18138 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036431; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Detroit Institute of Arts, Detroit, MI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Detroit Institute of Arts has completed an inventory of human remains and associated funerary objects and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any Indian Tribe. The human remains and associated funerary objects were removed from an unknown geographic location.

DATES: Disposition of the human remains and associated funerary objects in this notice may occur on or after September 22, 2023.

ADDRESSES: Denene De Quintal, Detroit Institute of Arts, 5200 Woodward Avenue, Detroit, MI 48202, telephone (313) 578–1067, email *NAGPRA@dia.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Detroit Institute of Arts. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Detroit Institute of Arts.

Description

On an unknown date, human remains representing, at minimum, 11 individuals were removed from an unknown geographic location. The individuals (X1989.2344; X1989.3750; X1989.3758) were acquired by the Detroit Institute of Arts (DIA). On May 19, 2021, museum staff encountered human remains during a comprehensive review of the ''Indigenous Americas'' collection. The six associated funerary objects are one lot consisting of unidentified animal teeth; one tooth or claw fragment; one lot of claws; one piece of wood; one shell; and one lot consisting of non-human bone fragments.

Pursuant to 43 CFR 10.16, the Secretary of the Interior may make a recommendation for a transfer of control of the culturally unidentifiable human remains and associated funerary objects. In June of 2023, the Detroit Institute of Arts requested that the Review Committee consider a proposal to transfer control of the human remains in this notice to the Sault Ste. Marie Tribe of Chippewa Indians, Michigan. The Review Committee, acting pursuant to its responsibility under 25 U.S.C. 3006(c)(5), considered the request at its June 2023 meeting and recommended to the Secretary that the proposed transfer of control proceed. A July 2023 letter on behalf of the Secretary of Interior from the Designated Federal Official transmitted the Secretary's independent review and concurrence with the Review Committee that:

- The Detroit Institute of Arts consulted with every appropriate Indian Tribe or Native Hawaiian organization,
- None of the consulted and notified Indian Tribes and Native Hawaiian organizations objected to the proposed transfer of control, and
- The Detroit Institute of Arts may proceed with the agreed upon transfer of control of the culturally unidentifiable human remains and associated funerary objects to the Sault Ste. Marie Tribe of Chippewa Indians, Michigan.

Transfer of control is contingent on the publication of a Notice of Inventory Completion in the **Federal Register**. This notice fulfills that requirement.

Determinations

Officials of the Detroit Institute of Arts have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on biological evidence.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 11 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the six objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.
- Pursuant to 43 CFR 10.10(g)(2) and 10.16, the disposition of the human remains and associated funerary objects may be to the Sault Ste. Marie Tribe of Chippewa Indians, Michigan.

Request for Disposition

Written requests for disposition of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes or non-Federally recognized Indian groups identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary objects described in this notice to a requestor may occur on or after September 22, 2023. If competing requests for disposition are received, the Detroit Institute of Arts must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary objects are considered a single request and not competing requests. The Detroit Institute of Arts is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18131 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036444; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Augusta Museum of History, Augusta, GA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Augusta Museum of History intends to repatriate certain cultural items that meet the definition of objects of cultural patrimony and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Placer County, CA.

DATES: Repatriation of the cultural items in this notice may occur on or after September 22, 2023.

ADDRESSES: Nancy Glaser, Executive Director, Augusta Museum of History, 560 Reynolds Street, Augusta, GA 30901, telephone (706) 722–8454, email *amh@augustamuseum.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Augusta Museum of History. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Augusta Museum of History.

Description

Ten lots of cultural items were removed from Placer County, CA, most likely between 1924 and 1938, by Smith Coin and Curio Company, which, during those years, was located at 1541 48th Street in Sacramento, CA. These cultural items were likely procured for the Augusta Museum of History by former director Jouett Davenport, Sr. (1937–1963). The 10 objects of cultural patrimony are individual lots consisting of ceramic, glass, and stone beads.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: archeological, geographical, historical, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Augusta Museum of History has determined that:

- The 10 cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and

the United Auburn Indian Community of the Auburn Rancheria of California.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after September 22, 2023. If competing requests for repatriation are received, the Augusta Museum of History must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The Augusta Museum of History is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, § 10.10, and § 10.14.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18142 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036433; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Vassar College, Poughkeepsie, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), Vassar College has completed an inventory of human remains and has determined that there is no cultural affiliation between the human remains and any Indian Tribe. The human remains were removed from unknown geographic locations.

DATES: Disposition of the human remains in this notice may occur on or after September 22, 2023.

ADDRESSES: Brian Daly, Vassar College, 124 Raymond Avenue, Poughkeepsie, NY 12604, telephone (845) 437–5310, email *brdaly@vassar.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Vassar College. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by Vassar College.

Description

Human remains representing, at minimum, five individuals were removed from unknown geographic locations. During the 1920s, the human remains (7; 8; 9; 14; 24) were acquired by Vassar College's Natural History and Social Museums. After the museums dissolved in the 1960s, the human remains were acquired by the Anthropology and Biology Departments. Human remains located in the Biology and Anthropology Department teaching collections were examined for visual and statistical markers of Native American affinities, with results reported on December 21, 2020. No associated funerary objects are present.

Pursuant to 43 CFR 10.16, the Secretary of the Interior may make a recommendation for a transfer of control of the culturally unidentifiable human remains. In June of 2023, Vassar College requested that the Review Committee consider a proposal to transfer control of the human remains in this notice to the Saginaw Chippewa Indian Tribe of Michigan and the Stockbridge Munsee Community, Wisconsin. The Review Committee, acting pursuant to its responsibility under 25 U.S.C. 3006(c)(5), considered the request at its June 2023 meeting and recommended to the Secretary that the proposed transfer of control proceed. A July 2023 letter on behalf of the Secretary of Interior from the Designated Federal Official transmitted the Secretary's independent review and concurrence with the Review Committee that:

- Vassar College consulted with every appropriate Indian Tribe or Native Hawaiian organization,
- None of the consulted and notified Indian Tribes and Native Hawaiian organizations objected to the proposed transfer of control, and
- Vassar College may proceed with the agreed upon transfer of control of the culturally unidentifiable human remains to the Saginaw Chippewa Indian Tribe of Michigan and the Stockbridge Munsee Community, Wisconsin.

Transfer of control is contingent on the publication of a Notice of Inventory Completion in the **Federal Register**. This notice fulfills that requirement.

Determinations

Officials of Vassar College have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on biological evidence.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of five individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian Tribe.
- Pursuant to 43 CFR 10.10(g)(2) and 10.16, the disposition of the human remains and associated funerary objects may be to the Saginaw Chippewa Indian Tribe of Michigan and the Stockbridge Munsee Community, Wisconsin.

Request for Disposition

Written requests for disposition of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains described in this notice to a requestor may occur on or after September 22, 2023. If competing requests for disposition are received, Vassar College must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains are considered a single request and not competing requests. Vassar College is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18133 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036432; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Colorado Springs Fine Arts Center at Colorado College, Colorado Springs, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Colorado Springs Fine Arts Center at Colorado College (previously the Fine Arts Center Taylor Museum and the Colorado Springs Fine Arts Center) has completed an inventory of human remains and associated funerary objects and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any Indian Tribe. The human remains and associated funerary objects were removed from an unknown geographic location.

DATES: Disposition of the human remains and associated funerary objects in this notice may occur on or after September 22, 2023.

ADDRESSES: Michael Christiano, Colorado Springs Fine Arts Center at Colorado College, 30 West Dale Street, Colorado Springs, CO 80903, telephone (719) 477–4311, email *mchristiano@coloradocollege.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Colorado Springs Fine Arts Center at Colorado College. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by Colorado Springs Fine Arts Center at Colorado College.

Description

On an unknown date, human remains representing, at minimum, one individual were removed from an unknown geographic location. Sometime prior to January 1929, the human remains were acquired by Dr. Richard Warren Corwin (1852–1929). Corwin was a world traveler who made numerous trips to various locales across Europe, Asia, Africa, and Oceania. Corwin's nephew, Dr. William Senger, inherited Corwin's collections and donated them to Colorado College in 1940 and 1943. In 1987, Colorado College closed the Palmer Hall Museum, and the collection was loaned to several museums, including the Fine Arts Center Taylor Museum. Subsequently, the human remains became part of the collection of the Fine Arts Center Taylor Museum and in 2016, the Fine Arts Center Taylor Museum merged with Colorado College. The human remains (Colorado College catalog number 11 and 249)—two teeth—belong to a child. Additional teeth belonging to this individual (Colorado College catalog number 1, 2, 3, 4, 5, 7, 8, 9, 235, 236, 240, 242, 243, and 252) are currently missing from the museum's collections, but upon being located, they will be transferred together with the human remains listed in this notice. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from an unknown geographic location. On April 5, 2022, an envelope marked ''July 2019 Tooth and Bone Fragments'' was discovered. The human remains (FIC 2022.77)—a tooth—belong to an adult. The two associated funerary objects are the femur fragment of a small adult mammal (176; FIC 2022.75) and a mammalian skeletal fragment (FIC 2022.76).

Pursuant to 43 CFR 10.16, the Secretary of the Interior may make a recommendation for a transfer of control of the culturally unidentifiable human remains and associated funerary objects. In June of 2023, the Colorado Springs Fine Arts Center at Colorado College requested that the Review Committee consider a proposal to transfer control of the human remains and associated funerary objects in this notice to the Hopi Tribe of Arizona and the Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado. The Review Committee, acting pursuant to its responsibility under 25 U.S.C. 3006(c)(5), considered the request at its June 2023 meeting, and it recommended to the Secretary that the proposed transfer of control proceed. A July 2023 letter on behalf of the Secretary of Interior from the Designated Federal Official transmitted the Secretary's independent review and concurrence with the Review Committee that:

- The Colorado Springs Fine Arts Center at Colorado College consulted with every appropriate Indian Tribe or Native Hawaiian organization,
- None of the consulted and notified Indian Tribes and Native Hawaiian organizations objected to the proposed transfer of control, and
- The Colorado Springs Fine Arts Center at Colorado College may proceed with the agreed upon transfer of control of the culturally unidentifiable human remains and associated funerary objects to the Hopi Tribe of Arizona and the Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado.

Transfer of control is contingent on the publication of a Notice of Inventory Completion in the **Federal Register**. This notice fulfills that requirement.

Determinations

Officials of the Colorado Springs Fine Arts Center at Colorado College have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on biological evidence and museum history.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the two objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.
- Pursuant to 43 CFR 10.10(g)(2) and 10.16, the disposition of the human remains and associated funerary objects may be to the Hopi Tribe of Arizona and the Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado.

Request for Disposition

Written requests for disposition of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes or non-Federally recognized Indian groups identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or

Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary objects described in this notice to a requestor may occur on or after September 22, 2023. If competing requests for disposition are received, Colorado Springs Fine Arts Center at Colorado College must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary objects are considered a single request and not competing requests. Colorado Springs Fine Arts Center at Colorado College is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18132 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036441; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion Amendment: University of California, Riverside, Riverside, CA

AGENCY: National Park Service, Interior.

ACTION: Notice; amendment.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of California, Riverside has amended a Notice of Inventory Completion published in the **Federal Register** on May 2, 2003. This notice amends the number of associated funerary objects and the cultural affiliation in a collection removed from Riverside County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after September 22, 2023.

ADDRESSES: Megan Murphy, University of California, Riverside, 900 University Avenue, Riverside, CA 92517–5900, telephone (951) 827–6349, email *megan.murphy@ucr.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the University of California, Riverside. The National Park Service is not responsible for the determinations in this notice. Additional information on the amendments and determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the University of California, Riverside.

Amendment

This notice amends the determinations published in a Notice of Inventory Completion in the **Federal Register** (68 FR 23495, May 2, 2003). Repatriation of the items in the original Notice of Inventory Completion has not occurred. This amendment is being made to reflect a change in cultural affiliation and the identification of newly discovered associated funerary objects for the archeological collection CA–RIV–102 (accession 58).

The Soboba Band of Luiseno Indians, California have been newly identified as being culturally affiliated with CA–RIV–102. Also, objects have been newly identified as associated funerary objects (previously, no associated funerary objects were identified). The 6,600 associated funerary objects are 4,003 animal bones, one ceramic sherd, two pieces of clay, 16 pieces of charcoal, one seed pod bead, five seeds, one glass object, 14 fire-affected rocks, 1,201 pieces of lithic materials, 43 flaked stone tools, 87 ground stone tools, 44 crystals, one piece of ochre, six battered stones, two stone beads, 1,151 unmodified lithic pieces, five shell beads, 12 unmodified shells, and five metates.

Determinations (as Amended)

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the University of California, Riverside has determined that:

- The human remains represent the physical remains of one individual of Native American ancestry.
- The 6,600 objects described in this amended notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California; Augustine Band of Cahuilla Indians, California; Cabazon Band of Cahuilla Indians (*Previously* listed as Cabazon Band of Mission Indians, California); Cahuilla Band of Indians; Los Coyotes Band of Cahuilla and Cupeno Indians, California; Morongo Band of Mission Indians, California; Ramona Band of Cahuilla, California; Santa Rosa Band of Cahuilla Indians, California; Soboba Band of Luiseno Indians, California; and the Torres Martinez Desert Cahuilla Indians, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 22, 2023. If competing requests for repatriation are received, the University of California, Riverside must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The University of California, Riverside is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, 10.13, and 10.14.

Dated: August 16, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–18139 Filed 8–22–23; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1324]

Certain Mobile Electronic Devices; Notice of Commission Decision Not To Review an Initial Determination Terminating the Investigation Based on Settlement; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 35) of the presiding Administrative Law Judge (''ALJ'') terminating the investigation in its entirety based on settlement. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–4716. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On August 22, 2022, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), based on a complaint filed by Maxell, Ltd. of Kyoto, Japan (''Complainant''). *See* 87 FR 51445–46 (Aug. 22, 2022). The complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain mobile electronic devices by reason of infringement of certain claims of U.S. Patent Nos. 7,199,821; 7,324,487; 8,170,394 (''the '394 patent''); 8,982,086; 10,129,590 (''the '590 patent''); and 10,244,284 (''the '284 patent''). The notice of investigation names Lenovo Group Ltd. of Beijing, China; Lenovo (United States) Inc. of Morrisville, North Carolina; and Motorola Mobility LLC of Libertyville, Illinois (collectively, ''Respondents'') as respondents in the investigation. *See id.* The Office of Unfair Import Investigations (''OUII'') is also a party to the investigation. *See id.*

On March 6, 2023, the Commission partially terminated the investigation as to the '590 and '284 patents based on the withdrawal of the complaint as to those patents. *See* Order No. 16 (Feb. 6, 2023), *unreviewed by* Comm'n Notice (Mar. 6, 2023). On May 15, 2023, the Commission partially terminated the investigation as to the '394 patent based on the withdrawal of the complaint as to that patent. *See* Order No. 22 (Apr. 13, 2023), *unreviewed by* Comm'n Notice (May 15, 2023).

On July 17, 2023, Complainant and Respondents jointly moved to terminate the investigation in its entirety based on settlement. On July 20, 2023, OUII filed a response in support of the joint motion.

On July 26, 2023, the ALJ issued the subject ID (Order No. 35) granting the joint motion to terminate the investigation based on settlement. The ID finds that the joint motion complies with Commission Rules 210.21(a), (b) (19 CFR 210.21(a), (b)). *See* ID at 1–2. Specifically, the ID notes that the joint motion includes confidential and public copies of the settlement agreement. *See id.* at 2. In addition, the motion states that ''there are no other agreements, written or oral, express or implied, relating to the subject matter of this Investigation.'' *See id.* Furthermore, in accordance with Commission Rule 210.50(b)(2) (19 CFR 210.50(b)(2)), the ID finds ''no evidence of any adverse impact on the public interest from termination of this investigation by settlement.'' *See id.*

No petition for review of the subject ID was filed.

The Commission has determined not to review the subject ID. The investigation is terminated.

The Commission's vote for this determination took place on August 17, 2023.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: August 18, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–18122 Filed 8–22–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to The National Cooperative Research and Production Act of 1993—Medical Technology Enterprise Consortium

Notice is hereby given that, on July 5, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Medical Technology Enterprise Consortium (''MTEC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 2508 Biosciences LLC, Denver, CO; ALA Scientific Instruments, Farmingdale, NY; American Military Families Action Network, Tacoma, WA; American Technology Solutions International, Fredericksburg, VA; AMK Technologies of Ohio LLC, Mount Vernon, OH; Anchor Therapy Clinic, Sacramento, CA; Aphios Corp., Woburn, MA; Aruna Bio, Inc., Athens, GA; Asante Bio, Tampa, FL; Atorvia Health Technologies, Inc., Ottawa, Ontario, CAN; Axioforce, Inc., St. Louis, MO; BioAesthetics Corp., Durham, NC; Boundless Science LLC, Chapel Hill, NC; Brinter, Inc., Santa Monica, CA; California State University, Long Beach Research Foundation, Long Beach, CA; Compremium AG, Westlake Village, CA; Critical Path Institute, Tucson, AZ; CSP Technologies, Inc., Auburn, AL; CTD Group LLC, Vashon, WA; Dawson CMS, Fairfax, VA; Daxor Corp., Oak Ridge, TN; Design West Technologies, Inc., Tustin, CA; Diagnostic Biochips, Inc., Glen Burnie, MD; Edward Via College of Osteopathic Medicine, Blacksburg, VA; Equilibr.io, Inc., Palo Alto, CA; FireFlare Games LLC, Cheyenne, WY; fluidIQ, Inc., Ellijay, CA; FreeFlow Medical Devices LLC, Brevard, NC; Global Coalition for Adaptive Research, Larkspur, CA; Goldbelt Apex LLC, Herndon, VA; Hafion, Inc., Ann Arbor, MI; HealthTech Connex, Surrey, CAN; Hope 4 You Global LLC, Lowell, AR; ImmersiveTouch, Inc., Chicago, IL; Innerpulse Compression, Inc., Ft. Meyers, FL; Innovative Emergency Management, Inc., Morrisville, NC; International Consulting Associates, Inc., Arlington, VA; Jurata Thin Film, Inc., Chapel Hill, NC; K9s for Warriors, Ponte Vedra Beach, FL; Kendall Square

Sciences, Cambridge, MA; Leveque Intellectual Property Law, P.C., Frederick, MD; Link to Learn dba Simwerx, Denver, CO; Locus Biosciences, Morrisville, NC; LSU Health Science Center at Shreveport, Shreveport, LA; MACH32, Inc., Edmonton, AB, CAN; Maravai Life Sciences, San Diego, CA; Mechano Therapeutics LLC, Philadelphia, PA; Memsel, Inc., Fort Worth, TX; My Buddies Place, Inc., Pasadena, CA; National Foundation for Integrative Medicine, Warrenton, VA; Neuraptive Therapeutics, Inc., Chesterbrook, PA; NeuroGeneces, Inc., Santa Fe, NM; New York University School of Medicine, New York, NY; Newrotex, Ltd., Oxford, GBR; NextStep Robotics, Inc., Baltimore, MD; nFlux, Inc., Palm Springs, CA; NovoPedics, Inc., Princeton, NJ; Operation Freedom Paws, San Martin, CA; Optum Public Sector Solutions, Inc., Falls Church, VA; Otter Cove Solutions LLC, Gaithersburg, MD; Paws for Purple Hearts, Penngrove, CA; Paxauris LLC, Phoenix, AZ; Pison Technology, Boston, MA; Plas-Free, Ltd., Nazareth, ISR; Problem Solutions LLC, Johnstown, PA; Quidel Corp., San Diego, CA; Rapid Prototyping & Manufacturing Technologies LLC, Forest Hill, MD; RayBalance, Inc., San Diego, CA; Recornea SRL, Martignacco, ITA; Regents of the University of Minnesota, Minneapolis, MN; Resilient Lifescience, Inc., Pittsburgh, PA; Reveille Group, Tampa, FL; RSM US LLP, Chicago, IL; SafeBeat Rx, Inc., Chico, CA; SafeBVM Corp., Boston, MA; Safi Biotherapeutics, Inc., Cambridge, MA; Saint Louis University, St. Louis, MO; Shee Atiká Enterprises, Huntsville, AL; Smith & Nephew, Inc., Cordova, TN; SpineThera, Inc., Plymouth, MN; Summa Bio Solutions, Inc., Fort Worth, TX; Surgicure Technologies, Inc., Charlestown, MA; Tanner Research, Inc., Duarte, CA; Texas Research & Technology Foundation, San Antonio, TX; The McConnell Group, Landover, MD; The Ohio State University, Columbus, OH; The Research and Recognition Project, Inc., Corning, NY; Transom Scopes, Inc. dba Instrument Technology, Inc., Westfield, MA; TreMonti Consulting LLC, Reston, VA; UES, Inc., Dayton, OH; Virginia Biotechnology Association, Richmond, VA; Virginia Polytechnic Institute and State University, Blacksburg, VA; Webworld Technologies, Inc. dba WTI, Fairfax, VA; ZeSa LLC, Eden Prarie, MN; and Zylo Therapeutics, Inc., Greenville, SC have been added as parties to this venture.

Also, 4M Biotech, Ltd., Victoria, CANADA; 8i East, Inc., Hermosa Beach, CA; Acenxion Biosystems, Inc., Kansas City, KS; Advanced Biomimetic Sensors, Inc., Bethesda, MD; Anthem Engineering LLC, Elkridge, MD; ApnoMed, Inc., Bellevue, WA; Applied Brain Research, Inc., Waterloo, Ontario, CAN; Aptitude Medical Systems, Santa Barbara, CA; ArchieMD, Inc., Boca Raton, FL; Asayena, La Jolla, CA; Aspen Medical USA, San Antonio, TX; Aspen Stem Cell Institute LLC, Basalt, CO; Aspisafe Solutions, Inc., Brooklyn, NY; Assursec LLC, Leesburg, VA; Atlantic Diving Supply, Inc. dba ADS, Inc., Virginia Beach, VA; Atmospheric Plasma Solutions, Cary, NC; Bennett Federal LLC, Plymouth, MN; Bio Med Sciences, Inc., Allentown, PA; Blue Horizon Development LLC dba Precise Portions LLC, Norfolk, VA; Cambridge Research & Development, Inc., Nashua, NH; Career Haven LLC, Largo, MD; Cibao Cloud Technologies, Inc., Portsmouth, RI; Cleveland Clinic Foundation, Cleveland, OH; Collaborative Effort, Inc. dba RAIN Incubator, Tacoma, WA; Cornell University, Ithaca, NY; Curia Global, Inc., Albany, NY; Curza Global LLC, Salt Lake City, UT; DeltaStrac LLC, New Windsor, MD; DxLab, Inc., Somerville, MA; ECM Therapeutics, Inc., Warrendale, PA; electroCore, Inc., Rockaway, NJ; Elite Performance & Learning Center, PS, Seattle, WA Enalare Therapeutics, Inc., Princeton, NJ; Excera, Inc., Minneapolis, MN; Fed Grow LLC dba FedNetix, Issaquah, WA; Felix Biotechnology, Inc., South San Francisco, CA; First Nation Group LLC, Niceville, FL; Georgia Tech Research Corp., Atlanta, GA; Gothams LLC, Austin, TX; Hememics Biotechnologies, Inc., Gaithersburg, MD; Hewlett Packard Enterprise, Reston, VA; Hough Ear Institute, Oklahoma City, OK; Icarus Medical LLC, Charlottesville, VA; Ichor Sciences LLC, Nashville, TN; INdev LLC, Austin, TX; Inovio, Plymouth Meeting, PA; Jaw Joint Science Institute, Philadelphia, PA; Kowa, Inc., Houston, TX; Legacy US, Inc., Boise, ID; Life Elixir LLC, Irvine, CA; Linshom Medical, Inc., Ellicott City, MD; Louisiana State University System dba Pennington Biomedical Research Center, Baton Rouge, LA; Malum, Inc., Coralville, IA; Microsoft, Redmon, VA; Nanohmics, Inc., Austin, TX; National Association of Veterans' Research and Education Foundations, Washington, DC; Neunos ZRt, Szeged, HUN; Neuro11 Technologies, Inc., Cambridge, MA; Neuronoff, Inc., Valencia, CA; Neursantys, Inc., Chicago, IL; NoMo Diagnostics, Chicago, IL; Noninvasix, Inc., Houston, TX; North Carolina State University, Raleigh, NC; ODSS Holdings, Greenville, SC; ORSA Technologies LLC, Scottsdale, AZ; Orthopedic Wellness Laboratories, Woodinville, WA; PERSOWN, Inc., Jacksonville, FL; Plymouth Rock Technologies, Inc., Plymouth, MA; Pneumeric, Inc., Rochester, MN; Powerbuilding Holdings Corp., Staten Island, NY; PuraLab LLC, Wilsonville, OR; Qidni Labs, Inc., Buffalo, NY; Quantum Ventura, Inc., San Jose, CA; Riverside Research, Arlington, VA; Rockley Photonics, Pasadena, CA; Rubix LS, Lawrence, MA; Sentien Biotechnologies, Lexington, MA; Shock Therapeutics Biotechnologies, Inc., Baltimore, MD; SiDx, Inc., Seattle, WA; Sierra Nevada Corp., Sparks, NV; Singularity Scitech LLC, Bronxville, NY; SmartHealth Catalyzer, Inc., Riverwoods, IL; Soar Technology, Inc., Ann Arbour, MI; Social Science Innovations Corp., New York, NY; Sonix Medical Devices, Inc., Braselton, GA; Strive Tech, Inc., Bothell, WA; SyncThink, Inc., Palo Alto, CA; Tasso, Inc., Seattle, WA; TechWerks LLC, Arlington Heights, IL; TensionSquare LLC, Port Charlotte, FL; Terida LLC, Pinehurst, NC; TetraCells, Inc., Marietta, GA; Thomas Jefferson University, Philadelphia, PA; Thought Leadership and Innovation Foundation, McLean, VA; TourniTek, Seattle, WA; Trauma Insight LLC, San Antonio, TX; TroutHouseTech LLC, Arlington, VA; Tygrus LLC, Troy, MI; University of Central Florida Research Foundation, Inc., Orlando, FL; University of Oregon, Eugene, OR; University of Tennessee Health Science Center, Memphis, TN; UTL, Inc., Carlsbad, CA; Vir Biotechnology, San Francisco, CA; Vizbii Technologies, Inc., Charleston, SC; Voltron Therapeutics, New York, NY; War Horses for Veterans, Inc., Stilwell, KS; and ZuluCare LLC, Bethpage, NY have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MTEC intends to file additional written notifications disclosing all changes in membership.

On May 9, 2014, MTEC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 9, 2014 (79 FR 32999).

The last notification was filed with the Department on April 5, 2023. A notice was published in the **Federal**

Register pursuant to section 6(b) of the Act on June 12, 2023 (88 FR 38095).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–18094 Filed 8–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to The National Cooperative Research and Production Act of 1993—Southwest Research Institute—Cooperative Research Group on Ros-Industrial Consortium-Americas

Notice is hereby given that, on June 15, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on ROS-Industrial Consortium-Americas (''RIC-Americas'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Instituto Tecnologico Y De Estudios Superiores De Monterrey, Monterrey, MEXICO, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and RIC-Americas intends to file additional written notifications disclosing all changes in membership.

On April 30, 2014, RIC-Americas filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 9, 2014 (79 FR 32999).

The last notification was filed with the Department on March 31, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on June 12, 2023 (88 FR 38097).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–18086 Filed 8–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The Open Group, L.L.C.

Notice is hereby given that, on June 29, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), The Open Group, L.L.C. (''TOG'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ABAI Business Solutions, S.A.U., Madrid, SPAIN; ANELLO Photonics Inc., Santa Clara, CA; Autonomous Defense Technologies Corp., New York, NY; CascadeIT-Dr Helmut Steigele, Zürich, SWITZERLAND; Department of National Defence/Ministère de la Défense National, Ottawa, CANADA; Dr. Jürgen Grötsch, Friedrich-Alexander Universität, Erlangen, GERMANY; E-Panzer Security Consulting, Inc., Southlake, TX; Gainwell Technologies LLC, Conway, AR; Galois, Inc., Portland, OR; Grupo Magnus SAS, Bogota, COLOMBIA; HII Mission Technologies Corp., Syracuse, NY; INEOS Offshore BCS Limited, London, UNITED KINGDOM; Innovation Technical Solutions, Muscat, OMAN; Intellisense Systems, Inc., Torrance, CA; Keystone.no AS, Stavanger, NORWAY; Kognitus Tecnologia, Consultoria e Serviços Ltda, Rio de Janeiro, BRAZIL; Moog, Inc., New York, NY; Nozom Alkhebrat Information Technology Company, Riyadh, SAUDI ARABIA; Phoenix International Systems, Inc., Orange, CA; Rapita Systems Ltd, York, UNITED KINGDOM; Revo Testing Technologies LLC, Houston, TX; Silixa Ltd, Elstree, UNITED KINGDOM; Spinning Yarns Ltd, Edinburgh, UNITED KINGDOM; State Bank of India, Navi Mumbai, INDIA, Tesserent Academy dba ALC Training, Box Hill, AUSTRALIA; Tieto Sweden AB, Solna, SWEDEN; US Army PEO C3T, Aberdeen Proving Ground, MD and Whitson AS Trondheim, NORWAY have been added as parties to this venture.

Also, Abaco Systems, Inc., Huntsville, AL; Abiztar Learning Technologies, S.C, Tlalpan, MEXICO; Adventium Enterprises LLC dba Adventium Labs, Minneapolis, MN; Area-I Inc., Kennesaw, GA; aRway AB, Stockholm, SWEDEN; Avancier Limited, New Malden, UNITED KINGDOM; Beeond, Inc., New Bern, NC; Coherent Technical Services Inc. (CTSI), Lexington Park, MD; Core Laboratories LP, Houston, TX; Deloitte Consulting, LLP, Atlanta, GA; E-Careers/Miltech Limited, Langley, UNITED KINGDOM; LNS Research, Cambridge. MA; Mi4 Corporation, Houston, TX; NETGEOMETRY SDN. BHD., Selangor, MALAYSIA; NICON Company, Seoul, REPUBLIC OF KOREA; OhioHealth Corporation, Dublin, OH; Performance Software, Clearwater, FL; QPR Software Plc, Helsinki, FINLAND; Real-Time Innovations, Inc., Sunnyvale, CA; Royal Philips N.V., Eindhoven, THE NETHERLANDS; SAP, Newton Square, PA; Shared Spectrum Company, Vienna, VA; Solvera Solutions, Regina, CANADA; Spirent Federal Systems Inc., Pleasant Grove, UT; TOTAL SA, Paris La Defense Cedex, FRANCE; Trenton Systems, Inc., Lawrenceville, GA; TTTech Industrial Automation AG, Vienna, AUSTRIA; and University of Houston, Houston, TX have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and TOG intends to file additional written notifications disclosing all changes in membership.

On April 21, 1997, TOG filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 13, 1997 (62 FR 32371).

The last notification was filed with the Department on February 28, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on March 27, 2023 (88 FR 18180).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–18090 Filed 8–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Open Grid Alliance, Inc.

Notice is hereby given that on June 16, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Open Grid Alliance, Inc. (''OGA'') has filed written notifications simultaneously with the

Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, CONNECT Centre, Dublin, IRELAND, has been added as a party to this venture.

Also, Accedian Networks, Inc., St-Laurent, CANADA; Arm, Ltd., Cambridge, UNITED KINGDOM; DriveNets, Ra'anana, ISRAEL; and Macrometa, San Mateo, CA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and OGA intends to file additional written notifications disclosing all changes in membership.

On March 31, 2022, OGA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on May 12, 2022 (87 FR 29180).

The last notification was filed with the Department on March 28, 2022. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on June 12, 2023 (88 FR 38099).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–18087 Filed 8–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to The National Cooperative Research and Production Act of 1993—Electrified Vehicle and Energy Storage Evaluation

Notice is hereby given that, on June 15, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Electrified Vehicle and Energy Storage Evaluation (''EVESE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Honda Development and Manufacturing of America, Raymond, OH, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and EVESE intends to file additional written notifications disclosing all changes in membership.

On September 24, 2020, EVESE filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on October 15, 2020 (85 FR 65423).

The last notification was filed with the Department on April 13, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on June 13, 2023 (88 FR 38535).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–18077 Filed 8–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to The National Cooperative Research and Production Act of 1993—Subcutaneous Drug Development & Delivery Consortium, Inc.

Notice is hereby given that, on June 23, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Subcutaneous Drug Development & Delivery Consortium, Inc. (''Subcutaneous Drug Development & Delivery Consortium, Inc.'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Becton, Dickinson and Company, Franklin Lakes, NJ, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Subcutaneous Drug Development & Delivery Consortium, Inc. intends to file additional written notifications disclosing all changes in membership.

On October 26, 2020, Subcutaneous Drug Development & Delivery Consortium, Inc. filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on December 3, 2020 (85 FR 78148).

The last notification was filed with the Department on December 21, 2022. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on January 25, 2023 (88 FR 4850).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–18088 Filed 8–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Undersea Technology Innovation Consortium

Notice is hereby given that, on July 5, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Undersea Technology Innovation Consortium (''UTIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Applied Research Associates, Inc., Albuquerque, NM; Baker Manufacturing, Inc., Tacoma, WA; Custom Materials, Inc., Chagrin Falls, OH; Fairbanks Morse LLC, Beloit, WI; Florida Atlantic University, Boca Raton, FL; MBDA, Inc., Huntsville, AL; and Huntington Ingalls, Inc., Pascagoula, MS, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and UTIC intends to file additional written notifications disclosing all changes in membership.

On October 9, 2018, UTIC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on November 2, 2018 (83 FR 55203).

The last notification was filed with the Department on April 6, 2023. A notice was published in the **Federal**

Register pursuant to section 6(b) of the Act on June 12, 2023 (88 FR 38095).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–18093 Filed 8–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Bureau of Labor Statistics Data Sharing Program

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Bureau of Labor Statistics (BLS)-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 22, 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: An important aspect of the mission of the BLS is to disseminate to the public the maximum amount of information possible. Not all data are publicly available because of the importance of maintaining the confidentiality of BLS data. However, the BLS has opportunities available on a limited basis for eligible researchers to access confidential data for purposes of conducting valid statistical analyses that further the mission of the BLS as permitted by the Confidential Information Protection and Statistical Efficiency Act. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 7, 2023 (88 FRN 37281).

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.

Agency: DOL–BLS.

Title of Collection: Bureau of Labor Statistics Data Sharing Program.

OMB Control Number: 1220–0180.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 128.

Total Estimated Number of Responses: 128.

Total Estimated Annual Time Burden: 35 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Acting Departmental Clearance Officer.

[FR Doc. 2023–18083 Filed 8–22–23; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–23–0010; NARA–2023–039]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on *regulations.gov* for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: We must receive responses on the schedules listed in this notice by October 10, 2023.

ADDRESSES: To view a records schedule in this notice, or submit a comment on one, use the following address: *https://www.regulations.gov/docket/NARA-23-0010/document.* This is a direct link to the schedules posted in the docket for this notice on *regulations.gov.* You may submit comments by the following method:

- *Federal eRulemaking Portal: https://www.regulations.gov.* On the website, enter either of the numbers cited at the top of this notice into the search field. This will bring you to the docket for this notice, in which we have posted the records schedules open for comment. Each schedule has a 'comment' button so you can comment on that specific schedule. For more information on *regulations.gov* and on submitting comments, see their FAQs at *https://www.regulations.gov/faq.*

If you are unable to comment via *regulations.gov*, you may email us at *request.schedule@nara.gov* for instructions on submitting your comment. You must cite the control number of the schedule you wish to comment on. You can find the control number for each schedule in parentheses at the end of each schedule's entry in the list at the end of this notice.

FOR FURTHER INFORMATION CONTACT: Eddie Germino, Strategy and Performance Division, by email at *regulation_comments@nara.gov* or at 301–837–3758. For information about records schedules, contact Records Management Operations by email at *request.schedule@nara.gov* or by phone at 301–837–1799.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule. We have uploaded the records schedules and accompanying appraisal memoranda to the *regulations.gov* docket for this notice as ''other'' documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the *regulations.gov* portal, you may contact *request.schedule@nara.gov* for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we may or may not make changes to the proposed records schedule. The schedule is then sent for final approval by the Archivist of the United States. After the schedule is approved, we will post on *regulations.gov* a ''Consolidated Reply'' summarizing the comments, responding to them, and noting any changes we made to the proposed schedule. You may elect at *regulations.gov* to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at *https://www.archives.gov/records-mgmt/rcs,* after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Department of Justice, Executive Office for Immigration Review, Charging Document Bond Files (DAA–0582–2023–0001).

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2023–18101 Filed 8–22–23; 8:45 am]

BILLING CODE 7515–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98159; File No. SR–NYSEAMER–2023–40]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Modify the NYSE American Options Fee Schedule

August 17, 2023.

Pursuant to section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on August 8, 2023, NYSE American LLC (''NYSE American'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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 modify the NYSE American Options Fee Schedule (''Fee Schedule'') regarding Floor Broker incentives and the Strategy Execution Fee Cap. The Exchange proposes to implement the fee changes effective August 8, 2023.[4] The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing to amend the Fee Schedule to (1) delete text relating to the expired Floor Broker Grow With Me Program and add a new Floor Broker incentive, and (2) add dividend strategies to the list of strategy executions eligible for the Strategy Execution Fee Cap (the ''Strategy Cap''). The Exchange proposes to implement the rule changes on August 8, 2023.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange previously filed to amend the Fee Schedule on July 31, 2023 (SR–NYSEAMER–2023–38) and withdrew such filing on August 8, 2023.

Floor Broker Incentives

The Exchange proposes to modify Section III.E.2. of the Fee Schedule to delete text providing for the Floor Broker Grow With Me Program (the ''Grow With Me Program''), which expired on July 31, 2023, and to introduce the Floor Broker Manual Billable Incentive Program (the ''Manual Billable Incentive Program''). The Exchange proposes that Floor Brokers would be eligible for rebates on manual billable volume through the Manual Billable Incentive Program by achieving certain qualifying levels of average daily manual billable contracts. Specifically, a Floor Broker would earn a rebate of ($0.05) per manual billable side by executing an average daily volume of 40,000 manual billable contracts; a rebate of ($0.07) per manual billable side by executing an average daily volume of 100,000 manual billable contracts; or a rebate of ($0.09) per manual billable side by executing an average daily volume of 150,000 manual billable contracts. Rebates available through the Manual Billable Incentive Program would be payable back to the first contract, and Floor Brokers would earn the highest rebate for which they qualify.[5] The Exchange believes that the proposed qualifications for rebates available through the Manual Billable Incentive Program are reasonable and attainable by Floor Brokers based on their recent manual billable volume.

Although the Exchange cannot predict with certainty whether the proposed change would encourage Floor Brokers to increase their manual billable volume, the proposed change is designed to continue to incentivize Floor Brokers to do so by offering rebates on manual billable volume. All Floor Brokers would be eligible to earn a rebate through the Manual Billable Incentive Program, as proposed.

Strategy Cap

Currently, the Strategy Cap provides for a $1,000 cap on transaction fees for strategy executions involving (a) reversals and conversions, (b) box spreads, (c) short stock interest spreads, (d) merger spreads, and (e) jelly rolls.[6] The Strategy Cap applies to each strategy execution executed in standard option contracts on the same trading day. In addition, the cap is reduced to $200 on transactions fees for qualifying strategies traded on the same trading day for those ATP Holders that trade at least 25,000 monthly billable contract sides in qualifying strategy executions.

The Exchange now proposes to modify Section I.J. of the Fee Schedule to add dividend strategies as item (f) in the list of strategy executions eligible for the Strategy Cap (and to make non-substantive conforming changes to include an item (f) in such list). The Exchange also proposes that dividend strategies would be included among the strategies that contribute to an ATP Holder's qualification for the lower cap of $200. Finally, the Exchange proposes to add new subparagraph (f) to Section I.J. of the Fee Schedule to define a dividend strategy as transactions done to achieve a dividend arbitrage involving the purchase, sale, and exercise of in-the-money options of the same class, executed the first business day prior to the date on which the underlying stock goes ex-dividend.

The Exchange notes that other options exchanges currently offer caps on fees for dividend strategy executions.[7] Although the Exchange cannot predict with certainty whether the proposed change would encourage ATP Holders to increase their dividend strategy executions, the proposed change is intended to encourage additional dividend strategy executions on the Exchange by including them in the strategies eligible for the Strategy Cap (including the lower cap for qualifying ATP Holders).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[8] in general, and furthers the objectives of sections 6(b)(4) and (5) of the Act,[9] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its 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.'' [10]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[11] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in June 2023, the Exchange had less than 7% market share of executed volume of multiply-listed equity and ETF options trades.[12]

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 or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

The Exchange believes the proposed deletion of the language describing the Grow With Me Program is reasonable because the program has expired, and the deletion would thus improve the clarity of the Fee Schedule and reduce confusion as to the fees and credits that are currently in effect. The Exchange also believes that the removal of obsolete text from the Fee Schedule would further the protection of investors and the public interest by promoting clarity and transparency in the Fee Schedule and making the Fee

[5] For example, a Floor Broker that executes an average daily volume of 100,000 manual billable contracts would be eligible for the ($0.07) rebate but would not also earn the ($0.05) rebate.

[6] *See* Fee Schedule, Section I.J., Strategy Execution Fee Cap.

[7] *See, e.g.,* BOX Options Fee Schedule, Section V.D. (Strategy QOO Order Fee Cap and Rebate), available at: *https://boxexchange.com/assets/BOX-Fee-Schedule-as-of-July-3-2023.pdf* (providing for daily cap on manual transaction fees for dividend strategies); Nasdaq PHLX LLC Options 7, Section 4, available at: *https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207* (providing for daily cap on fees for dividend strategies).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[11] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics.*

[12] Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, *see id.,* the Exchange's market share in equity-based options decreased from 7.43% for the month of June 2022 to 6.57% for the month of June 2023.

Schedule easier to navigate and understand.

The Exchange believes that the proposed Manual Billable Incentive Program is reasonable because it is designed to continue to incent Floor Brokers to increase their manual billable volume executed on the Exchange. The Exchange also believes that the proposed change is reasonable because the proposed volume thresholds to qualify for the rebates are attainable based on recent manual billable volume executed by Floor Brokers, and the proposed rebates would be available to all Floor Brokers.

The Exchange believes the proposed modification of the Strategy Cap is reasonable because it is designed to encourage ATP Holders to increase their dividend strategies executed on the Exchange by including dividend strategies among the strategy executions eligible for the Strategy Cap. The Exchange also believes the proposed change could incent ATP Holders to execute and aggregate dividend strategy orders as well as other types of strategy orders at NYSE American as a primary execution venue.

To the extent that the proposed changes attract greater volume and liquidity, the Exchange believes they would improve the Exchange's overall competitiveness, strengthen its market quality for all market participants, and continue to make the Exchange a more competitive venue for order execution, which, in turn, promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system. The Exchange notes that all market participants stand to benefit from any increase in volume, which could promote market depth, facilitate tighter spreads, and enhance price discovery, particularly to the extent the proposed change encourages market participants to utilize the Exchange as a primary trading venue, and may lead to a corresponding increase in order flow from other market participants.

In addition, in the backdrop of the competitive environment in which the Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to increase the depth of its market and improve its market share relative to its competitors. The Exchange's fees are constrained by intermarket competition, as ATP Holders may direct their order flow to any of the 16 options exchanges, including those that also offer caps on dividend strategies.[13] Thus, ATP Holders have a choice of where they direct their order flow, including their strategy executions. The proposed rule change is designed to incent ATP Holders to direct liquidity to the Exchange, thereby promoting market depth and enhancing order execution opportunities for market participants.

The Proposed Rule Change Is an Equitable Allocation of Fees and Credits

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposed deletion of language relating to the expired Grow With Me Program would eliminate text from the Fee Schedule no longer applicable to any Floor Brokers, thus impacting all similarly situated Floor Brokers on an equal basis and improving the clarity of the Fee Schedule to the benefit of all market participants. The proposed Manual Billable Incentive Program is equitable because it is based on the amount and type of business transacted on the Exchange; Floor Brokers can choose to execute manual billable volume to earn rebates through the program or not. In addition, the rebates offered through the Manual Billable Incentive Program would be available to all qualifying Floor Brokers equally. The Exchange further believes that the proposed change is equitable because it is intended to encourage the role performed by Floor Brokers in facilitating the execution of orders via open outcry, a function which the Exchange wishes to support for the benefit of all market participants. To the extent the proposed change continues to encourage increased liquidity on the Exchange, all market participants would benefit from enhanced opportunities for price improvement and order execution.

The Exchange also believes that the proposed change to the Strategy Cap is an equitable allocation of fees and credits because it is based on the amount and type of business transacted on the Exchange, and ATP Holders can opt to avail themselves of the Strategy Cap or not. The modified Strategy Cap, as proposed, would continue to be available to all ATP Holders that direct strategy executions, including dividend strategies, to the Exchange. Moreover, the proposal is designed to continue to encourage ATP Holders to aggregate strategy executions at the Exchange as a primary execution venue. To the extent that the proposed change attracts more dividend strategies to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange, thereby improving marked-wide quality and price discovery.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes the proposed rule change is not unfairly discriminatory. The proposed elimination of text describing the expired Grow With Me Program would affect all Floor Brokers on an equal and non-discriminatory basis, as the program would no longer be available to any Floor Brokers. The Exchange believes that the proposed Manual Billable Incentive Program is not unfairly discriminatory because all Floor Brokers are eligible to qualify for the rebates offered through the program. Moreover, the proposed change is not unfairly discriminatory to non-Floor Brokers because Floor Brokers serve an important function in facilitating the execution of orders on the Exchange, which the Exchange wishes to encourage and support to promote price improvement opportunities for all market participants.

The Exchange also believes the proposed change is not unfairly discriminatory because the proposed modification of the Strategy Cap would apply to all similarly-situated market participants on an equal and non-discriminatory basis. The proposal is based on the amount and type of business transacted on the Exchange, and ATP Holders are not obligated to try to achieve the Strategy Cap, nor are they obligated to execute any dividend strategies. Rather, the proposal is designed to encourage ATP Holders to increase their dividend strategy executions and to utilize the Exchange as a primary trading venue for all strategy executions (if they have not done so previously).

Thus, the Exchange believes that, to the extent the proposed rule change would continue to improve market quality for all market participants on the Exchange by attracting more order flow to the Exchange, thereby improving market-wide quality and price discovery, the resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest.

[13] *See* note 7, *supra.*

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [14]

Intramarket Competition. The Exchange does not believe that the proposed changes would impose any burden on intramarket competition that is not necessary or appropriate. The proposed changes are designed to attract order flow to the Exchange. The proposed Manual Billable Incentive Program is intended to attract additional order flow to the Exchange by offering Floor Brokers rebates on manual billable volume, which could increase the volume of contracts traded on the Exchange. The proposed modification of the Strategy Cap to include dividend strategies is intended to attract additional dividend strategies to the Exchange and could also encourage ATP Holders to aggregate all strategy executions on the Exchange to qualify for the Strategy Cap. Greater liquidity benefits all market participants on the Exchange, and increased manual billable transactions and strategy executions could increase opportunities for execution of other trading interest. Finally, the proposed deletion of language relating to the Grow With Me Program would remove language from the Fee Schedule no longer applicable to any Floor Brokers and, accordingly, would not have any impact on intramarket competition.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[15] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in June 2023, the Exchange had less than 8% market share of executed volume of multiply-listed equity and ETF options trades.[16]

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees and credits in a manner designed to continue to incent additional manual billable volume and dividend strategy volume to the Exchange, to provide liquidity, and to attract order flow. To the extent the proposed changes encourage Floor Brokers and other market participants to utilize the Exchange as a primary trading venue for all transactions, all of the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement. The Exchange also believes that the proposed change could promote competition between the Exchange and other execution venues, as other competing options exchanges currently offer fee caps for dividend strategies.[17] Finally, the Exchange believes that deleting text describing the Grow With Me Program would add clarity to the Fee Schedule by removing expired pricing and, accordingly, would not have any impact on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to section 19(b)(3)(A) [18] of the Act and paragraph (f) 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. 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–NYSEAMER–2023–40 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–NYSEAMER–2023–40. 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

[14] *See* Reg NMS Adopting Release, *supra* note 10, at 37499.

[15] *See* note 11, *supra.*

[16] *See* note 12, *supra.*

[17] *See* note 7, *supra.*

[18] 15 U.S.C. 78s(b)(3)(A).

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–NYSEAMER–2023–40 and should be submitted on or before September 13, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98160; File No. SR–FICC–2023–011]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To Adopt a Portfolio Differential Charge as an Additional Component to the Government Securities Division Required Fund Deposit

August 17, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 3, 2023, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–FICC–2023–011. On August 16, 2023, FICC filed Amendment No. 1 to the proposed rule change, to make clarifications and corrections to the proposed rule change.[3] The proposed rule change, as modified by Amendment No. 1, is described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 made clarifications and corrections to the description of the proposed rule change and Exhibit 3a of the filing (Summary of Impact Study) to incorporate a longer impact analysis. As originally filed, the time-period of the impact analysis was November 2021 to October 2022. As amended by Amendment No. 1, the time-period of the impact analysis is November 2021 to March 2023. These clarifications and corrections have been incorporated, as appropriate, into the description of the proposed rule change in Item II below. FICC has requested confidential treatment of Exhibit 3a, pursuant to 17 CFR 240.24b–2.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of modifications to FICC's Government Securities Division (''GSD'') Rulebook (''Rules'') in order to adopt a Portfolio Differential Charge (''PD Charge'') as an additional component to the GSD Required Fund Deposit, as described in greater detail below.[4]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency 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

1. Purpose

FICC is proposing to enhance the methodology for calculating Required Fund Deposit to the GSD Clearing Fund by adopting a new component, the PD Charge, which would be calculated to mitigate the risk presented to FICC by period-over-period fluctuations in a Member's Margin Portfolio(s) that may occur between the collections of Member's Required Fund Deposits.

Background

FICC, through GSD, serves as a central counterparty and provider of clearance and settlement services for the U.S. Treasury securities, as well as repurchase and reverse repurchase transactions involving U.S. Treasury securities.[5] As part of its market risk management strategy, FICC manages its credit exposure to Members by determining the appropriate Required Fund Deposit to the GSD Clearing Fund and monitoring its sufficiency, as provided for in the GSD Rules.[6] The Required Fund Deposit serves as each Member's margin.

The objective of a Member's margin is to mitigate potential losses to FICC associated with liquidating a Member's portfolio in the event FICC ceases to act for that Member (hereinafter referred to as a ''default'').[7] The aggregate amount of all Members' margin constitutes the GSD Clearing Fund. FICC would access the GSD Clearing Fund should a defaulting Member's own margin be insufficient to satisfy losses to FICC caused by the liquidation of that Member's portfolio. Each Member's Required Fund Deposit is calculated at least twice daily at the start-of-day and noon on each Business Day.

FICC regularly assesses market and liquidity risks as such risks relate to its margin methodologies to evaluate whether margin levels are commensurate with the particular risk attributes of each relevant product, portfolio, and market. For example, FICC employs daily backtesting to determine the adequacy of each Member's Required Fund Deposit.[8] FICC compares the Required Fund Deposit[9] for each Member with the simulated liquidation gains/losses, using the actual positions in the Member's portfolio(s) and the actual historical security returns. A backtesting deficiency occurs when a Member's Required Fund Deposit would not have been adequate to cover the projected liquidation losses estimated from a Member's settlement activity based on

[4] Terms not defined herein are defined in the GSD Rules, *available at www.dtcc.com/–/media/Files/Downloads/legal/rules/ficc_gov_rules.pdf.*

[5] GSD also clears and settles certain transactions on securities issued or guaranteed by U.S. government agencies and government sponsored enterprises.

[6] *See* GSD Rule 4 (Clearing Fund and Loss Allocation), *supra* note 4. FICC's market risk management strategy is designed to comply with Rule 17Ad–22(e)(4) under the Act, where these risks are referred to as ''credit risks.'' 17 CFR 240.17Ad–22(e)(4).

[7] The GSD Rules identify when FICC may cease to act for a Member and the types of actions FICC may take. For example, FICC may suspend a firm's membership with FICC or prohibit or limit a Member's access to FICC's services in the event that Member defaults on a financial or other obligation to FICC. *See* GSD Rule 21 (Restrictions on Access to Services) of the GSD Rules, *supra* note 4.

[8] The Model Risk Management Framework (''Model Risk Management Framework'') sets forth the model risk management practices of FICC and states that Value at Risk (''VaR'') and Clearing Fund requirement coverage backtesting would be performed on a daily basis or more frequently. *See* Securities Exchange Act Release Nos. 81485 (Aug. 25, 2017), 82 FR 41433 (Aug. 31, 2017) (SR–FICC–2017–014), 84458 (Oct. 19, 2018), 83 FR 53925 (Oct. 25, 2018) (SR–FICC–2018–010), 88911 (May 20, 2020), 85 FR 31828 (May 27, 2020) (SR–FICC–2020–004), 92380 (Jul. 13, 2021), 86 FR 38140 (Jul. 19, 2021) (SR–FICC–2021–006), 94271 (Feb. 17, 2022), 87 FR 10411 (Feb. 24, 2022) (SR–FICC–2022–001), and 97890 (Jul. 13, 2023), 88 FR 46287 (Jul. 19, 2023) (SR–FICC–2023–008).

[9] Members may be required to post additional collateral to the GSD Clearing Fund in addition to their Required Fund Deposit amount. *See e.g.,* Section 7 of GSD Rule 3 (Ongoing Membership Requirements), *supra* note 4 (providing that adequate assurances of financial responsibility of a member may be required, such as increased Clearing Fund deposits). For backtesting comparisons, FICC uses the Required Fund Deposit amount, without regard to the actual, total collateral posted by the member to the GSD Clearing Fund.

the backtesting results. Backtesting deficiencies highlight exposure that could subject FICC to potential losses in the event that a Member defaults.

FICC investigates the cause(s) of any backtesting deficiencies and determines if there is an identifiable cause of repeat backtesting deficiencies. FICC also evaluates whether multiple Members may experience backtesting deficiencies for the same underlying reason.

Pursuant to the GSD Rules, each Member's Required Fund Deposit amount consists of a number of applicable components, each of which is calculated to address specific risks faced by FICC, as identified within the GSD Rules.[10] These components include the VaR Charge, Blackout Period Exposure Adjustment, Backtesting Charge, Holiday Charge, Margin Liquidity Adjustment Charge, and special charge.[11] The VaR Charge generally comprises the largest portion of a Member's Required Fund Deposit amount.

The VaR Charge is based on the potential price volatility of unsettled positions using a sensitivity-based Value-at-Risk (VaR) methodology. The VaR methodology provides an estimate of the possible losses for a given portfolio based on: (1) confidence level, (2) a time horizon and (3) historical market volatility. The VaR methodology is intended to capture the risks related to market price that is associated with the Net Unsettled Positions in a Member's Margin Portfolios. This risk-based margin methodology is designed to project the potential losses that could occur in connection with the liquidation of a defaulting Member's Margin Portfolio, assuming a Margin Portfolio would take three days to liquidate in normal market conditions. The projected liquidation gains or losses are used to determine the amount of the VaR Charge to each Margin Portfolio, which is calculated to capture the market price risk [12] associated with each Member's Margin Portfolio(s) at a 99% confidence level. The start-of-day VaR component of the Required Fund Deposit addresses the risk presented by a Member's start-of-day positions. GSD also calculates VaR for intraday collection, which reflects the changes in a Member's positions and risk profile due to the submission of new trades and completed settlement activity from the start-of-day to noon.

The proposed change to include the PD Charge in the calculation of Required Fund Deposit to the GSD Clearing Fund is the result of FICC's regular review of the effectiveness of its margin methodology.

Proposed Change

The PD Charge is designed to capture variability in the VaR Charge collected from the Member over the look back period. FICC believes the proposed PD Charge would help mitigate the risks posed to FICC by the variability of clearing activity submitted to GSD throughout the day by measuring the historical period-over-period increases in the VaR Charge of a Member over a given time period.

A Member's Margin Portfolio(s) may fluctuate significantly intraday as the Member executes trades throughout the day. Given that the trades are generally novated and guaranteed by FICC upon comparison,[13] they may result in a coverage gap due to large un-margined intraday portfolio fluctuations that may not be mitigated until the collection of the Required Fund Deposit occurs intraday, or on the next Business Day. This exposure may result in backtesting deficiencies, and the PD Charge is designed to mitigate such exposure.

The proposed PD Charge would increase Members' Required Fund Deposits by an amount designed to address the variability of clearing activity submitted to GSD throughout the day, based upon the Member's historical trading activity. The PD Charge would be calculated twice a day and, if applicable, charged as a part of each Member's Required Fund Deposit. Specifically, the PD Charge would look at historical period-over-period increases between the (i) start-of-day and the intraday VaR components and (ii) the intraday and the end-of-day VaR components, respectively, of a Member's Required Fund Deposit over a look-back period of no less than 100 days [14] with a decay factor of no greater than 1 and would be calculated to equal the exponentially weighted moving average (''EWMA'') of such changes to the Member's VaR Charge during the look-back period, times a multiplier that is no less than 1 and no greater than 3, as determined by FICC from time to time based on backtesting results.[15] The array of VaR Charge increases would be exponentially weighted to emphasize more recent observations in determining the PD Charge. By addressing the period-over-period changes to each Member's VaR Charge, the PD Charge would help mitigate the risks posed to FICC by un-margined period-over-period fluctuations to a Member's portfolio resulting from trading activity that would be guaranteed during the coverage gap.

Accordingly, FICC is proposing to add a definition of ''Portfolio Differential Charge'' to GSD Rule 1 (Definitions) that would provide that the terms ''Portfolio Differential Charge'' or ''PD Charge'' mean, with respect to each Margin Portfolio, an additional charge to be included in each Member's Required Fund Deposit. The proposed definition would also provide that the PD Charge shall be calculated twice each Business Day as the exponentially weighted moving average (''EWMA'') of the historical increases in the Member's VaR Charge that occur between collections of Required Fund Deposits over a lookback period of no less than 100 days with a decay factor of no greater than 1, times a multiplier that is no less than 1 and no greater than 3, as determined by FICC from time to time based on backtesting results. Furthermore, the proposed definition would provide that FICC will provide Members with at a minimum 10 Business Days advance notice of any change to the lookback period, the decay factor, and/or the multiplier via an Important Notice.

In addition, FICC is proposing to amend Section 1b of GSD Rule 4 (Clearing Fund and Loss Allocation) to include the PD Charge as an additional component in the calculation of each Member's Required Fund Deposit.

[10] *Supra* note 4.

[11] *See* GSD Rule 4 (Clearing Fund and Loss Allocation), Section 1b. *Supra* note 4.

[12] Market price risk refers to the risk that volatility in the market causes the price of a security to change between the execution of a trade and settlement of that trade. This risk is sometimes also referred to as volatility risk.

[13] With respect to trades submitted in FICC's Sponsored GC service, novation of a trade occurs when all of the requirements set forth in GSD Rule 3A (Sponsoring Members and Sponsored Members), Section 7(b)(ii) are met. *Supra* note 4.

[14] Upon implementation, FICC would use a 100-day look-back period in conjunction with a decay factor of 0.97. FICC has determined that a 100-day look-back period with a decay factor of 0.97 would provide it with a sufficient time series to reflect the current market conditions. As market conditions shifts, FICC may modify the look-back period and/or the decay factor from time to time; however, any change in the look-back period and/or the decay factor would be subject to FICC's model governance process and announced by FICC via an Important Notice posted to its website.

[15] The uncertainty of the market condition and/or changes in Members' business model may lead to changes in Member activity pattern that would require a multiplier greater than 1 be invoked from time to time. FICC would determine whether to modify the multiplier based on the backtesting results to evaluate the effectiveness of PD Charge as a mitigant of the position change risk and may change the multiplier from time to time to maintain the effectiveness of the PD Charge in generating sufficient backtest coverage. Changes to the multiplier shall be approved through FICC's model governance process and would be announced by FICC via an Important Notice posted to its website.

Impact Study

FICC has conducted an impact study for the period from November 2021 to March 2023 (''Impact Study'').[16] The results of the Impact Study indicate that, if the proposed PD Charge had been in place during the Impact Study period, the change would have resulted in an average daily PD Charge of approximately $660 million for the start-of-day margin calculation (approximately 2.2% of the start-of-day average daily Clearing Fund deposit) and approximately $839 million for the noon margin calculation (approximately 2.9% of the noon average daily Clearing Fund deposit).

The rolling 12-month Clearing Fund requirement backtesting coverage ratio (from April 2022 through March 2023) would have improved by approximately 25 bps (from 98.37% to 98.62%). Specifically, if the proposed PD Charge had been in place during this 12-month period, the number of backtesting deficiencies would have been reduced by 77 (from 498 to 421 or approximately 15%) and the backtesting coverage for 44 Members (approximately 34% of the GSD membership) would have improved, with 14 Members who were below 99% coverage brought back to above 99%.

The average daily PD Charge in dollars per Member would be approximately $5.4 million (approximately 2.2% of the average daily Clearing Fund deposit per Member) for the start-of-day margin calculation and approximately $6.9 million (approximately 2.9% of the average daily Clearing Fund deposit per Member) for the noon margin calculation.

The three largest average daily PD Charge in dollars for Members would be $41.09 million (approximately 3.22% of its average daily Clearing Fund deposit), $31.50 million (approximately 8.14% of its average daily Clearing Fund deposit), and $26.40 million (approximately 5.90% of its average daily Clearing Fund deposit) for the start-of-day margin calculation and $104.06 million (approximately 4.55% of its average daily Clearing Fund deposit), $62.47 million (approximately 7.46% of its average daily Clearing Fund deposit), and $52.15 million (approximately 6.38% of its average daily Clearing Fund deposit) for the noon margin calculation.

The three largest average daily PD Charge for Members as percentages of the relevant Member's average daily Clearing Fund deposit would be 16.74% (PD Charge of $1.42 million), 15.76% (PD Charge of $3.64 million), and 13.87% (PD Charge of $7.74 million) for the start-of-day margin calculation and 39.76% (PD Charge $15.55 million), 26.16% (PD Charge of $0.43 million), and 22.47% (PD Charge of $21.42 million) for the noon margin calculation.

Implementation Timeframe

Subject to approval by the Commission, FICC expects to implement this proposal by no later than 60 Business Days after such approval and would announce the effective date of the proposed change by an Important Notice posted to FICC's website.

2. Statutory Basis

FICC believes the proposed change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. In particular, FICC believes the proposed rule change is consistent with section 17A(b)(3)(F) of the Act,[17] and Rules 17Ad–22(e)(4)(i), (e)(6)(i), (e)(6)(iii), and (e)(23)(ii), each promulgated under the Act,[18] for the reasons described below.

Section 17A(b)(3)(F) of the Act requires that the rules of FICC be designed to, among other things, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and be designed to promote the prompt and accurate clearance and settlement of securities transactions.[19] FICC believes the proposed change to implement a PD Charge is designed to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible because it is designed to mitigate risks to FICC by un-margined period-over-period fluctuations to a Member's portfolio that could increase the risks to FICC related to liquidating a Member's portfolio following that Member's default. Specifically, the proposed PD Charge would allow FICC to collect financial resources to cover exposures that it may face due to fluctuations in a Member's portfolio that occur between collections of Required Fund Deposits.

The Clearing Fund is a key tool that FICC uses to mitigate potential losses to FICC associated with liquidating a Member's portfolio in the event of Member default. Therefore, the proposed change to include a PD Charge among the GSD Clearing Fund components would enable FICC to better address period-over-period changes in a Member's portfolio that occur between collections of Required Fund Deposits, such that, in the event of Member default, FICC's operations would not be disrupted and non-defaulting Members would not be exposed to losses they cannot anticipate or control. In this way, the proposed change to implement the PD Charge is designed to assure the safeguarding of securities and funds which are in the custody or control of FICC or for which it is responsible, consistent with section 17A(b)(3)(F) of the Act.[20]

Rule 17Ad–22(e)(4)(i) under the Act requires, in part, that FICC establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[21] As described above, FICC believes the proposed change to adopt a PD Charge would enable it to better identify, measure, monitor, and, through the collection of Members' Required Fund Deposits, manage its credit exposures to Members by maintaining sufficient resources to cover those credit exposures fully with a high degree of confidence. Specifically, FICC believes that the proposed PD Charge would effectively mitigate the risks to FICC by un-margined period-over-period fluctuations to a Member's portfolio and would address the increased risks FICC may face related to liquidating a Member's portfolio following that Member's default. Therefore, FICC believes the proposal would enhance FICC's ability to effectively identify, measure and monitor its credit exposures and would enhance its ability to maintain sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence. As such, FICC believes the proposed change to adopt a PD

[16] GSD increased the minimum Required Fund Deposit for Members to $1 million on Dec. 5, 2022 (*see* Securities Exchange Act Release No. 96136 (Oct. 24, 2022) 87 FR 65268 (Oct. 28, 2022) (SR–FICC–2022–006)); however, for the purpose of this Impact Study, the $1 million minimum Requirement Fund Deposit is assumed to be in effect for the entirety of the Impact Study period.

[17] 15 U.S.C. 78q–1(b)(3)(F).

[18] 17 CFR 240.17Ad–22(e)(4)(i), (e)(6)(i), (e)(6)(iii), and (e)(23)(ii).

[19] 15 U.S.C. 78q–1(b)(3)(F).

[20] *Id.*

[21] 17 CFR 240.17Ad–22(e)(4)(i).

Charge is consistent with Rule 17Ad–22(e)(4)(i) under the Act.[22]

Rule 17Ad–22(e)(6)(i) under the Act requires, in part, that FICC establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[23] The Required Fund Deposits are made up of risk-based components (as margin) that are calculated and assessed daily to limit FICC's credit exposures to Members. FICC's proposed change to introduce a PD Charge is designed to more effectively address the risks presented by un-margined period-over-period fluctuations to a Member's portfolio. FICC believes the addition of the PD Charge would enable FICC to assess a more appropriate level of margin that accounts for increases in these risks that may occur between collections of Required Fund Deposits. This proposed change is designed to assist FICC in maintaining a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant portfolio. Therefore, FICC believes the proposed change to adopt a PD Charge is consistent with Rule 17Ad–22(e)(6)(i) under the Act.[24]

Rule 17Ad–22(e)(6)(iii) under the Act requires, in part, that FICC establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, calculates margin sufficient to cover its potential future exposure to participants in the interval between the last margin collection and the close out of positions following a participant default.[25] The Required Fund Deposits are made up of risk-based components (as margin) that are calculated and assessed daily to limit FICC's credit exposures to Members. FICC's proposed change to introduce a PD Charge is designed to more effectively address the risks presented by un-margined period-over-period fluctuations to a Member's portfolio. FICC believes the addition of the PD Charge would enable FICC to assess a more appropriate level of margin that accounts for increases in these risks that may occur between collections of Required Fund Deposits. This proposed change is designed to assist FICC in maintaining a risk-based margin system that produces margin levels sufficient to cover its potential future exposure to participants in the interval between the last margin collection and the close out of positions following a participant default. Therefore, FICC believes the proposed change to adopt a PD Charge is consistent with Rule 17Ad–22(e)(6)(iii) under the Act.[26]

Rule 17Ad–22(e)(23)(ii) under the Act requires that FICC establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for providing sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they incur by participating in FICC.[27] FICC is proposing to amend the GSD Rules to include a description of the PD Charge, including the method by which FICC would calculate that charge. Through these proposed amendments to the GSD Rules, the proposal would assist FICC in providing its Members with sufficient information to identify and evaluate the risks and costs, in the form of Required Fund Deposits to the GSD Clearing Fund, that they incur by participating in FICC. In this way, FICC believes the proposed change is consistent with Rule 17Ad–22(e)(23)(ii) under the Act.[28]

(B) Clearing Agency's Statement on Burden on Competition

FICC believes that the proposed change to adopt a PD Charge could have an impact on competition. Specifically, FICC believes the proposed charge could burden competition because it could result in Members being assessed a higher Required Fund Deposit than they would have been assessed under the current GSD Clearing Fund formula.

The impact of this proposal on a particular Member would depend on the period-over-period change in the size and composition of the Member's portfolio. The proposed change is not designed in a way that is intended to or expected to impact Members of a certain legal entity type or size or who employ a particular business model. FICC expects that Members that present similar pattern in portfolio changes, regardless of the type or size of the Member or a Member's particular business practices, would have similar impact on their Required Fund Deposit amounts as a result of the proposal.

When the proposal results in a larger Required Fund Deposit, the proposed change could burden competition for Members that have lower operating margins or higher costs of capital compared to other Members. However, the increase in Required Fund Deposit would be in direct relation to the specific risks presented by each Member's portfolio, and each Member's Required Fund Deposit would continue to be calculated with the same parameters and at the same confidence level for each Member. Therefore, because the impact of the proposal on a Member is relative to the specific risks presented by that Member's clearing activity and not on the type or size of a Member, FICC believes that any burden on competition imposed by the proposed change would be both necessary and appropriate, as permitted by section 17A(b)(3)(I) of the Act for the reasons described in this filing and further below.[29]

FICC believes the above described burden on competition that may be created by the proposed PD Charge would be necessary in furtherance of the Act, specifically section 17A(b)(3)(F) of the Act.[30] As stated above, the proposed PD Charge is designed to address the risks to FICC by un-margined period-over-period fluctuations to a Member's portfolio that could increase the costs to FICC of liquidating a Member portfolio in the event of the Member's default. Specifically, the proposed PD Charge would allow FICC to collect sufficient financial resources to cover exposure that it may face due to fluctuations in Members' portfolios that occur between collections of margin. Therefore, FICC believes this proposed change is necessary and appropriate in furtherance of the requirements of section 17A(b)(3)(F) of the Act, which requires that the GSD Rules be designed to assure the safeguarding of securities and funds that are in FICC's custody or control or which it is responsible.[31]

[22] *Id.*

[23] 17 CFR 240.17Ad–22(e)(6)(i).

[24] *Id.*

[25] 17 CFR 240.17Ad–22(e)(6)(iii).

[26] *Id.*

[27] 17 CFR 240.17Ad–22(e)(23)(ii).

[28] *Id.*

[29] 15 U.S.C. 78q–1(b)(3)(I).

[30] 15 U.S.C. 78q–1(b)(3)(F).

[31] *Id.*

FICC believes the proposed change would also support FICC's compliance with Rules 17Ad–22(e)(4)(i), (e)(6)(i), and (e)(6)(iii) under the Act, which require FICC to establish, implement, maintain and enforce written policies and procedures reasonably designed to (x) effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence; (y) cover its credit exposures to its participants by establishing a risk based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market; and (z) cover its credit exposures to its participants by establishing a risk based margin system that, at a minimum, calculates margin sufficient to cover its potential future exposure to participants in the interval between the last margin collection and the close out of positions following a participant default.[32]

As described above, FICC believes the introduction of the PD Charge would allow FICC to employ a risk-based methodology that would address the increased risks to FICC by period-over-period fluctuations to a Member's portfolio that may occur between collections of the Required Fund Deposits. Therefore, the proposed change would better limit FICC's credit exposures to Members, necessary in furtherance of the requirements of Rules 17Ad–22(e)(4)(i), (e)(6)(i) and (e)(6)(iii) under the Act. [33]

FICC believes that the above-described burden on competition that could be created by the proposed change would be appropriate in furtherance of the Act because, as described above, such change has been appropriately designed to assure the safeguarding of securities and funds which are in the custody or control of FICC or for which it is responsible, as required by section 17A(b)(3)(F) of the Act.[34] Specifically, the proposed change would improve the risk-based margining methodology that FICC employs to set margin requirements and better limit FICC's credit exposures to its Members. As described above, the proposed PD Charge would enable FICC to produce margin levels more commensurate with the risks and particular attributes of each Member's portfolio. The proposed PD Charge would do this by measuring the historical period-over-period increases in the VaR Charge of the Member. Therefore, because the proposed PD Charge is designed to provide FICC with an appropriate measure of the risk presented by Members' portfolios, FICC believes the proposed change is appropriately designed to meet its risk management goals and regulatory obligations.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

FICC has not received or solicited any written comments relating to this proposal. If any written comments are received, they will be publicly filed as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, *available at www.sec.gov/regulatory-actions/how-to-submit-comments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the SEC's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

FICC reserves the right not to respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FICC–2023–011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–FICC–2023–011. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FICC and on DTCC's website (*http://www.dtcc.com/legal/sec-rule-filings.aspx*). 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–FICC–2023–011 and should be submitted on or before September 13, 2023.

[32] 17 CFR 240.17Ad–22(e)(4)(i), (e)(6)(i), and (e)(6)(iii).

[33] *Id.*

[34] 15 U.S.C. 78q–1(b)(3)(F).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–18106 Filed 8–22–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98156; File No. SR–CboeBZX–2023–058]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To List and Trade Shares of the Global X Bitcoin Trust, Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

August 17, 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 4, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (''BZX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposed rule change to list and trade shares of the Global X Bitcoin Trust (the ''Trust''),[3] under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),[4] which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.[5] Global X Digital Assets is the sponsor of the Trust (''Sponsor''). The Shares will be registered with the Commission by means of the Trust's registration statement on Form S–1 (the ''Registration Statement'').[6] A third-party U.S.-based trust company and qualified custodian will be responsible for custody of the Trust's bitcoin (the ''Custodian'').

As further discussed below, the Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.[7] Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the ''CFTC'') regulated futures market.[8]

[35] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Trust was formed as a Delaware statutory trust on July 13, 2021 and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

[4] The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

[5] All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

[6] *See* Form S–1 Registration Statement submitted to the Commission on July 21, 2021. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

[7] *See* Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. *See* Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the ''Winklevoss Order'').

[8] *See* streetTRACKS Gold Shares, Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR–NYSE–2004–22) (the ''First Gold Approval Order''); iShares COMEX Gold Trust, Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751, 3754–55 (Jan. 26, 2005) (SR–Amex–2004–38); iShares Silver Trust, Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Mar. 24, 2006) (SR–Amex–2005–072); ETFS Gold Trust, Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993, 22994–95, 22998, 23000 (May 15, 2009) (SR–NYSEArca–2009–40); ETFS Silver Trust, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775–77 (Apr. 24, 2009) (SR–NYSEArca–2009–28); ETFS Palladium Trust, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (SR–NYSEArca–2009–94) (notice of proposed rule change included NYSE Arca's representation that ''[t]he most significant palladium futures exchanges are the NYMEX and the Tokyo Commodity Exchange,'' that ''NYMEX is the largest exchange in the world for trading precious metals futures and options,'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which NYMEX is a member, Exchange Act Release No. 60971 (Nov. 9, 2009), 74 FR 59283, 59285–86, 59291 (Nov. 17, 2009)); ETFS Platinum Trust, Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886, 68887–88 (Dec. 29, 2009) (SR–NYSEArca–2009–95) (notice of proposed rule change included NYSE Arca's representation that ''[t]he most significant platinum futures exchanges are the NYMEX and the Tokyo Commodity Exchange,'' that ''NYMEX is the largest exchange in the world for trading precious metals futures and options,'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which NYMEX is a member, Exchange Act Release No. 60970 (Nov. 9, 2009), 74 FR 59319, 59321, 59327 (Nov. 17, 2009)); Sprott Physical Gold Trust, Exchange Act Release No. 61496 (Feb. 4, 2010), 75 FR 6758, 6760 (Feb. 10, 2010) (SR–NYSEArca–2009–113) (notice of proposed rule change included NYSE Arca's representation that the COMEX is one of the ''major world gold markets,'' that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' and that NYMEX, of which COMEX is a division, is a member of the Intermarket Surveillance Group, Exchange Act Release No. 61236 (Dec. 23, 2009), 75 FR 170, 171, 174 (Jan. 4, 2010)); Sprott Physical Silver Trust, Exchange Act Release No. 63043 (Oct. 5, 2010), 75 FR 62615, 62616, 62619, 62621 (Oct. 12, 2010) (SR–NYSEArca–2010–84); ETFS Precious Metals Basket Trust, Exchange Act Release No. 62692 (Aug. 11, 2010), 75 FR 50789, 50790 (Aug. 17, 2010) (SR–NYSEArca–2010–56) (notice of proposed rule change included NYSE Arca's representation that ''the most significant gold, silver, platinum and palladium futures exchanges are the COMEX and the TOCOM'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 62402 (Jun. 29, 2010), 75 FR 39292, 39295, 39298 (July 8, 2010)); ETFS White Metals Basket Trust, Exchange Act Release No. 62875 (Sept. 9, 2010), 75 FR 56156, 56158 (Sept. 15, 2010) (SR–NYSEArca–2010–71) (notice of proposed rule change included NYSE Arca's representation that ''the most significant silver, platinum and palladium futures exchanges are the COMEX and the TOCOM'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655, 47657, 47660 (Aug. 6, 2010)); ETFS Asian Gold Trust, Exchange Act Release No. 63464 (Dec. 8, 2010), 75 FR 77926, 77928 (Dec. 14, 2010) (SR–NYSEArca–2010–95) (notice of proposed rule change included NYSE

Further to this point, the Commission's prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the First Gold Approval Order ''was based on an assumption that the currency market and the spot gold market were largely unregulated.'' [9]

As such, the regulated market of significant size test does not require that the spot bitcoin market be regulated in order for the Commission to approve this proposal, and precedent makes clear that a regulated underlying market for a spot commodity or currency would be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission's oversight, but the Commission has consistently looked to surveillance sharing agreements with the relevant underlying futures market to determine whether such products were consistent with the Act. With this in mind, the CME Bitcoin Futures market is the appropriate market to consider in determining whether there is a related regulated market of significant size.

Further to this point, the Exchange notes that the Commission has approved proposals related to the listing and trading of funds that would primarily hold CME Bitcoin Futures that are registered under the Securities Act of 1933.[10] In the Teucrium Approval, the Commission found the CME Bitcoin Futures market to be a regulated market of significant size as it relates to CME Bitcoin Futures, an odd tautological truth that is also inconsistent with prior disapproval orders for ETPs that would hold actual bitcoin instead of derivatives contracts (''Spot Bitcoin ETPs'') that use the exact same pricing methodology as the CME Bitcoin Futures. As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME Bitcoin Futures market represents a regulated market of significant size as it relates both to the CME Bitcoin Futures market and to the spot bitcoin market and that this proposal should be approved.

Finally, as discussed in greater detail below, by using professional custodians and other service providers, the Trust provides investors interested in exposure to bitcoin with important protections that are not always available to investors that invest directly in bitcoin, including protection against insolvency, cyber attacks, and other risks. If U.S. investors had access to vehicles such as the Trust for their bitcoin investments, instead of directing their bitcoin investments into loosely regulated offshore vehicles (such as loosely regulated centralized exchanges that have since faced bankruptcy proceedings or other insolvencies), then countless investors would have had the option to better protect their principal investments in bitcoin from the aforementioned events and risks.

Background

Bitcoin is a digital asset based on the decentralized, open source protocol of the peer-to-peer computer network launched in 2009 that governs the creation, movement, and ownership of bitcoin and hosts the public ledger, or ''blockchain,'' on which all bitcoin transactions are recorded (the ''Bitcoin Network'' or ''Bitcoin''). The decentralized nature of the Bitcoin Network allows parties to transact directly with one another based on cryptographic proof instead of relying on a trusted third party. The protocol also lays out the rate of issuance of new bitcoin within the Bitcoin Network, a rate that is reduced by half approximately every four years with an eventual hard cap of 21 million. It's generally understood that the combination of these two features—a systemic hard cap of 21 million bitcoin and the ability to transact trustlessly with anyone connected to the Bitcoin Network—gives bitcoin its value. The first rule filing proposing to list an exchange-traded product to provide exposure to bitcoin in the U.S. was submitted by the Exchange on June 30, 2016.[11] At that time, blockchain technology, and digital assets that utilized it, were relatively new to the broader public. The market cap of all bitcoin in existence at that time was approximately $10 billion. No registered offering of digital asset securities or shares in an investment vehicle with exposure to bitcoin or any other cryptocurrency had yet been conducted, and the regulated infrastructure for conducting a digital asset securities

Arca's representation that ''the most significant gold futures exchanges are the COMEX and the Tokyo Commodity Exchange,'' that ''COMEX is the largest exchange in the world for trading precious metals futures and options,'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 63267 (Nov. 8, 2010), 75 FR 69494, 69496, 69500–01 (Nov. 12, 2010)); Sprott Physical Platinum and Palladium Trust, Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239, 75240–41 (Dec. 19, 2012) (SR–NYSEArca–2012–111) (notice of proposed rule change included NYSE Arca's representation that ''[f]utures on platinum and palladium are traded on two major exchanges: The New York Mercantile Exchange . . . and Tokyo Commodities Exchange'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 68101 (Oct. 24, 2012), 77 FR 65732, 65733, 65739 (Oct. 30, 2012)); APMEX Physical—1 oz. Gold Redeemable Trust, Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817, 27818 (May 11, 2012) (SR–NYSEArca–2012–18) (notice of proposed rule change included NYSE Arca's representation that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the ''major world gold markets,'' Exchange Act Release No. 66627 (Mar. 20, 2012), 77 FR 17539, 17542–43, 17547 (Mar. 26, 2012)); JPM XF Physical Copper Trust, Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75472, 75485–86 (Dec. 20, 2012) (SR–NYSEArca–2012–28); iShares Copper Trust, Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726, 13727, 13729–30, 13739–40 (Feb. 28, 2013) (SR–NYSEArca–2012–66); First Trust Gold Trust, Exchange Act Release No. 70195 (Aug. 14, 2013), 78 FR 51239, 51240 (Aug. 20, 2013) (SR–NYSEArca–2013–61) (notice of proposed rule change included NYSE Arca's representation that FINRA, on behalf of the exchange, may obtain trading information regarding gold futures and options on gold futures from members of the Intermarket Surveillance Group, including COMEX, or from markets ''with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,'' and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the ''major world gold markets,'' Exchange Act Release No. 69847 (June 25, 2013), 78 FR 39399, 39400, 39405 (July 1, 2013)); Merk Gold Trust, Exchange Act Release No. 71378 (Jan. 23, 2014), 79 FR 4786, 4786–87 (Jan. 29, 2014) (SR–NYSEArca–2013–137) (notice of proposed rule change included NYSE Arca's representation that ''COMEX is the largest gold futures and options exchange'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' including with respect to transactions occurring on COMEX pursuant to CME and NYMEX's membership, or from exchanges ''with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,'' Exchange Act Release No. 71038 (Dec. 11, 2013), 78 FR 76367, 76369, 76374 (Dec. 17, 2013)); Long Dollar Gold Trust, Exchange Act Release No. 79518 (Dec. 9, 2016), 81 FR 90876, 90881, 90886, 90888 (Dec. 15, 2016) (SR–NYSEArca–2016–84).

[9] *See* Winklevoss Order at 37592.

[10] *See* Exchange Act Release Nos. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the ''Teucrium Approval'') and 94853 (May 5, 2022) (collectively, with the Teucrium Approval, the ''Bitcoin Futures Approvals'').

[11] *See* Winklevoss Order.

offering had not begun to develop.[12] Similarly, regulated U.S. bitcoin futures contracts did not exist. The CFTC had determined that bitcoin is a commodity,[13] but had not engaged in significant enforcement actions in the space. The New York Department of Financial Services (''NYDFS'') adopted its final BitLicense regulatory framework in 2015, but had only approved four entities to engage in activities relating to virtual currencies (whether through granting a BitLicense or a limited-purpose trust charter) as of June 30, 2016.[14] While the first over-the-counter bitcoin fund launched in 2013, public trading was limited and the fund had only $60 million in assets.[15] There were very few, if any, traditional financial institutions engaged in the space, whether through investment or providing services to digital asset companies. In January 2018, the Staff of the Commission noted in a letter to the Investment Company Institute and SIFMA that it was not aware, at that time, of a single custodian providing fund custodial services for digital assets.[16] Fast forward to today and the digital assets financial ecosystem, including bitcoin, has progressed significantly. The development of a regulated market for digital asset securities has significantly evolved, with market participants having conducted registered public offerings of both digital asset securities [17] and shares in investment vehicles holding bitcoin futures.[18] Additionally, licensed and regulated service providers have emerged to provide fund custodial services for digital assets, among other services, including the Custodian. For example, in February 2023, the Commission proposed to amend Rule 206(4)–2 under the Advisers Act of 1940 (the ''custody rule'') to expand the scope beyond client funds and securities to include all crypto assets, among other assets; [19] in May 2021, the Staff of the Commission released a statement permitting open-end mutual funds to invest in cash-settled bitcoin futures; in December 2020, the Commission adopted a conditional no-action position permitting certain special purpose broker-dealers to custody digital asset securities under Rule 15c3–3 under the Exchange Act (the ''Custody Statement''); [20] in September 2020, the Staff of the Commission released a no-action letter permitting certain broker-dealers to operate a non-custodial Alternative Trading System (''ATS'') for digital asset securities, subject to specified conditions; [21] in October 2019, the Staff of the Commission granted temporary relief from the clearing agency registration requirement to an entity seeking to establish a securities clearance and settlement system based on distributed ledger technology,[22] and multiple transfer agents who provide services for digital asset securities registered with the Commission.[23]

Outside the Commission's purview, the regulatory landscape has changed significantly since 2016, and cryptocurrency markets have grown and evolved as well. The market for bitcoin is approximately 100 times larger, having at one point reached a market cap of over $1 trillion.[24] According to the CME Bitcoin Futures Report, from February 13, 2023 through March 27, 2023, CFTC regulated bitcoin futures represented between $750 million and $3.2 billion in notional trading volume on Chicago Mercantile Exchange (''CME'') (''Bitcoin Futures'') on a daily basis.[25] Open interest was over $1.4 billion for the entirety of the period and at one point was over $2 billion. ETPs that primarily hold CME Bitcoin Futures have raised over $1 billion dollars in assets. The CFTC has exercised its regulatory jurisdiction in bringing a number of enforcement actions related to bitcoin and against trading platforms that offer cryptocurrency trading.[26] As of February 14, 2023 the NYDFS has granted no fewer than thirty-four BitLicenses,[27] including to established public payment companies like PayPal Holdings, Inc. and Square, Inc., and limited purpose trust charters to entities providing cryptocurrency custody services. In addition, the Treasury's Office of Foreign Assets Control (''OFAC'') has brought enforcement actions over apparent violations of the sanctions laws in connection with the

[12] Digital assets that are securities under U.S. law are referred to throughout this proposal as ''digital asset securities.'' All other digital assets, including bitcoin, are referred to interchangeably as ''cryptocurrencies'' or ''virtual currencies.'' The term ''digital assets'' refers to all digital assets, including both digital asset securities and cryptocurrencies, together.

[13] *See* ''In the Matter of Coinflip, Inc.'' (''Coinflip'') (CFTC Docket 15–29 (September 17, 2015)) (order instituting proceedings pursuant to Sections 6(c) and 6(d) of the CEA, making findings and imposing remedial sanctions), in which the CFTC stated: ''Section 1a(9) of the CEA defines 'commodity' to include, among other things, 'all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.' 7 U.S.C. § 1a(9). The definition of a 'commodity' is broad. *See, e.g., Board of Trade of City of Chicago* v. *SEC*, 677 F. 2d 1137, 1142 (7th Cir. 1982). Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.''

[14] A list of virtual currency businesses that are entities regulated by the NYDFS is available on the NYDFS website. *See https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/regulated_entities.*

[15] Data as of March 31, 2016 according to publicly available filings. *See* Bitcoin Investment Trust Form S–1, dated May 27, 2016, available at *https://www.sec.gov/Archives/edgar/data/1588489/000095012316017801/filename1.htm.*

[16] *See* letter from Dalia Blass, Director, Division of Investment Management, U.S. Securities and Exchange Commission to Paul Schott Stevens, President & CEO, Investment Company Institute and Timothy W. Cameron, Asset Management Group—Head, Securities Industry and Financial Markets Association (January 18, 2018), available at *https://www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm.*

[17] *See* Prospectus supplement filed pursuant to Rule 424(b)(1) for INX Tokens (Registration No. 333–233363), available at *https://www.sec.gov/Archives/edgar/data/1725882/000121390020023202/ea125858-424b1_inxlimited.htm.*

[18] *See* Prospectus filed by Stone Ridge Trust VI on behalf of NYDIG Bitcoin Strategy Fund Registration, available at *https://www.sec.gov/Archives/edgar/data/1764894/000119312519309942/d693146d497.htm.*

[19] *See* Investment Advisers Act Release No. 6240 88 FR 14672 (March 9, 2023) (Safeguarding Advisory Client Assets).

[20] *See* Securities Exchange Act Release No. 90788, 86 FR 11627 (February 26, 2021) (File Number S7–25–20) (Custody of Digital Asset Securities by Special Purpose Broker-Dealers).

[21] *See* letter from Elizabeth Baird, Deputy Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Kris Dailey, Vice President, Risk Oversight & Operational Regulation, Financial Industry Regulatory Authority (September 25, 2020), available at *https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf.*

[22] *See* letter from Jeffrey S. Mooney, Associate Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Charles G. Cascarilla & Daniel M. Burstein, Paxos Trust Company, LLC (October 28, 2019), available at *https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf.*

[23] *See, e.g.,* Form TA–1/A filed by Tokensoft Transfer Agent LLC (CIK: 0001794142) on January 8, 2021, available at *https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xslFTA1X01/primary_doc.xml.*

[24] As of December 1, 2021, the total market cap of all bitcoin in circulation was approximately $1.08 trillion.

[25] Data sourced from the CME Bitcoin Futures Report: 30 March, 2023, available at *https://www.cmegroup.com/markets/cryptocurrencies/bitcoin/bitcoin.volume.htm.*

[26] The CFTC's annual report for Fiscal Year 2022 (which ended on September 30, 2022) noted that the CFTC completed the fiscal year with 18 enforcement filings related to digital assets. ''Digital asset actions included manipulation, a $1.7 billion fraudulent scheme, and a decentralized autonomous organization (DAO) failing to register as a SEF or FCM or to seek DCM designation.'' *See* CFTC FY 2022 Agency Financial Report, available at *https://www.cftc.gov/media/7941/2022afr/download.* Additionally, the CFTC filed on March 27, 2023, a civil enforcement action against the owner/operators of the Binance centralized digital asset trading platform, which is one of the largest bitcoin derivative exchanges. *See* CFTC Release No. 8680–23 (March 27, 2023), available at *https://www.cftc.gov/PressRoom/PressReleases/8680-23.*

[27] *See https://www.dfs.ny.gov/virtual_currency_businesses.*

provision of wallet management services for digital assets.[28]

In addition to the regulatory developments laid out above, more traditional financial market participants become more active in cryptocurrency: large insurance companies, asset managers, university endowments, pension funds, and even historically bitcoin skeptical fund managers have allocated to bitcoin. As noted in the Financial Stability Oversight Council (''FSOC'') Report on Digital Asset Financial Stability Risks and Regulation, ''[i]ndustry surveys suggest that the scale of these investments grew quickly during the boom in crypto-asset markets through late 2021. In June 2022, PwC estimated that the number of crypto-specialist hedge funds was more than 300 globally, with $4.1 billion in assets under management. In addition, in a survey PwC found that 38 percent of surveyed traditional hedge funds were currently investing in 'digital assets,' compared to 21 percent the year prior.'' [29] The largest over-the-counter bitcoin fund previously filed a Form 10 registration statement, which the Staff of the Commission reviewed and which took effect automatically, and is now a reporting company.[30] Established companies like Tesla, Inc., MicroStrategy Incorporated, and Square, Inc., among others, have announced substantial investments in bitcoin in amounts as large as $1.5 billion (Tesla) and $425 million (MicroStrategy). The foregoing examples demonstrate that bitcoin has gained mainstream usage and recognition.

Despite these developments, access for U.S. retail investors to gain exposure to bitcoin via a transparent and U.S. regulated, U.S. exchange-traded vehicle remains limited. Instead current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot bitcoin; (ii) over-the-counter bitcoin funds (''OTC Bitcoin Funds'') with high management fees and potentially volatile premiums and discounts; [31] (iii) purchasing shares of operating companies that they believe will provide proxy exposure to bitcoin with limited disclosure about the associated risks; [32] or (iv) purchasing Bitcoin Futures ETFs, as defined below, which represent a sub-optimal structure for long-term investors that will cost them significant amounts of money every year compared to Spot Bitcoin ETPs, as further discussed below. Meanwhile, investors in many other countries, including Canada and Brazil, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical bitcoin) to gain exposure to bitcoin. Similarly, investors in Switzerland and across Europe have access to Exchange Traded Products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting bitcoin exposure, as described above.[33]

To this point, the lack of a Spot Bitcoin ETP exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot Bitcoin ETP are forced to find exposure through generally riskier alternatives. For instance, many U.S. investors that held their digital assets in accounts at FTX,[34] Celsius Network LLC,[35] BlockFi Inc.[36] and Voyager Digital Holdings, Inc.[37] have become unsecured creditors in the insolvencies of those entities. If a Spot Bitcoin ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure—a Spot Bitcoin ETP. For this reason alone, the approval of a Spot Bitcoin ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. As further described below, the Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including bitcoin, on centralized platforms.

Additionally, investors in other countries, specifically Canada, generally pay lower fees than U.S. retail investors that invest in OTC Bitcoin Funds due to the fee pressure that results from increased competition among available bitcoin investment options. Without an approved and regulated Spot Bitcoin ETP in the U.S., U.S. investors could seek to purchase shares of non-U.S. bitcoin vehicles to get access to bitcoin exposure. Given the separate regulatory regime, potentially adverse foreign and U.S. tax implications, and the

[28] *See* U.S. Department of the Treasury Enforcement Release: ''OFAC Enters Into $98,830 Settlement with BitGo, Inc. for Apparent Violations of Multiple Sanctions Programs Related to Digital Currency Transactions'' (December 30, 2020) available at *https://home.treasury.gov/system/files/126/20201230_bitgo.pdf See also* U.S. Department of the Treasury Enforcement Release: ''Treasury Announces Two Enforcement Actions for over $24M and $29M Against Virtual Currency Exchange, Bittrex, Inc.'' (October 11, 2022) available at *https://home.treasury.gov/news/press-releases/jy1006. See also* U.S. Department of Treasure Enforcement Release ''OFAC Settles with Virtual Currency Exchange Kraken for $362,158.70 Related to Apparent Violations of the Iranian Transactions and Sanctions Regulations'' (November 28, 2022) available at *https://home.treasury.gov/system/files/126/20221128_kraken.pdf.*

[29] *See* the FSOC ''Report on Digital Asset Financial Stability Risks and Regulation 2022'' (October 3, 2022) (at footnote 26) at *https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf.*

[30] *See* Letter from Division of Corporation Finance, Office of Real Estate Construction to Barry E. Silbert, Chief Executive Officer, Grayscale Bitcoin Trust (January 31, 2020) *https://www.sec.gov/Archives/edgar/data/1588489/000000000020000953/filename1.pdf.*

[31] The premium and discount for OTC Bitcoin Funds is known to move rapidly. For example, over the period of 12/21/20 to 1/21/21, the premium for the largest OTC Bitcoin Fund went from 40.18% to 2.79%. While the price of bitcoin appreciated significantly during this period and NAV per share increased by 41.25%, the price per share increased by only 3.58%. This means that investors are buying shares of a fund that experiences significant volatility in its premium and discount outside of the fluctuations in price of the underlying asset. Even operating within the normal premium and discount range, it's possible for an investor to buy shares of an OTC Bitcoin Fund only to have those shares quickly lose 10% or more in dollar value excluding any movement of the price of bitcoin. That is to say—the price of bitcoin could have stayed exactly the same from market close on one day to market open the next, yet the value of the shares held by the investor decreased only because of the fluctuation of the premium. As more investment vehicles, including mutual funds and ETFs, seek to gain exposure to bitcoin, the easiest option for a buy and hold strategy for such vehicles is often an OTC Bitcoin Fund, meaning that even investors that do not directly buy OTC Bitcoin Funds can be disadvantaged by extreme premiums (or discounts) and premium volatility.

[32] A number of operating companies engaged in unrelated businesses—such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company)—have announced investments as large as $5.3 billion in bitcoin. Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up purchasing shares in these companies in order to gain the exposure to bitcoin that they seek. In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot bitcoin in the absence of a bitcoin ETP. *See e.g.,* ''7 public companies with exposure to bitcoin'' (February 8, 2021) available at: *https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html;* and ''Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas'' (February 19, 2021) available at: *https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself-.html.*

[33] The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot Bitcoin ETPs.

[34] *See* FTX Trading Ltd., et al., Case No. 22–11068.

[35] *See* Celsius Network LLC, et al., Case No. 22–10964.

[36] *See* BlockFi Inc., Case No. 22–19361.

[37] *See* Voyager Digital Holdings, Inc., et al., Case No. 22–10943.

difficulties associated with any international legal proceeding, including litigation, such an arrangement would create more risk exposure and a diminished investment opportunity for U.S. investors than they would otherwise have with a U.S. exchange-listed ETP. In addition to the benefits to U.S. investors articulated throughout this proposal, approving this proposal (and others like it) would provide U.S. ETFs and mutual funds with an additional U.S.-listed and regulated product through which to obtain exposure to bitcoin thereby lessening the need to seek such exposure through investments in either flawed products or, to the limited extent currently permitted by Commission Staff (*i.e.,* 10% to 15% of a fund's assets), products listed and primarily regulated in other countries. Such an approval would also give rise to increased competition among the limited product range available in the U.S. benefitting both ETFs and mutual funds, including those seeking only minimal exposure to bitcoin for its non-correlative investment performance, and individual investors.

Bitcoin Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the ''1940 Act'') and the Bitcoin Futures Approvals that provide exposure to bitcoin primarily through CME Bitcoin Futures (''Bitcoin Futures ETFs''). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on bitcoin. The Bitcoin Futures Approvals, however, have created a logical inconsistency in the application of the standard the Commission applies when considering bitcoin ETP proposals.

As discussed further below, the standard applicable to bitcoin ETPs is whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size in the underlying asset. Previous disapproval orders have made clear that a market that constitutes a regulated market of significant size is generally a futures and/or options market based on the underlying reference asset rather than the spot commodity markets, which are often unregulated.[38] Leaving aside the analysis of that standard until later in this proposal,[39] the Exchange believes that the following rationale the Commission applied to a Bitcoin Futures ETF should result in the Commission approving this and other Spot Bitcoin ETP proposals:

The CME ''comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.'' Thus the CME's surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by trading outside of the CME bitcoin futures market. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.[40]

CME Bitcoin Futures pricing is based on pricing from spot bitcoin markets. The statement from the Teucrium Approval that ''CME's surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts . . . indirectly by trading outside of the CME bitcoin futures market,'' makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This was further acknowledged in the ''Grayscale lawsuit'' [41] when Judge Rao stated ''. . . the Commission in the Teucrium order recognizes that the futures prices are influenced by the spot prices, and the Commission concludes in approving futures ETPs that any fraud on the spot market can be adequately addressed by the fact that the futures market is a regulated one . . .'' The Exchange agrees with the Commission on this point.

Further to this point, a Bitcoin Futures ETF is potentially more susceptible to potential manipulation than a Spot Bitcoin ETP that offers only in-kind creation and redemption because settlement of CME Bitcoin Futures (and thus the value of the underlying holdings of a Bitcoin Futures ETF) occurs at a single price derived from spot bitcoin pricing, while shares of a Spot Bitcoin ETP would represent interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP (as proposed herein) would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. It is not logically possible to conclude that the CME Bitcoin Futures market represents a significant market for a futures-based product, but also conclude that the CME Bitcoin Futures market does not represent a significant market for a spot-based product.

In addition to potentially being more susceptible to manipulation than a Spot Bitcoin ETP, the structure of Bitcoin Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Bitcoin ETP.[42] Specifically, the cost of rolling CME Bitcoin Futures contracts cause the Bitcoin Futures ETFs to lag the performance of bitcoin and cost U.S. investors significantly more on an annual basis than the cost of a comparable investment in a Spot Bitcoin ETP. Spot Bitcoin ETPs hold bitcoin and therefore, do not incur rolling costs. Further, Bitcoin Futures ETFs could potentially hit CME position limits, which would force a Bitcoin Futures ETF to halt its investments in Bitcoin Futures and seek other instruments that would provide

[38] *See* Winklevoss Order at 37593, specifically footnote 202, which includes the language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly; and 37600, specifically where the Commission provides that ''when the spot market is unregulated—the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.'' As noted above, the Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be ''regulated'' in order for a spot commodity ETP to be approved by the Commission, and in fact that it's been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

[39] As further outlined below, both the Exchange and the Sponsor believe that the Bitcoin Futures market represents a regulated market of significant size and that this proposal and others like it should be approved on this basis.

[40] *See* Teucrium Approval at 21679.

[41] Grayscale Investments, *LLC* v. *Securities and Exchange Commission, et al.,* Case No. 22–1142.

[42] *See e.g.,* ''Bitcoin ETF's Success Could Come at Fundholders' Expense,'' Wall Street Journal (October 24, 2021), available at *https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580*; ''Physical Bitcoin ETF Prospects Accelerate,'' *ETF.com* (October 25, 2021), available at: *https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&__cf_chl_jschl_tk__=pmd_JsK.fjXz9eAQW9zol0qpzhXDrrlpIVdoCloLXbLjl44-1635476946-0-gqNtZGzNApCjcnBszQql.*

exposure to bitcoin of which there are few options as discussed previously. Such an event could not only cause investor confusion as to the Bitcoin Futures ETF's investment strategy, but also prevent the Bitcoin Futures ETF from achieving its investment objective (*e.g.,* capital appreciation through exposure to CME Bitcoin Futures), not to mention completely changing its risk profile. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors seeking long-term exposure to bitcoin that will unnecessarily cost U.S. investors significantly more every year when compared to the cost of investing in Spot Bitcoin ETPs. The Exchange believes any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this important investor protection context in mind, as well as the benefit of encouraging increased competition among market participants in this space.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Bitcoin ETPs compared to the Bitcoin Futures ETFs and the Bitcoin Futures Approvals would lead to the conclusion that Spot Bitcoin ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Bitcoin Futures ETFs as compared to Spot Bitcoin ETPs, losses which could be prevented by the Commission approving Spot Bitcoin ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a Bitcoin Futures ETF. Both the Exchange and Sponsor believe that the CME Bitcoin Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing and approving the listing and trading of Bitcoin Futures ETFs that hold primarily CME Bitcoin Futures, however, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the CME Bitcoin Futures market is a regulated market of significant size.

Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

Bitcoin Futures

CME began offering trading in Bitcoin Futures in 2017. Each contract represents five bitcoin and is based on the CME CF Bitcoin Reference Rate.[43] The contracts trade and settle like other cash-settled commodity futures contracts. Nearly every measurable metric related to Bitcoin Futures has generally trended up since launch, although certain notional volume calculations have decreased roughly in line with the decrease in the price of bitcoin. For example, there were 143,215 Bitcoin Futures contracts traded in April 2023 (approximately $20.7 billion) compared to 193,182 ($5 billion), 104,713 ($3.9 billion), 118,714 ($42.7 billion), and 111,964 ($23.2 billion) contracts traded in April 2019, April 2020, April 2021, and April 2022, respectively.[44]

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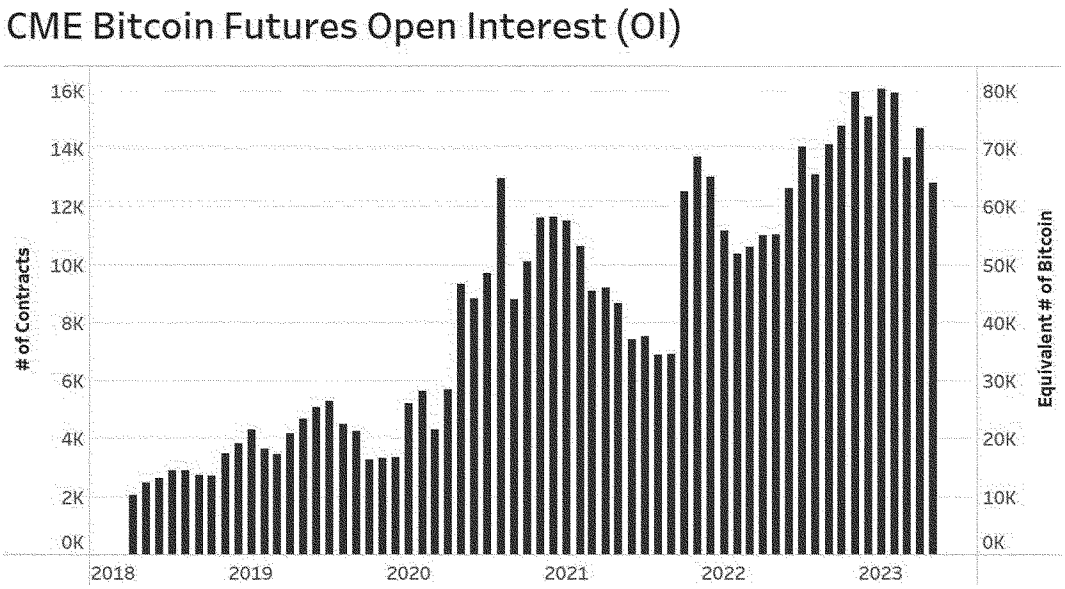
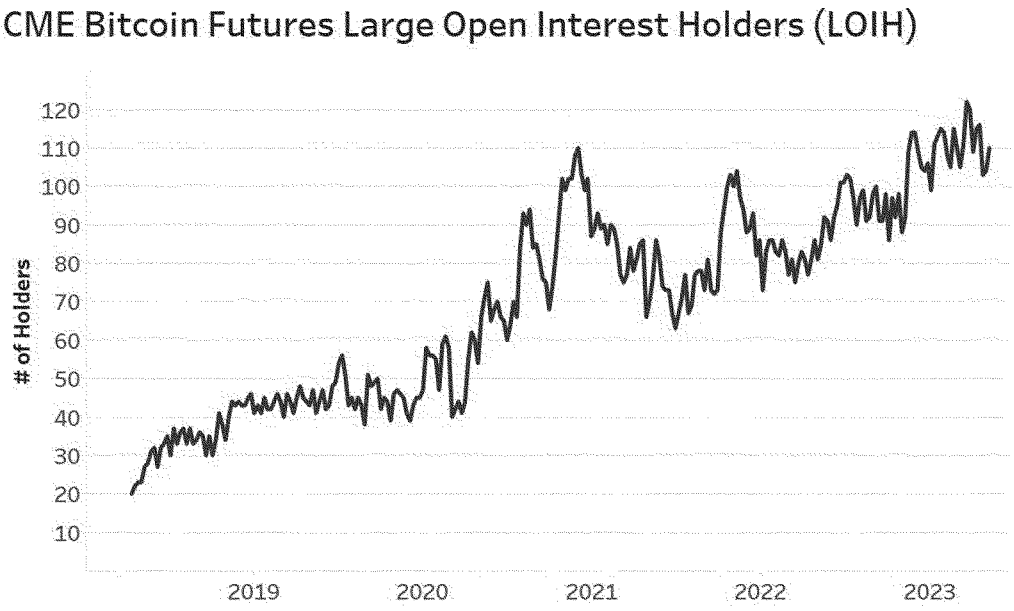
[43] The CME CF Bitcoin Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

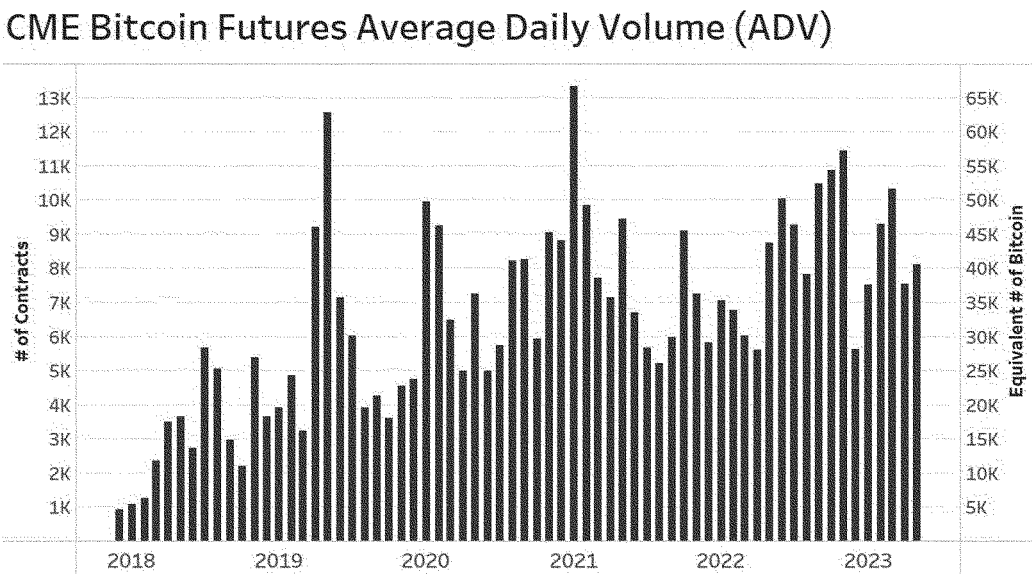
[44] Source: CME, Yahoo Finance 4/30/23.



The number of large open interest holders [45] and unique accounts trading Bitcoin Futures have both increased, even in the face of heightened Bitcoin price volatility.



[45] A large open interest holder in Bitcoin Futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin. At a price of approximately $29,268.81 per bitcoin on 4/30/2023, more than 100 firms had outstanding positions of greater than $3.65 million in Bitcoin Futures.



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The Sponsor further believes that publicly available research, including research done as part of rule filings proposing to list and trade shares of Spot Bitcoin ETPs, corroborates the overall trend outlined above and supports the thesis that the Bitcoin Futures pricing leads the spot market and, thus, a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP. Specifically, the Sponsor believes that such research indicates that bitcoin futures lead the bitcoin spot market in price formation.[46]

Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts,[47] including Commodity-Based Trust Shares,[48] to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; [49] and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Bitcoin Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place [50] with a regulated

[46] *See* Exchange Act Releases No. 94080 (January 27, 2022), 87 FR 5527 (April 12, 2022) (specifically ''Amendment No. 1 to the Proposed Rule Change To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(3)(4), Commodity-Based Trust Shares''); 94982 (May 25, 2022), 87 FR 33250 (June 1, 2022); 94844 (May 4, 2022), 87 FR 28043 (May 10, 2022); and 93445 (October 28, 2021), 86 FR 60695 (November 3, 2021). *See also* Hu, Y., Hou, Y. and Oxley, L. (2019). ''What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective'' (available at: *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/*). This academic research paper concludes that ''There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective.''

[47] *See* Exchange Rule 14.11(f).

[48] Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

[49] As the Exchange has stated in a number of other public documents, it continues to believe that bitcoin is resistant to price manipulation and that ''other means to prevent fraudulent and manipulative acts and practices'' exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

[50] As previously articulated by the Commission, ''The standard requires such surveillance-sharing agreements since ''they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement

Continued

market of significant size. Both the Exchange and CME are members of ISG.[51] The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[52]

The Commission has also recognized that the ''regulated market of significant size'' standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[53]

(a) Manipulation of the ETP

According to the research and analysis presented above, the Bitcoin Futures market is the leading market for bitcoin price formation. Where Bitcoin Futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market would have to participate in the Bitcoin Futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the Bitcoin Futures market because the NAV is based on the price of bitcoin on the principal market, which identified market must be an active market with orderly transactions. Further, the Trust only allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the Shares through manipulation of the Trust's methodology for calculating NAV or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, which is led by the Bitcoin Futures market. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market or spot market for a number of reasons, including the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange is proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares. On June 21, 2023, the Exchange reached an agreement on terms with Coinbase, Inc. (''Coinbase''), an operator of a United States-based spot trading platform for Bitcoin that represents a substantial portion of US-based and USD denominated Bitcoin trading,[54] to enter into a surveillance-sharing agreement (''Spot BTC SSA'') and executed an associated term sheet. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares.

The Spot BTC SSA is expected to be a bilateral surveillance-sharing agreement between the Exchange and Coinbase that is intended to supplement the Exchange's market surveillance program. The Spot BTC SSA is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot Bitcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares.[55] This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot bitcoin trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.[56]

Further, and consistent with prior points above, offering only in-kind creation and redemption will also provide unique protections against potential attempts to manipulate the price of the Shares. While the Sponsor believes that the index which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the index significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new Shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed Shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.[57] When authorized participants are creating Shares with the Trust, they need to deliver a certain number of bitcoin per Share (regardless of the valuation used) and when they're redeeming, they can

from obtaining this information from, or producing it to, the other party.'' The Commission has historically held that joint membership in the Intermarket Surveillance Group (''ISG'') constitutes such a surveillance sharing agreement. *See* Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR–NYSEArca–2019–39) (the ''Wilshire Phoenix Disapproval'').

[51] For a list of the current members and affiliate members of ISG, *see www.isgportal.com*.

[52] *See* Wilshire Phoenix Disapproval.

[53] *See* Winklevoss Order at 37580. The Commission has also specifically noted that it ''is not applying a 'cannot be manipulated' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.'' *Id.* at 37582.

[54] According to a Kaiko Research report dated June 26, 2023, Coinbase represented roughly 50% of exchange trading volume in USD–BTC trading on a daily basis during May 2023.

[55] For additional information regarding ISG and the hallmarks of surveillance-sharing between ISG members, see *https://isgportal.org/overview*.

[56] The Exchange also notes that it already has in place ISG-like surveillance sharing agreement with Cboe Digital Exchange, LLC and Cboe Clear Digital, LLC.

[57] While the Index will not be particularly important for the creation and redemption process, it will be used for calculating fees.

similarly expect to receive a certain number of bitcoin per Share. As such, even if the price used to value the Trust's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the index because there is little financial incentive to do so.

(ii) Designed To Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars, including through Bitcoin Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Bitcoin Futures ETFs and premium/discount volatility and management fees for OTC Bitcoin Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Bitcoin Futures ETFs and operating companies that are imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodying spot bitcoin.

Global X Bitcoin Trust

Delaware Trust Company is the trustee (''Trustee''). The Bank of New York Mellon will be the administrator (''Administrator'') and transfer agent (''Transfer Agent''). Coinbase Custody Trust Company, LLC, a third-party regulated custodian (the ''Custodian''), will be responsible for custody of the Trust's bitcoin. Sponsor selects the marketing agent in connection with the creation and redemption of ''Baskets'' of Shares.[58]

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest and ownership in the Trust. The Trust's assets will consist of bitcoin held by the Custodian on behalf of the Trust. The Trust generally does not intend to hold cash or cash equivalents. However, there may be situations where the Trust will unexpectedly hold cash or cash equivalents on a temporary basis.

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,[59] nor a commodity pool for purposes of the Commodity Exchange Act (''CEA''), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

When the Trust sells or redeems its Shares, it will do so in ''in-kind'' transactions in large blocks of Shares (a ''Creation Basket'') at the Trust's NAV. Authorized participants will deliver, or facilitate the delivery of, bitcoin to the Trust's account with the Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Custodian, will deliver bitcoin to such authorized participants when they redeem Shares with the Trust. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust's assets, and market conditions at the time of a transaction. Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Trust.

Investment Objective

According to the Registration Statement and as further described below, the investment objective of the Trust is to reflect the performance of the price of bitcoin less the expenses of the Trust's operations. In seeking to achieve its investment objective, the Trust will hold bitcoin.

The Trust will value its Shares daily based on the value of bitcoin as reflected by the CoinDesk Bitcoin Price Index (XBX) (the ''Index''), a real-time, US dollar equivalent spot rate for Bitcoin. The Index leverages real-time prices from multiple constituent exchanges to provide a representative spot price. Each constituent exchange is weighted proportionally to its trailing 24-hour liquidity with adjustments for price variance and inactivity. Given the potential for anomalies or manipulation at individual exchanges, constituent weights may dynamically adjust using CoinDesk Indices proprietary Constituent Weighting Adjustment Algorithm (CWAA). The algorithm is designed to calculate a real-time index that is an accurate and reliable reflection of the market price of each digital asset, using multi-sourced spot prices and dynamically reduce the weights of individual exchanges with lower liquidity, inactivity, and higher price variance. The Index is administered in alignment with the International Organization of Securities Commissions (''IOSCO'') Principles for Financial Benchmarks. The Index price is calculated using non-GAAP[60] methodology and is not used in the Trust's financial statements.

The Trust will process all creations and redemptions in-kind in transactions with authorized participants. The Trust is not actively managed.

Net Asset Value

The Net Asset Value (''NAV'') of the Trust is used by the Trust in its day-to-day operations to measure the net value of the Trust's assets. The NAV is calculated on each business day and is equal to the aggregate value of the Trust's assets less its liabilities based on the Index price. In determining the NAV of the Trust on any business day, the Administrator will calculate the price of the bitcoin held by the Trust as of 4:00 p.m. EST on such day. The Administrator will also calculate the NAV per Share of the Trust, which equals the NAV of the Trust divided by the number of outstanding Shares.

The Administrator will rely on the Index as the Index price to be used when determining NAV. The methodology used to calculate the Index price to value bitcoin in determining the net asset value of the Trust may not be deemed consistent with U.S. GAAP. However, the Trust will utilize a pricing source that is consistent with GAAP for the Trust's periodic financial statements. Therefore, to the extent the methodology used to calculate the Index is deemed not to be consistent with GAAP, the Trust's periodic financial statements may not utilize net asset value or NAV. The Sponsor will determine in its sole discretion the valuation sources and policies used to

[58] The Exchange notes that the Sponsor is finalizing negotiations with the marketing agent and it will submit an amendment to this proposal upon execution of the agreement with the marketing agent.

[59] 15 U.S.C. 80a–1.

[60] GAAP refers to generally accepted account principles.

prepare the Trust's financial statements in accordance with GAAP.

Calculation of Net Asset Value and the Index

On each Business Day, as soon as practicable after 4:00 p.m. EST, the Administrator evaluates the bitcoin held by the Trust as reflected by the Index and determines the net asset value of the Trust and the NAV. For purposes of making these calculations, a Business Day means any day other than a day when the Exchange is closed for regular trading.

The Index is a real-time, USD-equivalent spot rate for Bitcoin. The Index leverages real-time prices from multiple constituent exchanges to provide a representative spot price. Each constituent exchange is weighted proportionally to its trailing 24-hour liquidity with adjustments for price variance and inactivity. Given the potential for anomalies or manipulation at individual exchanges, constituent weights may dynamically adjust using CoinDesk Indices proprietary Constituent Weighting Adjustment Algorithm (CWAA). The algorithm is designed to calculate a real-time index that is an accurate and reliable reflection of the market price of each digital asset, using multi-sourced spot prices and dynamically reduce the weights of individual exchanges with lower liquidity, inactivity, and higher price variance. The Index is administered in alignment with the IOSCO Principles for Financial Benchmarks.

If the Index is not available or the Sponsor determines, in its sole discretion, that the Index should not be used, the Trust's holdings may be fair valued in accordance with the policy approved by the Sponsor.

Availability of Information

In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's bitcoin holdings as well as additional data regarding the Trust. The Trust will provide an Intraday Indicative Value (''IIV'') per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price [61] in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of bitcoin will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Index, including key elements on how the Index is calculated, will be publicly available at *https://www.coindesk.com/indices/xbx/.*

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association (''CTA'').

Quotation and last sale information for bitcoin is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in bitcoin is available from major market data vendors and from the exchanges on which bitcoin are traded. Depth of book information is also available from bitcoin exchanges. The normal trading hours for bitcoin exchanges are 24 hours per day, 365 days per year.

Custody of the Trust's Bitcoins

An investment in the Shares is backed by bitcoin held by the Custodian on behalf of the Trust. The Custodian will keep custody of all of the Trust's bitcoin, other than that which is maintained in the Trading Balance with the Prime Broker, in accounts that are required to be segregated from the assets held by the Custodian as principal and the assets of its other customers (the ''Vault Balance''), with any remainder of the Vault Balance held as part of a ''hot storage''.[62] The Custodian will keep a substantial portion of the private keys associated with the Trust's bitcoin in ''cold storage'' [63] or similarly secure technology (the ''Cold Vault Balance''). The hardware, software, systems, and procedures of the Custodian may not be available or cost effective for many investors to access directly.

Creation and Redemption of Shares

According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more baskets. Purchase orders must be placed by 4:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of bitcoin required is an amount of bitcoin that is in the same proportion to the total assets of the Trust, net of accrued expenses and other liabilities, on the date the order to purchase is properly received, as the number of Shares to be created under the purchase order is in proportion to the total number of Shares outstanding on the date the order is received. Each night, the Sponsor will publish the amount of bitcoin that will be required in exchange for each creation order. The Administrator determines the required deposit for a

[61] As defined in Rule 11.23(a)(3), the term ''BZX Official Closing Price'' shall mean the price disseminated to the consolidated tape as the market center closing trade.

[62] A portion of the Trust's bitcoin holdings and cash holdings from time to time may be held with the Prime Broker, an affiliate of the Custodian, in the Trading Balance, in connection with in-kind creations and redemptions of Baskets and the sale of bitcoin to pay the Sponsor's Fee and Trust expenses not assumed by the Sponsor. These periodic holdings held in the Trading Balance with the Prime Broker represent an omnibus claim on the Prime Broker's bitcoins held on behalf of clients; these holdings exist across a combination of omnibus hot wallets, omnibus cold wallets, or in accounts in the Prime Broker's name on a trading venue (including third-party venues and the Prime Broker's own execution venue) where the Prime Broker executes orders to buy and sell bitcoin on behalf of its clients.

[63] The term ''cold storage'' refers to a safeguarding method by which the private keys corresponding to bitcoins stored on a digital wallet are removed from any computers actively connected to the internet. Cold storage of private keys may involve keeping such wallet on a non-networked computer or electronic device or storing the public key and private keys relating to the digital wallet on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus or paper) and deleting the digital wallet from all computers.

given day by dividing the number of bitcoin held by the Trust as of the opening of business on that business day, adjusted for the amount of bitcoin constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the number of Shares in a Creation Unit. The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

Rule 14.11(e)(4)—Commodity-Based Trust Shares

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and that these values and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds a specified commodity [64] deposited with the trust; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker (''Market Maker'') in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, *e.g.,* Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the bitcoin underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is $0.01 where the price is greater than $1.00 per share or $0.0001 where the price is less than $1.00 per share.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and Bitcoin Futures via ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.[65]

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares.

[64] For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act. As noted above, the CFTC has opined that Bitcoin is a commodity as defined in Section 1a(9) of the Commodity Exchange Act. *See* Coinflip.

[65] For a list of the current members and affiliate members of ISG, *see www.isgportal.com.*

Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours [66] when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act [67] in general and Section 6(b)(5) of the Act [68] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts, including Commodity-Based Trust Shares, to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; [69] and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Bitcoin Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place [70] with a regulated market of significant size. Both the Exchange and CME are members of ISG. The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[71]

The Commission has also recognized that the ''regulated market of significant size'' standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[72]

(a) Manipulation of the ETP

According to the research and analysis presented above, the Bitcoin Futures market is the leading market for bitcoin price formation. Where Bitcoin Futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market (beyond just the constituents of the Index) would have to participate in the Bitcoin Futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the Bitcoin Futures market because the NAV is

[66] Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

[67] 15 U.S.C. 78f.

[68] 15 U.S.C. 78f(b)(5).

[69] As the Exchange has stated in a number of other public documents, it continues to believe that bitcoin is resistant to price manipulation and that ''other means to prevent fraudulent and manipulative acts and practices'' exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

[70] As previously articulated by the Commission, ''The standard requires such surveillance-sharing agreements since ''they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.'' The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. *See* Wilshire Phoenix Disapproval).

[71] *Id.*

[72] See Winklevoss Order at 37580. The Commission has also specifically noted that it ''is not applying a 'cannot be manipulated' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.'' *Id.* at 37582.

based on spot prices. Further, the Trust only allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the Shares through manipulation of the Trust's methodology for calculating NAV or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, which is led by the Bitcoin Futures market. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market or spot market for a number of reasons, including the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange is proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares. On June 21, 2023, the Exchange reached an agreement on terms with Coinbase, Inc. (''Coinbase''), an operator of a United States-based spot trading platform for Bitcoin that represents a substantial portion of US-based and USD denominated Bitcoin trading,[73] to enter into a surveillance-sharing agreement (''Spot BTC SSA'') and executed an associated term sheet. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares.

The Spot BTC SSA is expected to be a bilateral surveillance-sharing agreement between the Exchange and Coinbase that is intended to supplement the Exchange's market surveillance program. The Spot BTC SSA is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot Bitcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares.[74] This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot bitcoin trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.[75]

Further, and consistent with prior points above, offering only in-kind creation and redemption will also provide unique protections against potential attempts to manipulate the price of the Shares. While the Sponsor believes that the Index which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Index significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new Shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed Shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important. When authorized participants are creating Shares with the Trust, they need to deliver a certain number of bitcoin per Share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per Share. As such, even if the price used to value the Trust's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Index because there is little financial incentive to do so.

(ii) Designed To Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars, including through Bitcoin Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Bitcoin Futures ETFs and premium/discount volatility and management fees for OTC Bitcoin Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Bitcoin Futures ETFs and operating companies that are imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodying spot bitcoin.

Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of

[73] According to a Kaiko Research report dated June 26, 2023, Coinbase represented roughly 50% of exchange trading volume in USD-BTC trading on a daily basis during May 2023.

[74] For additional information regarding ISG and the hallmarks of surveillance-sharing between ISG members, see *https://isgportal.org/overview.*

[75] The Exchange also notes that it already has in place ISG-like surveillance sharing agreement with Cboe Digital Exchange, LLC and Cboe Clear Digital, LLC.

Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed bitcoin derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about bitcoin and will be available regarding the Trust and the Shares. In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's bitcoin holdings as well as additional data regarding the Trust. The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of bitcoin will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

Quotation and last sale information for bitcoin is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in bitcoin is available from major market data vendors and from the exchanges on which bitcoin are traded. Depth of book information is also available from bitcoin exchanges. The normal trading hours for bitcoin exchanges are 24 hours per day, 365 days per year

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Bitcoin Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

The Exchange believes that the proposal is, in particular, designed to protect investors and the public interest. The investor protection issues for U.S. investors has grown significantly over the last several years, through roll costs for Bitcoin Futures ETFs and premium/discount volatility and management fees for OTC Bitcoin Funds. As discussed throughout, this growth investor protection concerns need to be reevaluated and rebalanced with the prevention of fraudulent and manipulative acts and practices concerns that previous disapproval orders have relied upon. Finally, the Exchange notes that in addition to all of the arguments herein which it believes sufficiently establish the CME Bitcoin Futures market as a regulated market of significant size, it is logically inconsistent to find that the CME Bitcoin Futures market is a significant market as it relates to the CME Bitcoin Futures market, but not a significant market as it relates to the bitcoin spot market for the numerous reasons laid out above.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. by order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–058 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2023–058. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–058 and should be submitted on or before September 13, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[76]

Sherry R. Haywood,

Assistant Secretary.

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[76] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98158; File No. SR–BX–2023–020]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Set Fees for the Purchase of Field-Programmable Gate Array Technology as an Optional Delivery Mechanism for BX Totalview

August 17, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 9, 2023, Nasdaq BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to set fees for the purchase of field-programmable gate array (''FPGA'') technology as an optional delivery mechanism for BX TotalView.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/bx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to establish a fee schedule for the purchase of field-programmable gate array (''FPGA'') technology as an optional delivery mechanism for BX TotalView (''BX FPGA Service'').[3] This follows a recently-filed proposal to offer FPGA technology as an optional delivery mechanism for BX TotalView.[4]

FPGA

FPGA is a hardware-based delivery mechanism that utilizes an integrated circuit that is programmed to reduce ''jitter''—a technical term of art referring to the deviation in amplitude, phase timing or width of a signal pulse in a digital signal—that will allow data to be processed in a more predictable, or ''deterministic,'' fashion. Reducing jitter can be useful for certain customers due to the variability in the timing of market data packets transmitted by an exchange over the course of the trading day. Orders, and therefore market data packets, typically accumulate in larger numbers at the beginning and end of the trading day, as well as during the peaks of activity that occur at random intervals during the day. These bursts of activity may alter the time interval between the delivery of data packets because software processes information at variable rates depending on load to the system. Processing times may increase at higher loads, and decrease during periods of lesser activity. FPGA technology processes data packets at a constant time interval, without regard to the number of packets processed. Higher levels of determinism mean less variable queuing, which improves the predictability of data transfer, particularly during times of peak market activity.

[3] This Proposal was initially filed by the Exchange on May 23, 2023. *See* Securities Exchange Act Release No. 97627 (May 31, 2023), 88 FR 37112 (June 6, 2023) (SR–BX–2023–014). On July 7, 2023, that filing was withdrawn and replaced to provide supplemental information. *See* Securities Exchange Act Release No. 97946 (July 19, 2023), 88 FR 47937 (July 25, 2023) (SR–BX–2023–016). On August 9, 2023, the second filing was withdrawn and replaced with the instant filing, which provides additional information without changing the Proposal in substance.

[4] *See* SR–BX–2023–011 (''A proposal to offer field-programmable gate array ('FPGA') technology as an optional delivery mechanism for BX TotalView.''), available at *https://listingcenter.nasdaq.com/rulebook/BX/rulefilings.* A proposal to establish a fee schedule for the use of FPGA technology for the Phlx exchange is being filed concurrently with this proposal.

The benefits of determinism depend on the use case of the customer, as well as the customer's specific system architecture.

Higher determinism does not necessarily mean lower latency. The concepts of determinism and latency are related, but distinct. Determinism refers to predictability in the rate of data transmission; latency refers to the time required to process data or transport it from one location to another. Low latency is not necessarily deterministic, and higher determinism does not necessarily mean low latency. As such, use of FPGA technology will increase determinism, but does not guarantee lower latency at all times.[5]

Among customers that seek a higher degree of determinism, the benefits of FPGA technology vary, as FPGA technology is one possible solution, among a catalog of possible solutions, for increasing the consistency and predictability of message throughput over the course of the trading day. Some customers are able to adequately control jitter without using FPGA technology; other customers address jitter using specialized software, coding or other design solutions in conjunction with FPGA; still others use FPGA alone. The specific choice depends on a complex analysis of the customer's information technology systems in the context of their particular use cases.

FPGA is a broadly-available, commonly-used type of programmable circuit that can be modified to suit different use cases. It is used in a wide spectrum of industries, including the consumer electronics, automotive, and aerospace, as well as in a variety of industrial applications. It is not unique to the financial services industry,[6] or to the Exchange.

FPGA technology has been offered by the Nasdaq Stock Exchange for over a decade, and the Nasdaq Options Market for nearly as long,[7] and has been cited by the SEC as an example of a technology useful in the distribution of market data products.[8]

The Exchange proposes to offer the BX FPGA Service in conjunction with the Exchange's depth of book feed, BX TotalView. BX TotalView is a real-time market data product that provides full order depth using a series of order messages to track the life of customer orders in the BX market, as well as trade data for BX executions and administrative messages such as Trading Action messages, Symbol Directory, and Event Control messages.[9]

Customers that choose to purchase BX TotalView without the BX FPGA Service will receive the same data as customers that elect to purchase BX TotalView with the BX FPGA Service.

Proposed Fees

BX proposes internal distribution fees of $3,500 per month and external distribution fees of $350 for the BX FPGA Service; customers that elect to use the BX FPGA Service for both internal and external distribution will pay both fees.[10] These fees are in addition to Market Data Distributor Fees,[11] fees for BX TotalView,[12] and other fees for Distribution Models.[13] Customers that elect to receive BX depth of book data without using the BX FPGA Service will pay no fee in addition to the underlying fees listed above.

The proposed fees for the BX FPGA Service are substantially lower than fees for the Nasdaq FPGA Service, which are set at $25,000 per Distributor for internal only distribution, $2,500 for external only, and $27,500 for internal and external distribution.[14] The difference is based, in part, on a comparison of peak activity at the two exchanges. As noted above, high levels of determinism are particularly valuable during periods of peak activity.

Although there is considerable variation in the number of messages at various peaks, as well as the duration of peak activity, the proposed fees are roughly comparable to the differences in average peak activity at the BX exchange relative to the Nasdaq exchange. Exchange staff have also discussed the proposed fees with customers, and believe, based on those discussions and their own business judgment, that the proposed fees fairly reflect the value of the BX FPGA Service. A number of customers provisionally agree with this assessment, and have indicated that they are interested in testing it.

No other exchange currently offers FPGA technology as a separate service in conjunction with the delivery of a proprietary data feed, and therefore there are no other fees for comparison.

If BX is incorrect in its determination that the proposed fees reflect the underlying value of the BX FPGA Service, customers will not purchase the product. The BX FPGA Service is not necessary for a customer to ingest and process depth of book information, and those customers that seek a higher degree of determinism have a number of options at their disposal to reduce jitter without using the BX FPGA Service.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[15] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[16] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposal is reasonable and unlikely to burden the market because the purchase of the BX FPGA Service is optional for all categories of customers. No customer and no category of customers (such as, for example, vendors, proprietary trading firms, banks, hedge funds, market makers, or high frequency trading firms) are required to purchase the BX FPGA

[5] Because software can be impacted by workload, FPGA technology in general can provide lower latency during periods of peak activity. The same FPGA technology that will support the BX FPGA Service is also broadly commercially available for purchase from third-party sellers unrelated to the Exchange.

[6] *See, e.g.,* Contrive Datum Insights, ''Field-Programmable Gate Array (FPGA) Market is expected to reach around USD 22.10 Billion by 2030, *Grow at a CAGR of 15.12% during Forecast Period 2023 to 2030,*'' *(February 21, 2023), available at https://www.globenewswire.com/en/news-release/2023/02/21/2612772/0/en/Field-Programmable-Gate-Array-FPGA-Market-Is-Expected-To-Reach-around-USD-22-10-Billion-by-2030-Grow-at-a-CAGR-Of-15-12-during-Forecast-Period-2023-To-2030-Data-By-Contrive-Datum-I.html* (describing the general size and state of the FPGA market in 2023).

[7] *See* Securities Exchange Act Release No. 67297 (June 28, 2012), 77 FR 39752 (July 5, 2012) (SR–Nasdaq–2012–063) (introducing FPGA technology); *see also* Nasdaq Data News 2012–13, available at *http://www.nasdaqtrader.com/TraderNews.aspx?id=dn2012-13* (introducing TotalView FPGA service as of August 1, 2012); Securities Exchange Act Release No. 74745 (April 16, 2015), 80 FR 22588 (April 22, 2015) (SR–Nasdaq–2015–035) (establishing FPGA for the Nasdaq Options Market); The Nasdaq Stock Market LLC Rules, Equity 7, Section 126(c) (Hardware-Based Delivery of Nasdaq Depth data).

[8] *See* Securities Exchange Act Release No. 90610, 86 FR 18596, 18647 (April 9, 2021) (File No. S7–03–20) (listing field programmable gate array services as an example of a technological innovation that could be employed by competing consolidators as part of the Market Data Infrastructure rule).

[9] *See* Nasdaq BX, Inc. Rules, Equity 7, Section 123 (BX TotalView); *see also* Securities Exchange Act Release No. 59307 (January 28, 2009), 74 FR 6069 (February 4, 2009) (establishing fees for BX TotalView).

[10] The difference in amount for external and external distribution reflects Nasdaq's experience that the Exchange's FPGA hardware is best employed at the point of ingestion, as the utility of FPGA technology falls as the data moves farther from the source.

[11] *See* Nasdaq BX, Inc. Rules, Equity 7, Section 119.

[12] *See Id.,* Section 123.

[13] *See Id.,* Section 126.

[14] *See* The Nasdaq Stock Market LLC Rules, Equity 7 (Pricing Schedule), Section 126(c) (Hardware-based delivery of Nasdaq depth data).

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4) and (5).

Service for either legal or technological reasons—even a customer that seeks to reduce jitter.[17]

The Nasdaq exchange has over ten years of experience in selling the Nasdaq FPGA Service. That experience has shown that the vast majority of Nasdaq depth customers do not find value in the Nasdaq FPGA Service. The Exchange expects customers that do not find value in the Nasdaq FPGA Service to make a similar decision with respect to the BX FPGA Service, and continue to ingest BX TotalView as they do now.

For those customers that may seek to increase determinism, the purchase of FPGA technology from the BX exchange will be only one of several options available. FPGA technology is not unique to the Exchange or even the financial services industry. Third-party data vendors offer FPGA technology services. Customers may also install their own FPGA hardware for internal use. All of these are viable options; the benefits of any particular option will depend on the particular customer's systems and use cases.

Customers may also choose not to address jitter using FPGA technology at all. As noted above, FPGA technology processes the data at a consistently predictable rate relative to software. This predictability in the rate of processing may not be advantageous or optimal for all systems receiving the exchange data feed.

The design of data processing architecture is complex. The ingestion of data from an exchange is just one step in the life-cycle of trading. Customers must also generate and submit orders, evaluate trades, and then generate new orders while interacting with multiple exchanges. All of these steps are part of a single trading system. Changing any one step in the process—by, for example, purchasing the BX FPGA Service when other exchanges may not offer FPGA—often results in the need for changes to other aspects of the process. As such, the decision to buy the BX FPGA Service will be based on whether the service is compatible with the customer's trading system as a whole, not just on whether it may facilitate the processing of data from a single exchange. The appropriateness of any particular solution will depend on the customer's system architecture, and the specific use cases for the market data consumed.

To illustrate the choice faced by exchange customers, consider the decisions made by the two consolidated data processors, the UTP and CTA Plans, two different systems that use dissimilar means to achieve an optimal solution. Both perform the same task—combining quotes and trades from all U.S. exchanges into a consolidated data feed with relatively low jitter. Yet only one processor—the CTA Plan—uses FPGA hardware, while the other—the UTP Plan—does not.

This is because the UTP Plan's design, coding and hardware achieve the desired level of determinism without FPGA technology. The CTA Plan, by contrast, elected to incorporate FPGA technology into its system design. Notwithstanding these different design decisions, both plans achieve broadly similar levels of performance. FPGA technology is therefore not essential to addressing jitter, but rather is one option among many to address the issue.

Market data customers face an array of choices to optimize determinism, much like the UTP and CTA Plans. For example, a customer may purchase and deploy its own FPGA hardware, without purchasing the proposed FPGA technology service from the Exchange, *after* receiving data from the Exchange. Another customer may find use of the BX FPGA Service, which lowers the level of jitter prior to the customer's receipt of the data, to be a better fit for its system architecture. The solution chosen will vary based on the needs and design choices of the customer.

The experience of the Nasdaq exchange in offering the Nasdaq FPGA Service shows that customers sensitive to jitter often avail themselves of substitutes for FPGA technology, a decision that can change over time. Over the past decade, a total of 21 current or potential users of the Nasdaq FPGA Service—all of which sought a higher degree of determinism—substituted the Nasdaq FPGA Service with an alternative solution. Six of these customers were in the process of developing and testing the Nasdaq FPGA Service, but ultimately decided not to purchase it before completing this process. The remaining 15 customers purchased the Nasdaq FPGA Service, only to cancel it after using it. Because all of these customers continued to utilize the underlying data, these cancelations demonstrate that the BX FPGA Service, like the Nasdaq FPGA Service, will be an optional service, even for those customers that seek to reduce jitter.

Moreover, as noted above, no other exchange currently offers FPGA technology in conjunction with their proprietary data feeds as a separate service, notwithstanding the fact that it is a widely available technology, providing further evidence that customers have multiple options at their disposal to address jitter.

In the experience of the Nasdaq exchange, the Nasdaq FPGA Service is purchased by vendors, proprietary trading firms, banks, high-frequency trading firms, hedge funds, and market makers. The Nasdaq exchange is aware of no systematic differences within any of these categories among market participants that choose to use or not to use the Nasdaq FPGA Service.

Few customers of Nasdaq TotalView purchase the Nasdaq FPGA Service. This is because the bulk of customers consume Nasdaq TotalView for display (*i.e.,* human) usage. FPGA technology impacts performance at a speed that a human cannot process, and there is no need for FPGA technology for such usage.

Of the customers that receive Nasdaq TotalView from Nasdaq (either through a direct feed or an extranet connection), and are in a position to utilize the Nasdaq FPGA Service, only about 15 percent purchase it.

Most strikingly, only approximately 3% of market makers at Nasdaq purchase the Nasdaq FPGA Service.[18] This may seem a surprising result, given that market makers, by definition, trade throughout the day and during periods of peak activity, but, as noted above, customers have several options: purchase FPGA services from a third-party vendor, implement FPGA technology on their own, or configure their systems to process data during peaks without the use of FPGA. The fact that only about 3% of market makers at the Nasdaq exchange purchase the Nasdaq FPGA Service demonstrates that most customers make use of alternative solutions. As such, the determining factor in whether to purchase the Nasdaq FPGA Service is not the category of customer, but rather the compatibility of that service with the customer's specific systems architecture and technical requirements, which can and do change over time as systems are modified, replaced or updated.

For all of these reasons, customers can discontinue the use of the BX FPGA Service at any time, or decide not to purchase it, for any reason, including the level of fees.

[17] Not all customers of depth of book information process at sufficiently high speeds for jitter to become a concern. Neither FPGA hardware nor its substitutes are required to ingest depth of book information.

[18] The 3% figure represents the percentage of designated market makers by market participant identifier (''MPID'') that currently purchase the Nasdaq FPGA Service relative to all MPIDs on the Nasdaq Market Center. The MPID is a unique four-letter mnemonic assigned to each Participant in the Nasdaq Market Center. A Participant may have one or more than one MPID. *See* The Nasdaq Stock Market LLC Rules, Equity 1, Section 1(a)(11).

Customers that choose not to purchase the BX FPGA Service are not impacted by the proposal.

The BX FPGA Service will be available to all customers on a non-discriminatory basis, and therefore the proposed fees are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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.

This Proposal, a response to customer demand, is a product of a competitive marketplace. To date, lower levels of peak activity at the BX Exchange relative to the Nasdaq exchange have been associated with low levels of customer interest in this product. Recently, however, BX has heard from customers interested in using FPGA technology for BX TotalView. To address this customer demand, and to drive liquidity to the BX Exchange by making it a more attractive trading venue, BX has decided to offer this product.

Approval of this Proposal will further promote competition by providing market participants additional choices in the transmission of depth of book data.

Nothing in the Proposal burdens inter-market competition (the competition among self-regulatory organizations) because approval of the Proposal does not impose any burden on the ability of other exchanges to compete. As noted above, FPGA technology is generally available and any exchange has the ability to offer it if it so chooses.

Nothing in the Proposal burdens intra-market competition (the competition among consumers of exchange data) because the BX FPGA Service will be available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase the BX FPGA Service can do so on a non-discriminatory basis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act.[19]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–BX–2023–020 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–BX–2023–020. 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–BX–2023–020 and should be submitted on or before September 13, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–18104 Filed 8–22–23; 8:45 am]

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[19] 15 U.S.C. 78s(b)(3)(A)(ii).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98169; File No. SR–NYSENAT–2023–17]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.44

August 18, 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 8, 2023, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.44 to provide for a Retail Liquidity Program. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 7.44, which is currently designated as Reserved, to provide for a Retail Liquidity Program (the ''Program''). The purpose of the Program would be to attract retail order flow to the Exchange and allow such order flow to receive potential price improvement at the midpoint or better. As described in greater detail below, the Program would allow ETP Holders to provide potential price improvement to retail investor orders in the form of a non-displayed order that is priced at the less aggressive of the midpoint of the PBBO or its limit price, called a Retail Price Improvement Order (''RPI Order'').[3] When there is an RPI Order in a particular security that is eligible to trade at the midpoint of the PBBO, the Exchange would disseminate an indicator, known as the Retail Liquidity Identifier, that such interest exists.[4] Retail Member Organizations (''RMOs'') would be able to submit a Retail Order to the Exchange, which interacts, to the extent possible, with available contra-side RPI Orders and may interact with other liquidity on the Exchange, depending on the Retail Order's instructions.[5] The segmentation in the Program would allow retail order flow to receive potential price improvement as a result of that order flow being deemed more desirable by liquidity providers.

The rules providing for the proposed Program are structured similarly to the Retail Liquidity Programs currently offered by its affiliated exchanges, New York Stock Exchange, LLC (''NYSE'') and NYSE Arca, Inc. (''NYSE Arca'') except for differences as further described below relating to RPI Orders and Retail Orders, and uses the same terminology as is used in the approved rules governing the NYSE and NYSE Arca Retail Liquidity Programs.[6] Accordingly, proposed Rule 7.44 is based on NYSE Rule 7.44 and NYSE Arca Rule 7.44–E, except as described in further detail below to reflect that the proposed Program would differ substantively from the NYSE and NYSE Arca Retail Liquidity Programs in that it would primarily seek to provide retail order flow with price improvement opportunities at the midpoint or better.[7] The Exchange notes that several other equities exchanges also offer retail price improvement programs, one of which offers trading opportunities at the midpoint, similar to the Program, as proposed.[8]

Definitions

The Exchange proposes to adopt the following definitions for the Program under proposed Rule 7.44(a).[9]

- Proposed Rule 7.44(a)(1) would define a Retail Member Organization or RMO as an ETP Holder that is approved by the Exchange under Rule 7.44 to submit Retail Orders. Proposed Rule 7.44(a)(1) is substantively identical[10] to NYSE Rule 7.44(a)(2) and NYSE Arca Rule 7.44–E(a)(2) and is also substantially similar to IEX Rule 11.232(a)(1).
- Proposed Rule 7.44(a)(2) would define a Retail Order as an agency order or riskless principal order that meets the criteria of FINRA Rule 5320.03, originating from a natural person, and that is submitted to the Exchange by an RMO, 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. A Retail Order would operate in accordance with proposed Rule 7.44(f) (as described below). Proposed Rule 7.44(a)(2) is substantively identical to NYSE Rule 7.44(a)(3) and NYSE Arca Rule 7.44–E(a)(3) as to the core definition of a Retail Order and the provision that the operation of a Retail Order would be outlined further in a later section of the rule.[11] Proposed Rule 7.44(a)(2) is also substantially similar to IEX Rule 11.190(b)(15).
- Proposed Rule 7.44(a)(3) would define a Retail Price Improvement Order

[3] *See* proposed Rule 7.44(a)(3).

[4] *See* proposed Rule 7.44(e). The Exchange notes that it will seek an exemption from the provisions of Regulation NMS Rule 602, 17 CFR 242.602(d) (the ''Quote Rule'') with respect to its planned dissemination of a Retail Liquidity Identifier to allow it to disseminate the Retail Liquidity Identifier to indicate the presence of RPI Order interest without including such interest in the Exchange's quotation. The Exchange will not implement the proposed Program unless and until its request for exemption from the requirements of the Quote Rule has been granted.

[5] *See* proposed Rules 7.44(a)(1), 7.44(a)(2), and 7.44(f).

[6] *See* NYSE Rule 7.44; NYSE Arca Rule 7.44–E. The Exchange notes that NYSE Arca has proposed to decommission its Retail Liquidity Program in a separate rule filing. *See* SR–NYSEARCA–2023–55. The Exchange proposes to implement the Program in the third quarter of 2023, in tandem with the discontinuation of the NYSE Arca Retail Liquidity Program, on a date to be announced by Trader Update.

[7] The Exchange notes that it is not seeking an exemption under Rule 612 of Regulation NMS, 17 CFR 242.612 (the ''Sub-Penny Rule'') because it will not accept or rank orders priced greater than $1.00 per share in an increment smaller than $0.01. The Program will thus differ from the NYSE and NYSE Arca Retail Liquidity Programs in this respect, as both of those programs operate pursuant to exemptive relief granted by the Commission from the requirements of the Sub-Penny Rule.

[8] *See, e.g.,* Investors Exchange LLC (''IEX'') Rule 11.232 (describing the IEX Retail Program, which is designed to provide retail order flow with price improvement opportunities at the midpoint); Cboe BYX Exchange, Inc. (''BYX'') Rule 11.24 (setting forth BYX's Retail Price Improvement Program); Nasdaq BX, Inc. (''BX'') Rule 4780 (setting forth BX's Retail Price Improvement Program). The Exchange further notes that Nasdaq BX, like the Exchange, utilizes a ''taker-maker'' or inverted fee model; accordingly, offering a retail price improvement program on an exchange that operates with such a model is not novel.

[9] The Exchange notes that it does not propose that the Program include a role for Retail Liquidity Providers (''RLPs''), unlike the NYSE and NYSE Arca Retail Liquidity Programs. *See* NYSE Rules 7.44(a)(1), 7.44(a)(4)(D), 7.44(c)—(g), 7.44(i); NYSE Arca Rules 7.44–E(a)(1), 7.44–E(a)(4)(C), 7.44–E(c)—(g), 7.44–E(i). The Exchange believes that the Program can operate effectively without RLPs, including because any ETP Holder may enter RPI Orders, as proposed, and notes that other exchanges currently operate retail price improvement programs that likewise do not include an RLP function. *See, e.g.,* IEX Rule 11.232 (describing IEX Retail Price Improvement Program); Nasdaq BX Rule 4780 (describing Nasdaq BX Retail Price Improvement Program).

[10] The phrase ''substantively identical'' is used in this filing to indicate that the proposed rules are the same as the rules of another exchange except for non-substantive grammatical or stylistic differences, including differences in nomenclature or numbering (for example, whereas the Exchange and NYSE Arca use the term ''ETP Holder'' to generally refer to member firms, NYSE uses the term ''member organization'').

[11] The Exchange notes that NYSE Rule 7.44(a)(3) and NYSE Arca Rule 7.44–E(a)(3) differ from each other in two ways. First, NYSE Rule 7.44(a)(3) provides that a Retail Order is an Immediate or Cancel Order. NYSE Arca Rule 7.44–E(a)(3) does not provide the same because the NYSE Arca Retail Liquidity Program offers Retail Order types that are not IOC. The Exchange does not propose to include this detail in Proposed Rule 7.44(a)(2), as the operation of Retail Orders is further outlined in proposed Rule 7.44(f). Second, NYSE Arca Rule 7.44–E(a)(3) provides that a Retail Order may be an odd lot, round lot, or mixed lot. NYSE Rule 7.44(a)(3) previously included the same language, which NYSE recently proposed to delete as extraneous. *See* Securities Exchange Act Release No. 96944 (February 16, 2023), 88 FR 11499 (February 23, 2023) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 7.44 Relating to the Retail Liquidity Program). Proposed Rule 7.44(a)(2) would be consistent with NYSE Rule 7.44(a)(3) rather than NYSE Arca Rule 7.44–E(a)(3) in this regard.

or RPI as an MPL Order [12] that is eligible to trade only with incoming Retail Orders submitted by an RMO. This proposed rule would also provide that an RPI may not be designated IOC, ALO, or with an MTS Modifier.[13] Proposed Rule 7.44(a)(3) further provides that an RPI remains non-displayed in its entirety and is ranked Priority 3—Non-Display Orders.

The definition of an RPI as a non-displayed order that trades only with Retail Orders is consistent with NYSE Rule 7.44(a)(4) and NYSE Arca Rule 7.44–E(a)(4). However, proposed Rule 7.44(a)(3) differs substantively from the definition of RPI Orders under NYSE Rule 7.44(a)(4) and NYSE Arca Rule 7.44–E(a)(4) in that RPI Orders in the Program will only be MPL Orders, in accordance with the goal of the Program to provide potential price improvement to retail orders at the midpoint or better. The Exchange notes that it would not be novel for RPI Orders to function as MPL Orders to offer retail orders trading opportunities at the midpoint. NYSE Arca Rule 7.44–E(a)(4) currently provides that RPI Orders in the NYSE Arca Retail Liquidity Program may be designated as either Limit Orders or MPL Orders, and, similar to the Program, as proposed, the IEX Retail Price Improvement Program provides for Retail Liquidity Provider Orders that are non-displayed orders priced at the less aggressive of the midpoint price or the order's limit price and interact with eligible retail orders in price-time priority at the midpoint price.[14]

RMO Qualifications and Application Process

As noted above, Retail Orders may be submitted by RMOs. Under proposed Rule 7.44(b)(1), any ETP Holder could qualify as an RMO if it conducts retail business or routes retail orders on behalf of another broker-dealer. For purposes of this rule, the Exchange proposes that conducting a retail business includes carrying retail customer accounts on a fully disclosed basis. Proposed Rule 7.44(b)(2) would provide that, to become an RMO, an ETP Holder must submit: (1) an application form; (2) supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant's order flow; [15] and (3) an attestation, in a form prescribed by the Exchange, that any order submitted by the ETP Holder as a Retail Order would meet the qualifications for such orders under Rule 7.44. Proposed Rule 7.44(b)(3) would provide that the Exchange would notify an applicant of its decision in writing after an applicant submits the application form, supporting documentation, and attestation. Proposed Rule 7.44(b)(4) would provide that a disapproved applicant may request an appeal of such disapproval by the Exchange as provided in proposed Rule 7.44(d) (discussed further below) and/or reapply for RMO status 90 days after the disapproval notice issued by the Exchange. An RMO may also voluntarily withdraw from such status at any time by giving written notice to the Exchange, as set forth in proposed Rule 7.44(b)(5).

An RMO must have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met, pursuant to proposed Rule 7.44(b)(6). Such written policies and procedures must require the ETP Holder to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements of Rule 7.44, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the RMO represents Retail Orders from another broker-dealer customer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The RMO must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends its orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements of this rule, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.

Proposed Rule 7.44(b) is substantively identical to NYSE Rule 7.44(b) and NYSE Arca Rule 7.44–E(b) and is also substantially similar to IEX Rule 11.232(b).

Failure of RMO To Abide by Retail Order Requirements

Proposed Rule 7.44(c) addresses an RMO's failure to abide by Retail Order requirements. If an RMO designated orders submitted to the Exchange as Retail Orders and the Exchange determined, in its sole discretion, that those orders failed to meet the requirements of Retail Orders, the Exchange could disqualify an ETP Holder from its status as an RMO. When disqualification determinations are made, the Exchange would provide a written disqualification notice to the ETP Holder. A disqualified RMO could appeal the disqualification as provided in proposed Rule 7.44(d), discussed below, and/or reapply for RMO status 90 days after the disqualification notice was issued by the Exchange.

Proposed Rule 7.44(c) is substantively identical to NYSE Rule 7.44(h) and NYSE Arca Rule 7.44–E(h) and is also substantially similar to IEX Rule 11.232(c).

Appeal of Disapproval or Disqualification

Proposed Rule 7.44(d) provides appeal rights to ETP Holders that are disapproved or disqualified as RMOs. If an ETP Holder disputes the Exchange's decision to disapprove it under proposed Rule 7.44(b) or disqualify it under proposed Rule 7.44(c), such ETP Holder could request, within five business days after notice of the decision was issued by the Exchange,

[12] An MPL Order is a Limit Order to buy (sell) that is not displayed and does not route, with a working price at the lower (higher) of the midpoint of the PBBO or its limit price. An MPL Order is ranked Priority 3—Non-Display Orders and may be entered during any Exchange trading session. *See* Rule 7.31(d)(3). An MPL Order to buy (sell) must be designated with a limit price in the minimum price variation for the security and will be eligible to trade at its working price. *See* Rule 7.31(d)(3)(A). If there is no PBB or PBO, or if the PBBO is locked or crossed, an arriving or resting MPL Order will not be eligible to trade until the PBBO is not locked or crossed. *See* Rule 7.31(d)(3)(B). An Aggressing MPL Order to buy (sell) will trade at the working price of resting orders to sell (buy) when such resting orders have a working price at or below (above) the working price of the MPL Order. Resting MPL Orders to buy (sell) will trade against all Aggressing Orders to sell (buy) priced at or below (above) the working price of the MPL Order. *See* Rule 7.31(d)(3)(C). An MPL Order may be designated IOC (''MPL–IOC Order'') and, subject to such IOC instructions, will follow the same trading and priority rules as an MPL Order except that an MPL–IOC Order will be rejected if there is no PBBO or the PBBO is locked or crossed. *See* Rule 7.31(d)(3)(D).

[13] *See* Rules 7.31(b)(2) (providing that an order with an IOC Modifier will be traded in whole or in part on the Exchange as soon as such order is received, with any untraded quantity cancelled); 7.31(e)(2) (providing that an ALO Order is a Non-Routable Limit Order that, unless it receives price improvement, will not remove liquidity from the Exchange Book); 7.31(i)(3) (providing that the MTS Modifier designates an order with a minimum trade size and an order with an MTS Modifier will be rejected if the MTS is less than a round lot or if the MTS is larger than the size of the order).

[14] *See* NYSE Arca Rule 7.44–E(a)(4)(D) (''An RPI must be designated as either a Limit Non-Displayed Order or MPL Order. . . .''); IEX Rule 11.190(b)(14) (defining Retail Liquidity Provider Order as a Midpoint Peg order that is only eligible to execute against retail orders through the execution process described in IEX Rule 11.232(e)).

[15] Proposed Rule 7.44(b)(2) would further provide that such supporting documentation may include sample marketing literature, website screenshots, other publicly disclosed materials describing the ETP Holder's retail order flow, and any other documentation and information requested by the Exchange in order to confirm that the applicant's order flow would meet the requirements of the Retail Order definition.

the Retail Liquidity Program Panel (''RLP Panel'') review the decision to determine if it was correct.

The RLP Panel would consist of the NYSE's Chief Regulatory Officer (''CRO''), or a designee of the CRO, and two qualified Exchange employees. The RLP Panel would review the facts and render a decision within the time frame prescribed by the Exchange. The RLP Panel may overturn or modify an action taken by the Exchange, and all determinations by the RLP Panel would constitute final action by the Exchange on the matter at issue.

Proposed Rule 7.44(d) is substantively identical to NYSE Rule 7.44(i) and NYSE Arca Rule 7.44–E(i) and is also substantially similar to IEX Rule 11.232(d).

Retail Liquidity Identifier

Proposed Rule 7.44(e) would provide for the Retail Liquidity Identifier, which is an identifier disseminated by the Exchange through proprietary data feeds and through the Consolidated Quotation System or the UTP Quote Data Feed, as applicable, when RPI interest eligible to trade at the midpoint of the PBBO for a particular security is available in Exchange systems. The Retail Liquidity Identifier would reflect the symbol for the particular security and the side (buy or sell) of the RPI interest but would not include the price or size of the RPI interest.

Proposed Rule 7.44(e) is the same as NYSE Rule 7.44(j), aside from differences to reflect that the Program's Retail Liquidity Identifier would indicate when RPI interest is available at the midpoint of the PBBO, consistent with the goal of the Program to offer trading opportunities to Retail Orders at the midpoint or better.

Retail Order Designation

Proposed Rule 7.44(f) would describe the operation of Retail Orders in the Program. A Retail Order may be designated with an MTS Modifier.[16] Proposed Rule 7.44(f) provides for two types of Retail Orders, and an RMO would be able to designate how a Retail Order will trade with available contra-side interest.

Proposed Rule 7.44(f)(1) would define the Type 1 Retail Order. A Type 1 Retail Order to buy (sell) would be an MPL IOC Order with a working price at the lower (higher) of the midpoint of the PBBO or its limit price and that will trade only with available RPI Orders to sell (buy) and all other orders to sell (buy) with a working price below (above) or equal to the midpoint of the PBBO on the Exchange Book. A Type 1 Retail Order would not route, and the quantity of a Type 1 Retail Order to buy (sell) that does not trade with eligible orders to sell (buy) will be immediately and automatically cancelled. A Type 1 Retail Order would be cancelled on arrival if there is no PBBO or the PBBO is locked or crossed.

Proposed Rule 7.44(f)(1) is similar to NYSE Rule 7.44(k) and NYSE Arca Rule 7.44–E(k)(1) except that the Type 1 Retail Order, as proposed, would differ from the NYSE Retail Order and the NYSE Arca Type 1 Retail Order in that it would be an MPL Order (rather than a Limit Order), to reflect the intent of the Program to provide potential price improvement opportunities for retail order flow at the midpoint or better. The Type 1 Retail Order, as an order eligible to trade at the midpoint or better, accordingly also shares characteristics with the existing MPL Order type available on the Exchange and is similar to the retail order in IEX's Retail Price Improvement Program.[17]

Proposed Rule 7.44(f)(2) would define the Type 2 Retail Order. A Type 2 Retail Order to buy (sell) would be a Limit IOC Order that trades first with available RPI Orders to sell (buy) (which, as noted above, are orders with a working price at the lower (higher) of the midpoint of the PBBO or their limit price) and with all other orders to sell (buy) with a working price below (above) the PBO (PBB) on the Exchange Book. Any remaining quantity of a Type 2 Retail Order would then trade with orders to sell (buy) on the Exchange Book at prices equal to or above (below) the PBO (PBB) as a Limit IOC Order and would not route. Any untraded quantity would be immediately and automatically cancelled. Retail Orders designated by the submitting RMO as Type 2 thus differ from Type 1 Retail Orders because they would be able to trade with all contra-side orders inside the PBBO and then would have the opportunity to trade as a Limit IOC Order, as such order is defined in Rule 7.31.

Proposed Rule 7.44(f)(2) is identical to NYSE Arca Rule 7.44–E(k)(2)(A) except that proposed Rule 7.44(f)(2) references the Exchange Book rather than the NYSE Arca Book.

Priority and Order Allocation

Proposed Rule 7.44(g) would set forth priority and allocation rules for the Program. RPI Orders in the same security would be ranked together with all other interest ranked as Priority 3—Non-Display Orders, and odd lot orders ranked as Priority 2—Display Orders would have priority over orders ranked Priority 3—Non-Display Orders at each price. Any remaining unexecuted RPI interest would remain available to trade with other incoming Retail Orders. Any remaining unfilled quantity of the Retail Order would cancel in accordance with proposed Rule 7.44(f), as described above.

Proposed Rule 7.44(g) would also include the following examples to illustrate priority and allocation of orders in the Program.

Examples of priority and order allocation are as follows:

PBBO for security ABC is $10.00–$10.10.

User 1 enters a Retail Price Improvement Order to buy ABC at $10.06 for 500.

User 2 then enters a Retail Price Improvement Order to buy ABC at $10.09 for 400.

User 3 then enters a Retail Price Improvement Order to buy ABC at $10.04 for 500.

An incoming Type 1 Retail Order to sell ABC for 1,000 at $10.00 would trade first with User 1's bid for 500 at $10.05. The Retail Order would then trade with User 2's bid for 400 at $10.05, because User 2's bid is ranked at the same price as User 1's but arrived later. User 3 would not be filled because the limit price of its order is not priced to execute at or above the current midpoint price of $10.05, and the remaining 100 shares of the Retail Order would be cancelled back to the Retail Member Organization. The Retail Order trades with RPI Orders in price/time priority, as illustrated by this example.

The result would be the same as the above if User 1's order was instead either an MPL Order to buy ABC at $10.06 for 500 or a non-displayed order to buy ABC at $10.05 for 500. The incoming Retail Order would trade first with User 1 for 500 at $10.05, then with User 2 for 400 at $10.05. User 3 would not be filled because the limit price of its order is not priced to execute at or above the current midpoint price of $10.05, and the remaining 100 shares of the Retail Order would be cancelled back to the Retail Member Organization.

As a final example, assume the original facts, except that User 3's order was not an

[16] The Exchange notes that the availability of an MTS Modifier with retail orders is not novel, as it is currently offered on other exchanges operating retail price improvement programs. *See, e.g.,* Investors Exchange LLC Rules 11.190(b)(9)(G), 11.190(b)(10)(G), and 11.232(a)(2) (providing that a Retail order may be a Discretionary Peg order or Midpoint Peg order, either of which may be designated with a minimum trade size). In addition, the Commission recently noticed for immediate effectiveness a proposed rule change by the NYSE to permit Retail Orders to be designated with an MTS Modifier. *See* Securities Exchange Act Release No. 96944 (February 16, 2023), 88 FR 11499 (February 23, 2023) (SR–NYSE–2023–11) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 7.44 Relating to the Retail Liquidity Program).

[17] *See* note 13, *supra* (describing the MPL Order); IEX Rule 11.232(a)(2) (providing that a retail order must be a Discretionary Peg order or Midpoint Peg order with a Time-in-Force of IOC or FOK that is only eligible to trade at a price between the NBB and the Midpoint Price (for bids) or between the NBO and the Midpoint Price (for offers)).

RPI Order, but rather, a non-displayed order to buy ABC at $10.09 for 400 and User 4 enters a displayed odd lot limit order to buy ABC at $10.05 for 60. The incoming Retail Order to sell for 1,000 would trade first with User 3's bid for 400 at $10.09, because it is the best-priced bid, then with User 4's bid for 60 at $10.05 because it is the next best-priced bid and is ranked Priority 2—Display Orders and has priority over same-priced non-displayed orders (RPIs and non-displayed limit orders). The incoming Retail Order would then trade with User 1's bid for 500 at $10.05 and, finally, with User 2 for 40 at $10.05, at which point the entire size of the Retail Order to sell 1,000 would be depleted. The balance of User 2's bid would remain on the Exchange Book and be eligible to trade with the next incoming Retail Order to sell.

To demonstrate how a Type 2 Retail Order would trade with available Exchange interest, assume the following facts:

PBBO for security DEF is $19.99—$20.03.

User 1 enters a Limit Order to buy DEF at $20.00 for 100 (*updated PBBO 20.00 × 20.03.*)

User 2 then enters a Retail Price Improvement Order to buy DEF at $20.03 for 100.

User 3 then enters an MPL Order to buy DEF at $21.00 for 100.

User 4 then enters a Non-Displayed Order to buy DEF at $20.01 for 100.

User 5 then enters a Non-Displayed Order to buy DEF at $20.02 for 100.

An incoming Type 2 Retail Order to sell DEF for 1,000 at $20.00 would trade first with User 5's bid for 100 at $20.02, because it is the best-priced bid. The incoming Retail Order would then trade with User 2's bid for 100 at $20.015, because it is the next best-priced bid, then with User 3's bid for 100 at $20.015, because User 3's bid is ranked at the same price as User 2's but arrived later. The incoming Retail Order would then trade with User 4's bid for 100 at $20.01 because it is the next best-priced bid. Finally, the Retail Order would trade with User 1's bid for 100 at $20.00. The remaining 500 shares of the Retail Order would be cancelled back to the Retail Member Organization.

Finally, proposed Rule 7.44(g) would limit the Program to trades occurring at prices equal to or greater than $1.00 per share and provide that Exchange systems will reject Retail Orders and RPI Orders priced below $1.00. The Program will operate only during the Core Trading Session and Retail Orders will be accepted during Core Trading Hours only.

Proposed Rule 7.44(g) is substantially the same as NYSE Arca Rule 7.44–E(l) except that it provides that remaining unfilled quantities of Retail Orders would cancel only (because all Retail Orders in the Program, as proposed, would be IOC Orders) and is also substantially the same as NYSE Rule 7.44(l) except to the extent the NYSE rule refers to the allocation of Retail Orders pursuant to NYSE Rule 7.37(b). The examples of priority and allocation provided in proposed Rule 7.44(g) are structured similarly to those that appear in NYSE Arca Rule 7.44–E(l), with differences to reflect that RPI Orders and Type 1 Retail Orders in the Program would function as MPL Orders.

* * * * *

Subject to effectiveness of this proposed rule change, the Exchange will implement this change no later than in the third quarter of 2023 and announce the implementation date by Trader Update.

2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Act,[18] in general, and furthers the objectives of section 6(b)(5),[19] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes the proposed change would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and protect investors and the public interest because proposed Rule 7.44 is based on NYSE Rule 7.44 and NYSE Arca Rule 7.44–E providing for the NYSE and NYSE Arca Retail Liquidity Programs, respectively, and is also substantially similar to rules providing for the IEX Retail Price Improvement Program. Proposed Rule 7.44 sets forth definitions, order types, processes for RMO application, qualification, disapproval and disqualification for the Program, and the operation, priority, and allocation of orders in the Program that are based on rules previously approved by the Commission for retail price improvement programs currently offered by equities exchanges. Accordingly, the Exchange also believes the proposed change would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and protect investors and the public interest by promoting consistency among exchange rules setting forth retail price improvement programs, which could encourage retail investors to direct order flow to the Program to seek out price improvement opportunities.

The Exchange also believes that the proposed change would 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 because it is intended to attract retail order flow to the Exchange, including by facilitating opportunities for such order flow to receive potential price improvement at the midpoint or better. The proposed change would also promote competition for retail order flow among execution venues, which would benefit retail investors by creating additional price improvement opportunities for marketable retail order flow on a public exchange. In particular, the Exchange believes that providing for RPI Orders and Retail Orders that function as MPL Orders could provide more deterministic price improvement opportunities for Retail Orders, thereby attracting additional retail order flow to the Exchange. In addition, the Exchange believes that also offering a Retail Order to buy (sell) that could trade with orders to sell (buy) on the Exchange Book at prices equal to or above (below) the PBO (PBB) (after trading with RPI Orders and interest on the Exchange Book with a working price below (above) the PBO (PBB)) could provide for additional trading opportunities for Retail Orders designated as Type 2 by the RMO. The Exchange notes that this type of Retail Order is currently offered in the NYSE Arca Retail Liquidity Program. The Exchange also believes that the proposed change would allow it to compete with other exchanges that similarly promote additional trading opportunities for retail order flow at the midpoint.[20]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed change could encourage competition by promoting additional trading opportunities at the midpoint and supporting price improvement opportunities at the midpoint of the PBBO or better for retail investors. The Exchange further believes that the proposed change could promote competition between the Exchange and other exchanges that offer retail price improvement programs, including an exchange that operates a retail price improvement program intended to

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] *See* note 9, *supra.*

provide additional trading opportunities at the midpoint.[21]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[22] and Rule 19b–4(f)(6) thereunder.[23] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act[24] and Rule 19b–4(f)(6)(iii) thereunder.[25]

A proposed rule change filed under Rule 19b–4(f)(6)[26] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[27] the Commission may 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 stated that it anticipates that it will be technologically ready to implement the Program within 30 days of the date of filing, and a waiver of the 30-day operative delay would allow the Exchange to provide beneficial price improvement opportunities to retail investors as soon as practicable. Further, the Exchange stated that waiver of the operative delay would encourage competition for retail order flow among execution venues. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because it would allow the Exchange to implement its Program to provide retail investors with price improvement opportunities and compete with other execution venues for retail order flow. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[28]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under section 19(b)(2)(B)[29] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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–NYSENAT–2023–17 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–NYSENAT–2023–17. 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–NYSENAT–2023–17 and should be submitted on or before September 13, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–18190 Filed 8–22–23; 8:45 am]

BILLING CODE 8011–01–P

[21] *See* note 9, *supra.*

[22] 15 U.S.C. 78s(b)(3)(A)(iii).

[23] 17 CFR 240.19b–4(f)(6).

[24] 15 U.S.C. 78s(b)(3)(A).

[25] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of 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.

[26] 17 CFR 240.19b–4(f)(6).

[27] 17 CFR 240.19b–4(f)(6)(iii).

[28] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78s(b)(2)(B).

[30] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

Delegation of Authority DA 543; Designation of Chief International Agreements Officer

By virtue of the authority vested in the Secretary of State by the laws of the United States, including 5 U.S.C. 301, 2104, 2105 and 3101, I hereby appoint Joshua L. Dorosin as an Officer of the United States.

Pursuant to 1 U.S.C. 112b, and section 1 of the State Department Basic Authorities Act (22 U.S.C. 2651a), I hereby designate Joshua L. Dorosin as the Chief International Agreements Officer of the Department of State, with the title of International Agreements Compliance Officer.

This document will be published in the **Federal Register**.

Dated: August 10, 2023.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2023–18098 Filed 8–22–23; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice: 12158]

United States Passports Invalid for Travel to, in, or Through the Democratic People's Republic of Korea (DPRK)

ACTION: Notice of extension of passport travel restriction.

SUMMARY: On September 1, 2017, all U.S. passports were declared invalid for travel to, in, or through the Democratic People's Republic of Korea (DPRK), unless specially validated for such travel. The restriction was extended for one year in 2018, 2019, 2020, 2021, and 2022 and, if not renewed, the restriction is set to expire on August 31, 2023. This notice extends the restriction until August 31, 2024, unless extended or revoked by the Secretary of State.

DATES: The extension of the travel restriction is in effect on September 1, 2023.

FOR FURTHER INFORMATION CONTACT: Jennifer Tinianow, Bureau of Consular Affairs, Passport Services, Office of Adjudication, 202–485–8800 or *tinianowja@state.gov.*

SUPPLEMENTARY INFORMATION: On September 1, 2017, pursuant to the authority of 22 U.S.C. 211a and E.O. 11295 (31 FR 10603), and in accordance with 22 CFR 51.63(a)(3), all U.S. passports were declared invalid for travel to, in, or through the DPRK unless specially validated for such travel. The restriction was renewed on September 1, 2018, September 1, 2019, September 1, 2020, September 1, 2021 and again for another year effective September 1, 2022. If not renewed again, the restriction is set to expire on August 31, 2023.

The Department of State has determined there continues to be serious risk to U.S. citizens and nationals of arrest and long-term detention constituting imminent danger to their physical safety, as defined in 22 CFR 51.63(a)(3). Accordingly, all U.S. passports shall remain invalid for travel to, in, or through the DPRK unless specially validated for such travel under the authority of the Secretary of State. This extension to the restriction of travel to the DPRK shall be effective on September 1, 2023, and shall expire August 31, 2024, unless extended or revoked by the Secretary of State.

Dated: August 1, 2023.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2023–18099 Filed 8–22–23; 8:45 am]

BILLING CODE 4710–13–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36715]

The New York, Susquehanna and Western Railway Corporation—Acquisition and Operation Exemption—Onondaga County Industrial Development Agency

The New York, Susquehanna and Western Railway Corporation (NYS&W), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire and operate approximately 10 miles of rail line, known as the Jamesville Cluster, from the Onondaga County Industrial Development Agency (OCIDA), in Onondaga County, N.Y. The rail line consists of the following segments: (1) the Jamesville Industrial Track, extending from approximately milepost 264.3 to approximately milepost 272.0; (2) the Lake Industrial Track, extending from approximately milepost 272.0 to approximately milepost 273.5 (including the Saltland Spur); and (3) Track 7 of the Chicago Line, extending from approximately milepost 292.0 to approximately milepost 292.8 (known to NYS&W as mileposts 274.0 to 274.8) (collectively, the Line). According to the verified notice, NYS&W is the current freight rail operator on the Line, having received operating authority for local and overhead trackage rights in 1995 by assignment from Consolidated Rail Corporation (Conrail). *See N.Y., Susquehanna & W. Ry.—Trackage Rights Exemption—Onondaga Cnty. Indus. Dev. Agency,* FD 32772 (ICC served Sept. 20, 1995).

According to NYS&W, in addition to the assignment of local and overhead trackage rights, Conrail also assigned to NYS&W Conrail's right to re-acquire the Line from OCIDA. The verified notice states that NYS&W is now exercising that right.

NYS&W certifies that the proposed acquisition of the Line does not involve any interchange commitments. NYS&W further certifies that its projected revenues as a result of this transaction will not result in the creation of a Class II or Class I rail carrier. Pursuant to 49 CFR 1150.42(e), if a carrier's projected annual revenues will exceed $5 million, it must, at least 60 days before the exemption becomes effective, post a notice of its intent to undertake the proposed transaction at the workplace of the employees on the affected lines, serve a copy of the notice on the national offices of the labor unions with employees on the affected lines, and certify to the Board that it has done so. However, NYS&W has filed a request for waiver of the 60-day advance labor notice requirements to allow the transaction to become effective 30 days after NYS&W's notice of exemption was filed. NYS&W's waiver request will be addressed in a separate decision. The Board will establish the effective date of the exemption in its separate decision on the waiver request.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than August 30, 2023.

All pleadings referring to Docket No. FD 36715, should be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, one copy of each pleading must be served on NYS&W's representative, Justin Marks, Clark Hill, 1001 Pennsylvania Ave. NW, Suite 1300 South, Washington, DC 20004.

According to NYS&W, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: August 18, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2023–18146 Filed 8–22–23; 8:45 am]

BILLING CODE 4915–01–P

TENNESSEE VALLEY AUTHORITY

Sunshine Act Meetings

TIME AND DATE: 9:00 a.m. ET on August 24, 2023.

PLACE: Chattanooga Convention Center, 1 Carter Drive, Chattanooga, Tennessee.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Meeting No. 23–03

The TVA Board of Directors will hold a public meeting on August 24, 2023, at the Chattanooga Convention Center, 1 Carter Drive, Chattanooga, Tennessee.

The meeting will be called to order at 9:00 a.m. ET to consider the agenda items listed below. TVA management will answer questions from the news media following the Board meeting.

On August 23, at the Chattanooga Convention Center, the public may comment on any agenda item or subject

at a board-hosted public listening session which begins at 2:00 p.m. ET and will last until 4:00 p.m. Preregistration is required to address the Board.

Agenda

1. Chair's Welcome
2. Report of the Operations and Nuclear Oversight Committee
   A. Recission of surplus regarding the Bellefonte site
3. Report of the Audit, Finance, Risk, and Cybersecurity Committee
   A. Rate adjustment
   B. FY24 Financial plan and budget
   C. FY24 External auditor selection
4. Report of the People and Governance Committee
5. Report of the External Stakeholders and Regulation Committee
6. Report from President and CEO

CONTACT PERSON FOR MORE INFORMATION: For more information: Please call Ashton Davies, TVA Media Relations at (865) 632–6000, Knoxville, Tennessee. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

Dated: August 17, 2023.

Edward C. Meade,

Agency Liaison.

[FR Doc. 2023–18179 Filed 8–21–23; 11:15 am]

BILLING CODE 8120–08–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Comments and Notice of the Third United States-Mexico-Canada Agreement Environment Committee Meeting

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Request for comments and notice of committee meetings.

SUMMARY: The Parties to the United States-Mexico-Canada Agreement (USMCA) intend to hold the third meeting of the Environment Committee (Committee) on September 27, 2023. Following the government-to-government Committee meeting, the Committee will hold a virtual public session on implementation of the USMCA environment chapter. USTR seeks comments suggesting topics to be discussed during the Committee meeting, and questions for the public session.

DATES:

September 8, 2023, at 11:59 p.m. EDT: Deadline for submission of written comments suggesting topics for the Committee meeting and questions for the public session.

September 27, 2023, from 9:00 a.m. to 3:30 p.m. EDT: The Parties will host the third meeting of the Environment Committee.

September 27, 2023, from 4:00 p.m. to 5:00 p.m. EDT: The Parties will host a virtual public session of the Committee.

ADDRESSES: Submit written comments and/or your interest in joining the public session to Judith Webster, Director for Environment and Natural Resources, by email at *judith.a.webster@ustr.eop.gov* with the subject line *USMCA Environment Committee Meeting.*

FOR FURTHER INFORMATION CONTACT: Judith Webster, Director for Environment and Natural Resources, at *judith.a.webster@ustr.eop.gov,* or 202–881–7318.

SUPPLEMENTARY INFORMATION:

I. Background

Article 24.26 of the USMCA establishes an Environment Committee composed of senior government representatives to oversee implementation of chapter 24, the environment chapter, and provide a forum to discuss and review chapter implementation. The USMCA requires the Committee to meet within one year of the date of entry into force of the USMCA and every two years thereafter unless the Committee agrees otherwise. The Committee last met on September 23, 2022, and agreed to hold another meeting in 2023. All decisions and reports of the Committee will be made publicly available, unless the Committee decides otherwise. The Committee will provide for public input on matters relevant to the Committee's work, as appropriate, and hold a public session at each meeting.

II. Committee Meeting

On September 27, 2023, the Committee will meet in a government-to-government session to (1) review implementation of chapter 24 (Environment), and discuss how the Parties are meeting their chapter 24 obligations; and (2) receive a presentation from the Commission on Environmental Cooperation Secretariat on cooperation and public submissions for enforcement matters. This session will not be open to the public.

III. Public Session on USMCA Chapter 24 Implementation

Following the government-to-government session, the Committee invites all interested persons to attend a virtual public session on USMCA Chapter 24 implementation. At the session, the Committee will welcome questions, input, and information concerning the Parties' implementation of the chapter 24 obligations. The Committee will cover both questions raised in comments submitted to USTR, and those submitted through a live chat function during the public session, overseen by a moderator. Information on how to register for the live session will be available at *https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/benefits-environment-united-states-mexico-canada-agreement* by September 8, 2023, or you can email Judith Webster, Director for Environment and Natural Resources, at *judith.a.webster@ustr.eop.gov* for a link to join the live session.

IV. Comments

USTR invites comments on topics and issues for the U.S. government to consider as it prepares for the Committee meeting, and specific questions for the public session. As noted, during the public session, there also will be an allotted time for the public to ask questions through a chat function overseen by a moderator. Accordingly, participation in the public session is not limited to the questions submitted through comments in advance of the session. When preparing comments, we encourage submitters to refer to Chapter 24 of the USMCA: *https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter_24.pdf.*

Kelly Milton,

Assistant U.S. Trade Representative for Environment and Natural Resources, Office of the United States Trade Representative.

[FR Doc. 2023–18152 Filed 8–22–23; 8:45 am]

BILLING CODE 3390–F3–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent of Waiver With Respect to Land; Dayton-Wright Brothers Airport, Dayton, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA is considering a proposal to change 54.42 acres of airport land from aeronautical use to non-aeronautical use and to authorize the sale of airport property located at Dayton-Wright Brothers Airport, Dayton, OH. The aforementioned land is

not needed for aeronautical use. The land is located in the northeast part of the airport, east of Runway 2/20 and south of Austin Boulevard. The property is currently vacant with no current or proposed aeronautical use. The City proposes to sell the land to be developed for light manufacturing or commercial office use.

DATES: Comments must be received on or before September 22, 2023.

ADDRESSES: All requisite and supporting documentation will be made available for review by appointment at the FAA Detroit Airports District Office, Alex Erskine, Program Manager, 11677 South Wayne Road, Suite 107, Romulus, MI 48174. Telephone: (734) 229–2927/Fax: (734)229–2950 and City of Dayton Department of Aviation Offices, 3600 Terminal Drive, Suite 300, Vandalia OH, Mr. Gilbert Turner. Telephone: (937)454–8202.

Written comments on the Sponsor's request may be submitted using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov,* and follow the instructions for sending your comments electronically.
- *Mail:* Alex Erskine, Program Manager, Federal Aviation Administration, Detroit Airports District Office, 11677 South Wayne Road, Suite 107, Romulus, MI 48174, Telephone Number: (734) 229–2927/FAX Number: (734) 229–2950.
- *Hand Delivery:* Deliver to mail address above between 8 a.m. and 5 p.m. Monday through Friday, excluding Federal holidays.
- *Fax:* 734–229–2950.

FOR FURTHER INFORMATION CONTACT: Alex Erskine, Program Manager, Federal Aviation Administration, Detroit Airports District Office, 11677 South Wayne Road, Suite 107, Romulus, MI 48174. Telephone Number: (734) 229–2927/FAX Number: (734) 229–2950.

SUPPLEMENTARY INFORMATION: In accordance with section 47107(h) of title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

The property is currently vacant with no current or proposed aeronautical use. The land proposed for release and disposal was purchased with the aid of Grant No. ADAP 5–39–0030–05. The City proposes to sell the land to be developed for light manufacturing or commercial office use at Fair Market Value.

The disposition of proceeds from the sale of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999 (64 FR 7696).

This notice announces that the FAA is considering the release of the subject airport property at the Dayton-Wright Brothers Airport, Dayton, OH from federal land covenants, subject to a reservation for continuing right of flight as well as restrictions on the released property as required in FAA Order 5190.6B section 22.16. Approval does not constitute a commitment by the FAA to financially assist in the disposal of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA.

The Land referred to herein below is situated in the County of Montgomery, State of OHIO, and is described as follows:

Parcel 5

Situate in the Township of Miami, County of Montgomery, State of Ohio and being part of Section 10, Town 2, Range 5 M.R.s., and being more particularly bounded and described as follows:

Starting at a stone at the Southeast corner of Section 10, Town 2, Range 4, M.R.s.;

Thence N 10°17′35″ E along the East line of said Section 10 for a distance of 3462.53 feet to a PK nail in Austin Pike;

Thence S 87°46′35″ W along Austin Pike for a distance of 102.44 feet to the point of beginning;

Thence continuing S 87°46′35″ W along Austin Pike for a distance of 1,370.63 feet to a point;

Thence S 9°38′25″ W for a distance of 18.00 feet to an iron pin in the center line of Austin Pike;

Thence S 88°09′25″ W along the center line of Austin Pike for a distance of 534.31 feet to a Railroad spike at a corner of a tract described as Parcel III in Microfiche 74–23/D06 of the deed records of Montgomery County;

Thence S 9°39′43″ W along the East line of said Parcel III for a distance of 1,090.85 feet to an iron pipe at the Southeast corner of said Parcel III;

Thence N 77°23′50″ W along the South line of said Parcel III for a distance of 732.50 feet to a point in the West line of the East half of Section 10;

Thence S 9°24′19″ W along said half-section line for a distance of 466.41 feet to a point in the Building Restriction Line for Runway 2–20, said line being parallel to and 750 feet, measured perpendicularly, East of the center line of Runway 2–20;

Thence N 27°50′38″ E along said Building Restriction Line for a distance of 399.26 feet to a point in the Building Restriction Line for Runway 9–27, said line being parallel to and 350 feet, measured perpendicularly, South of the center line of Runway 9–27;

Thence S 84°09′22″ E along said Building Restriction Line for a distance of 2,459.89 feet to a point;

Thence N 10°17′35″ E along a line parallel to and 100 feet, measured perpendicularly, West of the East line of Section 10 for a distance of 1,383.49 feet to the point of beginning.

Containing 54.423 acres, more or less.

Issued in Detroit Airports District Office, Romulus, MI, on August 17, 2023.

Stephanie R. Swann,

Deputy Manager, Detroit Airports District Office, FAA, Great Lakes Region.

[FR Doc. 2023–18078 Filed 8–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on the US 380 Project in Texas

AGENCY: Texas Department of Transportation (TxDOT), Federal Highway Administration (FHWA), U.S. Department of Transportation.

ACTION: Notice of limitation on claims for judicial review of actions by TxDOT and Federal agencies.

SUMMARY: This notice announces actions taken by TxDOT and Federal agencies that are final. The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by TxDOT pursuant to an assignment agreement executed by FHWA and TxDOT. These actions grant licenses, permits, and approvals for the US 380 project, from Teel Parkway/Championship Drive to Lakewood Drive in Collin and Denton Counties, Texas.

DATES: By this notice, TxDOT is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of TxDOT and Federal agency actions on the US 380 project will be barred unless the claim is filed on or before the deadline. For the US 380 project the deadline is January 22, 2024. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such a claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Patrick Lee, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street,

Austin, Texas 78701; telephone: (512) 416–2358; email: *Patrick.Lee@txdot.gov*. TxDOT's normal business hours are 8:00 a.m.–5:00 p.m. (central time), Monday through Friday.

SUPPLEMENTARY INFORMATION: The US 380 project will extend from Teel Parkway/Championship Drive to Lakewood Drive in Collin and Denton Counties, Texas. The project will reconstruct the existing roadway to a six-lane controlled-access freeway with one-way two to three lane frontage roads in each direction. The facility will also include ramps, direct connectors, frontage roads, and arterial roadway extensions to support connectivity to the existing roadway network. The project is approximately 5.9 miles in length.

The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment, Finding of No Significant Impact (FONSI) issued on July 25, 2023, and other documents in the TxDOT project file. The Final Environmental Assessment, FONSI, and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone: (214) 320–4480.

The environmental review, consultation, and other actions required by applicable Federal environmental laws for the US 380 project are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 9, 2019, and executed by FHWA and TxDOT.

Notice is hereby given that TxDOT and Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the US 380 project in the State of Texas.

This notice applies to all TxDOT and Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 300101 *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [54 U.S.C. 312501 *et seq.*]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act [33 U.S.C. 1251–1377] (Section 404, Section 401, Section 319); Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

Authority: 23 U.S.C. 139(l)(1).

Michael T. Leary,

Director, Planning and Program Development, Federal Highway Administration.

[FR Doc. 2023–18175 Filed 8–22–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway Projects in Texas

AGENCY: Texas Department of Transportation (TxDOT), Federal Highway Administration (FHWA), U.S. Department of Transportation.

ACTION: Notice of limitation on claims for judicial review of actions by TxDOT and Federal agencies.

SUMMARY: This notice announces actions taken by TxDOT and Federal agencies that are final. The environmental review, consultation, and other actions required by applicable Federal environmental laws for these projects are being, or have been, carried out by TxDOT pursuant to an assignment agreement executed by FHWA and TxDOT. The actions relate to various proposed highway projects in the State of Texas. These actions grant licenses, permits, and approvals for the projects.

DATES: By this notice, TxDOT is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of TxDOT and Federal agency actions on the highway projects will be barred unless the claim is filed on or before the deadline. For the projects listed below, the deadline is January 22, 2024. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such a claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Patrick Lee, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; telephone: (512) 416–2358; email: *Patrick.Lee@txdot.gov.* TxDOT's normal business hours are 8:00 a.m.–5:00 p.m. (central time), Monday through Friday.

SUPPLEMENTARY INFORMATION: The environmental review, consultation, and other actions required by applicable Federal environmental laws for these projects are being, or have been, carried out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 9, 2019, and executed by FHWA and TxDOT.

Notice is hereby given that TxDOT and Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the highway projects in the State of Texas that are listed below.

The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion (CE), Environmental Assessment (EA), or Environmental Impact Statement (EIS) issued in connection with the projects and in other key project documents. The CE, EA, or EIS and other key documents for the listed projects are available by contacting the local TxDOT office at the

address or telephone number provided for each project below.

This notice applies to all TxDOT and Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. General: National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. Air: Clean Air Act [42 U.S.C. 7401–7671(q)].

3. Land: Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. Wildlife: Endangered Species Act [16 U.S.C. 1531–1544 and section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 300101 *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [54 U.S.C. 312501 *et seq.*]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. Social and Economic: Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. Wetlands and Water Resources: Clean Water Act [33 U.S.C. 1251–1377] (section 404, section 401, section 319); Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)-300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. Executive Orders: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species. (Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

The projects subject to this notice are:

1. Loop 1604 from Macdona Lacoste Rd to US 90, Bexar County, Texas. The project will construct a four-lane general purpose divided highway consisting of two 12-foot-wide travel lanes in each direction with a ten-foot outside shoulder and a four-foot inside shoulder from the Medina River to US 90. The existing Medina River bridge will remain in place and be converted to northbound-only travel lanes. A second parallel bridge will be constructed to the west for southbound lanes and will be approximately 690 feet long. South of the Medina River, Loop 1604 will transition back to the existing two-lane undivided highway approximately 200 feet north of Macdona Lacoste Road. The project is approximately 3.8 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on March 1, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT San Antonio District Office at 4615 NW Loop 410, San Antonio, TX 78229; telephone: (210) 615–5839.

2. SH 35 (Spur 5) from I–45 to I–610 in Harris County, Texas. The project will extend existing Spur 5 and construct a roadway on new location south of existing Spur 5 as SH 35. SH 35 will consist of a four- to ten-lane roadway between I–45 and Dixie Drive with an interchange at I–610. The number of main lanes will transition from four main lanes (between Dixie Drive and Glencoe Avenue) to six main lanes (between Glencoe Avenue and Griggs Road) to ten main lanes (between Griggs Road and Old Spanish Trail) and back to eight main lanes (between Old Spanish Trail and I–45). The SH 35/I–610 interchange would consist of an elevated, multi-level interchange between SH 35 and I–610. SH 35 would be elevated over I–610. The project is approximately 3.4 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on March 7, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Houston District Office at 7600 Washington Ave., Houston, TX 77007; telephone: (713) 802–5000.

3. US 90 from I–10 to FM 1463 in Waller, Fort Bend, and Harris Counties, Texas. US 90 will be widened to a four-lane roadway with a raised median. Improvements from I–10 to Donigan Road will include only pavement upgrades and striping. Within the City of Brookshire from Koomey Road to Kenney Street, travel lanes will be separated by a 14-foot-wide center left-turn lane. Accommodation for bicycles and pedestrians will be provided. The project is approximately 10 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on March 16, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Houston District Office at 7600 Washington Ave., Houston, TX 77007 or 713–802–5000. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Houston District Office at 7600 Washington Ave., Houston, TX 77007; telephone: (713) 802–5000.

4. FM 407 from Cleveland Gibbs Road to Gateway Drive in Denton County, Texas. The project will include the widening of FM 2931 to a six-lane urban roadway section with a raised median and left-turn lanes in various locations within the project limits. The project includes widening of FM 407 and reconstructing to an urban six-lane section with turn lanes. The project is approximately 1.4 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on March 20, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone: (214) 320–4480.

5. Temple Outer Loop from 522 feet south of Jupiter Drive to north of Riverside Trail along Old Waco Road in Bell County, Texas. The project will be approximately 1.25 miles long and will widen the existing two-lane undivided roadway to a four-lane divided roadway with a raised boulevard grassy median section. The project will include curbs, gutters, a hike and bike trail, and dedicated bike lanes. The project will increase capacity by the construction of

two additional travel lanes, one in each direction. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on March 21, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Waco District Office at 100 S Loop Drive, Waco, TX 76704; telephone: (254) 867–2700.

6. FM 741 from US 175 to FM 548 in Kaufman County, Texas. The project includes reconstructing and widening FM 741 to include an additional 12-foot travel lane in each direction as well as a raised median, totaling four lanes. The project is approximately 8.32 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on March 28, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone: (214) 320–4480.

7. IH 20 from FM 1187/FM 3325 to Markum Ranch Road, and IH 30 from IH 20 to Linkcrest Drive, in Parker and Tarrant Counties, Texas. The project will include three new interchanges on IH 20 and one new interchange on IH 30. Portions of the existing frontage roads along IH 20 and IH 30 would be reconstructed and shared-use paths for bicycle and pedestrian accommodations will be provided. The project will also include operational improvements to existing cross streets, main lanes, ramps, and auxiliary lanes. The length of the project along IH 20 is approximately 5.6 miles and the length of the project along IH 30 is approximately 2.4 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on April 4, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Fort Worth District Office at 2501 SW Loop 820, Fort Worth, TX 76133; telephone: (817) 370–6744.

8. US 82 West from 0.1 mile west of FM 3403 to 0.1 mile west of US 259 in Bowie and Red River Counties, Texas. The project will widen a 6.9-mile section of US 82 from a two-lane roadway to a four-lane divided roadway with a paved median. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on April 26, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Atlanta District Office at 701 E Main Street, Atlanta, TX 75551; telephone: (903) 799–1306.

9. Meandering Road from SH 183 to Anahuac Avenue, and LTjg Barnett Road from Meandering Road to the Naval Air Station Reserve Base east gate, in Tarrant County, Texas. The Cities of Fort Worth and River Oaks are proposing improvements along Meandering Road and LTjg Barnett Road. Road reconstruction on Meandering Road between Roberts Cut Off Road and LTjg Barnett Road will result in a reduction from four lanes to three lanes, and the addition of a shared-use path on the north side of the roadway, and a sidewalk on the south side. On LTjg Barnett Road from Meandering Road to the east side of the West Fork Trinity River, the project will involve reconstructing the two 12-foot-wide lanes to 11-foot-wide lanes and adding a bike lane in each direction (on-road), a sidewalk on the north side of the roadway, and a shared-use path on the south side. From the east side of the West Fork Trinity River to the East Gate of the NASJRB, only pavement restriping would occur (*i.e.,* no construction). A new traffic signal would be installed at the intersection of Meandering Road and Roberts Cut Off Road, and Meandering Road would be realigned at and intersect Roberts Cut Off Road at a 90-degree angle, effectively shifting the intersection approximately 150 feet to the north. Approximately 800 feet of Roberts Cut Off Road south of Meandering Road would be reconstructed and a sidewalk would be added to the west side. A roundabout is proposed at Meandering Road's intersection with LTjg Barnett Road/Brocks Lane. A shared-use path would accommodate both bicycles and pedestrians at this roundabout. The existing connection of Brocks Lane to the Meandering Road/LTjg Barnett Road intersection would be moved approximately 130 feet to the west and connect directly to Meandering Road. A new driveway would also be constructed, extending from this new segment southward to access the parking lot at the west corner of the LTjg Barnett Road/Brocks Lane intersection. The existing Brocks Lane pavement past (east of) this new connection would be removed and revegetated as part of the project. Drainage would remain curb-and-gutter throughout the length of the project. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on May 4, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Fort Worth District Office at 2501 SW Loop 820, Fort Worth, TX 76133; telephone: (817) 370–6744.

10. Construction of Border Inspection Facilities on the South Orient Railroad from the Texas/Mexico Border to CR 31 in Presidio County, Texas. The project will construct border inspection facilities to include scanning equipment, office buildings, parking lots, rail car covered area, access roadways, and applicable utilities. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on May 11, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT El Paso District Office at 13301 Gateway West, El Paso, TX; telephone: (915) 790–4341.

11. SH 30 from William D. Fitch Parkway to CR 175 in Brazos and Grimes Counties, Texas. The project will widen SH 30 from a two-lane undivided roadway to a four-lane roadway with a continuous center turn lane from approximately 1,500 feet northwest of William D. Fitch Parkway in Brazos County to approximately 1,500 feet east of CR 175 in Grimes County. Project length is approximately 2.75 miles. The project will reconstruct SH 30 to four 12-foot wide travel lanes (two in each direction) with a 15-foot wide median/two-way left-turn lane and 10-foot wide outside shoulders. The three bridge structures within the project limits would be replaced to accommodate the improvements. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on May 24, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Bryan District Office at 2591 North Earl Rudder

Freeway, Bryan, TX 77803; telephone: (979) 778–2165.

12. Lampasas US 183 Widening Project from 0.46 mile east of Lometa to US 281 in Lampasas County, Texas. The project will provide additional pavement width where necessary for a total of four travel lanes, two in each direction, add a flush center median for left-hand turning movements; improve shoulders; add guardrails; improve drainage by upgrading culverts; and reduce the slope (steepness) of ditches. The total length of project is approximately 15 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on May 24, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Brownwood District Office at 2495 Highway 183 North, Brownwood, TX 76802; telephone: (325) 646–2591.

13. US Highway 79 Widening Project from approximately 0.3 mile west of IH 45 to approximately 0.5 mile west of FM 1512 in Leon County, Texas. The majority of the project will provide two 12-foot travel lanes in each direction separated by a 76-foot grass median. The travel lanes will be bounded by four-foot inside and ten-foot outside shoulders. There will be grade separations at railroads and at the Nucor entrance. Entrance and exit ramps will provide access to Nucor. The FM 39 bridge over US 79 will be replaced and the existing entrance and exit ramps will be removed and replaced with a single connection just northeast of the FM 39 crossing. In Jewett, the project will provide two 12-foot travel lanes in each direction separated by a 16-foot two-way center turn lane. The total length of the project is approximately 10.3 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on March 1, 2023, and other documents in the TxDOT project file. The EA, FONSI and other documents in the TxDOT project file are available by contacting the TxDOT Bryan District Office at 2591 North Earl Rudder Freeway, Bryan, TX 77803; telephone: (979) 778–2165.

Authority: 23 U.S.C. 139(l)(1).

Michael T. Leary,

Director, Planning and Program Development, Federal Highway Administration.

[FR Doc. 2023–18173 Filed 8–22–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on the US 380 Farmersville Project in Texas

AGENCY: Texas Department of Transportation (TxDOT), Federal Highway Administration (FHWA), U.S. Department of Transportation.

ACTION: Notice of limitation on claims for judicial review of actions by TxDOT and Federal agencies.

SUMMARY: This notice announces actions taken by TxDOT and Federal agencies that are final. The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by TxDOT pursuant to an assignment agreement executed by FHWA and TxDOT. These actions grant licenses, permits, and approvals for the US 380 Farmersville project, from County Road 560 to County Road 699 in Collin and Hunt Counties, Texas.

DATES: By this notice, TxDOT is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of TxDOT and Federal agency actions on the US 380 Farmersville project will be barred unless the claim is filed on or before the deadline. For the US 380 Farmersville project the deadline is January 22, 2024. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such a claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Patrick Lee, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; telephone: (512) 416–2358; email: *Patrick.Lee@txdot.gov*. TxDOT's normal business hours are 8:00 a.m.–5:00 p.m. (central time), Monday through Friday.

SUPPLEMENTARY INFORMATION: The US 380 Farmersville project will extend from County Road 560 to County Road 699 in Collin and Hunt Counties, Texas. It will consist of a new location realignment with three westbound 12-foot general purpose travel lanes and three eastbound 12-foot general purpose travel lanes with 10-foot outside shoulders within the proposed limits. The project may include, as needed, additional auxiliary lanes. The project will also include continuous, two-lane, one-way frontage roads with 12-foot travel lanes and a 10-foot shared use path on both sides of the facility. The project is approximately 7.6 miles in length.

The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment, Finding of No Significant Impact (FONSI) issued on June 30, 2023, and other documents in the TxDOT project file. The Final Environmental Assessment, FONSI, and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone: (214) 320–4480.

The environmental review, consultation, and other actions required by applicable Federal environmental laws for the US 380 Farmersville project are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 9, 2019, and executed by FHWA and TxDOT.

Notice is hereby given that TxDOT and Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the US 380 Farmersville project in the State of Texas.

This notice applies to all TxDOT and Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 300101 *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [54 U.S.C. 312501 *et seq.*]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland

Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act [33 U.S.C. 1251–1377] (section 404, section 401, section 319); Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

Authority: 23 U.S.C. 139(l)(1).

Michael T. Leary,

Director, Planning and Program Development, Federal Highway Administration.

[FR Doc. 2023–18174 Filed 8–22–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[OCC Charter Number 703367]

Peru Federal Savings Bank, Peru, Illinois; Approval of Conversion Application

Notice is hereby given that on August 11, 2023, the Office of the Comptroller of the Currency (OCC) approved the application of Peru Federal Savings Bank, Peru, Illinois, to convert to the stock form of organization. Copies of the application are available on the OCC website at the FOIA Reading Room (*https://foia-pal.occ.gov/palMain.aspx*) under Mutual to Stock Conversion Applications. If you have any questions, please contact Licensing Activities at (202) 649–6260.

(Authority: 12 CFR 192.205).

Dated: August 11, 2023.

By the Office of the Comptroller of the Currency.

Stephen A. Lybarger,

Deputy Comptroller for Licensing.

[FR Doc. 2023–18108 Filed 8–22–23; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the name of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Compliance, Outreach, & Implementation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On August 16, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

BILLING CODE 4810–AL–P

Entities

1. DEFENSE ENGINEERING LIMITED LIABILITY PARTNERSHIP (Cyrillic: ТОВАРИЩЕСТВО С ОГРАНИЧЕННОЙ ОТВЕТСТВЕННОСТЬЮ ДЭФЭНС ИНЖИНИРИНГ) (a.k.a. DEFENS INZHINIRING; a.k.a. "DEFENSE ENGINEERING, TOO"), Ul. Dinmukhamed Konaev 12/1, Sultan, Kazakhstan; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Organization Established Date 27 Nov 2018; Company Number 181140030924 (Kazakhstan) [DPRK] (Linked To: MKRTYCHEV, Ashot).

   Designated pursuant to section 1(a)(ii)(F) of Executive Order 13551, "Blocking Property of Certain Persons With Respect to North Korea" (E.O. 13551), for being owned or controlled by, directly or indirectly, Ashot Mkrtychev, a person whose property and interests in property are blocked pursuant to E.O. 13551.

2. LIMITED LIABILITY COMPANY VERUS (Cyrillic: ОБЩЕСТВО С ОГРАНИЧЕННОЙ ОТВЕТСТВЕННОСТЬЮ ВЕРУС) (a.k.a. VERUS CONSULTING GROUP; a.k.a. "LLC VERUS"), Per. Balakirevskii D. 23, Floor 3, Pomeshch. 309 Komnata 1, Office 45, Moscow 105082, Russia; Office 45, Room 1, Facility 309, Floor 3, Building 23, Balakirevskiy Lane, Basmanny Municipal District Federal Intracity Territory, Moscow 105082, Russia; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Organization Established Date 10 Feb 2021; Tax ID No. 9701170663 (Russia); Registration Number 1217700053493 (Russia) [DPRK] (Linked To: MKRTYCHEV, Ashot).

   Designated pursuant to section 1(a)(ii)(F) of E.O. 13551, for being owned or controlled by, directly or indirectly, Ashot Mkrtychev, a person whose property and interests in property are blocked pursuant to E.O. 13551.

3. VERSOR S.R.O., Karadzicova 8/A, Bratislava 82108, Slovakia; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Organization Established Date 14 Apr 2012; Tax ID No. 2023480030 (Slovakia); Identification Number 46622764 (Slovakia) [DPRK] (Linked To: MKRTYCHEV, Ashot).

   Designated pursuant to section 1(a)(ii)(F) of E.O. 13551, for being owned or controlled by, directly or indirectly, Ashot Mkrtychev, a person whose property and interests in property are blocked pursuant to E.O. 13551.

Authorities: E.O. 13551, 75 FR 53837, 3 CFR, 2010 Comp., p. 242.

Dated: August 16, 2023.

Andrea M. Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–18123 Filed 8–22–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request Relating to the Guidance on Cost Recovery Under the Income Forecast Method

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 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 the guidance on cost recovery under the income forecast method. More specifically, the burden associated with filing Form 8866, *Interest Computation Under the Look-Back Method for Property Depreciated Under the Income Forecast Method.*

DATES: Written comments should be received on or before October 23, 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 1545–1622'' in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions 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: Interest Computation under the look-back Method for Property Depreciated Under the Income Forecast Method.

OMB Number: 1545–1622.

Form Number: 8866.

Abstract: Taxpayers depreciating property under the income forecast method and placed in service after September 13, 1995, must use Form 8866 to compute and report interest due or to be refunded under Internal Revenue Code 167(g)(2). The Internal Revenue Service uses the information on Form 8866 to determine if the interest has been figured correctly.

Current Actions: There is no change to the form at this time. This request is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, and business or other for-profit organizations.

Estimated Number of Respondents: 50.

Estimated Time per Respondent: 13 hours, 51 min.

Estimated Total Annual Burden Hours: 693.

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.

Desired Focus of Comments: The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: August 17, 2023.

Sara L. Covington,

IRS Tax Analyst.

[FR Doc. 2023–18074 Filed 8–22–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Veterans and Community Oversight and Engagement Board, 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 Veterans and Community Oversight and Engagement Board (Board) will meet on September 28–29, 2023, at Veterans Administration Central Office (VACO), 810 Vermont Avenue NW, Washington, DC 20429. The meeting sessions will begin, and end as follows:

Date	Time
September 28, 2023.	8:30 a.m. to 5:00 p.m.—Eastern Daylight Time (EDT).
September 29, 2023.	8:30 a.m. to 5:00 p.m.—EDT.

The meetings are open to the public and will be recorded.

The Board was established by the West Los Angeles Leasing Act of 2016 on September 29, 2016. The purpose of the Board is to provide advice and make recommendations to the Secretary of Veterans Affairs on identifying the goals of the community and Veteran partnership; improving services and outcomes for Veterans, members of the Armed Forces, and the families of such Veterans and members; and on the implementation of the Draft Master Plan approved by VA Secretary on January 28, 2016, and on the creation and implementation of any successor master plans.

On Thursday, September 28, 2023, the Board will meet in open session with key staff of the VA Greater Los Angeles Healthcare System, (VAGLAHS), and Department of Veteran Affairs Leadership. The agenda will include opening remarks from the Board Chair, Executive Sponsor, and other VA officials. There will be an overview provided by the Veterans Experience Office (VEO) highlighting VEO Organization and Operations. The Director of VAGLAHS will provide opening remarks and provide an overview of ongoing progress associated with the GLA campus. The Board will receive presentations on the status of the hiring process and VHA hiring fairs, and an in-depth presentation of the Town Center Concept final report generated by the ULI Technical Assistance Panel. The Board will receive a comprehensive presentation on Barriers to existing Housing and Urban Development (HUD) Voucher use

followed by a presentation from HUD leadership on HUD strategies to reduce administrative burdens and the potential for Area Median Income policy modifications. The Community Engagement and Reintegration Service Office will provide an overview of the Coordinated Entry System, and a comprehensive trend analysis of the data reflected on the VAGLAHS Dashboard. The Community Engagement and Reintegration Service Office will also provide an overview of the Housing Navigating Contracts, and an update on plans for future use of the CTRS site. The Office of Asset and Enterprises Management will present detailed information on the VA Greater Los Angeles Medical Center campus parcel release plan.

On Friday September 29, 2023, the Board will reconvene in open session from 8:30 a.m. to 4:15 p.m. Each Enhanced Use Lease developer is scheduled to provide an updated status of ongoing construction to include projected completion date, proposed move in plan, current selected service provider and funding commitment levels. The VAGLAHS Community Engagement and Reintegration Service Office will provide an overview of the One Team efforts since the last meeting to include data on reductions in eh ''interest list' as well as changes in the By Name List (BNL) and placement rates. The Board's subcommittees on Outreach and Community Engagement with Services and Outcomes, and Master Plan with Services and Outcomes will provide an out brief to the full Board and update on draft recommendations to be considered for forwarding to the Secretary.

Time will be allocated for receiving public comments on September 28, 2023, at 4:00 p.m. EDT. Individuals wishing to make public comments should contact Chihung Szeto at 562–708–9959 or at *Chihung.Szeto@va.gov* and are requested to submit a 1–2-page summary of their comments for inclusion in the official meeting record. Only those members of the public (first 12 public comment registrants) who have confirmed registrations to provide public comment will be allowed to provide public comment. In the interest of time, each speaker will be held to 3–5 minutes time limit. The Board will accept written comments from interested parties on issues outlined in the meeting agenda, from September 20 through October 6, 2023. Members of the public not able to attend in person can attend the meeting via WEBEX by joining from the meeting link below. The link will be active from 8:00 a.m.–5:45 p.m. EDT, September 28, 2023 and 8:00 a.m.–5:45 p.m. EDT, September 29, 2023.

Day 1: September 28, 2023

Veteran Community Oversight and Engagement Board (VCOEB) 21st Meeting
Hosted by Walsh, Margaret K. (ERPI)
https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=ma78e82a155d0ec78e0599f8acb932cd7
Thursday, September 28, 2023, 8:00 a.m. | 9 hours | (UTC–04:00) Eastern Time (US & Canada)
Meeting number: 2762 163 7715
Password: sdRppp3P*65
Join by video system:
Dial *27621637715@veteransaffairs.webex.com*
You can also dial 207.182.190.20 and enter your meeting number.
Join by phone:
14043971596 USA Toll Number
Access code: 276 216 37715

Day 2: September 29, 2023

Veteran Community Oversight and Engagement Board (VCOEB) 21st Meeting
Hosted by Walsh, Margaret K. (ERPI)
https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=me46251dfcb4b4cc246c3eed70f06330f
Friday, September 29, 2023, 8:00 a.m. | 9 hours | (UTC–04:00) Eastern Time (US & Canada)
Meeting number: 2761 269 5365
Password: FJqx7Jb5X@5
Join by video system:
Dial *27612695365@veteransaffairs.webex.com*
You can also dial 207.182.190.20 and enter your meeting number.
Join by phone:
14043971596 USA Toll Number
Access code: 276 126 95365

Any member of the public seeking additional information should contact Mr. Eugene W. Skinner Jr. at 202–631–7645 or at *Eugene.Skinner@va.gov.*

Dated: August 18, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–18126 Filed 8–22–23; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 88 Wednesday,
No. 162 August 23, 2023

Part II

Department of Labor

29 CFR Parts 1, 3, and 5
Updating the Davis-Bacon and Related Acts Regulations; Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Parts 1, 3, and 5

RIN 1235–AA40

Updating the Davis-Bacon and Related Acts Regulations

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Labor (Department or DOL) updates regulations issued under the Davis-Bacon and Related Acts. As the first comprehensive regulatory review in nearly 40 years, revisions to these regulations will promote compliance, provide appropriate and updated guidance, and enhance their usefulness in the modern economy.

DATES:

Effective date: This final rule is effective on October 23, 2023.

Applicability date: The provisions of this final rule regarding wage determination methodology and related part 1 provisions prescribing the content of wage determinations may be applied only to wage determination revisions completed by the Department on or after October 23, 2023. Except with regard to § 1.6(c)(2)(iii), the provisions of this final rule are applicable only to contracts entered into after October 23, 2023. Contracting agencies must apply the terms of § 1.6(c)(2)(iii) to existing contracts of the types addressed in that regulatory provision, without regard to the date a contract was entered into, if practicable and consistent with applicable law. For additional information, see the discussion of Applicability Date in section III.C. below.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1–866–487–9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at *https://www.dol.gov////offices* for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

In order to provide greater clarity and enhance their usefulness in the modern economy, on March 18, 2022, the Department published a notice of proposed rulemaking (NPRM), 87 FR 15698, proposing to update and modernize the regulations at 29 CFR parts 1, 3, and 5, which implement the Davis-Bacon Act and the Davis-Bacon Related Acts (collectively, the DBRA). The Davis-Bacon Act (DBA or Act), enacted in 1931, requires the payment of locally prevailing wages and fringe benefits on Federal contracts for construction. *See* 40 U.S.C. 3142. The DBA applies to workers on contracts entered into by Federal agencies and the District of Columbia that are in excess of $2,000 and for the construction, alteration, or repair of public buildings or public works. Congress subsequently incorporated DBA prevailing wage requirements into numerous statutes (referred to as ''Related Acts'') under which Federal agencies assist construction projects through grants, loans, loan guarantees, insurance, and other methods.

The Supreme Court has described the DBA as ''a minimum wage law designed for the benefit of construction workers.'' *United States* v. *Binghamton Constr. Co.,* 347 U.S. 171, 178 (1954). The Act's purpose is ''to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.'' *Univs. Research Ass'n, Inc.* v. *Coutu,* 450 U.S. 754, 773 (1981) (quoting H. Comm. on Educ. & Lab., Legislative History of the Davis-Bacon Act, 87th Cong., 2d Sess., 1 (Comm. Print 1962)). By requiring the payment of minimum prevailing wages, Congress sought to ''ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards.'' Determination of Wage Rates Under the Davis-Bacon & Serv. Cont. Acts, 5 Op. O.L.C. 174, 176 (1981) (citation and internal quotation marks omitted).[1]

Congress has delegated authority to the Department to issue prevailing wage determinations and prescribe rules and regulations for contractors and subcontractors on DBA-covered construction projects.[2] *See* 40 U.S.C. secs. 3142, 3145. It has also directed the Department, through Reorganization Plan No. 14 of 1950, to ''prescribe appropriate standards, regulations and procedures'' to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts. 15 FR 3173, 3176 effective May 24, 1950, reprinted as amended in 5 U.S.C. app. 1 and in 64 Stat. 1267. These regulations, which have been updated and revised periodically over time, are primarily located in parts 1, 3, and 5 of title 29 of the Code of Federal Regulations.

The Department last engaged in a comprehensive revision of the regulations governing the DBA and the Related Acts in a 1981–1982 rulemaking.[3] Since that time, Congress has expanded the reach of the Davis-Bacon[4] labor standards[5] significantly, adding numerous Related Act statutes to which these regulations apply. The Davis-Bacon Act and now more than 70 active Related Acts[6] collectively apply to an estimated $217 billion in Federal and federally assisted construction spending per year and provide minimum wage rates for an estimated 1.2 million U.S. construction workers.[7] The Department expects these numbers to continue to grow as Federal and State governments seek to address the significant infrastructure needs of the country, including, in particular, the energy and transportation infrastructure necessary to mitigate climate change.[8]

[1] Available at: *https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174_0.pdf.*

[2] The DBA and the Related Acts apply to both prime contracts and subcontracts of any tier thereunder. In this final rule, as in the regulations themselves, where the terms ''contracts'' or ''contractors'' are used, they are intended to include reference to subcontracts and subcontractors of any tier.

[3] *See* 46 FR 41444 (1981 NPRM); 47 FR 23644 (1982 final rule); 48 FR 19532 (1983 revised final rule).

[4] The term ''Davis-Bacon'' is used in this final rule as a shorthand reference for the Davis-Bacon and Related Acts.

[5] In this final rule, the term ''Davis-Bacon labor standards'' means, as defined in § 5.2 of the final rule, ''the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes referenced in § 5.1, and the regulations in parts 1 and 3 of this subtitle and this part.''

[6] The Department maintains a list of the Related Acts at *https://www.dol.gov/agencies/whd/government-contracts/.*

[7] These estimates are discussed below in section V (Executive Order 12866, Regulatory Planning and Review et al.).

[8] *See* Executive Order 14008, ''Tackling the Climate Crisis at Home and Abroad,'' section 206 (Jan. 27, 2021), available at: *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.*

In addition to the expansion of the prevailing wage rate requirements of the DBA and the Related Acts, the Federal contracting system itself has undergone significant changes since the 1981–1982 rulemaking. Federal agencies have dramatically increased spending through interagency Federal schedules such as the Multiple Award Schedule (MAS). Contractors have increased their use of single-purpose entities, such as joint ventures and teaming agreements, in construction contracts with Federal, State and local governments. Federal procurement regulations have been overhauled and consolidated in the Federal Acquisition Regulation (FAR; 48 CFR chapter 1), which contains a subpart on the Davis-Bacon Act and related contract clauses. *See* 48 CFR 22.400 *et seq.* Court and agency administrative decisions have developed and clarified myriad aspects of the laws governing Federal procurement.

During the past 40 years, the Department's DBRA program also has continued to evolve. Where the program initially was focused on individual project-specific wage determinations, contracting agencies now incorporate the Department's general wage determinations for the construction type in the locality in which the construction project is to occur. The program also now uniformly uses wage surveys to develop general wage determinations, eliminating an earlier practice of developing wage determinations based solely on other evidence about the general level of unionization in the targeted area. In a 2006 decision, the Department's Administrative Review Board (ARB) identified several survey-related wage determination procedures as inconsistent with the 1982 final rule. *See Mistick Constr.,* ARB No. 04–051, 2006 WL 861357, at *5–7 (Mar. 31, 2006).[9] As a consequence of these developments, the use of averages of wage rates from survey responses has increasingly become the methodology used to issue new wage determinations—notwithstanding the Department's long-held interpretation that the DBA allows the use of such averages only as a methodology of last resort.

The Department has also received significant feedback from stakeholders and others since the last comprehensive rulemaking. In a 2011 report, the Government Accountability Office (GAO) reviewed the Department's wage survey and wage determination process and found that the Department was often behind schedule in completing wage surveys, leading to a backlog of wage determinations and the use of out-of-date wage determinations in some areas.[10] The report also identified dissatisfaction among regulated parties regarding the rigidity of the Department's county-based system for identifying prevailing rates,[11] and missing wage rates requiring an overuse of ''conformances'' for wage rates for specific job classifications.[12] A 2019 report from the Department's Office of the Inspector General (OIG) made similar findings regarding out-of-date wage determinations.[13]

Ensuring that construction workers are paid the wages required under the DBRA also requires effective enforcement in addition to an efficient wage determination process. In the last decade, enforcement efforts at the Department have resulted in the recovery of more than $229 million in back wages for over 76,000 workers.[14] But the Department has also encountered significant enforcement challenges. Among the most critical of these is the omission of DBRA contract clauses from contracts that are clearly covered by the DBRA. In one recent case, a contracting agency agreed with the Department that a blanket purchase agreement (BPA) it had entered into with a contractor had mistakenly omitted the Davis-Bacon clauses and wage determination, but the omission still resulted in an 8-year delay before the workers were paid the wages they were owed.

Through this rulemaking, the Department seeks to address a number of these outstanding challenges in the program while also providing greater clarity in the DBRA regulations and enhancing their usefulness in the modern economy. In the NPRM, the Department proposed to update and modernize the regulations implementing the DBRA at 29 CFR parts 1, 3, and 5. In some of these proposed revisions, the Department had determined that changes it made in the 1981–1982 rulemaking were mistaken or ultimately resulted in outcomes that are increasingly in tension with the DBA statute itself. In others, the Department sought to expand further on procedures that were introduced in that last major revision, or to propose new procedures that will increase efficiency of administration of the DBRA and enhance protections for covered construction workers. The Department invited comments on these proposed updates and received 40,938 timely comments after a 60-day comment period.

The comments were from a broad array of constituencies, including contractors, unions, employer and industry associations, worker advocacy groups, non-profit organizations, social scientists, law firms, think tanks, Members of Congress, a state attorney general, a state department of labor, and other interested members of the public. All timely received comments may be viewed on the *regulations.gov* website, docket ID WHD–2022–0001. Some of the comments the Department received were general statements of support or opposition, and the Department also received approximately 40,200 ''campaign'' comments sent in response to organized initiatives. Commenters expressed a wide variety of views on the merits of particular aspects of the Department's proposal; however, most commenters favored some, if not all, of the changes proposed in the NPRM. The Department has considered the timely submitted comments addressing the proposed changes.

The Department also received a number of comments that are beyond the scope of this rulemaking. These included requests that would require Congress to amend statutory language in the DBRA. For example, many commenters suggested a change to the $2,000 threshold for DBA and certain Related Acts to apply. Others suggested eliminating or changing the weekly certified payroll requirement that is expressly required by 40 U.S.C. sec 3145.

Other comments beyond the scope of the rulemaking included those that suggested significant new regulatory provisions or changes that were not proposed in the NPRM. Among these, for example, the Iron Workers International Union suggested the codification of the requirement to thoroughly investigate ''area practice'' issues that arise during the wage survey

[9] Decisions of the ARB from 1996 to the present are available on the Department's website at *https://www.dol.gov/agencies/arb/decisions.*

[10] *See* Gov't Accountability Office, GAO–11–152, ''Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey'' (2011) (2011 GAO Report), at 12–19, available at: *https://www.gao.gov/assets/gao-11-152.pdf.*

[11] *Id.* at 23–24.

[12] *Id.* at 32–33.

[13] *See* Department of Labor, Office of the Inspector General, ''Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates'' (2019) (2019 OIG Report), at 10, available at: *https://www.oversight.gov/sites/default/files/oig-reports/04-19-001--Davis%20Bacon.pdf.*

[14] The listed figures have been corrected from the NPRM. The updated figures reflect the sum of the annual enforcement statistics from 2010–2019 in Gov't Accountability Office, GAO–21–13, ''Fair Labor Standards Act: Tracking Additional Complaint Data Could Improve DOL's Enforcement'' (2020) (2020 GAO Report), at 39, available at: *https://www.gao.gov/assets/gao-21-13.pdf.*

process. *See Fry Bros. Corp.,* WAB No. 76–06, 1977 WL 24823, at *6 (June 14, 1977), *aff'd sub nom. Fry Bros. Corp.* v. *Dep't of Hous. & Urb. Dev.,* 614 F.2d 732, 732–33 (10th Cir. 1980). The Iron Workers also suggested creation of a new administrative process for issuing ''right to sue'' notices to workers to pursue rights of action authorized by 40 U.S.C. sec 3144(a)(2). As noted in the comment, such an initiative would be better proposed in a separate and subsequent notice-and-comment rulemaking.

The Department reviewed the comments submitted in particular for assertions by interested parties of their reliance on the existing regulations in a way that would be adversely affected by the proposed rule. Although many comments stated that the current regulations had been in place for many years, few specified that parties had relied on the regulations so as to raise questions about the fairness or reasonableness of amending them in the current rulemaking. Nonetheless, the Department considered whether the rule as a whole, as well as its individual proposed provisions, could plausibly implicate significant and legitimate reliance interests, and the Department has concluded that the proposed amendments to the regulations do not raise reliance interests that would outweigh the agency objectives discussed throughout this preamble.

The Department did not identify significant reliance interests among contractors or others in the existing part 1 regulations. The part 1 regulations involve the Department's methodology for determining the prevailing wage rates that are required on covered contracts. Some of the changes the Department proposed to this part may lead to higher required wage rates in places and lower wage rates in others, and the new periodic adjustments of certain non-collectively bargained wage rates will result in a smoother increase in such wage rates over time instead of longer periods of the same wage rates for an area followed by steeper increases after the publication of new survey rates. Similarly, the new language clarifying the procedure for incorporating prevailing wage rates into multiple award schedules and other similar contracts may result in more frequent updates to prevailing wage rates on such contracts when options are executed. These types of changes, however, should not be significantly different in their effect on contractors than the fluctuations in prevailing wage rates that already occur between wage surveys as a result of changes in local economies and shifts in regional labor markets. Even if the part 1 changes were to have significant effects on prevailing wage rates in certain local areas, any reliance interests of local contractors, governmental agencies, or workers on prior prevailing wage rates would be limited, given that the changes to the wage determination processes generally will not affect current contracts—which will continue to be governed by the wage determinations incorporated at the time of their award, with limited exceptions. Most of the revisions to part 1 will only apply to wage surveys that are finalized after the rule becomes effective, and thus they will generally apply only to contracts awarded after such new wage determinations are issued.[15] Contractors will therefore be able to factor any new wage rates into their bids on future contracts.

Many of the amendments to part 5 of the regulations are regulatory changes that codify the Department's current practices and interpretations of existing regulations. As a result, such changes do not, in practical terms, impose new obligations on contractors or contracting agencies. Other changes, such as the new anti-retaliation provision, provide new remedies to address conduct that already may subject contractors to potential debarment. Any reliance interest in the ability to carry out such conduct with lesser potential consequences is particularly weak. Regardless, these new amendments to part 5 will generally only apply to contracts that are awarded after the effective date of this final rule. Contractors entering into new contracts issued after the rule is published and becomes applicable will have notice of the regulatory changes and will be able to take the changes into consideration as they analyze internal controls and develop their bids or negotiate contract pricing.

ABC argued that the Department's denial of requests to extend the public comment period beyond the 60 days provided was arbitrary and capricious, and other commenters expressed disappointment that the comment period had not been extended. As explained in the Department's public response to the extension requests in regulations.gov, the Department concluded that the 60-day period provided the public with a meaningful opportunity to comment on the proposed rule. The Davis-Bacon and Related Acts' applicability is limited to Federal and federally assisted construction projects, and therefore applies to a defined group of stakeholders. Additionally, various elements of the proposed and final rules codify or clarify longstanding policies, practices, and interpretations. As a result, stakeholders were familiar with many of the issues addressed in the NPRM. The public had additional time to review the NPRM, which was available on the Department's website on March 11, 2022, seven days in advance of its publication in the **Federal Register**. The comprehensive nature and substance of the comments received—both in favor of and opposing the proposed rule—support the Department's view that the 60-day period was appropriate and sufficient. Finally, the Department and the Office of Management and Budget have participated in several meetings pursuant to E.O. 12866 at which stakeholders have had opportunities to elaborate on their public comments.

Finally, some commenters raised concerns about the administrative or paperwork burdens contractors might face while adjusting to, and under, the Department's final rule. The Department considered such concerns in its economic analyses and concluded that the paperwork burdens associated with the rule are limited and are outweighed by the benefits of the regulation.

Having considered all of the comments, the Department has decided to adopt the NPRM's proposed changes with some modifications. Significant issues raised in the comments are discussed in more detail below in section III (''Final Regulatory Revisions''), along with the Department's responses to those comments.

This final rule includes several elements targeted at increasing the amount of information available for wage determinations and speeding up the determination process. In particular, the final rule amends § 1.3 of the

[15] As explained in § 1.6(c), whenever a new wage determination is issued (either after the completion of a new wage survey or through the new periodic adjustment mechanism), that revision as a general matter does not and will not apply to contracts which have already been awarded, with three exceptions. These exceptions are explained in § 1.6(c)(2)(iii), and they include where a contract or order is changed to include substantial covered work that was not within the original scope of work, where an option is exercised, and also certain ongoing contracts that are not for specific construction, for which new wage determinations must be incorporated on an annual basis under § 1.6(c)(2)(iii)(B) of the final rule. The final rule instructs contracting agencies to apply the terms of § 1.6(c)(2)(iii) to all existing contracts, without regard to the date of contract award, if practicable and consistent with applicable law. The Department does not anticipate that the application of the amended wage determination methodologies in these situations will result in unfair harm to reliance interests in a manner sufficient to outweigh the benefits of the final rule implementation as planned. *See also* section III.C. (''Applicability Date'') below.

regulations by outlining a new methodology to expressly give the Wage and Hour Division (WHD) Administrator authority and discretion to adopt State or local wage determinations as the Davis-Bacon prevailing wage where certain specified criteria are satisfied. Such a change will help improve the currentness and accuracy of wage determinations, as many States and localities conduct surveys more frequently than the Department and have relationships with stakeholders that may facilitate the process and foster more widespread participation. This revision will also increase efficiency and reduce confusion for the regulated community where projects are covered by both DBRA and local or State prevailing wage laws and contractors are already familiar with complying with the local or State prevailing wage requirement.

The Department also amends the definition of ''prevailing wage'' in § 1.2, and in § 1.7, the scope of data considered to identify the prevailing wage in a given area. To address the overuse of weighted average rates, the Department returns to the definition of ''prevailing wage'' in § 1.2 that it used from 1935 to 1983.[16] Currently, a wage rate may be identified as prevailing in the area only if it is paid to a majority of workers in a classification on the wage survey; otherwise, a weighted average is used. The Department returns instead to the ''three-step'' method that was in effect before 1983. Under that method (also known as the 30-percent rule), in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. The Department also returns to a prior policy on another change made during the 1981–1982 rulemaking related to the delineation of wage survey data submitted for ''metropolitan'' or ''rural'' counties in § 1.7(b). Through this change, the Department will more accurately reflect modern labor force realities, allow more wage rates to be determined at smaller levels of geographical aggregation, and will increase the sufficiency of data at the statewide level.

Revisions to §§ 1.3 and 5.5 are aimed at reducing the need for the use of ''conformances'' where the Department has received insufficient data to publish a prevailing wage for a classification of worker—a process that currently is burdensome on contracting agencies, contractors, and the Department. This final rule codifies a new procedure through which the Department may identify (and list on the wage determination) wage and fringe benefit rates for certain classifications for which WHD received insufficient data through its wage survey program. The procedure will reduce the need for conformances of classifications for which conformances are now often required.

The Department also revises § 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the Employment Cost Index (ECI) published by the Bureau of Labor Statistics (BLS).[17] The mechanism is intended to keep such rates more current between surveys so that they do not become out-of-date and fall behind prevailing rates in the area.

The Department also strengthens enforcement in several critical ways. The Department addresses the challenges caused by the omission of contract clauses. In a manner similar to its rule under Executive Order 11246 (Equal Employment Opportunity), the Department designates the DBRA contract clauses in § 5.5(a) and (b), and applicable wage determinations, as effective by ''operation of law'' notwithstanding their mistaken omission from a contract. This is an extension of the retroactive modification procedures that were put into effect in § 1.6 by the 1981–1982 rulemaking, and it will expedite enforcement efforts to ensure the timely payment of prevailing wages to all workers who are owed such wages under the relevant statutes.

In addition, the Department finalizes new anti-retaliation provisions in the Davis-Bacon contract clauses in new paragraphs at § 5.5(a)(11) (DBRA) and (b)(5) (Contract Work Hours and Safety Standards Act (CWHSSA)), and in a new section of part 5 at § 5.18. The language ensures that workers who raise concerns about payment practices or assist agencies or the Department in investigations are protected from termination or other adverse employment actions.

Finally, to reinforce the remedies available when violations are discovered, the Department clarifies and strengthens the cross-withholding procedure for recovering back wages by including new language in the withholding contract clauses at § 5.5(a)(2) (DBRA) and (b)(3) (CWHSSA) to clarify that cross-withholding may be accomplished on contracts held by agencies other than the agency that awarded the contract. The Department also creates a mechanism through which contractors will be required to consent to cross-withholding for back wages owed on contracts held by different but related legal entities in appropriate circumstances—if, for example, those entities are controlled by the same controlling shareholder or are joint venturers or partners on a Federal contract. The revisions also include a harmonization of the DBA and Related Act debarment standards.

II. Background

A. Statutory and Regulatory History

The Davis-Bacon Act, as enacted in 1931 and subsequently amended, requires the payment of minimum prevailing wages determined by the Department to laborers and mechanics working on Federal contracts in excess of $2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings and public works. *See* 40 U.S.C. 3141 *et seq.* Congress has also included the Davis-Bacon requirements in numerous other laws, known as the Davis-Bacon Related Acts (the Related Acts and, collectively with the Davis-Bacon Act, the DBRA), which provide Federal assistance for construction projects through grants, loans, loan guarantees, insurance, and other methods. Congress intended the Davis-Bacon Act to ''protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.'' *Coutu,* 450 U.S. at 773 (quoting H. Comm. on Educ. and Lab., Legis. History of the Davis-Bacon Act, 87th Cong., 2d Sess., 1 (Comm. Print 1962)).

The Copeland Act, enacted in 1934, added the requirement that contractors working on Davis-Bacon projects must submit weekly certified payrolls for work performed on the contract. *See* 40 U.S.C. 3145. The Copeland Act also prohibits contractors from inducing any worker to give up any portion of the wages due to them on such projects. *See* 18 U.S.C. 874. In 1962, Congress passed CWHSSA, which, as amended, requires an overtime payment of additional half-time for hours worked over 40 in the workweek by laborers and mechanics, including watchpersons and guards, on Federal contracts or federally assisted contracts containing Federal prevailing wage standards. *See* 40 U.S.C. 3701 *et seq.*

As initially enacted, the DBA did not take into consideration the provision of fringe benefits to workers. In 1964, Congress expanded the Act to require the Department to include an analysis of fringe benefits as part of the wage determination process. The amendment

[16] The 1981–1982 rulemaking went into effect on Apr. 29, 1983. 48 FR 19532.

[17] Available at: *https://www.bls.gov/news.release/eci.toc.htm.*

requires contractors and subcontractors to provide fringe benefits (such as vacation pay, sick leave, health insurance, and retirement benefits), or the cash equivalent thereof, to their workers at the level prevailing for the labor classification on projects of a similar character in the locality. *See* Act of July 2, 1964, Public Law 88–349, 78 Stat. 238.

Congress has delegated broad rulemaking authority under the DBRA to the Department. The DBA, as amended, contemplates regulatory and administrative action by the Department to determine the prevailing wages that must be paid and to ''prescribe reasonable regulations'' for contractors and subcontractors. 40 U.S.C. 3142(b); 40 U.S.C. 3145. Congress also, through Reorganization Plan No. 14 of 1950, directed the Department to ''prescribe appropriate standards, regulations and procedures'' to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts. 15 FR 3176; 5 U.S.C. app. 1.

The Department promulgated its initial regulations implementing the Act in 1935 and has since periodically revised them. *See* U.S. Department of Labor, Regulations No. 503 (Sept. 30, 1935). In 1938, these initial regulations, which set forth the procedures for the Department to follow in determining prevailing wages, were included in part 1 of Title 29 of the new Code of Federal Regulations. *See* 29 CFR 1.1 *et seq.* (1938). The Department later added regulations to implement the payroll submission and anti-kickback provisions of the Copeland Act—first in part 2 and then relocated to part 3 of Title 29. *See* 6 FR 1210 (Mar. 1, 1941); 7 FR 687 (Feb. 4, 1942); 29 CFR part 2 (1942); 29 CFR part 3 (1943). After the Reorganization Plan No. 14 of 1950, the Department issued regulations setting forth procedures for the administration and enforcement of the Davis-Bacon and Related Acts in a new part 5. 16 FR 4430 (May 12, 1951); 29 CFR part 5. The Department made significant revisions to the regulations in 1964, and again in the 1981–1982 rulemaking.[18]

While the Department has made periodic revisions to the regulations in recent years, such as to better protect the personal privacy of workers, 73 FR 77511 (Dec. 19, 2008); to remove references to the ''Employment Standards Administration,'' 82 FR 2225 (Jan. 9, 2017); and to adjust Federal civil money penalties, 81 FR 43450 (July 1, 2016), 83 FR 12 (Jan. 2, 2018), 84 FR 218 (Jan. 23, 2019), 87 FR 2328 (Jan. 14, 2022), 88 FR 2210 (Jan. 13, 2023), the Department has not engaged in a comprehensive review and revision since the 1981–1982 rulemaking.

B. Overview of the Davis-Bacon Program

WHD, an agency within the U.S. Department of Labor, administers the Davis-Bacon program for the Department. WHD carries out its responsibilities in partnership with the Federal agencies that enter into direct DBA-covered contracts for construction and/or administer Federal assistance to State and local governments and other funding recipients that is covered by the Related Acts. The State and local governmental agencies and authorities that receive covered financial assistance also have important responsibilities in administering Related Act program rules, as they manage programs through which covered funding flows or the agencies themselves directly enter into covered contracts for construction.

The DBRA program includes three basic components in which these government entities have responsibilities: (1) wage surveys and wage determinations; (2) contract formation and administration; and (3) enforcement and remedies.

1. Wage Surveys and Determinations

The DBA delegates to the Secretary of Labor the responsibility to determine the wage rates that are ''prevailing'' for each classification of covered laborers and mechanics on similar projects ''in the civil subdivision of the State in which the work is to be performed.'' 40 U.S.C. 3142(b). WHD carries out this responsibility for the Department through its wage survey program and derives the prevailing wage rates from survey information that responding contractors and other interested parties voluntarily provide. The program is carried out in accordance with the program regulations in part 1 of Title 29 of the Code of Federal Regulations, *see* 29 CFR 1.1 through 1.7, and its procedures are described in guidance documents such as the ''Davis-Bacon Construction Wage Determinations Manual of Operations'' (1986) (Manual of Operations) and ''Prevailing Wage Resource Book'' (2015) (PWRB).[19] Although part 1 of the regulations provides the authority for WHD to create project-specific wage determinations, such project wage determinations, once more common, now are rarely employed. Instead, nearly all wage determinations are general wage determinations issued for general types of construction (building, residential, highway, and heavy) and applicable to a specific geographic area. General wage determinations can be incorporated into the vast majority of contracts and create uniform application of the DBRA for that area.

2. Contract Formation and Administration

The Federal agencies that enter into DBA-covered contracts or administer Related Act programs have the initial responsibility to determine whether a contract is covered by the DBA or one of the Related Acts and identify the contract clauses and the applicable wage determinations that must be included in the contract. *See* 29 CFR 1.6(b). In addition to the Department's regulations, this process is also guided by parallel regulations in part 22 of the FAR for those contracts that are subject to the FAR. *See* 48 CFR part 22. Federal agencies also maintain their own regulations and guidance governing agency-specific aspects of the process. *See, e.g.,* 48 CFR subpart 222.4 (Defense); 48 CFR subpart 622.4 (State); U.S. Department of Housing and Urban Development (HUD), HUD Handbook 1344.1, Federal Labor Standards Requirements in Housing and Urban Development Programs (2013).[20]

Where contracting agencies or interested parties have questions about such matters as coverage under the DBRA or the applicability of the appropriate wage determination to a specific contract, they are directed to submit those questions to the Administrator of WHD (the Administrator) for resolution. *See* 29 CFR 5.13. The Administrator responds to such questions and provides periodic guidance on other aspects of the DBRA program to contracting agencies and other interested parties, particularly through All Agency Memoranda

[18] *See* 29 FR 13462 (Sept. 30, 1964); 46 FR 41444–70 (NPRM parts 1 and 5) (Aug. 14, 1981); 47 FR 23644–79 (final rule parts 1, 3, and 5) (May 28, 1982). The Department also proposed a significant revision of parts 1 and 5 of the regulations in 1979 and issued a final rule in 1981. *See* 44 FR 77026 (Dec. 28, 1979) (NPRM Part 1); 44 FR 77080 (Dec. 28, 1979) (NPRM part 5); 46 FR 4306 (Jan. 16, 1981) (final rule part 1); 46 FR 4380 (Jan. 16, 1981) (final rule part 5). The 1981 final rules, however, were delayed and subsequently replaced by the 1981–1982 rulemaking. The 1982 final rule was delayed by litigation and re-published with amendments in 1983 and 1985. 48 FR 19532–53 (Apr. 29, 1983) (final rule parts 1 and 5); 50 FR 4506 (Jan. 31, 1985) (final rule §§ 1.3(d) and 1.7(b)).

[19] The Manual of Operations is a 1986 guidance document that is still used internally for reference within WHD. The PWRB is a 2015 document that is intended to provide practical information to contracting agencies and other interested parties, and is available at *https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book.*

[20] Available at: *https://www.hud.gov/sites/dfiles/OCHCO/documents/Work-Schedule-Request.pdf.*

(AAMs) and ruling letters. In addition, the Department maintains a guidance document, the Field Operations Handbook (FOH), to provide guidance for the regulated community and for WHD investigators and staff on contract administration and enforcement policies.[21]

During the administration of a DBRA-covered contract, contractors and subcontractors are required to provide certified payrolls to the contracting agency to demonstrate their compliance with the incorporated wage determinations on a weekly basis. *See generally* 29 CFR part 3. Contracting agencies have the duty to ensure compliance by engaging in periodic audits or investigations of contracts, including examinations of payroll data and confidential interviews with workers. *See* 29 CFR 5.6. Prime contractors have the responsibility for the compliance of all the subcontractors on a covered prime contract. 29 CFR 5.5(a)(6). WHD conducts investigations of covered contracts, which include determining if the DBRA contract clauses or appropriate wage determinations were mistakenly omitted from the contract. *See* 29 CFR 1.6(f). If WHD determines that there was such an omission, it will request that the contracting agency either terminate and resolicit the contract or modify it to incorporate the required clauses or wage determinations retroactively. *Id.*

3. Enforcement and Remedies

In addition to WHD, contracting agencies have enforcement authority under the DBRA. When a contracting agency's investigation reveals underpayments of wages of the DBA or one of the Related Acts, the Federal agency generally is required to provide a report of its investigation to WHD, and to seek to recover the underpayments from the contractor responsible. *See* 29 CFR 5.6(a), 5.7. If violations identified by the contracting agency or by WHD through its own investigation are not promptly remedied, contracting agencies are required to suspend payment on the contract until sufficient funds are withheld to compensate the workers for the underpayments. 29 CFR 5.9. The DBRA contract clauses also provide for ''cross-withholding'' if sufficient funds are no longer available on the contract under which the violations took place. Under this procedure, funds may be withheld from any other covered Federal contract or federally assisted contract held by the same prime contractor in order to remedy the underpayments on the contract at issue. *See* 29 CFR 5.5(a)(2), (b)(3). Contractors that violate the DBRA may also be subject to debarment from future Federal contracts and federally assisted contracts. *See* 29 CFR 5.12.

Where WHD conducts an investigation and finds that violations have occurred, it will notify the affected prime contractor(s) and subcontractor(s) of the findings of the investigation—including any determination that workers are owed back wages and whether there is reasonable cause to believe the contractor may be subject to debarment. *See* 29 CFR 5.11(b). Contractors can request a hearing regarding these findings through the Department's Office of Administrative Law Judges (OALJ) and may appeal any ruling by the OALJ to the Department's ARB. *Id.; see also* 29 CFR parts 6 and 7 (OALJ and ARB rules of practice for Davis-Bacon proceedings). Decisions of the ARB are final agency actions that may be reviewable under the Administrative Procedure Act (APA) in Federal district court. *See* 5 U.S.C. 702, 704.[22]

III. Final Regulatory Revisions

A. Legal Authority

The Davis-Bacon Act, as enacted in 1931 and subsequently amended, requires the payment of certain minimum ''prevailing'' wages determined by the Department to laborers and mechanics working on Federal contracts in excess of $2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings and public works. *See* 40 U.S.C. 3141 *et seq.* The DBA authorizes the Secretary of Labor to develop a definition for the term ''prevailing'' wage and a methodology for setting it based on wages paid on similar projects in the civil subdivision of the State in which a covered project will occur. *See* 40 U.S.C. 3142(b); *Bldg. & Constr. Trades' Dep't, AFL–CIO* v. *Donovan,* 712 F.2d 611, 616 (D.C. Cir. 1983).

The Secretary of Labor has the responsibility to ''prescribe reasonable regulations'' for contractors and subcontractors on covered projects. 40 U.S.C. 3145. The Secretary, through Reorganization Plan No. 14 of 1950, also has the responsibility to ''prescribe appropriate standards, regulations and procedures'' to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts ''[i]n order to assure coordination of administration and consistency of enforcement of the labor standards provisions'' of the DBRA. 15 FR 3176; 5 U.S.C. app. 1.

The Secretary has delegated authority to promulgate these regulations to the Administrator and to the Deputy Administrator of the WHD if the Administrator position is vacant. *See* Secretary's Order No. 01–2014, 79 FR 77527 (Dec. 24, 2014); Secretary's Order No. 01–2017, 82 FR 6653 (Jan. 19, 2017).

B. Overview of the Final Rule

The Department finalizes its proposals to update and modernize the regulations at 29 CFR parts 1, 3, and 5, which implement the DBRA. The sections below address these regulatory revisions as adopted in the final rule.

1. 29 CFR Part 1

The procedures for determining the prevailing wage rates and fringe benefits applicable to laborers and mechanics engaged in construction activity covered by the Davis-Bacon and Related Acts are set forth in 29 CFR part 1. The regulations in this part also set forth the procedures for the application of such prevailing wage determinations to covered construction projects.

i. Section 1.1 Purpose and Scope

The Department proposed technical revisions to § 1.1 to update the statutory reference to the Davis-Bacon Act, now recodified at 40 U.S.C. 3141 *et seq.* The Department also proposed to eliminate outdated references to the Deputy Under Secretary of Labor for Employment Standards at the Employment Standards Administration. The Employment Standards Administration was eliminated as part of an agency reorganization in 2009, and its authorities and responsibilities were devolved into its constituent components, including the WHD. *See* Secretary's Order No. 09–2009 (Nov. 6, 2009), 74 FR 58836 (Nov. 13, 2009), 82 FR 2221 (Jan. 9, 2017). The Department further proposed to revise § 1.1 to reflect the removal of Appendix A of part 1, as discussed below. The Department also proposed to add new paragraph (a)(1) to reference the WHD website (*https://*

[21] The FOH reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator. It is not used as a device for establishing interpretive policy. Chapter 15 of the FOH covers the DBRA, including CWHSSA, and is available at *https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15.*

[22] In addition to reviewing liability determinations and debarment, the ARB, the Secretary (when exercising discretionary review), and the courts also have jurisdiction in certain circumstances to review general wage determinations. Judicial review, however, is strictly limited to any procedural irregularities, as there is no jurisdiction to review the substantive correctness of a wage determination under the DBA. *See Binghamton Constr. Co.,* 347 U.S. at 177.

www.dol.gov/agencies/whd/government-contracts, or its successor website) on which a listing of laws requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act is currently found.

The Department received one comment in favor of this proposal. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada (UA) commented in support of the proposal, noting that the current information was outdated. The final rule therefore adopts this change as proposed, with one technical edit to delete an unnecessary conjunction that is not intended to reflect a change in the substance of this section.

ii. Section 1.2 Definitions

(A) Prevailing Wage

Section 1.2 contains the definition of the term ''prevailing wage.'' The DBA and the Related Acts require laborers and mechanics on covered projects to be paid a prevailing wage as set by the Secretary of Labor, but the statutes do not define the term ''prevailing.'' The Department's regulatory definition of the term ''prevailing wage'' in 29 CFR 1.2 specifies the basic methodology with which the Department determines whether a certain wage rate is prevailing in a given geographic area. The Department uses this methodology to prepare wage determinations that are incorporated into DBRA-covered contracts to set minimum wage rates for each classification of covered workers on a project.

In the NPRM, the Department proposed to redefine the term ''prevailing wage'' in § 1.2 to return to the original methodology for determining whether a wage rate is prevailing. This original methodology has been referred to as the ''three-step process.''

Since 1935, the Secretary has interpreted the word ''prevailing'' in the Davis-Bacon Act to be consistent with the common understanding of the term as meaning ''predominant'' or ''most frequent.'' From 1935 until the 1981–1982 rulemaking, the Department employed a three-step process to identify the most frequently used wage rate for each classification of workers in a locality. *See* Regulation 503 section 2 (1935); 47 FR 23644.[23] This process identified as prevailing: (1) any wage rate paid to a majority of workers; and, if there was none, then (2) the wage rate paid to the greatest number of workers, provided it was paid to at least 30 percent of workers, and, if there was none, then (3) the weighted average rate. The second step has been referred to as the ''30-percent rule.''

The three-step process relegated the average rate to a final, fallback method of determining the prevailing wage. In 1962 congressional testimony, Solicitor of Labor Charles Donahue explained the reasoning for this sequence in the determination: An average rate ''does not reflect a true rate which is actually being paid by any group of contractors in the community being surveyed.'' Instead, ''it represents an artificial rate which we create ourselves, and which does not reflect that which a predominant amount of workers are paid.'' [24]

In 1982, the Department published a final rule that amended the definition of ''prevailing wage'' by eliminating the second step in the three-step process—the 30-percent threshold. *See* 47 FR 23644. The new process required only two steps: first identifying if there was a wage rate paid to more than 50 percent of workers, and then, if not, relying on a weighted average of all the wage rates paid. *Id.* at 23644–45.

In eliminating the 30-percent threshold, however, the Department did not change its underlying interpretation of the word ''prevailing''—that it means ''the most widely paid rate'' must be the ''definition of first choice'' for the prevailing wage. 47 FR 23645. While the 1982 rule continued to allow the Department to use an average rate as a fallback, the Department rejected commenters' suggestions that the weighted average could be used in all cases. *See* 47 FR 23644–45. As the Department explained, this was because the term ''prevailing'' contemplates that wage determinations mirror, to the extent possible, those rates ''actually paid'' to workers. 47 FR 23645.

This interpretation—that the definition of first choice for the term ''prevailing wage'' should be an actual wage rate that is most widely paid—has now been shared across administrations for over 85 years. In the intervening decades, Congress has amended and expanded the reach of the Act's prevailing wage requirements dozens of times without altering the term ''prevailing'' or the grant of broad authority to the Secretary of Labor to define it.[25] In addition, the question was also reviewed by the Office of Legal Counsel (OLC) at the Department of Justice, which independently reached the same conclusions: ''prevailing wage'' means the current and predominant actual rate paid, and an average rate should only be used as a last resort. *See* Determination of Wage Rates Under the Davis-Bacon & Serv. Cont. Acts, 5 Op. O.L.C. 174, 176–77 (1981).[26]

In the 1982 final rule, when the Department eliminated the 30-percent threshold, it anticipated that this change would increase the use of artificial average rates. 47 FR 23648–49. Nonetheless, the Department believed a change was preferable because the 30-percent threshold could in some cases not account for up to 70 percent of the remaining workers. *See* 46 FR 41444. The Department also stated that it agreed with the concerns expressed by certain commenters that establishing a prevailing wage rate based on 30-percent of survey wage rates was ''inflationary'' and gave ''undue weight to collectively bargained rates.'' 47 FR 23644–45.

After reviewing the development of the Davis-Bacon Act program since the 1981–1982 rulemaking, the Department has concluded that eliminating the 30-percent threshold has ultimately resulted in an overuse of average rates. On paper, the weighted average remains the fallback method to be used only when there is no majority rate. In practice, though, it has become a central mechanism to set the prevailing wage rates included in Davis-Bacon wage determinations and covered contracts.

Prior to the 1982 rule change, the use of averages to set a prevailing wage rate was relatively rare. In a Ford Administration study of Davis-Bacon Act prevailing wage rates in commercial-type construction in 19 cities, none of the rates were based on averages because all of the wage rates were ''negotiated'' rates, *i.e.,* based on collective bargaining agreements (CBAs) that represented a predominant wage rate in the locality.[27] The Department

[23] Implemented Apr. 29, 1983. *See* 48 FR 19532.

[24] *Administration of the Davis Bacon Act: Hearings before the Spec. Subcomm. of Lab. of the H. Comm. on Educ. & Lab.,* 87th Cong. 811–12 (1962) (testimony of Charles Donahue, Solicitor of Labor).

[25] *See, e.g.,* Act of Mar. 23, 1941, ch. 26, 55 Stat. 53 (1941) (applying the Act to alternative contract types); CWHSSA of 1962, Public Law 87–581, 76 Stat. 357 (1962) (requiring payment of overtime on contracts covered by the Act); Act of July 2, 1964, Public Law 88–349, 78 Stat. 238 (1964) (extending the Act to cover fringe benefits); 29 CFR 5.1 (referencing 57 Related Acts into which Congress incorporated Davis-Bacon Act requirements between 1935 and 1978).

[26] Available at: *https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174_0.pdf.*

[27] *See* Robert S. Goldfarb & John F. Morrall, ''An Analysis of Certain Aspects of the Administration of the Davis-Bacon Act,'' Council on Wage and Price Stability (May 1976), reprinted in Bureau of Nat'l Affs., *Construction Labor Report,* No. 1079, D–1, D–2 (1976).

estimates that prior to the 1982 final rule, as low as 15 percent of classification rates across all wage determinations were based on averages. After the 1982 rule was implemented, the use of averages may have initially increased to approximately 26 percent of all wage determinations.[28]

The Department's current use of weighted averages is now significantly higher than this 26 percent figure. To analyze the current use of weighted averages and the potential impacts of this rulemaking, the Department compiled data for select classifications for 19 recent wage surveys—nearly all of the completed surveys that WHD began in 2015 or later. The data show that the Department's reliance on average rates has increased significantly, and now accounts for 63 percent of the observed classification determinations in this recent time period.[29]

Such an overuse of weighted averages is inconsistent with the Department's longstanding interpretation of Congress's use of the word ''prevailing'' in the text of the Act—including the Department's statements in the preamble to the 1982 rule itself that the definition of first choice for the ''prevailing'' wage should be the most widely paid rate that is actually paid to workers in the relevant locality. If nearly two-thirds of rates that are now being published based on recent surveys are based on a weighted average, it is no longer fair to say that it is a fallback method of determining the prevailing wage.

The use of averages as the dominant methodology for issuing wage determinations is also in tension with the recognized purpose of the Act ''to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.'' *Coutu,* 450 U.S. at 773 (internal quotation marks and citation omitted). Using an average to determine the minimum wage rate on contracts allows a single low-wage contractor in the area to depress wage rates on Federal contracts below the higher rate that may be generally more prevalent in the community—by factoring into (and lowering) the calculation of the average that is used to set the minimum wage rates on local Federal contracts.[30]

To address the increasing tension between the current methodology and the purpose and definition of ''prevailing,'' the Department proposed in the NPRM to return to the original three-step process. The Department expects that re-introducing the 30-percent threshold will reduce the use of average rates roughly by half—from 63 percent to 31 percent. The data from the regulatory impact analysis included in section V suggests that returning to the three-step process will continue to result in 37 percent of prevailing wage rates based on the majority rule, with the balance of 32 percent based on the 30-percent threshold, and 31 percent based on the weighted average.

As part of its review of the wage determination definition and methodology, the Department also considered, but decided against, proposing to use the median wage rate as the ''prevailing'' rate. The median, like the average (mean), is a number that can be unrelated to the wage rate paid with the greatest frequency to employees working in the locality. Using either the median or the average as the primary method of determining the prevailing rate is not consistent with the Department's long-held interpretation of the meaning of the term ''prevailing'' in the Davis-Bacon Act. *See* 47 FR 23645. The Department therefore proposed to return to the three-step process and the 30-percent threshold, and did not propose as alternatives the use of either the median or mean as the primary or sole methods for making wage determinations.

(1) Comments on the Definition of ''Prevailing Wage''

The Department received many comments regarding the definition of the term ''prevailing wage'' and the proposed return to the three-step process and the 30-percent threshold. These included comments in favor of the proposal, comments in favor of keeping the current definition, comments suggesting that the Department abandon the ''modal'' methodology entirely and use only an average, and comments suggesting the Department should use data from sources other than its wage surveys before applying any specific methodology. Having reviewed and considered all the comments, the Department has decided that the best course is to adopt the re-definition of ''prevailing wage'' as proposed and return to the three-step process that was in effect from 1935 to 1983.

The Department continues to believe, as it has consistently for over 85 years, that the best methodology for determining the ''prevailing wage'' under the Davis-Bacon Act is one that uses a mathematical mode to determine ''the most widely paid rate'' as the ''definition of first choice.'' 47 FR 23645. The modal definition of prevailing as ''the most widely paid rate'' is the methodology that is most consistent with Congress's use of the word ''prevailing'' in the statutory text. Commenters in support of the Department's proposal cited to various dictionary definitions of the word ''prevailing'' that support this conclusion. The Construction Employers of America (CEA), for example, noted the definition of ''prevailing'' as ''most frequent'' or ''generally current'' and descriptive of ''what is in general or wide circulation or use'' from Webster's Third New International Dictionary (1976). *Accord* 5 Op. O.L.C. at 175. The Department agrees that this and other similar dictionary definitions support the use of a modal methodology as the method of first choice.

Although the legislative history of the Act does not suggest that Congress understood there to be only one possible way of determining the prevailing wage,[31] there is no question that a modal methodology was within the common and ordinary public meaning of the term ''prevailing'' at the time. One

[28] *See Oversight Hearing on the Davis-Bacon Act, Before the Subcomm. on Lab. Standards of the H. Comm. on Educ. & Lab.,* 96th Cong. 58 (1979) (statement of Ray Marshall, Secretary of Labor) (discussing study of 1978 determinations showing only 24 percent of classification rates were based on the 30-percent rule); Jerome Staller, ''Communications to the Editor,'' *Policy Analysis,* Vol. 5, No. 3 (Summer 1979), pp. 397–98 (noting that 60 percent of determinations in the internal Department 1976 and 1978 studies were based on the 30-percent rule or the average-rate rule). The authors of the Council on Wage and Price Stability study, however, pointed out that the Department's figures were for rates that had been based on survey data, while 57 percent of rates in the mid-1970's were based solely on CBAs without the use of surveys (a practice that the Department no longer uses to determine new rates). *See* Robert S. Goldfarb & John F. Morrall II., ''The Davis-Bacon Act: An Appraisal of Recent Studies,'' 34 Indus. & Lab. Rel. Rev. 191, 199 − 200 & n.35 (1981). Thus, the actual percentage of annual classification determinations that were based on average rule before 1982 may have been as low as 15 percent, and the percent based on the average rule after 1982 would have been expected to be around 26 percent.

[29] *See* below section V (Executive Order 12866, Regulatory Planning and Review et al.).

[30] For example, the 2001 wage determination for electricians in Eddy County, New Mexico, was an average rate based on responses that included lower-paid workers that had been brought in from Texas by a Texas electrical contractor to work on a single job. As the ARB noted in reviewing a challenge to the wage determination, the result was that ''contract labor from Texas, where wages reportedly are lower, effectively has determined the prevailing wage for electricians in this New Mexico county.'' *New Mexico Nat'l Elec. Contractors Ass'n,* ARB No. 03–020, 2004 WL 1261216, at *8 (May 28, 2004).

[31] *See, e.g.,* 74 Cong. Rec. H6516 (daily ed. Feb 28, 1931) (statement of Rep. William Kopp) (noting that some might argue ''the term 'prevailing rate' has a vague and indefinite meaning,'' but that this was not an obstacle because ''the power will be given . . . to the Secretary of Labor to determine what the prevailing rates are'').

contemporaneous exchange from 1932 is particularly instructive. During an early debate over potential amendments to the Act, the Associated General Contractors (AGC) explained that union representatives believed the prevailing rate should always be a collectively bargained union wage, while the contractors, many members of Congress, and Federal contracting agencies believed it should be ''the rate paid to the largest number in a particular locality at a given time''—in other words, the modal rate.[32]

Several commenters on the Department's current proposal also argued that a modal methodology is generally more consistent with the purpose of Davis-Bacon Act. These commenters, including the National Black Worker Center, the International Union of Bricklayers and Allied Craftworkers, and others, argued that the use of a modal methodology results in a prevailing wage rate that is ''actually paid'' to workers in the area. These commenters said that average rates are less preferable because they are ''artificial'' and may not mirror any of the actual wage rates paid in the community. North America's Building Trade Union (NABTU), among others, asserted that ''average rates paid to no one are not 'prevailing[.]' '' Many unions and contractor associations, including the Washington State Building and Construction Trades Council (WA BCTC) and NABTU, noted that the use of wage rates that are actually paid to workers in the community is more likely to protect local construction firms from being underbid by unscrupulous low-wage contractors, which is the purpose of the Act.[33] Accordingly, commenters in favor of the proposal said averages should only be used as a fallback method when there is no clear rate prevailing in a given area.

A wide range of commenters that supported the proposal agreed with the Department that the use of an average—rather than a ''modal'' number identifying the most prevalent wage rate—is less preferable because the use of an average allows outlier wage rates paid to very few workers to influence the prevailing wage. The Leadership Conference on Civil and Human Rights (LCCHR), the National Women's Law Center, Oxfam America, and several other civil rights and worker advocacy organizations similarly commented that ''reliance on weighted averages creates the potential for a single employer's rates that are exceptionally high or exceptionally low having outsize influence in determining the prevailing wage.'' Commenters noted that this feature of averages makes the overuse of averages less consistent with the Act's purposes of limiting the depressive effect of low-wage contractors on the wage rates in the local community.

Commenters supportive of the Department's proposal also argued that this characteristic of average rates is particularly problematic for maintaining prevailing local construction standards where the use of an average results in a prevailing wage rate that is lower than a modal rate. As a Professor of Economics at the University of Utah commented, ''[b]ecause the mean is sensitive to a long tail of lower wages compared to the mode, the mode is less likely to undercut local labor standards, including fringe benefits which underpin training and apprenticeship programs.'' Conversely, the commenter noted, ''the modal wage will deter market failures associated with short-run bidding practices that incentivize bidders to jettison all but the most necessary short-run costs of specific projects.''

In addition to determining that a modal methodology continues to be preferable, the Department proposed to return to the lower 30-percent threshold for using the mode, before falling back to the use of an average rate. Several commenters, including think tanks such as Americans for Prosperity and Institute for the American Worker (AFP–I4AW) and Competitive Enterprise Institute (CEI), opposed this proposal because they asserted that only a wage rate paid to a ''majority'' of workers fits the term ''prevailing.'' The National Federation of Independent Business (NFIB) asserted that 30 percent did not fall within the meaning of ''prevailing'' when Congress enacted the DBA in 1931 and the Department's initial regulation was ''erroneous'' at the time. CEI cited to a definition of ''prevailing'' as meaning ''accepted, used, or practiced by most people.'' [34] CEI asserted that the term ''most people'' used in that context ''can only mean 'a majority' '' and therefore that ''30 percent is not 'prevailing' under any meaningful sense of the term.''

On the other hand, many commenters supported the Department's proposal and criticized the 1982 rule for seeming to conflate the dictionary definitions of ''prevailing'' with a ''majority.'' These commenters, including Mechanical Contractors Association of America (MCAA), National Electrical Contractors Association (NECA), and the UA, argued that the term ''prevailing'' is properly understood and defined as the most common or prevalent—which may be, but is not necessarily, a ''majority.'' If Congress had intended for the Department to determine only a ''majority'' wage, they argue, Congress would have explicitly stated as much in the statutory text. NECA and CEA noted that the interpretation of ''prevailing'' as not necessarily a majority was supported by the 1963 report of the House Subcommittee that examined the 30-percent threshold in depth before the passage of the 1964 amendments to the Act.[35] A joint comment from the Pennsylvania Attorney General and the Pennsylvania State Department of Labor and Industry (PAAG and PADLI) supported the reversion to the original definition, noting that it ''aligns with the underlying interpretation of the word 'prevailing' as the 'most widely paid rate.' ''

The Department agrees with these commenters that the 30-percent threshold is consistent with the meaning of the word ''prevailing'' because ''prevailing'' is not coextensive with ''majority.'' A statute is normally interpreted with reference to the ordinary public meaning of its terms ''at the time of its enactment.'' *Bostock* v. *Clayton Cnty.,* 140 S. Ct. 1731, 1738 (2020). Dictionaries from around the time of the 1935 amendments to the Act, when Congress revised the DBA to require the Secretary to predetermine prevailing wage rates, had definitions similar to the one cited in the 1981 OLC opinion. *See, e.g., Prevailing,* Merriam-Webster, Webster's Collegiate Dictionary (5th ed. 1936) (''Very generally current; most frequent; predominant'' with synonyms of common, widespread,

[32] *See* Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts: Hearings before the Committee on Labor, House of Representatives, 72nd Cong., 1st Sess., on S. 3847 and H. R. 11865 (Apr. 28, 1932) at 34–35. The National Association of Manufacturers, similarly, argued that the prevailing wages should be ''considered as that being paid to the largest number in the particular locality at a particular time.'' *Id.* at 71–72. *See also* 5 Op. O.L.C. at 175–76 (noting that this testimony leading up to the 1935 amendments ''indicates a common understanding by spokesmen for labor and management, as well as individual legislators, that the 'prevailing' wage was the wage paid to the largest number of workers in the relevant classification and locality'').

[33] *See also* Staff of the H. Subcomm. on Lab., 88th Cong., Administration of the Davis-Bacon Act, Rep. of the Subcomm. on Lab. of the Comm. on Educ. & Lab. (Comm. Print 1963) (1963 House Subcommittee Report), at 7–8; 5 Op. O.L.C. at 177 (quoting the 1963 House Subcommittee Report).

[34] The comment raising this language cited to an entry for ''prevailing'' in the online version of Merriam-Webster's dictionary. The Department was not able to find that language at the cited location, but was able to find it in an online version of a thesaurus from the same publisher. *See Prevailing,* Merriam-Webster's Thesaurus, *https://www.merriam-webster.com/thesaurus/prevailing.*

[35] 1963 House Subcommittee Report, at 8.

extensive, and prevalent); *Prevailing,* Oxford English Dictionary, Vol. VIII (1933) at 1334 (''2. Predominant in extent or amount; most widely occurring or accepted; generally current''); 5 Op. O.L.C. at 175. When there are only two kinds being compared, the ''most frequent'' or ''most widely occurring'' of the two kinds will be a majority, and thus only a majority will be prevailing. But the same is not true when a variety of kinds are compared. In such circumstances, even if a majority will still necessarily be prevailing, it does not follow that anything less than a majority cannot be considered prevailing. Rather, as the 1963 House Subcommittee Report concluded, '' 'prevailing' means only a greater number. It need not be a majority.'' [36]

In opposing the proposal, AFP–I4AW noted that in the 1981–1982 rulemaking the Department had agreed with commenters that stated ''a rate based on 30 percent does not comport with the definition of 'prevailing[.]' '' [37] The Department did not provide further explanation of this argument in the 1982 final rule, but had stated in the 1981 NPRM that the 30-percent rule ''ignores the rate paid to up to 70 percent of the workers.'' *See* 46 FR 41444. Several commenters that opposed the return to the 30-percent rule, including AFP–I4AW, Associated Builders and Contractors (ABC), and Clark Pacific, stated that they still found this reasoning persuasive.[38]

The Department disagrees. As an initial matter, the characterization of the 30-percent threshold as ''ignoring'' rates is not unique to that specific threshold. Rather, it is a feature of any rule based on a mathematical ''mode,'' in which the only value that is ultimately used is the value of the number that appears most frequently. This is in contrast to using a mean (average), in which the values of all the numbers are averaged together, or a median, which uses only the midpoint value. Both the 30-percent threshold and the majority rule are modal rules in which the values of the non-prevailing wage rates do not factor into the final analysis. This feature of a modal analysis can be viewed as particularly helpful for avoiding an unwarranted downward or upward impact from outlier wage rates. As the International Association of Sheet Metal, Air, Rail and Transportation Workers and the Sheet Metal and Air Conditioning Contractors National Association (SMART and SMACNA) noted in a joint comment, ''[w]hen using the mean, unusually low or high values distort the data; the mode, by contrast, eliminates from the analysis data that grossly deviate from what workers are actually paid and, therefore, would depress labor standards if included.''

Moreover, the characterization of the 30-percent threshold as ignoring up to 70 percent of wage rates distorts how the analysis is applied in practice. In the three-step process, the first step is to adopt the majority rate if there is one. Under both the proposed three-step process and the current majority-only rule, any wage rate that is paid to a majority of workers would be identified as prevailing. Under either method, the weighted average will be used whenever there is no wage rate that is paid to more than 30 percent of employees in the survey response. The difference between the current majority process and the three-step methodology is solely in how a wage rate is determined when there is no majority, but there is a significant plurality wage rate paid to between 30 and 50 percent of workers. In that circumstance, the current ''majority'' rule uses averages instead of the rate that is actually paid to that significant plurality of the survey population. This is true, for example, even where the same wage rate is paid to 45 percent of workers and no other rate is paid to as high a percentage of workers. In such circumstances, the Department believes that a wage rate paid to between 30 and 50 percent of workers—instead of an average rate that may be actually paid to few workers or none at all—is more of a ''prevailing'' wage rate.[39]

NABTU and other commenters in favor of the Department's proposed return to the 30-percent threshold noted that Congress specifically considered on numerous occasions whether to abolish the 30-percent rule and declined to do so.[40] Similarly, CEA commented that Congress's repeated expansion and amendment of the Act from 1935 to 1982 without changing or addressing the definition of prevailing wage should be interpreted as ''persuasive evidence that the interpretation is the one intended by Congress.' '' *CFTC* v. *Schor,* 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 274–75 (1974) (footnotes omitted)). The Department agrees that this legislative acquiescence is significant. It may not necessarily mean that the 30-percent rule was the only interpretation that was intended by Congress—especially in light of the subsequent Congressional acquiescence to the imposition of the majority-only rule.[41] However, the expansion of the Act, particularly in 1964 after the extensive hearings regarding the 30-percent rule, suggests that Congress did not believe that the 30-percent rule was ''erroneous'' at the time of its enactment or otherwise believe that it ''did not comport'' with the definition of prevailing. *Cf.* 5. Op. O.L.C. at 176 (noting Congress had acquiesced to the Department's interpretation of the term prevailing as embodied in its 1935 regulations).

In addition to considering questions regarding Congressional acquiescence, the Department has also considered whether the length of time that the majority-only rule has been in place has led to reliance interests among regulated entities that would counsel against reversion to the three-step process. While some commenters referred to the length of time the rule had been in effect, their comments generally did not focus on related reliance interests. The Department does not believe that any potential reliance interests would be so significant as to outweigh the objectives of seeking to align the prevailing wage methodology better with the longstanding meaning of the term prevailing and of seeking to better protect workers against the depressive

[36] 1963 House Subcommittee Report, at 8.

[37] 47 FR 23644.

[38] Similarly, CEI opposed the use of the 30-percent rule because it stated that the fact that other workers may earn less than the wage determined to be the prevailing wage is ''highly significant,'' because it indicates that the labor market is ''more competitive in terms of wages.'' Under this reasoning, however, only an average rate would be sufficient, because any modal (or median) rate would not include all of the wage rates paid. Using only an average is not consistent with the Department's long-held understanding of the meaning of the term ''prevailing.'' *See* 47 at FR 23644–45. Neither the text nor the legislative history of the Act suggests that the term prevailing wage was intended to necessarily capture and reflect all of the wage rates that are paid in an area. Instead, the Department has understood the statute as better carried out with a methodology that seeks to determine which among those wage rates is prevailing.

[39] As the OLC concluded in 1981, the use of an average instead of the 30-percent rule may be particularly inappropriate in circumstances where ''there is a wide variation in rates of wages and a large minority of persons paid significantly lower wages; use of an average in such a case might result in a contract wage well below the actual wages paid a majority of employees.'' 5 Op. O.L.C. at 177 n.3.

[40] *See, e.g.,* Federal Construction Costs Reduction Act of 1977 (S. 1540, H.R. 6100); Davis-Bacon Act—Fringe Benefits (H.R. 404): Hearings Before the General Subcomm. on Labor of the H. Comm. on Educ. & Labor, 88th Cong. at 38–39, 125, 219, 225–230 (Mar. 1, 7, 12, 21, 22, and 26, 1963).

[41] One individual commenter opposing the Department's proposal asserted that Congress's inaction in reimposing the 30-percent rule should be considered evidence that the 30-percent rule ''contravenes, rather than is required by, the statutory text.'' But given the wide discretion the courts have found the DBA affords to the Secretary of Labor, the Department does not believe that the acquiescence to the Department's decision to use one specific modal threshold can be understood as barring it from using another.

effect on wage rates of low-wage contractors. The Department's illustrative study of the proposed methodology change, in section V.D. below, suggests that the change may lead to higher required prevailing wage rates in some places and lower wage rates in others. The magnitude and direction of changes, however, should not be significantly different in their effect on contractors than the fluctuations in prevailing wage rates that already occur between wage surveys as a result of changes in local economies and shifts in regional labor markets. Even if the part 1 changes were to have significant effects on wage rates in certain local areas, any reliance interests of local contractors, governmental agencies, or workers on prior wage rates would be minimal, given that the changes to the wage determination processes generally will not affect current contracts—which will continue to be governed by the wage determinations incorporated at the time of their award, with limited exceptions. Most of the revisions to part 1 will only apply to wage surveys that are finalized after the rule becomes effective, and thus they will generally apply only to contracts awarded after such new wage determinations are issued.[42] Contractors will therefore be able to factor any new wage rates into their bids or negotiations on future contracts.

The Department received many comments in favor of and opposed to the use of the 30-percent threshold for other reasons. A number of commenters commented favorably on the use of 30 percent specifically as a reasonable modal threshold to choose. As the LCCHR, the National Women's Law Center, Oxfam America, and several other civil rights and worker advocacy organizations commented, the choice of the 30-percent threshold appropriately aligns the rate selected with the actual wages paid to ''significant shares'' of workers in a covered job classification. The Dakotas Mechanical Contractors Association (DMCA) and the Sheet Metal, Air Conditioning and Roofing Contractors Association stated that if 30 percent are paid the same rate, it is likely the prevailing rate for skilled workers in the area. The Center for American Progress Action Fund noted that the 30-percent rule is also followed by some states in the implementation of their own State prevailing wage programs.[43] Some commenters argued that a 50-percent threshold for using a modal rate is simply too high for many geographic areas. The DMCA, for example, noted that when there are multiple large construction projects going on in the Dakotas, many contractors travel from outside the area, and counting wage rates from these out-of-town contractors can make it difficult for the actual local rate to satisfy a 50-percent threshold.

Several commenters opposing the proposed reversion to the 30-percent rule asserted that a reversion to the 30-percent rule would result in rates that are less accurate or less likely to reflect the actual wage and fringe benefit rates in a locality, and therefore are inherently not ''prevailing'' under the meaning of the statute. ABC stated that a survey of its Federal contractor members showed that only 12.6 percent of its respondents stated that the reversion to the 30-percent rule would increase the accuracy of wage determinations. The Modular Building Institute (MBI) commented that a 30-percent threshold is too small a sample on which to base a prevailing wage. According to the Taxpayers Protection Alliance, returning to the 30-percent rule ''invites cherry-picking rather than serious analysis.'' On the other hand, several commenters in favor of the Department's proposal asserted, similar to the minority of respondents to ABC's survey, that returning to the 30-percent rule would increase the accuracy of wage determinations.

In making arguments about accuracy, most commenters for and against the proposal did not reference data or evidence to support their views. Commenters opposing the proposal that did cite data compared potential outcomes under the 30-percent threshold—or any modal determinations based on voluntary wage surveys—with average rates calculated by other sources or by reference to studies that found increases in total costs from the use of any prevailing wage at all. Commenters also argued that accuracy can be judged by the potential for the percentage of wage determinations based on CBAs to be higher than the union density in the local area.[44] The Department does not agree with these measurements of accuracy and instead understands these arguments as fundamentally about what the meaning of ''prevailing'' should be, or whether prevailing wage laws are good policy in the first place. While a comparison of costs in jurisdictions in which a State prevailing wage law applies with those where there is no such requirement may be helpful to understanding the cost impacts of prevailing wage requirements, that comparison is not helpful in understanding whether a certain prevailing wage methodology results in wage determinations that are ''accurate'' or not, because the point of the prevailing wage law is to eliminate the payment of substandard wage rates that may be paid in the absence of the law. For similar reasons, a comparison with average rates or union density does not reflect accuracy—rather it reflects different understandings of the term ''prevailing.''[45]

AFP–I4AW asserted that it is arbitrary to choose 30 percent instead of one of the other ''infinite percentages that might be chosen between 0 and 50 percent.'' The Department disagrees with the premise that the 30-percent threshold is arbitrary and therefore

[42] As explained in § 1.6(c), whenever a new wage determination is issued (either after the completion of a new wage survey or through the new periodic adjustment mechanism), that revision as a general matter does not and will not apply to contracts which have already been awarded, with three exceptions. These exceptions are explained in § 1.6(c)(2)(iii), and they include where a contract or order is changed to include substantial covered work that was not within the original scope of work, where an option is exercised, and also certain ongoing contracts that are not for specific construction, for which new wage determinations must be incorporated on an annual basis under § 1.6(c)(2)(iii)(B) of the final rule. The final rule instructs contracting agencies to apply the terms of § 1.6(c)(2)(iii) to all existing contracts, without regard to the date of contract award, if practicable and consistent with applicable law. The Department does not anticipate that the application of the amended wage determination methodologies in these situations will result in unfair harm to reliance interests in a manner sufficient to outweigh the benefits of the final rule implementation as planned. *See also* section III.C. (''Applicability Date'') below.

[43] *See, e.g.,* Haw. Code R. section 12–22–2(b) (30-percent threshold in Hawaii); 820 Ill. Comp. Stat. 130/4 section 4(a) (30-percent threshold in Illinois). Wyoming uses a version of the three-step process in which the prevailing wage is a majority, or 30-percent, unless more than one wage rate reaches the 30-percent threshold, in which case a weighted average is used. *See https://dws.wyo.gov/wp-content/uploads/2022/04/Labor-Standards-2022-Prevailing-Wage-Rates.pdf.* Minnesota and California use modal methodologies, but do not have specific thresholds. *See* Minn. Stat. section 177.42; Cal. Lab. Code section 1773.9(b)(1).

[44] ABC and the National Association of Home Builders (NAHB) cited data from a 2010 GAO report and subsequent data showing that as of 2010, a union rate prevailed in 63 percent of all then-existing wage determinations; in 2018, a union rate prevailed in 48 percent of determinations; and in 2022, a union rate prevailed in 42 percent of determinations. The commenters contrasted these numbers with data from the BLS that shows union density currently at less than 20 percent of the construction labor market.

[45] The Department also notes that, while the percentage of overall wage determinations based on collective bargaining rates nationwide has been higher than measures of union density in the construction industry generally, the percentage of wage determinations based on collectively bargained rates has significantly declined in recent years. NAHB and ABC pointed out that the 2011 GAO report stated that at the time 63 percent of published wage rates were union prevailing. *See* 2011 GAO Report, at 20. ABC notes current statistics from the Department show 42 percent are based on collectively bargained rates.

impermissible. As one commenter in favor of the proposal, the Iron Workers International Union (Iron Workers), stated, the ''30 percent'' rule can be seen as a ''middle position'' that the Department adopted in 1935. Among modal rates, the wage rate based on a 20 percent modal rate or even lower might also have been considered a reasonable interpretation of the term ''prevailing wage,'' rendering 30-percent a compromise among all of the different definitions being advanced at the time. *See Bldg. & Constr. Trades Dep't* v. *Donovan,* 553 F. Supp. 352, 354 (D.D.C. 1982) (''There is nothing intrinsically appropriate or inappropriate to the thirty percent rule or to any other figure as representing the 'prevailing wage.' '').[46] The fact that the Department could have chosen an even lower number, or no modal threshold at all, does not make the choice of 30 percent impermissible. The number is a familiar one that the Department used over five decades; as commenters noted, it represents at least a significant share of workers in a survey; and the Department has tested the potential outcome of returning to the number and found that it will alleviate concerns about overuse of average rates. *Cf. Ralph Knight, Inc.* v. *Mantel,* 135 F.2d 514, 518–19 (8th Cir. 1943) (holding the percentage threshold in an FLSA regulation was not arbitrary because it was reasonable).

The ABC and several other commenters criticized the Department for proposing to return to the 30-percent threshold without addressing concerns they have about the methodology of the wage survey program that produces the underlying numbers to which the three-step process would be applied. According to ABC and others, the Department should use more sophisticated representative sampling and statistical regression methods to come up with prevailing rates because of low response rates, low sufficiency thresholds and therefore small sample sizes, and response bias in the Department's voluntary Davis-Bacon wage survey program. ABC and the National Association of Home Builders (NAHB) referenced reports by the Department's OIG expressing concern about low response rates to WHD's wage surveys, including a 2019 report in which OIG calculated that as many as 53 percent of eligible contractors had not provided wage data on 7 surveys that were analyzed.[47] ABC and others argued that union contractors have a higher interest in responding to the wage surveys, and so the surveys tend to disproportionately reflect union rates and are therefore unreliable.[48] In a joint comment, a group of housing industry associations and entities stated that certain segments of the residential building industry have ''no incentive to participate in a survey method that provides no direct benefit to their business.'' Without making changes to the survey process to better account for non-union contractors, ABC argued, the Department should not be changing the threshold for identifying the prevailing wage. ABC stated that the survey process in its current form is ''incapable of accurately determining whether a single rate is paid to 30% (or a majority) of local construction workers.''

ABC, NAHB, and other commenters stated that the Department should have considered using data from the BLS, which performs representative sampling on surveys with higher response rates and larger sample sizes and uses other more sophisticated regression methods, and therefore would be more accurate. According to ABC and an individual commenter, the use of BLS data would result in more timely wage determinations and decrease the costs of Federal construction, making more projects viable and increasing construction employment. ABC acknowledged that the Department has previously declined to use BLS data for DBA wage determinations for a number of reasons, including that BLS data does not have the same benefits information, data by county level, or by construction type. But ABC asserted that none of these reasons entirely foreclose the use of such data, and it cited the fact that the Department already uses BLS data for wage determinations under the Service Contract Act (SCA), which has similar statutory parameters, as well as the Foreign Labor Certification Program, and with some statistical modeling, for Federal employee pay under the Federal Employee Pay Comparability Act. ABC also argued that the Department's current use of larger county groupings to identify wage rates for counties with insufficient data and the proposal in the NPRM to remove the bar on cross-consideration of rural and metropolitan data both undercut the Department's arguments against using BLS data. NAHB and the Mortgage Bankers Association (MBA) also suggested that the Department should consider outsourcing the wage data collection process to third-party organizations they believe would be better equipped to collect greater quantities of data.

A joint comment from the National Asphalt Pavement Association, National Ready Mixed Concrete Association, and National Stone, Sand & Gravel Association (NAPA, NRMPCA, and NSSGA) suggested that reverting to the use of a 30-percent threshold is ''unnecessary'' because there are other ways to improve the survey process. They suggested using the certified payrolls that are submitted on DBRA projects to help identify prevailing wages.[49] They also suggested updating and standardizing classifications that are ''outdated'' and confusing where they differ across political subdivisions. AGC suggested that the Department should revise the wage survey process to allow contractors to report wage information by individual craft classifications in each county by construction type, instead of broken-down project-by-project.

Several commenters stated that even if the 30-percent rule had been permissible previously, the Department could not reasonably return to it because the construction labor market has changed and prevailing rates ''rarely occur in the modern economy.'' ABC noted that union density has declined in the construction labor market from 34 percent in 1981 to under 14 percent in recent years. The Association of Washington Housing Authorities (AWHA) stated that the increase in

[46] The 1982 *Donovan* district court decision enjoined several elements of the 1981–1982 rulemaking but upheld the Department's decision to eliminate the 30-percent threshold. In affirming the district court's decision on the 30-percent threshold, the D.C. Circuit stated that it affirmed ''generally for the reasons stated in [the district court's] opinion.'' *Donovan,* 712 F.2d at 616.

[47] *See* OIG, U.S. Department of Labor, No. 04–19–001–15–001, ''Better Strategies are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates,'' 8, 15 (2019). Available at *https://www.oig.dol.gov/public/reports/oa/2019/04-19-001-15-001.pdf.*

[48] As evidence that the Department's Davis-Bacon wage surveys are statistically unrepresentative of the construction workforce, ABC asserted that average wages—both economywide and in specific occupations (construction or otherwise)—are consistently higher than median wages in the United States and most industrialized economies. For example, ABC points to BLS's May 2021 Occupational Employment and Wage Statistics (OEWS) survey showing that, nationally, average wages exceed median wages in 51 of 64 detailed construction occupations. ABC argues that the Department's surveys are unrepresentative because, in the wage determinations developed using the survey data and using the majority rule, the majority rate (which should be the same as the median) consistently exceeds wages calculated as survey averages.

[49] The Department appreciates this suggestion, but notes that using certified payrolls instead of the wage survey process would result in prevailing rates based entirely on data from DBRA-covered projects. While such data could be helpful in certain circumstances in which there is not sufficient data from private sources, it could not be used instead of the wage survey process because the DBA contemplates a wider analysis of wage rates that includes those on wholly privately funded projects where such data is available. *See generally infra* section III.B.1.iii.(B) (''29 CFR 1.3(d)'').

reliance on weighted averages actually reflects reality in certain construction types where union participation is lacking. AWHA also stated that there is no need to return to the 30-percent rule because there is better labor market wage information now available than there was when the 30-percent rule was last in effect, with both proprietary and public databases now containing ''up-to-date wage and salary information on thousands of job classifications at varying geographic levels.''

Finally, comments from ABC and a group of U.S. Senators asserted that the Department's reasoning for its proposal is contrary to the D.C. Circuit's decision in *Building & Construction Trades' Department* v. *Donovan,* 712 F.2d 611, 616–17 (D.C. Cir. 1983). In that decision, the Department's 1981–1982 rulemaking eliminating the 30-percent threshold had been challenged. The D.C. Circuit stated that the Department's new definition of ''prevailing'' as, first, the majority rate, and second, a weighted average, was ''within a common and reasonable reading of the term'' and ''would not defeat the essential purpose of the statute, which was to ensure that federal wages reflected those generally paid in the area.'' *Id.* at 616–17. ABC stated that this holding allowing the Department to eliminate the 30-percent threshold could not be squared with the Department's reasoning in the NPRM that the overuse of averages was inconsistent with the text and purpose of the Act. *See* 87 FR 15704.

Considering these comments, the Department agrees with the commenters in favor of the proposal that the 30-percent threshold is a reasonable threshold that represents the best course for making wage determinations based on wage rates that are actually paid to workers in the relevant area. The Department also believes that returning to the use of the 30-percent threshold at the second step in the wage determination process is preferable for the same reasons that it is preferable to use a modal methodology at all instead of using averages or the median for all wage determinations. The mode is more consistent with the term ''prevailing,'' and it is in general more protective of prevailing wage rates against the depressive effect of low-wage contractors. Even when adopting the current majority threshold for modal wage determinations in 1982, the Department reiterated this long-held interpretation that the ''most widely paid rate'' should be the ''definition of first choice'' for the prevailing wage, and that wage determinations should ''mirror, to the extent possible, those rates actually paid in appropriate labor markets.'' 47 FR 23645.

The Department disagrees that the D.C. Circuit's *Donovan* decision precludes a return to the 30-percent threshold or prevents the Department from concluding that an overuse of averages is in tension with the Department's long-held interpretation of the Act. In *Donovan,* the court stated that the majority-only rule was ''within a common and reasonable reading'' of the term prevailing, and ''would not defeat the essential purpose of the statute.'' 712 F.2d at 616–17. The court did not, however, state or even suggest that the majority rule represented the only proper reading of the statute. To the contrary, the court stated that it was upholding the new rule because ''the statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.'' 712 F.2d at 616.

As the Department explained in the NPRM, there has been a significant increase in the use of weighted averages between 1983 and the present—from as low as 15 percent prior to the implementation of the current regulations to 63 percent in the Department's review of 19 recent surveys. Several commenters noted that this increase in the use of averages appears to be far beyond what was expected at the time the Department implemented the majority-only rule and at the time of the D.C. Circuit opinion. For example, the unions that opposed the 1981–1982 rulemaking in court argued that it could result in ''a third or more'' of wage rates based on weighted averages. *Donovan,* 712 F.2d at 616. Now, nearly double that number—two thirds—of prevailing wage rates published from recent surveys have been based on weighted averages. These new circumstances represent a departure from the Department's longstanding interpretation of the Act. 5 Op. O.L.C. at 176–77.

The Department also disagrees with comments suggesting the Department can only justify its return to the 30-percent threshold by finding that the current majority rule is per se not allowed by the statute and suggesting furthermore that the *Donovan* decision bars the Department from reaching that conclusion. As noted, however, the decision in *Donovan* reflects that there can be more than one possible threshold for determining whether a wage rate is prevailing, and that the statute delegates the decision about methodology to the Secretary of Labor. 712 F.2d at 616. The Department has concluded that the original three-step process is preferable to the majority-only rule because it is more consistent with the meaning of the word ''prevailing'' and will be more protective against the depression of wage rates by low-wage contractors. Under these circumstances, the Department does not need to find that the current overuse of averages renders the majority-only rule effectively barred by the statute.

The Department also considered the comments critiquing the interface between the wage survey program and the Department's use of a modal methodology to determine prevailing wages and the use of the 30-percent modal threshold in particular. The Department does not believe it is necessary or preferable to abandon the current Davis-Bacon wage survey process, or to require by regulation that survey data be adjusted with regression or other similar statistical analyses. The process of adjusting survey data using weighting, imputation, or other representative sampling methods would require additional data regarding the universe of projects and classifications of workers—divided by construction type—that does not currently exist and would be overly burdensome and costly to obtain.[50] Moreover, other commenters on the rule specifically opposed the use of sampling or other similar methodologies because the decisions about the underlying assumptions used in the calculations or modeling would give the Department too much discretion that would be difficult for stakeholders to scrutinize. Finally, such sampling or other statistical methods could also significantly increase the likelihood that the wage rates the Department publishes would be akin to weighted averages and would not be wage rates that are actually paid to workers in the relevant areas. The Department declines to impose such requirements in this final rule.

The Department also considered ABC's and others' arguments that it should entirely discontinue the Davis-Bacon wage surveys and instead use data from BLS surveys to determine prevailing wages in the first instance. As ABC recognized in its comment, the Department has explored this possibility on various occasions in the past at the recommendation of the GAO and others. For example, ABC cited a 2004 letter

[50] Similarly, the 2019 OIG report noted WHD officials' concern that using statistical sampling during the clarification process instead of manual reviews of survey data might be less efficient and effective than current processes, and that ''use of statistical sampling in lieu of comprehensive clarification would likely result in the publication of fewer, and less robust, wage determinations.'' Report at 7, 43.

from the Assistant Secretary for Employment Standards, to the Department's OIG, noting the actions the Department had taken to consider this option, including funding pilot surveys to determine the feasibility of collecting fringe benefit data as part of BLS's National Compensation Survey (NCS), and working with BLS to examine the extent to which the Occupational Employment and Wage Statistics (OEWS) survey might provide detailed construction industry wage rate information by locality and occupation.[51]

The Department has repeatedly concluded that relying on BLS data sources to determine prevailing wages instead of continuing to conduct Davis-Bacon wage surveys is not preferable, and the Department again reaches this conclusion. No BLS survey publishes, at a county level, the wage data, fringe benefit data, data for sufficiently specific construction craft classifications, and data by construction type, that would align with the Department's interpretations of the statutory requirements to determine prevailing wages for ''corresponding class[es]'' of workers on ''projects of a character similar'' within ''civil subdivisions of the State'' in which the work is to be performed. 40 U.S.C. 3142(b).[52] The Department does not agree with ABC that the Department's current use of larger geographic groupings under certain conditions suggests that the Department should adopt BLS data that is compiled for areas larger than a county. The scope of consideration regulations at § 1.7 allow the Department to consider data from larger geographic areas only when there is insufficient wage survey data in a given county. This reflects the Department's long-established position that the county level is the appropriate level at which to determine prevailing wage rates where possible, and as such that the wholesale adoption of BLS data compiled for larger areas generally would not be appropriate. The Department also considered whether it would be possible to combine BLS surveys or use underlying BLS microdata instead of the Department's wage surveys but determined that the BLS's methodology does not allow such a procedure because, among other reasons, BLS does not collect data on a project-by-project basis and therefore does not capture circumstances in which employees may be paid different hourly rates for work based on the type of project. Finally, the Department's conclusion is bolstered by the widespread practice of states, many of which have adopted prevailing wage laws, that have likewise determined that wage surveys are an appropriate mechanism to set prevailing wages.[53]

ABC is correct that the Department uses BLS data for wage determinations under the SCA, which has important statutory similarities with the DBA in that it requires payment of wages ''in accordance with prevailing rates in the locality.'' 41 U.S.C. 6703(1). There are several reasons, however, why the Department's decisions have been different under the SCA than under the DBA. The first is that the SCA does not contain the same statutory text as the DBA requiring prevailing wages to be based on ''projects of a character similar.'' 40 U.S.C. 3142(b). This distinction underscores the Department's need to survey DBA wage rates by construction type, a level of detail that does not exist in any BLS data source. In addition, the SCA contains an alternative mechanism that gives weight to collectively bargained rates by requiring them to govern certain successor contracts where the predecessor contract was covered by a CBA. 41 U.S.C. 6703(1).

Comparisons between the DBA and SCA can also be fraught because construction work is significantly different from most service work. As a Professor of Economics at the University of Utah commented on this rulemaking, the construction industry is based on a ''craft classification'' model—in which crafts are understood to be a collection of related skills that allow a craft worker to address a range of jobs as that worker goes from project to project, and which can only be supported with proper investment and skills training. Protecting craft classifications where they prevail was one of the core original purposes of the Davis-Bacon Act. *See* Charles Donahue, ''The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions,'' 29 Law & Contemp. Probs. 488, 508 (1964) (noting the Department's deference to local craft organization in wage determinations because ''[t]o do otherwise would destroy craft lines which the statute seeks to preserve''); *see also Donovan,* 712 F.2d at 625 (noting that Congress was ''quite clear'' in 1935 that it was an ''evasion of the Act'' to break down craft classifications where they prevail). This industrial organization and the legislative history support the Department's stricter approach under the DBRA to protecting actual wage rates that prevail because when those rates are higher than the average wage, they are often higher because they are incorporating apprenticeship and other training costs that are critical for the maintenance of the craft organization of the local construction market.[54] It also explains why the Department does not agree with ABC's suggestions that the Davis-Bacon program should adopt the standardized national Standard Occupational Classification system for identifying construction worker classifications and also abandon the division of wage rates by ''construction type,'' so as to align all Davis-Bacon classifications with the format of BLS program data. Similarly, the differences between the SCA and the DBA and the industry sectors they cover, and the craft-protection focus of the DBA, also explain why the Department does not believe it is appropriate, as ABC suggests, to adopt a single nationwide

[51] Letter from Victoria A. Lipnic, Assistant Secretary for Employment Standards, to Elliot P. Lewis, Assistant Inspector General for Audit (Feb. 18, 2004). Available at: *https://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420x.pdf.*

[52] The BLS OEWS program produces employment and wage estimates for the nation as a whole, for individual states, for metropolitan areas delineated by the Office of Management and Budget (OMB), and nonmetropolitan areas, but it does not produce wage estimates at the county level, which is the default ''civil subdivision'' that the Department uses to determine prevailing wages. *See* Michael K. Lettau and Dee A. Zamora, BLS, ''Wage estimates by job characteristic: NCS and OES program data'' (2013). Available at: *https://doi.org/10.21916/mlr.2013.27.* Additionally, the data for metropolitan and nonmetropolitan areas do not allow for wage rates for occupations by industry. The NCS program provides measures of compensation trends and the incidence of employer-sponsored benefits, but only at the national and Census region levels. The BLS's Quarterly Census of Employment and Wages has data at the county level, but the data are not available by craft. Both the OEWS and NCS programs classify occupations based on job duties and responsibilities that apply nationwide in accordance with the Standard Occupational Classification system. WHD's survey program, on the other hand, has always considered local area practice in determining how work is classified for each occupation.

[53] *See, e.g.,* 26 Me. Rev. Stat. Ann. section 1308 (requiring the Maine Bureau of Labor Standards to determine prevailing wages through a regularly conducted wage and benefits survey); Minn. R. section 5200.1020 (providing for annual surveys to calculate prevailing wages on covered highway and construction projects); Mont. Code Ann. section 18–2–414 (authorizing the Montana Commission of Labor and Industry to either perform a wage survey or adopt the rates set by the United States Department of Labor); Tex. Gov't Code Ann. section 2258.022 (setting the state prevailing wage either through wage surveys or by incorporating the rates set by the United States Department of Labor).

[54] Notwithstanding these differences, under the SCA regulations, the Department also may publish prevailing collectively bargained rates rather than rely on BLS data. *See* 29 CFR 4.51(b) (''Where a single rate is paid to a majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality, that rate is determined to prevail.'').

fringe benefit rate under the DBRA in the same way that it has under the SCA.

ABC commented that the Department should be more flexible with how it analyzes the statutory requirements and find that the statute permits the use of averages or modal approximations derived from statistical modeling rather than revert to the three-step process and retain the current wage survey process. ABC and other commenters also suggested the use of BLS data would have other important benefits. ABC stated that directly using BLS data would improve the timeliness of wage determinations because BLS surveys are updated annually. ABC and the group of U.S. Senators stated that using BLS data would eliminate an impediment preventing small firms from bidding on Davis-Bacon contracts because it would eliminate the problem of missing classifications on wage determinations. The commenters said that such missing classifications can be an impediment for small firms because it is costly and complicated to request conformances. ABC suggested that the Department should consider transferring funding from WHD to BLS by contracting with BLS to provide data, with the additional funding to BLS going to address any ways in which BLS methods are deficient for DBRA purposes.

Having considered these arguments, the Department continues to believe that the best course of action is to adopt the proposed reversion from the majority rule to the three-step process as the methodology for making wage determinations. The Department agrees that it is important to continue seeking ways to improve contractor participation in its voluntary wage surveys, which will have the benefit of increasing sample sizes for wage determinations and making wage determinations possible for more classifications. The Department has initiated a process to revise the wage survey form (WD–10 form) that is used during wage surveys. In that process, it proposed a number of changes in order to decrease the burden on contractors of responding to the survey and lead to higher survey response rates. *See* 87 FR 36152, 36152–53 (June 15, 2022). The Department, through that process, is also considering updates to the directory of classifications that is listed on the form, and to procedures to assist in capturing information about local area practice and industry changes in classifications over time. Thus, the Department does not believe NAPA, NRMPCA, and NSSGA's concerns about outdated classifications is a persuasive reason not to adopt the changes to the methodology of determining prevailing wages from survey data. Collecting more accurate data and returning to the 30-percent threshold are supplementary, not mutually exclusive, means to determining appropriate wage rates. The Department is therefore not only returning to the use of the 30-percent threshold in this final rule, but also will continue to promote greater participation in its surveys and take related steps, such as its revision to the WD–10 form outside this rulemaking, in order to increase the pool of data that is available to determine accurate prevailing wage rates.

While the Department appreciates AGC's suggestions regarding revising the wage survey process to allow contractors to report data for workers more generally instead of on a project-by-project basis, the Department notes that the statute discusses the determination of the prevailing wage on the basis of ''projects of a similar character,'' 40 U.S.C. 3142(b), and that project-by-project reporting promotes accuracy in the survey process because it more readily enables the Department to identify the number of workers that were paid each reported rate (and hence to properly calculate the prevailing wage) in a given area. A data submission consisting solely of the wages and fringe benefits paid generally to a particular classification, particularly if such a submission did not identify how many workers received each identified rate, would at a minimum create challenges and inefficiencies in determining the prevailing wage rate.

The Department also agrees with commenters that addressing timeliness issues and the overuse of conformances are important goals. The use of BLS data, however, could cause its own problems with missing classifications. BLS's OEWS program, for example, uses the Office of Management and Budget's (OMB) Standard Occupational Classification (SOC) system when publishing wage estimates. The SOC system does not include a number of individual classifications that the Department commonly uses to appropriately account for local area practice and the craft system. For example, the Department often issues separate wage rates for Plumbers, Pipefitters, and Steamfitters. The OEWS program only issues a single wage rate in a given locality under SOC code 47–2152 (''Plumbers, Pipefitters, and Steamfitters''). For this reason, the Department believes that ABC's proposal to directly use the SOC system would result in less accurate craft classifications. As discussed further below, in this rulemaking, the Department is adopting new methods of reducing the need for conformances and more frequently updating wage determinations, including through the limited use of BLS data where it can reasonably be used to estimate wage-rate increases in between voluntary surveys. The Department believes these changes, once implemented, will improve the wage determination program without making a significant departure from longstanding interpretations of the statutory text and purpose of the DBRA.

(2) Comments Regarding Costs of the 30-Percent Threshold

In proposing the return to the 30-percent threshold, the Department also considered the other explanations it provided in 1982 for eliminating the rule in the first place—in particular, the potential for a possible upward pressure on wages, contract costs, or prices. In the 1982 final rule, the Department summarized comments stating that the rule is ''inflationary because it sometimes results in wage determination rates higher than the average.'' 47 FR 23644. The Department did not explain exactly what the commenters meant by the term ''inflationary.'' *See id.* Later, the Department stated simply that it ''agree[d] with the criticisms of the 30-percent rule,'' without specifically referencing the wage-inflation concerns. *Id.* at 23645. Later still, in a discussion of the final regulatory impact and regulatory flexibility analysis, the Department estimated that eliminating the 30-percent rule could result in a cost savings of $120 million per year. *Id.* at 23648. The Department then stated that it was adopting the new rule ''not only because it will result in substantial budgetary savings, but also because it is most consistent with the 'prevailing wage' concept contemplated in the legislation.'' *Id.*

In the current rulemaking, many commenters opposing the Department's proposed reversion to the 30-percent threshold, including several housing industry associations and entities, referenced and restated the earlier concerns about an ''inflationary effect.'' ABC and the group of Senators referenced criticism of the 30-percent rule by the GAO in the 1960's and 1970's, including the 1979 report that urged the repeal of the Act as a whole and related congressional hearings in which the GAO referred to the 30-percent rule as resulting in ''inflated wage rates.'' [55] Several commenters

[55] *See Administration of the Davis-Bacon Act, Hearings before the Spec. Subcomm. on Lab. of the H. Comm. on Educ. & Lab.,* 87th Cong. 283 (1962) (testimony of J.E. Welch, Deputy General Counsel,

pointed to two studies finding that prevailing wages under the DBA increase costs to taxpayers. The NAHB pointed to a 2008 study by the Beacon Hill Institute, finding that Davis-Bacon wage determinations increase the cost of Federal construction by ''nearly 10 percent,'' [56] and a study by the Congressional Budget Office (CBO) that estimated a $12 billion reduction in Federal spending from 2019 through 2028 if DBA requirements were not applied to covered projects.[57] CEI, stating that no more recent data is available on the economic impact of the 30-percent rule, cited a 1983 CBO estimate that the DBA's requirements added 3.7 percent to the overall cost of Federal construction projects.[58] They also cited a later estimate from after implementation of the majority rule, estimating that DBA requirements added 3.4 percent to the cost of Federal construction projects.[59] Comparing these two studies, CEI claimed, shows the difference between the 30-percent threshold and the majority-only rule accounts for about 8 percent in the overall cost of complying with the Act (or, presented differently, about 0.3 percent in the total cost of Federal construction projects).

Several commenters, in particular in the residential building industry, expressed general concern that higher labor costs could put some projects at risk of being financially infeasible. The NAHB stated that ''relatively small price increases can have an immediate impact on low-to moderate-income homebuyers and renters who are more susceptible to being priced out of the market.'' According to NAHB, there are already a number of other current difficulties with building housing that the proposed change does not address, including rising costs for materials, an increasingly transient and aging workforce, and the economic impact of COVID–19. The National Association of Housing and Redevelopment Officials (NAHRO) stated that Congress has underfunded affordable and public housing, and that because there is a limited amount of funding for such efforts, the number of units built will go down if costs go up. Because of this, the organization recommended that the HUD programs be excluded from the final rule.

Some commenters stated their opposition to the proposed reversion to the three-step process but appeared to misunderstand that the rule does not require, or always result in, the highest wage rate being identified as prevailing. AFP–I4AW, for example, stated that the 30-percent rule would ''serve to inflate the wage determination by relying only on the highest wage earners in the locality.'' This assumption is not correct. The 30-percent threshold does not distinguish between rates based on whether they are higher or lower. Rather, under the rule, the Department will determine that a wage rate is prevailing if that wage rate is earned by the most workers in a wage survey and if that number is also more than 30 percent of workers in the survey—whether that wage rate is higher or lower than any other wage rate in the survey, and whether it is collectively bargained or not. The Department's review of recent wage surveys suggests that the return to the 30-percent threshold will in some cases result in wage rates that are higher than the currently used average and in other cases lower rates. *See* section V.D.1.ii. This is consistent with the results of the 30-percent threshold when it was last in effect before the 1981–1982 rulemaking. *See* 1979 GAO Report, at 53 (noting the data showed that under the 30-percent rule, where a lower hourly rate prevailed, the Department identified the lower rate as the prevailing rate).

In contrast to the commenters that opposed the proposal, many commenters that supported the proposal argued that the rule would not significantly increase project costs or increase inflation. Several of these commenters noted studies regarding the cost effects of prevailing wage regulations in general. For example, the III–FFC noted that the ''economic consensus'' today is that prevailing wage requirements generally do not raise total construction costs. III–FFC cited a literature review that analyzed the 19 peer-reviewed studies that have been published since 2000 about the impacts of prevailing wage regulations in public construction (together covering more than 22,000 public works projects). *See* Kevin Duncan & Russell Ormiston, ''What Does the Research Tell Us About Prevailing Wage Laws,'' 44 Lab. Stud. J. 139, 141–42 (2018). A significant majority of those peer-reviewed studies did not find evidence that prevailing wages affected overall construction costs. As III–FFC noted, a key driver of this outcome is that contractors on covered projects will tend to hire higher-skilled workers and utilize more capital equipment. *See* William Blankenau & Steven Cassou, ''Industry Differences in the Elasticity of Substitution and Rate of Biased Technological Change between Skilled and Unskilled Labor,'' 43 Applied Econ. 3129–42 (2011); Edward Balistreri, Christine McDaniel, & Eina V. Wong, ''An Estimation of U.S. Industry-Level Capital-Labor Substitution Elasticities: Support for Cobb-Douglas,'' 14 N. Am. J. of Econ. & Fin 343–56 (2003). Other commenters submitted similar research showing that prevailing wages are associated with higher productivity and that labor costs are only a small part of overall project costs in many segments of the construction industry, limiting the impact of any increased wage costs on overall project costs. *See* Frank Manzo & Kevin Duncan, Midwest Econ. Policy Inst., Examination of Minnesota's Prevailing Wage Law: Effects on Costs, Training, and Economic Development 4 (2018); Nooshin Mahalia, Econ. Policy Inst., Prevailing Wages and Government Contracting Costs 3–4 (2008).

Several of these commenters specifically criticized the Department's apparent reliance in 1982 on arguments that the 30-percent rule had an ''inflationary effect.'' These commenters noted that the concerns about an ''inflationary effect'' at the time were drawn from the same 1979 GAO report on which the opponents of the proposal now rely.[60] The Iron Workers, for

General Accounting Office) (''Our experience indicates that the methods and procedures by which minimum wage requirements for Federal and federally assisted construction contracts are established and enforced under present law have not kept pace with the expansion and increased use of such requirements.''); *Oversight Hearing on the Davis-Bacon Act, Before the Subcomm. on Lab. Standards of the H. Comm. on Educ. & Lab.,* 96th Cong. 4 (1979) (testimony of Comptroller General Elmer Staats) and 60–64 (testimony of Secretary of Labor Ray Marshall criticizing GAO methodology).

[56] Paul Bachman, Michael Head, Sarah Glassman, & David G. Tuerck, Beacon Hill Inst., ''The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages,'' (2008). ABC cited this 2008 report, as well as a subsequent Beacon Hill report, which updated it. *See* William F. Burke & David G. Tuerck, Beacon Hill Inst., ''The Federal Davis-Bacon Act: Mismeasuring the Prevailing Wage,'' (2022).

[57] CBO, ''Repeal the Davis-Bacon Act,'' Dec. 13, 2018, *https://www.cbo.gov/budget-options/54786.*

[58] CBO, ''Modifying the Davis-Bacon Act: Implications for the Labor Market and the Federal Budget,'' July 1983, *https://www.cbo.gov/sites/default/files/98th-congress-1983-1984/reports/doc12-entire_0.pdf.*

[59] CBO, ''Toll Funding of U.S. Highways,'' Dec. 1985, *https://www.cbo.gov/sites/default/files/99th-congress-1985-1986/reports/1985_12_tollfinancing.pdf.*

[60] The GAO issued a report in 1979 urging Congress to repeal the Act because of ''inflationary'' concerns. *See* Gov't Accountability Office, HRD–79-18, ''The Davis Bacon Act Should be Repealed'' (1979) (1979 GAO Report). Available at: *https://www.gao.gov/assets/hrd-79-18.pdf.* The report argued that even using only weighted averages for prevailing rates would be inflationary because they could increase the minimum wage paid on contracts and therefore result in wages that were higher than they otherwise would be. The House Subcommittee on Labor Standards reviewed the report during oversight hearings in 1979, but Congress did not amend or repeal the Act, and instead continued to expand its reach. *See, e.g.,* Cranston-Gonzalez National Affordable Housing

Continued

example, noted that in 1979 the Department had strongly criticized the GAO report's statistical methods. In 1979, the Department maintained that the GAO's conclusions lacked ''statistical validity'' because it was methodologically flawed and failed to consider important variables, such as productivity. *See* 1979 GAO Report, at 15. However, in its 1982 rulemaking, the Department did not acknowledge other evidence undermining the GAO's conclusions, or the Department's own prior position that the 1979 GAO report could not be relied upon. Another commenter noted that the GAO itself had conceded that its sample size was insufficient for projecting results with statistical validity. *Id.*

The commenters supporting the Department's current proposed reversion to the 30-percent rule also noted that, whatever its persuasiveness at the time, the 1979 GAO report cannot be relied on now because of its outdated statistical methods and because of the existence of other, more contemporary, evidence undermining its conclusions. Commenters noted that the three main studies relied on by opponents of the 30-percent threshold, including the GAO report, the Department's 1981–1982 regulatory flexibility analysis, and the Beacon Hill studies, were all based on a ''wage differential'' calculation methodology that has been discredited by peer-reviewed scholarship published since the 1981–1982 rulemaking.[61] In a comment, two Professors of Economics argued that ''the results of any study that measures the cost of prevailing wages based on [the wage differential method] should be interpreted with extreme caution and is not suitable as a basis of public policy decisions.'' Commenters noted that more advanced statistical methods than those used by GAO have since established that in the construction industry, the substitution of lower-wage and lower-skilled workers for higher-paid and higher-skilled workers does not necessarily reduce project costs because the lower productivity of lower-skilled workers can offset incrementally higher wages paid to more-skilled workers.[62] That is why, they asserted, the preponderance of peer-reviewed studies conclude that prevailing wage laws as a whole have little or no effect on overall project costs.[63] Given the evidence for prevailing wage laws as a whole, the commenters expressed skepticism that the return to the 30-percent rule would have an effect on project costs.

The Department agrees with those commenters that found the 1979 GAO Report and the Department's 1981–1982 analysis unpersuasive. The Department does not believe that these analyses are reliable or accurate.[64] For example, the Department's 1981–1982 analysis did not consider labor market forces that could prevent contractors from lowering wage rates in the short run. The analysis also did not attempt to address productivity losses or other costs of setting a lower minimum wage, such as higher turnover and a reduced ability to recruit high-skilled workers. For these reasons, the Department does not believe that the analysis in the 1982 final rule implies that the current proposed reversion to the 30-percent rule would have a significant impact on contract costs. Moreover, even if the Department were to rely on this analysis as an accurate measure of impact, such purported cost savings (adjusted to 2019 dollars) would only amount to approximately two-tenths of a percent of total estimated covered contract costs.

The two CBO reports from 1983 and 1985 cited in a comment by CEI are not persuasive for the same reason. The 1983 CBO study projected that the elimination of the 30-percent rule would save an average of $112 million per year from 1984 to 1988. *Id.* at 36. That report, however, was based on the Department's own analysis in the 1981–1982 rulemaking, *id.* at xii, which was flawed as previously noted. The 1985 CBO report did not contain an independent analysis and simply cited to the 1983 report. *See* 1985 CBO Report, at 16 n.2. Thus, the reports provide no additional helpful evidence and instead suffer from the same analytical problems as the Department's own 1981–1982 study and other simple wage-differential analyses.[65]

After considering the available data, and assuming for the purposes of this discussion that costs are in fact a permissible consideration in defining the term ''prevailing wage,'' the Department is not persuaded that returning to the 30 percent threshold will cause a meaningful increase in Federal construction costs. Based on the Department's demonstration in the economic analysis of what the prevailing wage would be after applying the 30-percent threshold to a sample of recently published prevailing wage rates, the Department found no clear evidence of a systematic increase in the prevailing wage sufficient to affect prices across the economy. The illustrative analysis in section V.D. shows returning to the 30-percent rule will significantly reduce the reliance on the weighted average method to produce prevailing wage rates. Applying the 30-percent threshold, some prevailing wage determinations may increase and others may decrease, but the magnitude of these changes will, overall, be negligible. Even where wage determinations may increase, the Department is persuaded by recent peer-reviewed research, which generally has not found a significant effect from wage increases related to prevailing wage requirements on the total construction costs of public works projects.

For similar reasons, the Department is not persuaded that the reversion to the 30-percent threshold would have any impact on national inflation rates. Several commenters, including CEI and certain members of Congress, stated that the Department's proposal is ill-timed because of the current levels of

Act, Public Law 101–625, Sec. 811(j)(6), 104 Stat. 4329 (1990); Energy Independence and Security Act of 2007, Public Law No, 110–140, Sec. 491(d), 121 Stat. 1651 (2007); American Recovery and Reinvestment Act, Public Law 111–5, Sec. 1606, 123 Stat. 303 (2009); Consolidated Appropriations Act of 2021, Public Law 116–260, Sec. 9006(b), 134 Stat. 1182 (2021).

[61] *See* Kevin Duncan & Russell Ormiston, ''What Does the Research Tell Us About Prevailing Wage Laws,'' 44 Lab. Stud. J. 139, 141–42 (2018). The Beacon Hill Report was not peer-reviewed. *Id.* at 141. The 2022 Beacon Hill Report uses the same methodology as the 2008 Beacon Hill Report.

[62] *See* William Blankenau & Steven Cassou, ''Industry Differences in the Elasticity of Substitution and Rate of Biased Technological Change between Skilled and Unskilled Labor,'' 43 Applied Econ. 3129–42 (2011); Edward Balistreri, Christine McDaniel, & Eina V. Wong, ''An Estimation of U.S. Industry-Level Capital-Labor Substitution Elasticities: Support for Cobb-Douglas,'' 14 N. Am. J. of Econ. & Fin 343–56 (2003).

[63] *See* Duncan & Ormiston, *supra* note 61, at 142–48 (collecting peer-reviewed studies).

[64] The Department has not attempted to assess the relative accuracy of the $120 million estimate over the decades, which would be challenging given the dynamic nature of the construction industry and the relatively small impact of even $120 million in savings. The Department at the time acknowledged that its estimate had been heavily criticized by commenters and was only a ''best guess''—in part because it could not foresee how close a correlation there would be between the wage rates that are actually paid on covered contracts and the wage determinations that set the Davis-Bacon minimum wages. 47 FR 23648.

[65] The 1983 CBO study acknowledged these issues. It noted that the 1979 GAO study had been questioned because of inadequate sample sizes, the choice of projects covering small volumes of construction, and inappropriate assumptions. *See* 1983 CBO Report, at 48. It also noted that ''questions have been raised regarding the general approach of translating wage increases directly into cost increases.'' Such an approach, the report notes, ''may be incorrect . . . to the extent that workers at different wage levels may not be equally productive.'' *Id.* at 48–49. The 2018 CBO projection that NAHB cites does not explain its methodology, but it estimates savings from eliminating the entire Davis-Bacon Act as amounting to only 0.8 percentage points in project costs associated with a reduction in wages and benefits. *See supra* note 57, *https://www.cbo.gov/budget-options/54786.*

economy-wide inflation and the risks of a wage-price spiral. Returning to the 30-percent rule, CEI claimed, ''would likely contribute to the pressures'' that could create such a spiral. Although CEI referenced the 1983 CBO Report to support its argument that the 30-percent threshold would increase construction costs, CEI did not note the conclusion in that study that the DBA as a whole ''seems to have no measurable effect on the overall rate of inflation.'' 1983 CBO Report, at xii, 30–31.

One individual commenter asserted that the Department should be required to consider not only whether the 30-percent rule can alone cause inflation, but also whether the proposal, in combination with other regulatory and spending measures, would have an effect on inflation and what that effect would be. The commenter stated that the infusion of Federal infrastructure spending from the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58, will likely lead to substantial compensation premiums for construction workers. The commenter stated that such wage increases would occur ''because a sudden increase in federal infrastructure spending does not necessarily lead to a commensurate increase in construction sector employment.''

The Department disagrees that this rule will substantially impact inflation. As noted, the Department's illustrative analysis in section V.D. suggests that the reimplementation of the 30-percent threshold will result in some prevailing wage determinations increasing and others decreasing, but the magnitude of these changes will, overall, be negligible. In addition, even if this rule leads to an increase in some required prevailing wage rates, it will not have an equal impact on actual wages paid to workers on DBRA-covered contracts, because some workers may already be earning above the new prevailing wage rate.

If wages for potentially affected workers were to increase, the Department does not believe that it would lead to inflation. Recent research shows that wage increases, particularly at the lower end of the distribution, do not cause significant economy-wide price increases.[66] For example, a 2015 Federal Reserve Board study found little evidence that changes in labor costs have had a material effect on price inflation in recent years.[67] Even in the recent period of increased inflation, there was little evidence that the inflation was caused by increases in wages. A study of producer price inflation and hourly earnings from December 2020 to November 2021 found that inflation and wage growth were uncorrelated across industries.[68] Additionally, as two Professors of Economics commented, ''since prevailing wages are not associated with increased construction costs, there is no reason to assume that the policy causes inflation in the macroeconomy.''

More importantly, DBRA-covered contracts make up a small share of overall economic output. Because federally-funded construction only makes up approximately 13 percent of total construction output and the number of potentially affected workers (1.2 million) is less than 1 percent of the total workforce, the Department does not believe that any wage increase associated with this rule would significantly increase prices or have any appreciable effect on the macroeconomy.[69]

In sum, the factual conclusions about ''inflationary effects'' underlying the 1982 elimination of the 30-percent rule are no longer supportable because they have been discounted over the past 40 years by more sophisticated analytical tools. Furthermore, the available evidence does not suggest that concerns about the 30-percent threshold increasing project costs or national inflation rates are justified.

The Department also considered the comments that express concern about whether the 30-percent threshold may affect certain sectors or areas, and the residential construction industry in particular, differently than the national economy as a whole. As they are for other types of construction, respectively, prevailing wage rates for DBRA-covered residential construction are based on WHD wage surveys of residential construction projects. Residential construction can be distinguished from other construction types in several important ways: it tends to be less capital- and skill- intensive and thus generally has fewer barriers to entry for firms as well as for workers, projects tend to be of smaller and shorter duration, workers tend to move more often between firms, and firms tend to provide less training.[70] Wages also tend to be lower in residential construction than in nonresidential construction types, and unionization rates have historically been lower. Because of lower unionization rates in the residential construction industry, where the methodology for determining prevailing rates is based on the mode (whether majority or 30-percent threshold), the rates that prevail are more likely to come from non-union wage rates than from higher, collectively bargained rates. As a result, in comparison to other construction types, it is less likely—not more likely—that the 30-percent threshold will result in increases in prevailing wage rates on residential construction projects. However, in the more limited circumstances in which residential construction rates may change from averages to rates based on CBAs, the increases in wage rates could be larger given the generally lower wage floors in the industry.[71]

Moreover, even if implementation of the proposal were to lead in some areas to increased wages, and even assuming those increased wages resulted in increased project costs for federally financed residential construction, the

[66] *See, e.g.,* J.P. Morgan, ''Why Higher Wages Don't Always Lead to Inflation'' (Feb. 7, 2018), available at: *https://www.jpmorgan.com/commercial-banking/insights/higher-wages-inflation*; Daniel MacDonald & Eric Nilsson, ''The Effects of Increasing the Minimum Wage on Prices: Analyzing the Incidence of Policy Design and Context,'' Upjohn Institute working paper; 16–260 (June 2016), available at *https://research.upjohn.org/up_workingpapers/260/*; Nguyen Viet Cuong, ''Do Minimum Wage Increases Cause Inflation? Evidence from Vietnam,'' ASEAN Economic Bulletin Vol. 28, No. 3 (2011), pp. 337–59, available at: *https://www.jstor.org/stable/41445397*; Magnus Jonsson & Stefan Palmqvist, ''Do Higher Wages Cause Inflation?,'' Sveriges Riksbank Working Paper Series 159 (Apr. 2004), available at: *http://archive.riksbank.se/Upload/WorkingPapers/WP_159.pdf*; Kenneth M. Emery & Chih-Ping Chang, ''Do Wages Help Predict Inflation?,'' Federal Reserve Bank of Dallas, Economic Review First Quarter 1996 (1996), available at: *https://www.dallasfed.org/~/media/documents/research/er/1996/er9601a.pdf*.

[67] Ekaterina V. Peneva & Jeremy B. Rudd, ''The Passthrough of Labor Costs to Price Inflation,'' Federal Reserve Board (2015), available at: *https://www.federalreserve.gov/econres/feds/the-passthrough-of-labor-costs-to-price-inflation.htm*.

[68] Josh Bivens, ''U.S. Workers Have Already Been Disempowered in the Name of Fighting Inflation,'' Figure A, Economic Policy Institute (Jan. 2022), available at: *https://www.epi.org/blog/u-s-workers-have-already-been-disempowered-in-the-name-of-fighting-inflation-policymakers-should-not-make-it-even-worse-by-raising-interest-rates-too-aggressively/*.

[69] Federally funded construction as a share of total construction output can be calculated from the data in Table 3 ($216,700,000,000 ÷ $1,667,000,000,000 = 0.13). The estimate of 1.2 million potentially affected workers is calculated in section V.B.2.

[70] *See* Russell Ormiston et al., ''Rebuilding Residential Construction,'' in Creating Good Jobs: An Industry-Based Strategy 75, 78–79 (Paul Osterman ed., 2020).

[71] Although the transfer analysis presented in Section V.D.1 is simply illustrative and may not be representative of the impact of this rule, the results of this analysis reflect that only 5 percent of the residential fringe benefit rates analyzed were affected by the reversion to the 30-percent threshold, compared to 14 percent of building fringe rates, 19 percent of heavy fringe rates and 23 percent of highway fringe rates. In those limited circumstances where residential fringe rates were affected, however, they tended to increase more significantly given their largely nonunion baseline.

effects on overall housing prices or rents would not be significant. DBRA-covered construction makes up only a very small percentage of the total new construction in the residential construction market—only 1 percent as of July 2022.[72] And, annual new residential construction itself tends to be less than 1 percent of all available residential units.[73] Among the residential construction covered by the DBRA, many projects would be unaffected by the proposed reversion to the 30-percent threshold. The Department's illustrative analysis suggests that the proposal would only affect the methodology for approximately one-third of new wage determinations, and of those, some would result in decreases in the required wage rate, not an increase. *See* section V.D.1.ii.[74] The most reasonable conclusion is that any limited potential increase in some construction costs for such a small percentage of the residential market would not affect housing prices or rents generally.[75]

The Department also considered the concerns commenters raised about the construction of publicly funded affordable housing in particular. In a comment, two Professors of Economics said that three studies have found that the application of prevailing wage laws in general may be correlated with increased project costs for affordable housing projects.[76] But, for two reasons, these studies are of limited value for forecasting the effects of reversion to the 30-percent rule. First, as noted, the Department's illustrative analysis of the effects of the 30-percent threshold, which included residential construction survey data, does not show a systematic increase in prevailing wage rates. Second, the peer-reviewed studies showing potential increased project costs on affordable housing projects do not compare different prevailing wage methodologies, but instead compare whether projects are either covered or not covered at all by prevailing wage requirements. Where studies compare the existence of prevailing wage requirements at all (as opposed to a simple change in wage determination methodologies), other factors can explain project cost increases.[77]

The Department also considered the comments regarding the potential effects of economic conditions that may result from increased infrastructure spending. While it is true that increases in construction spending can lead to increases in construction wage rates in the short run,[78] this potential does not suggest the Department's proposal is unwarranted. Under the 30-percent threshold, as under the current majority rule or any other measure of prevailing wages, wage determinations will and should generally reflect increases in wage rates that result from separate policy decisions by Federal, State, or Local governments, or other macro-economic phenomena. The commenters did not suggest, and the Department did not identify, any specific mechanism through which the 30-percent threshold would interact with construction spending increases in a way that would materially affect the results of the Department's illustrative analyses or suggest outcomes other than those supported by the peer-reviewed literature. Finally, the prevailing wage methodology in this rule is not a short-term policy; it is intended to apply during timeframes when public infrastructure spending is lower, as well as those when it is higher, and during all phases of the construction industry business cycle.

Finally, the Department disagrees with NAHB that the proposal should be withdrawn because, among other reasons, the proposal does not address certain challenges in the residential building industry, including ''an increasingly transient and aging workforce, increased building costs resulting from supply shortages, and the economic impact of COVID–19, among other things.'' NAHB explains, in addition, that the residential construction industry has been ''suffering from a skilled labor shortage for many years.'' The Department agrees with NAHB that these topics are important for policymakers to consider. NAHB does not explain why the methodology for determining the prevailing wage under the DBRA is relevant to addressing these challenges, or why a methodology other than the Department's proposed reversion to the three-step process would be more beneficial. However, to the extent that the 30-percent threshold could increase wage rates in some areas, as NAHB also asserts, such an outcome would be beneficial to the industry by attracting more workers to the construction labor market and allowing required prevailing wages to more often support the maintenance of apprenticeship and training costs that will contribute to the expansion of the skilled workforce.

In addition to all of these factual arguments about whether costs or inflation may increase, however, several unions and contractor associations argued that the Department should not be permitted as a legal matter to consider contract costs or other similar effects of any wage increases when it determines the proper prevailing wage methodology. The United Brotherhood of Carpenters and Joiners of America (UBC) and NABTU argued that the Department's apparent goal in 1981–1982 of reducing construction costs was not consistent with the purpose of the Act. NABTU stated that such a reliance on cost considerations was arbitrary and capricious under the Supreme Court's decision in *Motor Vehicle Manufacturers Ass'n of the United States* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983) (*State Farm*), because it relied on a factor (cost) that Congress had not intended to be considered. To the contrary, commenters noted, statements in the legislative history suggest that Congress's ''chief concern'' was ''to maintain the wages of our workers and to increase them wherever possible.'' 74 Cong. Rec. 6513 (1931) (remarks of Rep. Mead); *see also United States* v. *Binghamton Constr. Co.,* 347 U.S. 171, 176–77 (1954) (noting that the legislative history demonstrates that the DBA was ''not enacted for the benefit of contractors, but rather to protect their employees from substandard earnings'').

The Department agrees with these commenters that there is a legitimate question as to whether it would be appropriate to use a methodology that is

[72] According to the Census Bureau, the Seasonally Adjusted Annual Value of Private Residential Construction Put in Place, as of July 2022, was $920.4 billion; public residential construction was $9.3 billion. *https://www.census.gov/construction/c30/c30index.html.*

[73] *See* U.S. Census Bureau, National and State Housing Unit Estimates: 2010 to 2019, *https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-housing-units.html*,

[74] There are additional reasons why increasing labor costs do not have a one-to-one correlation with housing and rent prices. In recent decades, housing prices have significantly outpaced real construction costs. *See* Joseph Gyourko & Raven Molloy, ''Regulation and Housing Supply,'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 20536, 2014), *https://www.nber.org/system/files/working_papers/w20536/w20536.pdf.* Gyourko and Molloy conclude that, as a general matter, labor and material costs do not appear to act as a major constraint on residential development, in comparison to land-use policy constraints.

[75] In addition, the reversion to the 30-percent threshold will not result in any wage increases in the short-term. Any effect on wage increase will only occur after wage new residential construction-type surveys are initiated and completed, and then wage determinations based on those surveys are incorporated into new construction contracts.

[76] *See also* Duncan & Ormiston, *supra* n. 61, at 142–48 (discussing peer-reviewed studies).

[77] For example, cost differences may be attributable in part to reductions in independent-contractor misclassification, failure to pay overtime, and other basic wage violations that are disincentivized because of the prevailing-wage requirement to submit certified payroll. *Id.* at 146.

[78] One commenter suggested that increased infrastructure spending could lead to an increase in demand for construction workers, and that the supply of skilled workers might not be commensurate in the short term, which could lead to an increase in wage rates.

less consistent with the definition of ''prevailing wage'' in order to reduce contract costs. Such a determination would not seem to be consistent with Congressional intent. As Solicitor Donahue testified in the 1962 hearings on the Act, ''Congress has not injected a cost factor into the Davis-Bacon Act as one of the standards to be used in determining which wage rates will apply.'' [79] The ''basic purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase costs to the [F]ederal [G]overnment.'' *Bldg. & Constr. Trades Dep't,* 543 F. Supp. at 1290. Congress considered cost concerns and enacted and expanded the DBA notwithstanding them. *Id.* at 1290–91; 1963 House Subcommittee Report, at 2–3; Reorganization Plan No. 14 of 1950, 15 FR 3176, 5 U.S.C. app. 1.[80]

Thus, even if concerns about an inflationary effect on government contract costs or speculative effects on the national macro economy were used to justify eliminating the 30-percent rule in 1982, the Department does not believe such reasoning now provides a persuasive factual basis or legal requirement to maintain the current majority rule. While the Department agrees with the commenters that are skeptical about the permissibility of considering costs or cost effects at all in deciding the appropriate definition of ''prevailing,'' the Department considered these cost-related arguments nonetheless and does not find them convincing, given the weakness of the wage-differential analyses on which they are based. However, even if the reversion to the 30-percent rule were to add 0.3 percent to total Federal construction contract costs (as CEI estimates and the Department disputes), and have idiosyncratic cost effects in certain localities or construction types, the Department would still conclude that this is the better course in order to more often ensure that the prevailing wage rates incorporated into covered contracts are rates that are actually paid to workers in an area and that are therefore, on balance, more protective of local construction wage rates.[81]

The Department also considered whether the 30-percent threshold gives ''undue weight'' to collectively bargained rates. In the 1982 final rule, the Department noted criticism of the 30-percent rule on that basis, and later—though without specifically discussing the issue—the Department stated generally that it agreed with the comments criticizing the rule. Now, certain commenters opposing the Department's proposal to return to the 30-percent rule have made similar arguments. ABC pointed to the phenomenon of ''wage dispersion,'' which affects non-union contractors more than it does union contractors. According to ABC, non-union contractors more often base compensation on skills or productivity rather than job category, unlike union contractors. Thus, they argue, union contractors are more likely than non-union contractors to pay their workers the same rate.[82] AFP–I4AW commented that nothing in the NPRM contradicts the conclusion in 1982 that the 30-percent rule gives undue weight to collectively bargained rates.

On the other hand, commenters supporting a return to the 30-percent rule criticized the reasoning in 1982 that the 30-percent rule provided ''undue weight'' to collectively bargained rates. These commenters argued that this reasoning was a symptom of anti-union bias and had no basis in the statute. The Iron Workers quoted the 1962 congressional testimony of Solicitor of Labor Charles Donahue regarding the interface between the rule and union rates. As Solicitor Donahue pointed out, the 30-percent rule did not uniformly lead to the identification of union rates as prevailing, but, in any case, the question of whether union or non-union contractors are disadvantaged by the Department's prevailing wage determinations is not something that the Department should be properly taking into consideration in making its wage determinations.[83] In a related comment, two Professors of Economics noted that the potential for union rates being identified as the prevailing rate does not necessarily mean that project costs will increase. The comment cited several peer-reviewed studies that found no statistically significant cost difference between projects built with prevailing rates based on union rates and projects that were not.[84]

The Department is no longer persuaded that the 30-percent threshold gives undue weight to collectively bargained rates or that whatever weight it gives to collectively bargained rates is a convincing basis to maintain the status quo. The underlying concern in 1982 was, as ABC explained, that identification of a modal prevailing wage could give more weight to union rates that more often tend to be the same across companies. If this occurs, however, it is a function of the statutory term ''prevailing,'' which, as both the Department and OLC have concluded, refers to a predominant modal wage rate. If a modal methodology with a modal threshold is used, then the modal threshold—regardless of the number used—may on balance be more likely to be satisfied by collectively bargained rates than by non-collectively bargained rates. Said differently, the same weight is given to collectively bargained rates whether the Department chooses a 50-percent or 30-percent threshold; thus any ''undue weight'' to collectively bargained rates should not be a basis for distinguishing between these two thresholds. The Department, accordingly, now understands the concerns about undue weight to collectively bargained rates to be concerns about the potential outcome (of more wage determinations based on collectively bargained rates) instead of concerns about any actual weight given to collectively bargained rates by the choice of the modal threshold. To choose a threshold because the outcome would be more beneficial to non-union contractors—as the Department seems to have suggested it was doing in 1982—does not have any basis in the statute. *Donovan,* 543 F. Supp. at 1291 n.16 (noting that the Secretary's concern about weight to collectively bargained rates ''bear[s] no relationship to the purposes of the statute'').

The Department also notes that there appears to be confusion among some

[79] A*dministration of the Davis-Bacon Act: Hearings before the Spec. Subcomm. Of Lab. Of the H. Comm. On Educ. & Lab.,* 87th Cong. 153 (1962).

[80] In his message accompanying Reorganization Plan No. 14, President Truman noted that ''[s]ince the principal objective of the plan is more effective enforcement of labor standards, it is not probable that it will result in savings. But it will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.'' 15 FR 3176; 5 U.S.C. app. 1.

[81] The Department also considered NAHRO's narrower suggestion that HUD programs should be excepted from the final rule because of concerns about potential cost impacts on affordable housing development. As discussed, the Department disagrees with the assertion that the reversion to the 30-percent threshold will necessarily raise costs to affordable housing projects in a significant or systematic manner so as to suggest the threshold should not be applied.

[82] *See also* 1979 GAO Report, at 52 (describing the difference between CBA pay scales and non-union contractor pay practices).

[83] *Administration of the Davis Bacon Act: Hearings before the Spec. Subcomm. of Lab. of the H. Comm. on Educ. & Lab.,* 87th Cong. 819–20 (1962) (statement and submission of Charles Donahue, Solicitor of Labor).

[84] *See* Lamek Onsarigo et al., ''The Effect of Prevailing Wages on Building Costs, Bid Competition, and Bidder Behaviour: Evidence from Ohio School Construction,'' 38 Constr. Mgmt. & Econ. 917 (2020); Kevin Duncan & Jeffrey Waddoups, ''Unintended Consequences of Nevada's Ninety-Percent Prevailing Wage Rule,'' 45 Lab. Stud. J. 166 (2020); Jaewhan Kim et al., ''The Effect of Prevailing Wage Regulations on Contractor Bid Participation and Behavior: A Comparison of Palo Alto, California with Four Nearby Prevailing Wage Municipalities,'' 51 Indus. Rels. 874 (2012).

commenters about what it means when the prevailing wage in a wage determination is set based on a collectively bargained wage rate. A comment on the Department's proposal from the group of U.S. Senators characterized the 1982 rule as having changed the definition of prevailing wage ''to allow open-shop contractors to bid on DBRA covered contracts on an equal footing with their unionized counterparts.'' This description seems to conflate the basis of a wage determination with its effect on competition. Whether wage determinations are based on collectively bargained rates or on non-collectively bargained rates, both non-union and union contractors are on similar footing in that they have similar notice of the Department's wage determinations and are required to pay at least the same specified minimum rates. *See* 74 Cong. Rec. 6510 (1931) (Statement of Rep. Bacon) (''If an outside contractor gets the contract . . . it means that he will have to pay the prevailing wages, just like the local contractor.'').[85] To the extent that a non-union contractor has to pay higher rates on a contract than it would have paid without the prevailing wage requirement, it is not unfairly harmed because all other bidders are required to pay at least the same prevailing rate.[86]

Regardless, the Department's regulatory impact analysis does not suggest that a return to the 30-percent rule would give undue weight to collectively bargained rates. Among a sample of rates considered in an illustrative analysis, one-third of all rates (or about half of rates currently established based on weighted averages) would shift to a different method. Among these rates that would be set based on a new method, the majority would be based on non-collectively bargained rates. In the illustrative example, the Department estimates that the use of single (modal-based) prevailing wage rates that are not the product of CBAs would increase from 12 percent to 36 percent of all wage rates—an overall increase of 24 percentage points. *See* Table 6, section V.D.1.ii. The use of modal wage rates that are based on CBAs would increase from 25 percent to 34 percent—an overall increase of 9 percentage points. *Id.*[87]

Having considered the comments both for and against the Department's proposed reversion to the three-step process for determining the prevailing wage, the final rule adopts the amended definition of prevailing wage in § 1.2 of the regulations as proposed.

(3) Former § 1.2(a)(2)

In a non-substantive change, the Department proposed to move the language currently at § 1.2(a)(2) that explains the interaction between the definition of prevailing wage and the sources of information in § 1.3. The Department proposed to move that language (altered to update the cross-reference to the definition of prevailing wage) to the introductory section of § 1.3. The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

(4) Variable Rates That Are Functionally Equivalent

The Department also proposed to amend the regulations on compiling wage rate information at § 1.3 to allow for variable rates that are functionally equivalent to be counted together for the purpose of determining whether a wage rate prevails under the proposed definition of ''prevailing wage'' in § 1.2. The Department generally followed this proposed approach until after the 2006 decision of the ARB in *Mistick Constr.,* ARB No. 04–051, 2006 WL 861357.

Historically, when reviewing wage survey data, the Department has considered wage rates that may not be exactly the same to be functionally equivalent—and therefore counted as the same—as long as there was an underlying logic that explained the difference between them. For example, some workers may perform work under the same labor classification for the same contractor or under the same CBA on projects in the same geographical area being surveyed and get paid different wages based on the time of day that they performed work—*e.g.,* a ''night premium.'' In that circumstance, the Department would count the normal and night-premium wage rates as the ''same wage'' rate for purposes of calculating whether that wage rate prevailed under the majority rule that is discussed in § 1.2. Similarly, where workers in the same labor classification were paid different ''zone rates'' for work on projects in different zones covered by the same CBA, the Department considered the difference between those rates to be compensating workers for the burden of traveling or staying away from home instead of reflecting fundamentally different underlying wage rates for the work actually completed. Variable zone rates would therefore be considered the ''same wage'' for the purpose of determining the prevailing wage rate.

In another example, the Department took into consideration ''escalator clauses'' in CBAs that may have increased wage rates across the board at some point during the survey period. Manual of Operations (1986), at 58–59. Wages for workers working under the same CBA could be reported differently on a survey solely because of the week their employer used in responding to the wage survey rather than an actual difference in prevailing wages. The Department has historically treated such variable rates the same for the purposes of determining the prevailing wages paid to laborers or mechanics in the survey area. *Id.* The Department has also considered wage rates to be the same where workers made the same combination of basic hourly rates and fringe rates, even if the basic hourly rates (and also the fringe rates) differed slightly.

In these circumstances, where the Department has treated certain variable rates as the same, it has generally chosen one of those rates to use as the

[85] As the AGC noted in a comment, the same is not necessarily true when the prevailing wage rate is set below a collectively bargained wage rate, as contractors bound by CBAs may not be able to pay their workers less than the collectively bargained rate on a covered project, while a non-union contractor could. For this reason, another commenter that is a member of a larger contractor association asserted the belief that its association was taking a position against the proposal because non-union contractors ''do not appear to want to compete on a level playing field by paying rates consistent with the determination. Rather, their position indicates they prefer to be able to undercut the wage/benefit determination by paying rates below these to gain an advantage over competitors.'' Thus, to the extent that eliminating the 30-percent rule in 1982 led to a decrease in the use of collectively bargained rates to set the prevailing wage, the effect was not to place non-union contractors on ''equal footing'' as union contractors, but to give non-union contractors an advantage.

[86] As the Department explains in section V.F.1., significant benefits flow from ensuring that as many contractors as possible can bid on a contract. One study on the impact of bid competition on final outcomes of State department of transportation construction projects, demonstrated that each additional bidder reduces final project cost overruns by 2.2 percent and increases the likelihood of achieving a high-quality bid by 4.9 times. *See* Delaney, J. (2018). ''The Effect of Competition on Bid Quality and Final Results on State DOT Projects.'' *https://www.proquest.com/openview/33655a0e4c7b8a6d25d30775d350b8ad/1?pq-origsite=gscholar&cbl=18750.*

[87] As discussed in the regulatory impact analysis, the Department found that fringe benefits currently do not prevail in slightly over half of the classification-county observations it reviewed—resulting in no required fringe benefit rate for that classification. *See* Table 6, section V.D.1.ii. This would be largely unchanged under the proposed reversion to the three-step process, with nearly half of classification rates still not requiring the payment of fringe benefits. Only about 13 percent of fringe rates would shift from no fringes or an average rate to a modal prevailing fringe rate. Overall, under the estimate, the percentage of fringe benefit rates based on CBAs would increase from 25 percent to 34 percent. The percentage of fringe benefit rates not based on collective bargaining rates would increase from 3 percent to 7 percent.

prevailing rate. In the case of rates that are variable because of an escalator-clause issue, it uses the most current rate under the CBA. Similarly, where the Department identified combinations of hourly and fringe rates as the ''same,'' the Department previously identified one specific hourly rate and one specific fringe rate that prevailed, following the guidelines in 29 CFR 5.24, 5.25, and 5.30.

In 2006, the ARB strictly interpreted the regulatory language of § 1.2(a) in a way that limited some of these practices. *See Mistick Constr.,* ARB No. 04–051, 2006 WL 861357, at *5–7. The decision affirmed the Administrator's continued use of the escalator-clause practice; but the ARB also found that the combination of basic hourly and fringe rates did not amount to a single ''wage,'' and thus the payment of the same combination of hourly and fringe rates could not justify a finding that the ''same wage,'' as used in § 1.2(a), had been paid. *Id.* The ARB also viewed the flexibility shown to CBAs as inconsistent with the ''purpose'' of the 1982 final rule, which the Administrator had explained was in part to avoid giving ''undue weight'' to collectively bargained rates. *Id.* The ARB held that, with the exception of escalator clauses, the Administrator could not consider variable rates under a CBA to be the ''same wage'' under § 1.2(a) as the regulation was written. *Id.* If no ''same wage'' prevailed under the majority rule for a given classification, the Administrator would have to use the fallback weighted average to determine the prevailing wage. *Id.* at * 7.

The ARB's conclusion in *Mistick*—particularly its determination that even wage data reflecting the same aggregate compensation but slight variations in the basic hourly rate and fringe benefit rates did not reflect the ''same wage'' as that term was used under the current regulations—could be construed as a determination that wage rates need to be identical ''to the penny'' in order to be regarded as the ''same wage,'' and that nearly any variation in wage rates, no matter how small and regardless of the reason for the variation, might need to be regarded as reflecting different, unique wage rates.

The ARB's decision in *Mistick* limited the Administrator's methodology for determining a prevailing rate, thus contributing to the increased use of weighted average rates. As noted in the discussion of the definition of ''prevailing wage'' in § 1.2, however, both the Department and OLC have agreed that averages should generally only be used as a last resort for determining prevailing wages. *See* section III.B.1.ii.A. As the OLC opinion noted, the use of an average is difficult to justify, ''particularly in cases where it coincides with *none* of the actual wage rates being paid.'' 5 Op. O.L.C. at 177.[88] In discussing those cases, OLC quoted from the 1963 House Subcommittee Report summarizing extensive congressional oversight hearings of the Act. *Id.* The report had concluded that ''[u]se of an average rate would be artificial in that it would not reflect the actual wages being paid in a local community,'' and ''such a method would be disruptive of local wage standards if it were utilized with any great frequency.'' *Id.*[89] To the extent that an inflexible approach to determining if wage data reflects the ''same wage'' promotes the use of average rates even when wage rate variations are based on CBAs or other written policies reflecting that the rates, while not identical, are functionally equivalent, such an approach would be inconsistent with these authorities and the statutory purpose they reflect.

As reflected in *Mistick,* the existing regulation does not clearly authorize the use of functionally equivalent wages to determine the local prevailing wage. *See* ARB No. 04–051, 2006 WL 861357, at *5–7. Accordingly, the Department proposed in the NPRM to amend § 1.3 to include a new paragraph at § 1.3(e) that would permit the Administrator to count wage rates together—for the purpose of determining the prevailing wage—if the rates are functionally equivalent and the variation can be explained by a CBA or the written policy of a contractor.

The Department received a number of comments from unions and contractor associations that supported the proposed new language in § 1.3(e). These commenters noted that there are various ways that CBAs and management decisions can create slight compensation variations that may reflect special circumstances and not simply different wages paid for the same underlying work. NABTU explained that the same principle explains why the Department does not count an overtime premium as a separate wage rate from the worker's base hourly rate for the purpose of calculating the prevailing wage.

The commenters in favor of the Department's proposal asserted that the reversion to the pre-*Mistick* practice of counting functionally equivalent rates as the same is consistent with the DBA's legislative history and the Department's longstanding preference for prevailing wages that reflect actual wages paid to workers instead of artificial averages. According to these commenters, the *Mistick* decision led to an increase in the unnecessary use of average rates for wage determinations, and it failed to adequately capture and reflect local area practice. *See Fry Bros. Corp.,* WAB No. 76–06, 1977 WL 24823, at * 6.[90] One commenter, MCAA, also asserted that the decision in the *Mistick* case was based on a ''non-statutory aim, if not animus, of limiting the impact of CBA rates in the process.''

Conversely, ABC and several of its members stated that the Department's proposal conflicts with the Department's intended definition of ''prevailing wage'' and contradicts the ARB's *Mistick* decision. Numerous other contractors and individual commenters, as part of an organized initiative, stated that the ''functionally equivalent'' proposal, in combination with the return to the three-step process and the elimination of the bar on cross-consideration of metropolitan and rural wage data, was likely to ''further distort the accuracy'' of WHD wage determinations, a process that the commenters stated was ''already deeply flawed.'' These commenters urged the Department to abandon these proposed changes to the rule, including the proposed language in § 1.3(e).

The Independent Electrical Contractors (IEC) and AFP–I4AW stated their opposition to the proposal because it would authorize the finding that rates are functionally equivalent on the basis of CBAs. AFP–I4AW stated that the modal analysis in the definition of prevailing wage in § 1.2 already favors the more uniform rates characteristic of CBAs, and that the functional equivalence proposal's direction to the agency to look to these agreements for the analysis ''will only increase the likelihood of finding union rates to be the prevailing rates, leading to the unjustified inflation of labor costs.'' IEC stated that, while they appreciate the Department's intention of obtaining additional data points for the purpose of determining a predominant wage rate, it

[88] *See* note 1, *supra.*

[89] *See* 1963 House Subcommittee Report, *supra,* at 7–8.

[90] In *Fry Brothers,* the Wage Appeals Board (WAB) described the importance of using CBAs to help determine classifications based on job content where collectively bargained rates prevail. 1977 WL 24823, at *6. The WAB was the Department's administrative appellate entity from 1964 until 1996, when it was eliminated and the ARB was created and provided jurisdiction over appeals from decisions of the Administrator and the Department's ALJs under a number of statutes, including the Davis-Bacon and Related Acts. 61 FR 19978 (May 3, 1996). WAB decisions from 1964 to 1996 are available on the Department's website at *https://www.dol.gov/agencies/oalj/public/dba_sca/references/caselists/wablist.*

is not sufficiently clear what principle will guide the Department's finding that varied rates are nonetheless functionally equivalent.

The Department has reviewed the many comments received regarding the proposed language at § 1.3(e) and agrees with the commenters that advocated in favor of the proposal. The Department's intent in the proposal is to ensure that prevailing wage rates reflect wage rates paid for the same underlying work, and do not instead give undue weight to artificial differences that can be explained because workers are being compensated for something other than the underlying work. This is consistent with the text and purpose of the Davis-Bacon Act and has the salutary effect of reducing the unnecessary reliance on average wage rates that are less protective of local construction wages.

The Department disagrees with the comments, sent in response to an organized initiative, that the proposal conflicts with the Department's intended definition of ''prevailing wage.'' The three-step process and the functional-equivalence rule are consistent because they both seek to reduce the reliance on averages and increase the use of wage rates that are actually paid to workers in the area. In doing so, they both seek to protect local prevailing wage rates and the craft classifications of local area practice, which is the core purpose of the DBRA. Moreover, the Department disagrees that there is any conflict between the two regulatory sections. The proposed language at § 1.3(e) explicitly cross-references the definition in § 1.2 and explains how it should apply to the real-world circumstances that WHD encounters when analyzing survey data. The new language in § 1.3(e) is an amendment to, and becomes an element of, the definition itself. The Department also does not agree that the new language contradicts the *Mistick* decision; rather, the new language changes the rule that would be interpreted by the ARB in the future. The *Mistick* decision was an interpretation of the text of the Department's 1983 regulations that required a determination of whether wage rates were the ''same wage'' and its fundamental holding was that the Department had not abided by the regulatory language as it was then written. There would be no basis for the ARB to come to the same conclusion under the proposed new language at § 1.3(e), which expressly authorizes the Administrator to count variable wage rates together as the ''same wage'' in appropriate circumstances.

While no commenter made the argument explicitly, the Department also considered whether the comments regarding the proposed departure from the post-*Mistick* status quo should be understood as assertions that contractors have reliance interests in the Department's recent practice. To the extent that any assertion of reliance interest was made, however, the Department concludes that it is not sufficient to override the value of the functionally equivalent analysis. The functionally equivalent analysis, like the return to the 30-percent threshold, is a change that will likely lead to increased use of modal prevailing wages and decreased use of averages on wage determinations. As with the 30-percent threshold, this change should reasonably be expected to lead in some circumstances to increases in prevailing wage rates and in other circumstances to decreases. Similar to the 30-percent rule and to other amendments to the wage determination process in part 1 of the regulations, the effects of this rule change will apply only to future wage determinations and the future contracts that incorporate them, with limited exception of certain ongoing contracts covered in § 1.6(d) of the final rule. Accordingly, contractors will generally be able to adjust their bids or price negotiations on future contracts to account for any effects of the regulatory change on prevailing wages in a particular area.

Many of the comments in opposition to the proposal, for example from IEC and AFP–I4AW, explained their opposition to be in part because of a perception that the use of CBAs to identify functionally equivalent rates would lead to more prevailing wage rates based on CBAs. At least some of these commenters appeared to misunderstand the proposal as only allowing for the use of CBAs to make an underlying determination. IEC, for example, stated that if the intent is to broaden the set of wage rates that can be used to determine that a certain wage rate is prevailing, then there is no reason the Department could not also find non-CBA wages ''functionally equivalent'' so long as they have the same acceptable variation proposed for CBA wages deemed functionally equivalent. The Department agrees. In the NPRM, the Department intended the functional equivalence analysis to be applicable to both collectively bargained and non-collectively bargained rates as appropriate. That is why the proposed text of § 1.3(e) expressly allowed for the determination of equivalence to be made based on a ''written policy'' maintained by a contractor or contractors—in addition to a CBA.

The Department also disagrees with the other criticisms related to the use of collectively bargained rates. The Department disagrees with the write-in campaign comments stating that any potential for this proposal to increase the use of collectively bargained rates would mean that wage determinations would be less accurate. The commenters' conception of ''accuracy'' is not well explained in the context of the ''functionally equivalent'' analysis, but the Department assumes it is similar to the way the term was used in the criticisms of the 30-percent rule—in other words, how closely the ''prevailing wage'' hews to the average rate, what the market rate would be in the absence of the law, or whether the percentage of prevailing wage rates based on CBAs matches the union density in an area. As the Department has explained, these comparisons may demonstrate the differences between possible conceptions of the term ''prevailing wage,'' but the Department disagrees that potential differences between these numbers necessarily represent differences in accuracy.[91]

The Department similarly disagrees with AFP–I4AW's argument that the proposal should be rejected because it could lead to an increase in the likelihood of finding collectively bargained rates to be the prevailing rates and therefore an ''unjustified inflation of labor costs.'' The Department has addressed variations of this argument above with respect to the definition of prevailing wage. The cost effects associated with shifting from the use of an average rate to a modal prevailing rate are complicated for a variety of reasons—in particular because there can be significant productivity gains associated with an increase in required wage rates on projects. Given these countervailing effects, and the fact that Congress did not specify the potential cost to the government as a factor in determining prevailing wage rates, the

[91] ABC made a related argument that the proposed functional equivalence analysis would not improve accuracy because it is just a ''tweak'' of the data that the Department received from its wage survey, which ABC believes should be replaced by use of BLS data or augmented through representative sampling. As explained above with regard to the definition of prevailing wage, the Department disagrees with ABC that its suggested alternatives to the wage survey program are either preferable or required. Regardless, the functional equivalence analysis can be beneficial to the determination of prevailing wages because the Department can avoid mistakenly assigning value in a wage determination to apparent differences in wage rates that a further examination would reveal to be superficial and not reflecting different pay received for the same work.

Department is not persuaded that the potential cost effects AFP–I4AW identifies are sufficient reason to reject the proposal.

Several commenters, both supporting and opposing the proposed language, asked for additional guidance regarding types of wage differentials that might appropriately be considered functionally equivalent. The Department believes that the term ''functionally equivalent'' as described here provides sufficient guidance—the difference between two wage rates must be explained by something other than simply different pay for the same work for the wage rates to be functionally equivalent. Furthermore, as the Foundation for Fair Contracting (FFC) and the Northern California District Council of Laborers (NCDCL) stated, the Department's specification that the functional-equivalence determination must be supported with reference to CBAs or the written policies represents a ''necessary precaution'' to appropriately limit the scope of the rule. The Department therefore has not added any additional language in § 1.3(e) delineating specific categories of wage differentials that may or may not fit the analysis.

While no amendment to the regulatory text is necessary, certain examples that commenters provided may be helpful to further illustrate the concept of functional equivalence. The Department does not mean for these examples to be an exhaustive list, but a discussion may be helpful in responding to commenters who asked for further clarification. For example, the NPRM mentioned the potential for different wages based on the time of day that hours are worked to be considered equivalent, but several commenters suggested a broader phrasing—to include differentials based on ''undesirable'' hours or shifts. This could include, for example, hours worked on certain undesirable days of the week or certain times of year. The Department agrees that where wage differentials are attributable to the timing of the work, they do not represent different wage rates for the same classification—and can be reasonably understood to be functionally equivalent.

Similarly, the UA and several other commenters requested that the Department identify hazard pay for working in hazardous conditions as a wage differential that would be considered functionally equivalent as the base rate. In another example, SMART and SMACNA described working forepersons who spend most of their time working in a specific ''mechanic'' classification. While their base rate is that of a journeyperson in that classification, they also get paid a premium to compensate them for the foreperson duties they perform as well. NABTU and several other commenters described premiums for call-back work as another example of a differential wage rate that should not be treated as a separate wage rate from the worker's underlying base hourly rate. All these examples are circumstances where two workers may be paid different amounts for work in the same classification but where the Department generally would not interpret those different amounts as representing different wage rates for the same underlying work. These are appropriate examples of variable rates that could be found to be functionally equivalent as long as the wage differentials are explained by CBAs or written policies.

SMART and SMACNA requested clarification regarding whether rates can be functionally equivalent if one rate is paid pursuant to a CBA and the other rate is not. This might apply, for example, if a CBA provided for a base hourly rate of $20 per hour for a classification and a night premium rate of $25 per hour for the same work, and one worker consistently earned a night premium rate of $25 per hour under the CBA while another worker not working at night earned $20 per hour for a different contractor and was not covered by the CBA. Under those circumstances, the Department could reasonably count both workers as earning the $20 per hour base rate for the purposes of determining the prevailing wage for the classification. The Department does not believe such a clarification is necessary in the text of § 1.3(e) because the language of § 1.3(e) already allows for such a determination.

AGC asked whether the wage rates of various groups of workers on a specific California wage determination would be considered functionally equivalent. In the example presented, a wage determination lists a number of different subclassifications for power equipment operators, and all of the subclassifications have base hourly rates within $5 of each other. AGC asked whether this differential of approximately 10 percent is an appropriate ''slight variation'' such that all of these wage rates should be considered functionally equivalent and counted as the same rate for purposes of determining a prevailing wage rate. The focus on the words ''slight variation'' in the NPRM is misplaced, because a slight variation between or among wage rates is not alone sufficient to render rates functionally equivalent. Rather, there must be some explanation in a CBA or written policy that explains why the variation exists and supports a conclusion that the variation does not represent simply different pay for the same underlying work. Thus, although some of the individual wage rates AGC describes might reasonably be considered to be slight variations in terms of the magnitude of the difference between them, the types of variable wage rates they represent generally do not fit within the concept of functionally equivalent. Wage differentials between types of power equipment operators in the example are associated with sufficiently different underlying work—for example, as the comment notes, the different groups include ''Cranes, Piledriving & Hoisting,'' ''Tunnel Work,'' and ''All Other Work.'' This kind of wage differential is a distinct concept from functionally equivalent pay rates received for work within the same labor classification.

As previously discussed, Congress did not intend to create a single minimum wage rate with the DBA. Rather, generally speaking, the Act requires prevailing wage rates for different types of construction work to be calculated separately. The statute explicitly addresses this concept in two ways—requiring the Secretary to determine the prevailing wage for ''corresponding classes'' of workers, and for workers employed on projects of a similar ''character'' in the area. 40 U.S.C. 3142(b). Thus, when the Department gathers wage information to determine the prevailing wages in an area, it attempts to identify the appropriate classifications (corresponding class) and construction types (projects of a similar character) of work. Through this process, the Department can develop wage determinations that allow for different prevailing wages to account for the different skills that workers use or where there are otherwise material differences in the actual work that workers are doing. The Department does not intend for the functional equivalence concept to apply to these types of situations where wage differentials are attributable to fundamentally different underlying work that requires different skills, or to differences in construction type.[92]

[92] In explaining the limits of this concept of functional equivalence, the Department does not intend to remove the necessary discretion that the Department separately exercises in determining classifications and sub-classifications of work in a particular area. The Department has long recognized that the appropriate level and division of craft specificity can be different in different

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AGC also questioned how the Department would decide which rate to identify on a wage determination among a set of multiple rates found in a survey to be functionally equivalent. AGC stated that the identification of the middle rate (or any rate that is less than the CBA rate in a wage determination that would otherwise use the CBA rates and classifications) could put contractors that are signatories to those CBAs at a competitive disadvantage in bidding, since the signatory contractors would be contractually obligated to pay the higher CBA rate while nonsignatory contractors would be free to pay the lower rate.

The Department agrees with AGC that WHD may need to be sensitive to the effects of identifying functionally equivalent wage rates, in particular where collectively bargained rates prevail. Where there are functionally equivalent wage rates, and only a single rate is published, that published wage rate may often be the base hourly rate (and not the higher rate including the relevant wage premium). This could lead to disadvantages for bidders bound by CBAs on projects that may require substantial work at the premium rate, such as substantial work that would be at a hazard pay rate or at night premiums. Thus, where collectively bargained rates prevail, an analysis of local area practice and the wage data received may suggest that WHD should include certain wage premiums (such as a project size premium or zone rates) as separate lines on a wage determination instead of counting them all as the same functionally equivalent underlying base rate.[93]

AGC also expressed concern that the concept of functionally equivalent wage rates might create incentives for contractors and unions to negotiate rates that preserve their competitiveness. As noted in the NPRM, some variations within the same CBA may clearly amount to different rates, and one example is when a CBA authorizes the use of ''market recovery rates'' that are lower than the standard rate to win a bid. It may not be appropriate to combine market recovery rates together with the CBA's standard rate as ''functionally equivalent'' in certain circumstances, because frequent use of such a rate could suggest (though does not necessarily compel) a conclusion that the CBA's regular rate would not be prevailing in the area.

A few of the commenters in favor of the proposal suggested helpful changes to the proposed language of § 1.3(e). NABTU highlighted that the Department used the term ''employee'' in proposed § 1.3(e) to explain the principle of treating variable rates for ''employees within the same classification'' as functionally equivalent. NABTU noted that DBRA applies to workers even in the absence of an employment relationship, *see* 40 U.S.C. 3142(c)(1), and suggested revising to refer instead to ''laborers and mechanics.'' The Department agrees that the use of the term ''employee'' in the proposed language was imprecise considering the scope of the Act, and the language of § 1.3(e) in the final rule is therefore revised to refer to ''workers'' instead of ''employees,'' to be consistent with the language used elsewhere in § 1.3 and the rule as a whole.

NABTU, the Laborers' International Union of North America (LIUNA), and the Iron Workers commented that the Department appeared to tether the ''functional equivalence'' analysis only to single CBAs or to written policies maintained by contractors. As the commenters noted, there are circumstances in which it may be appropriate to analyze multiple CBAs in order to identify whether rates in a survey are functionally equivalent. They suggested that the Department amend the text of proposed § 1.3(e) to allow a functional equivalence determination to be based on ''one or more collective bargaining agreements'' or ''written policies'' of a contractor or contractors instead of just ''a collective bargaining agreement'' or a ''written policy.'' The Department agrees that this change in the language is warranted because there are circumstances in which a comparison of multiple CBAs or written policies may be helpful to understanding the relationship between wage rates. For example, if different locals of the same union have parallel collective bargaining units with the same base rate and hazard pay rate, and the WHD survey captures rates from workers working at the base rate under one of the CBAs and from workers working in the same classification but at the hazard pay rate under the other CBA, it would be reasonable to consider the rates to be functionally equivalent for the purpose of determining the prevailing wage. Accordingly, the final rule adopts this change.

A few other commenters that were largely supportive of the proposal made suggestions that the final rule does not adopt. The Iron Workers recommended that the Department further codify that combined fringe and benefit wage rates must be treated as functionally equivalent wherever two workers have the same total overall compensation. The Iron Workers provided alternative regulatory text that would reference the statutory definition for the term ''wages'' in 40 U.S.C. 3141. That definition includes both the basic hourly rate of pay and fringe benefit rate. As the Iron Workers noted, the NPRM explained that slightly differing base hourly rates can be considered functionally equivalent where workers have the same combined hourly and fringe rate. In other words, where the combination of hourly and fringe rates are the same, it is appropriate for the Department to count the base rate as the ''same wage'' for the purpose of determining the prevailing wage. In light of this clarification, the Department does not believe it is necessary to add the additional text to § 1.3(e) that the Iron Workers suggested.

Finally, LIUNA and NABTU, while supporting the Department's proposal, urged that the language of proposed § 1.3(e) be changed from allowing the Department to treat functionally equivalent rates the same, to requiring it. These commenters noted that in the proposed language, the Administrator ''may'' treat variable wage rates as the same wage in appropriate circumstances, and they suggested that the language be revised to use the term ''shall'' instead. The Department declines to adopt this suggestion. During the survey process, respondents can assist the Department by identifying when wage differentials are due to elements of a CBA or written policy that are unrelated to the underlying work. However, as the Department has explained in this rulemaking, the wage survey and wage determination process can be resource-intensive and time-consuming for WHD, and the need for timely completion of surveys and wage determinations has been the subject of criticism levied against the current process.

Thus, while the identification of wage differentials that may be functionally

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areas, and that the decisions that the Department must make to identify the appropriate classifications can be fact specific. *See Fry Bros. Corp.,* 1977 WL 24823, at *6–7. An area practice survey in tandem with the wage survey can often be helpful in this process.

[93] This type of flexibility is consistent with the agency's current and historical practice. For example, the Department has periodically identified zone rates on wage determinations. In the Alaska Statewide wage determination for building and heavy construction types, the Department recently published separate wage lines for Laborers North of the 63rd Parallel & East of Longitude 138 Degrees and for those South of the 63rd Parallel & West of Longitude 138 Degrees. As commenters in favor of the ''functional equivalence'' proposal noted, CBAs can be helpful in identifying how relevant differences in the work actually performed or the projects of a similar ''character'' are divided between classifications of workers in areas where collectively bargained rates prevail. *See Fry Bros. Corp.,* 1977 WL 24823, at *4, *6; Manual of Operations at 23.

equivalent can be an important tool for WHD in increasing the use of predominant modal wage rates as prevailing in wage determinations, LIUNA and NABTU's proposal would not be reasonable or administratively feasible, because it would require WHD to review individual CBA wage rates as well as request that contractors provide written policies about every wage rate submitted during a survey—even where the successful identification of wage rates that are functionally equivalent might have limited or no effect on the outcome of the wage determination.

The final rule therefore adopts the language at § 1.3(e) as proposed, with the limited changes identified above.

(B) Area

The Department also proposed changes to the definition of the term ''area'' in § 1.2. The regulations use the term ''area'' to describe the relevant geographic units that the Department may use to determine the prevailing wage rates that laborers and mechanics must, at a minimum, receive on covered projects. *See* 29 CFR 1.2, 1.3. The definition of area therefore has consequences for how the Department gathers wage rate information and how the Department calculates prevailing wages.

The core definition of ''area'' in § 1.2 states that the term ''means the city, town, village, county or other civil subdivision of the State in which the work is to be performed.'' This definition largely reproduces the specification in the Davis-Bacon Act statute, prior to its 2002 re-codification, that the prevailing wage should be based on projects of a similar character in the ''city, town, village, or other civil subdivision of the State in which the work is to be performed.'' *See* 40 U.S.C. 276a(a) (2002).

The geography-based definition of ''area'' in § 1.2 applies to federally assisted projects covered by the Davis-Bacon Related Acts as well as projects covered by the DBA itself. Some of the Related Acts have used different terminology to identify the appropriate ''area'' for a wage determination, including the terms ''locality'' and ''immediate locality.'' [94] However, the Department has long concluded that these terms are best interpreted and applied consistent with the methodology for determining the area under the original DBA. *See Virginia Segment C–7, METRO,* WAB No. 71–4, 1971 WL 17609, at *3–4 (Dec. 7, 1971).

While the definition of ''area'' provides for the use of various possible geographic units, the Department has, for several decades now, identified the county as the default unit for this purpose. *See* 29 CFR 1.7(a). This has a corollary for contracting agencies. In order to determine what wages apply to a given construction project, the contracting agency will generally need to identify the county (or counties) in which the project will be constructed and obtain the general wage determination for the correct type of construction for that county (or counties) from the System for Award Management (SAM).

The Department's choice of a geographic ''area'' to use for a wage determination has consequences for how the prevailing wage will be determined. The regulations, as amended in this rulemaking, explain that the Department will carry out a voluntary wage survey to seek wage data for a type of construction in an ''area.'' They will then apply the three-step process to that data to determine what wage rate in an ''area'' prevails for a specific labor classification. *See* III.B.1.ii.A and III.B.1.iii.

Because the Department uses the county as the default area for a wage determination, it will normally gather wage survey data for each county and carry out the three-step process for each classification of worker and construction type in that county. If there is sufficient current wage data for a classification of workers in a county, this process will result in the prevailing wage that will appear on a wage determination. The regulations at § 1.7(b) and (c) describe the Department's procedures for making the determination if there is not sufficient wage data in a county for a given classification of workers.

In the NPRM, the Department proposed to maintain the core definition of ''area'' in § 1.2 as currently written, with its list of possible geographic units that the Administrator may use. As discussed in section III.B.1.vii regarding § 1.7 and geographic aggregation practices, the Department similarly proposed to maintain the use of the county as the default area for most wage determinations. The Department also, however, proposed two limited additions to the definition of ''area'' in § 1.2 to address projects that span multiple counties and to address highway projects specifically.

(1) Multi-County Project Wage Determinations

Under WHD's current methodology, if a project spans more than one county, the contracting officer is instructed to attach wage determinations for each county to the contract for the project and contractors may be required to pay differing wage rates to the same employees when their work crosses county lines. This policy was reinforced in 1971 when the Wage Appeals Board (WAB) found that, under the terms of the then-applicable regulations, there was no basis to provide a single prevailing wage rate for a project occurring in Virginia, the District of Columbia, and Maryland. *See Virginia Segment C–7, METRO,* WAB No. 71–4, 1971 WL 17609.

Critics of this policy have pointed out that this can be inconsistent with how workers are paid on projects outside of the Davis-Bacon context. In any given non-DBRA project that might be completed in multiple counties, workers are very often hired and paid a single wage rate for all of their work on the project, and—unless there are different city or county minimum wage laws, or zone pay under a CBA—workers' pay rates often would not change as they move between tasks in different counties. The 2011 report by the GAO, for example, quoted a statement from a contractor association representative that the requirement of different wage rates for the same workers on the same multi-county project is ''illogical.'' *See* 2011 GAO Report, at 24.[95]

To address the concerns of these critics, the Department proposed adding language in the definition of ''area'' in § 1.2 to expressly authorize WHD to issue project wage determinations with a single rate for each classification, using data from all of the relevant counties in which a project will occur. Under the proposal, the definition of ''area'' would provide that where a project requires work in multiple counties, the ''area'' may include all the counties in which the work will be performed. The NPRM also included related language at § 1.5(b)(i) that authorized contracting agencies to request a project wage determination where the project involves work in more than one county and will employ workers who may work in more than one county. The Department solicited comments on whether this procedure should be mandatory for multi-jurisdictional projects or available at the request of the contracting agency or an interested party, if WHD determines that

[94] *See, e.g.,* National Housing Act, 12 U.S.C. 1715c(a) (locality); Housing and Community Development Act of 1974, 42 U.S.C. secs. 1440(g), 5310(a) (locality); Federal Water Pollution Control Act, 33 U.S.C. 1372 (immediate locality); Federal-Aid Highway Acts, 23 U.S.C. sec 113(a) (immediate locality).

[95] *See* note 10, *supra.*

such a project wage determination would be appropriate.

Several commenters, including three contractor associations, a union, the Minnesota Department of Transportation (MnDOT), and the Council of State Community Development Agencies (COSCDA), generally supported the Department's proposal as written. COSCDA noted that the proposal could be helpful for broadband projects and AGC noted that it would be helpful for highway projects. According to AGC, the current practice can be particularly burdensome where the different county wage determinations that are applicable to the same project have differing craft classifications and job duties. AGC stated that the Department's proposal to allow a single wage determination to apply to an entire project is a proposal that ''provides logical relief'' and is ''true modernization.'' A Professor of Economics who commented on the proposal stated that combining contiguous counties together on ''horizontal projects'' such as heavy and highway projects is a ''conceptually appropriate way of designing a local labor market'' because all of the counties in which the project occurs are counties from which the workers are likely to be drawn.

One commenter, Montana Lines Inc., supported making these single-rate project wage determinations mandatory for multi-county projects. Montana Lines Inc. stated that in Montana, construction workers are available across the state and travel to all parts of the state and, therefore, the prevailing wage for the whole state should be the same.

Conversely, NFIB strongly opposed the proposal. NFIB asserted that the statutory language referencing ''civil subdivision of a state'' in 40 U.S.C. 3142(b) requires the establishment of prevailing wages on a ''subdivision by subdivision'' basis and thus requires a separate prevailing wage for each subdivision in which work under the contract occurs. NFIB thus recommended regulatory language that would instead codify the current practice that, in multi-county projects, ''each such civil subdivision in which work will be performed is a separate area.''

Two commenters, LIUNA and Indiana-Illinois-Iowa Foundation for Fair Contracting (III–FFC) supported the Department's proposal, but strongly advocated that it be discretionary as opposed to mandatory and that the Department ensure that it is used only where appropriate. They advocated that the Department should only adopt the proposal if it is limited to circumstances where the resulting wage determinations reflect local labor markets and do not undermine the highest rates paid in any included county under the governing general wage determination. LIUNA stated that the Department can maintain deference to established labor markets by analyzing available wage data, the jurisdictional coverage of CBAs, contractor bidding practices, geography, and/or administratively established areas under State law. The two commenters explained that these precautions are necessary to ensure that the procedure is consistent with the Davis-Bacon Act's purpose of preserving a wage floor in each local labor market.

The Florida Transportation Builder's Association, Inc. (FTBA) stated it supported the proposed change along with the proposal for using State highway districts as ''areas'' for highway projects. FTBA requested clarification regarding the methodology the Department would use in setting single rates for each job classification on project wage determinations for work that spans multiple counties. They proposed that the Department set rates based on the wage determination rates for the county where the majority of the work would occur on a covered project.

The Department considered these comments regarding the proposal to authorize multi-county ''areas.'' The proposal does not provide, as FTBA suggested, for the opportunity to identify the county in which most of the construction will occur and then use the wage rates in that county for all other counties in which the project would take place. Rather, the proposal intersects with the definition of ''prevailing wage'' in § 1.2 and the Department's guidelines for obtaining and compiling wage rate information in § 1.3. Those regulations, as amended in this rulemaking, explain that the Department will carry out the three-step process to determine whether any wage rate prevails in a given ''area.'' *See* section III.B.1.iii. Thus, if a multi-county area is used, then the wage data from all counties where the project will take place would be combined together before the Department determines whether there is a modal wage rate that prevails for each classification and construction type.

The Department disagrees with NFIB's argument that this procedure is not permissible. Using a project wage determination with a single ''area'' for multi-county projects is not inconsistent with the text of the DBA. The DBA and Related Act statutes themselves do not address multi-jurisdictional projects, and ''Congress anticipated that the general authorization to the Secretary to set the prevailing wage would encompass the power to find a way to do so in the interstitial areas not specifically provided for in the statute.'' *Donovan,* 712 F.2d at 618. As other commenters noted, providing contractors with the ability to pay a single wage rate to workers within the same classification on a multi-county project is responsive to concerns that have been raised about administrative burdens of the program.

In addition, as a general matter, the creation of multi-county areas for projects covering multiple counties is consistent with the purpose of the DBA, which is to protect against the depression of local wage rates caused by competition from low-bid contractors from outside of the locality. Allowing the use of data from all counties in which the project is being carried out means incorporating wage data from workers who will generally have been working in the vicinity of some portion of the project and thus cannot reasonably be characterized as imported labor from outside of the project locality.

The Department, however, is sensitive to the concerns raised by LIUNA and III-FFC. In many circumstances, multi-county projects will satisfy these commenters' concerns that the counties involved are effectively within the same labor market. But it is certainly possible that a multi-county project could take place in counties that are particularly dissimilar and represent entirely different labor markets, such as may be the case if the project were to span a long string of counties across an entire state. In such circumstances, while a multi-county project wage determination could still be requested, it may not be appropriate to combine the county data by using a multi-county area. Instead, it could be more appropriate to use general wage determinations with separate county wage rates for counties that are in wholly different labor markets, or to create a project wage determination for certain counties that are part of the same labor market and use available general wage determinations for any other counties that are not.

Accordingly, the Department is disinclined to make multi-county areas mandatory for any multi-county project wage determination or to make them available as a matter of course at the request of interested parties other than the contracting agency. Instead, the final rule adopts the language as proposed, which allows the Department to use multi-county areas for multi-county

project wage determinations but does not require their use. The Department agrees with LIUNA that it will be important for the Department to ensure that the multi-county areas do not undermine the two important purposes of the statute of identifying actual prevailing wage rates where they exist and guarding against the depression of local wage standards. *See* 5 Op. O.L.C. at 176. Thus, as LIUNA noted, a multi-county area may be inappropriate for a classification of workers on a project wage determination if it would result in the use of an average rate where existing individual county wage determinations would otherwise identify prevailing wage rates under the Department's preferred modal methodology. Similarly, a single multi-county area for certain classifications of workers on a project wage determination might be inconsistent with the purpose of the statute if the procedure results in average wage rates that are substantially lower than the prevailing wage rate would be in one of the included counties under the default general wage determination.

(2) State Highway Districts

The Department's other proposed change to the definition of ''area'' in § 1.2 was to allow the use of State highway districts or similar transportation subdivisions as the relevant wage determination area for highway projects, where appropriate. Although there is significant variation between states, most states maintain civil subdivisions responsible for certain aspects of transportation planning, financing, and maintenance.[96] These districts tend to be organized within State departments of transportation or otherwise through State and County governments.

In the NPRM, the Department explained that using State highway districts as a geographic unit for wage determinations would be consistent with the Davis-Bacon Act's specification that wage determinations should be tied to a ''civil subdivision of a State.'' State highway districts were considered to be ''subdivisions of a State'' at the time the term was used in the original Davis-Bacon Act. *See Wight* v. *Police Jury of Par. of Avoyelles, La.,* 264 F. 705, 709 (5th Cir. 1919) (describing the creation of highway districts as ''governmental subdivisions of the [S]tate''). The Department further explained that State highway or transportation districts often plan, develop, and oversee federally financed highway projects. Accordingly, the provision of a single wage determination for each district would simplify the procedure for incorporating Federal financing into these projects.

Several commenters that supported the proposal for multi-county project wage determinations, such as MnDOT and FTBA, also supported the proposal to authorize WHD to adopt State highway districts as areas for highway projects. The New Jersey Heavy & Highway Construction Laborers District Council (NJHHCL) called the proposal a ''common-sense revision'' that will simplify how projects are structured and planned, allowing more resources to be devoted to the projects themselves instead of their administration. The American Road & Transportation Builders Association (ARTBA) supported the proposal because highway construction projects often span more than one county, and the use of a single area would ensure workers on the project are paid at the same rate regardless of the county in which they are working. As noted, AGC strongly supported the use of multi-county wage project wage determinations for highway projects. Although AGC did not specifically mention the use of state Highway districts as ''areas,'' the two proposals would work in similar ways and have similar effects. NFIB recommended that the Department adopt the proposal, revised slightly to apply to highway districts and ''other similar State agency geographical units'' instead of the language the Department proposed referring to highway districts and ''other similar State subdivisions.''

LIUNA expressed a similar position regarding the State highway district proposal as it did for multi-county project wage determinations. They advocated that the Department should only adopt the proposal if the use is limited to circumstances where the resulting wage determinations reflect local labor markets and do not undermine the highest rates paid in any individual county under a general wage determination. III–FFC stated that they were ''neutral'' on the Department's proposal. They stated that the existence of State highway districts may be an appropriate consideration when establishing a project wage determination on a highway project but that this consideration should be secondary to ''local labor market considerations.''

The group of U.S. Senators submitted a comment strongly opposing the proposal. They argued that the Department lacks statutory authority to interpret the term ''civil subdivision of the State'' in the DBA statute as including State highway districts. The comment asserted that the separate reference in the statutory text at 42 U.S.C. 3142(b) to the District of Columbia should limit the meaning of ''other subdivision of the State'' to subdivisions that the District of Columbia does not have. The comment also asserted that the Department's proposal runs counter to decades of agency practice, faulted it for failing to cite any legislative history to support its interpretation, and found the Department's citation to the 1919 *Wight* decision to be unconvincing. The Senators stated that not all State highway districts are the same, because not all States grant taxing and bonding authority or formal subdivision status to their highway districts. They also suggested that stakeholders had ''come to rely upon'' the current and prior regulations, which did not expressly provide for the use of State highway districts.

The Department generally agrees with the commenters that supported the highway districts proposal. The use of State highway districts or similar subdivisions as the areas for highway project wage determinations has the potential to reduce burdens and streamline highway projects that may cross county lines. These projects otherwise will require the use of multiple wage determinations for the same classification of workers and may often require the same individual workers to be paid different rates for doing the same work on different parts of the project.

The Department disagrees with the Senators that asserted the proposal is not permitted by the statute. The plain text of the Davis-Bacon statute supports the Department's interpretation. Congress has used the terms political subdivision and civil subdivision interchangeably, including with regard to the DBA's ''civil subdivision requirement.'' *See* 1963 Subcommittee Report, at 5 (''There may be isolated areas where no rate can be found for the particular kind of project in the political subdivision of the State in which the project is located.''); *see also Political Subdivision,* Black's Law Dictionary (11th ed. 2019) (defining political subdivision as a ''division of a state that exists primarily to discharge some function of a local government.''). As the *Wight* decision explained, during the time period leading up to the passage of the DBA, the funding and maintenance of roads was a function of subdivisions of State government, and

[96] *See generally* Am. Assoc. of State Highway and Transp. Offs., ''Transportation Governance and Financing: A 50-State Review of State Legislatures and Departments of Transportation'' (2016), available at: *http://www.financingtransportation.org/pdf/50_state_review_nov16.pdf.*

''many States'' created subdivisions to exercise those functions. 264 F. at 709.

The Senators did not provide any authority to support their statement that at the time of the DBA's passage ''there was a widely accepted distinction between state highway districts and civil subdivisions'' and that ''Congress has always differentiated between the two.'' If anything, the history of Federal highway funding statutes supports the opposite conclusion. In the Federal-Aid Road Act of 1916, Congress directly linked highway funding to ''civil subdivisions'' that were required to maintain the funded roads or else forfeit future Federal funding. Public Law 64–156, Sec. 7, 39 Stat. 355, 358 (1916). The current version of the Federal highway aid statute reinforces this understanding, as it ties funding to State highway districts or ''other'' political or administrative subdivisions of a State. 23 U.S.C. 116.[97]

The Department also disagrees that the meaning of the term ''subdivision'' in the DBA is constrained by the subsequent statutory reference to the District of Columbia. *See* 40 U.S.C. 3142(b). The Act provides for the determination of rates for the various potential ''civil subdivisions of a State in which the work is to be performed,'' followed by ''or in the District of Columbia if the work is to be performed there.'' The Department interprets this language as suggesting only that the District of Columbia may be the appropriate ''area'' to use for projects occurring there, and that for such projects it should not be necessary to further subdivide the District of Columbia into smaller areas.

The Department disagrees with the U.S. Senators' suggestion that the final rule should not adopt the revised definition of ''area'' because stakeholders have come to rely on the prior definition. Any such reliance interests would not weigh strongly against adopting the multi-county and State highway district area proposals, because these area subdefinitions would only factor into the development of wage determinations that are finalized after this rule becomes effective. Any resulting new wage determinations would themselves generally have effect once they have been incorporated into future contracts, allowing contractors to take any new rates into consideration as they develop their bids or negotiate contract pricing.[98]

The legislative history of the DBA, while it does not expressly address highway districts, is helpful because the text of the statute should be interpreted in a manner consistent with its purpose. Given that the purpose of the Act is to protect locally prevailing wage rates, the term ''civil subdivision'' necessarily must have a geographical component. *Cf. Jones* v. *Conway Cnty,* 143 F.3d 417, 418–19 (8th Cir. 1998) (noting that the enumerated examples of ''political subdivisions,'' such as counties, municipal corporations, and school districts, can help to interpret that the term is meant to be limited to subdivisions that involve a ''physical division of the state'').[99] The Department agrees with NFIB's comment that a slight revision to the proposed language would be appropriate to communicate this understanding. The final rule therefore provides that, for highway projects, the ''area'' for wage determinations may be State department of transportation highway districts or other similar State ''geographic'' subdivisions.

The Department also agrees with LIUNA and III–FFC that while the use of State highway districts may at times be consistent with the purpose of the DBRA, they will not necessarily always be so. For this reason, the proposed language does not make it mandatory for the Department to use State highway districts as ''areas'' for highway projects, and instead gives the Department discretion to use them where they are appropriate. Relevant here, the Federal-Aid Highway Act of 1956 (FAHA), one of the Related Acts, uses the term ''immediate locality'' instead of ''civil subdivision'' for identifying the appropriate geographic area of a wage determination. 23 U.S.C. 113. The FAHA requires the application of prevailing wage rates in the immediate locality to be ''in accordance with'' the DBA, *id.,* and, as noted above, WHD has long applied these alternative definitions of area in the Related Acts in a manner consistent with the ''civil subdivision'' language in the original Act. The FAHA ''locality'' language, however, is helpful guidance for determining whether certain State highway districts, while within the broadest meaning of ''civil subdivision of a State,'' may be too large to be used as the default areas for general wage determinations.

Similarly, it would not be consistent with the purpose of the DBRA to use State highway districts as ''areas'' in a State where doing so would result in a significant increase in the use of average rates instead of modal prevailing wage rates on wage determinations. The Department therefore will need to take similar precautions with regard to the use of State highway districts as with multi-county project wage determinations.

Having considered the comments regarding the State highway district proposal, the final rule adopts the proposal with the addition of the word ''geographic'' to better describe the type of State agency transportation subdivisions that may be used.

(C) Type of Construction (or Construction Type)

The Department proposed to define ''type of construction'' or ''construction type'' to mean the general category of construction as established by the Administrator for the publication of general wage determinations. The proposed language also provided examples of types of construction, including building, residential, heavy, and highway, consistent with the four construction types the Department currently uses in general wage determinations, but did not exclude the possibility of other types. The terms ''type of construction'' or ''construction type'' are already used elsewhere in part 1 to refer to these general categories of construction, as well as in wage

[97] Similarly, in 1927 Congress enacted the Longshore and Harbor Workers Compensation Act (LHWCA), where it limited the workers compensation liability under the Act for ''political subdivisions'' of a State. *See* Public Law 69–803, Sec. 3, 44 Stat. 1424, 1426 (1927). As used in the LHWCA, ''political subdivision'' includes State-authorized transportation districts such as the Golden Gate Bridge, Highway & Transportation District. *See Wheaton* v. *Golden Gate Bridge, Highway & Transp. Dist.,* 559 F.3d 979, 984–85 (9th Cir. 2009).

[98] As explained in § 1.6(c), whenever a new wage determination is issued (either after the completion of a new wage survey or through the new periodic adjustment mechanism), that revision as a general matter does not and will not apply to contracts which have already been awarded, with three exceptions. These exceptions are explained in § 1.6(c)(2)(iii), and they include where a contract or order is changed to include substantial covered work that was not within the original scope of work, where an option is exercised, and also certain ongoing contracts that are not for specific construction, for which new wage determinations must be incorporated on an annual basis under § 1.6(c)(2)(iii)(B) of the final rule. The final rule instructs contracting agencies to apply the terms of § 1.6(c)(2)(iii) to all existing contracts, without regard to the date of contract award, if practicable and consistent with applicable law. The Department does not anticipate that the application of the amended wage determination methodologies in these situations will result in unfair harm to reliance interests in a manner sufficient to outweigh the benefits of the final rule implementation as planned. *See also* section III.C. (''Applicability Date'') below.

[99] For the same reason, there is no particular reason to interpret the term as requiring some element of exercise of particular State powers such as taxing and bonding authority. These factors may be helpful where the use of the term ''political subdivision'' implicates questions regarding the rights or duties of the governmental entity in charge of such a subdivision, but those characteristics are not particularly relevant to the economic and geographical context in which the term is used in the DBA.

determinations themselves. As used in this part, the terms ''type of construction'' and ''construction type'' are synonymous and interchangeable. The Department believes that including this definition will provide additional clarity for these references, particularly for members of the regulated community who might be less familiar with the terms.

The Department received no comments specifically addressing this proposal. However, the Department received several comments relating to the definitions provided in AAM 130 (Mar. 17, 1978) for the residential and building construction categories. AAM 130 provides a description of the four types of construction with an illustrative listing of the kinds of projects that are generally included within each type for DBRA purposes. Under AAM 130, apartment buildings of no more than four stories in height are classified as residential and apartment buildings of five or more stories are classified as building construction.

MBA, AWHA, and NAHB urged the Department to adopt in the final rule an expanded definition of residential construction that would include all multifamily structures regardless of their story level. On the other hand, SMART and SMACNA argued AAM 130's categorization of apartment buildings based on the story level has resulted in the misclassification of ''mixed-use'' buildings as residential and called for the reexamination of the classifications.

The Department believes the definition of what falls under each type of construction is best addressed through subregulatory guidance and intends to continue with that approach. The final rule therefore adopts the proposal without any changes.

(D) Other Definitions

The Department proposed additional conforming edits to 29 CFR 1.2 in light of proposed changes to 29 CFR 5.2. As part of these conforming edits, the Department proposed to revise the definition of ''agency'' (and add a sub-definition of ''Federal agency'') to mirror the definition proposed and discussed in the preamble regarding § 5.2. The Department also proposed to add new defined terms to § 1.2 that were proposed in parts 3 and 5, including ''employed,'' ''type of construction (or construction type),'' and ''United States or the District of Columbia.'' As discussed in the preamble regarding § 5.2, the Department did not receive any comments on the proposed changes to the definition of ''agency'' or the addition of the definition of ''United States or the District of Columbia,'' and therefore the final rule adopts these changes as proposed. The proposed addition of the terms ''employed'' and ''type of construction (or construction type),'' and comments associated with them, are discussed in the preamble sections III.B.1.ii.C (§ 1.2) and III.B.3.xxii (§ 5.2).

(E) Paragraph Designations

The Department also proposed to amend §§ 1.2, 3.2, and 5.2 to remove paragraph designations of defined terms and instead to list defined terms in alphabetical order. The Department proposed to make conforming edits throughout parts 1, 3, and 5 in any provisions that currently reference lettered paragraph definitions.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

iii. Section 1.3 Obtaining and Compiling Wage Rate Information

(A) 29 CFR 1.3(b)

The Department proposed to switch the order of § 1.3(b)(4) and (5) for clarity. This non-substantive change would simply group together the paragraphs in § 1.3(b) that apply to wage determinations generally and follow those paragraphs with one that applies only to Federal-aid highway projects under 23 U.S.C. 113.

The Department received no comments on this specific proposal. The final rule therefore adopts this change as proposed.

However, the Department received one comment in response to its proposed revision to § 1.3(b). Although the Department only proposed revisions to § 1.3(b)(4) and (5), the Iron Workers noted that § 1.3(b) provides guidelines concerning the types of information that WHD may consider when making prevailing wage determinations and suggested that the Department also amend § 1.3(b)(2) to further safeguard against the fragmentation of job classifications. Specifically, this commenter suggested the Department codify *Fry Brothers* in § 1.3(b)(2).

The Department appreciates the recommendation and notes that classification decisions are made in accordance with relevant legal precedent and subregulatory guidance, including the decision in *Fry Brothers* and subregulatory guidance such as AAM 213 (Mar. 22, 2013). Because the Department did not propose changes to § 1.3(b)(2), it declines to adopt the Iron Workers' recommendation.

(B) 29 CFR 1.3(d)

The Department noted in the NPRM that it was considering whether to revise § 1.3(d), which addresses when survey data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements (hereinafter ''Federal project data'') may be used in determining prevailing wages for building and residential construction wage determinations. The Department did not propose any specific revisions to § 1.3(d) in the NPRM, but rather sought comment on whether § 1.3(d)—particularly its limitation on the use of Federal project data in determining wage rates for building and residential construction projects—should be revised.

As the Department observed in the NPRM, for approximately 50 years (beginning shortly after the DBA was enacted in 1931 and continuing until the 1981–1982 rulemaking), the Department used Federal project data in determining prevailing wage rates for all categories of construction, including building and residential construction. The final rule promulgated in May 1982 codified this practice with respect to heavy and highway construction, providing in new § 1.3(d) that ''[d]ata from Federal or federally assisted projects will be used in compiling wage rate data for heavy and highway wage determinations.''[100] The Department explained that ''it would not be practical to determine prevailing wages for 'heavy' and 'highway' construction projects if Davis-Bacon covered projects are excluded in making wage surveys because such a large portion of those types of construction receive Federal financing.''[101]

With respect to building and residential construction, however, the 1982 final rule concluded that such construction often occurred without Federal financial assistance subject to Davis-Bacon prevailing wage requirements, and that to invariably include Federal project data in calculating prevailing wage rates applicable to building and residential construction projects therefore would ''skew[] the results upward,'' contrary to congressional intent.[102] The final rule therefore provided in § 1.3(d) that ''in compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to

[100] 47 FR 23652.

[101] *Id.* at 23645.

[102] *See Donovan,* 712 F.2d at 620.

determine the prevailing wages in the absence of such data.'' 29 CFR 1.3(d). In subsequent litigation, the D.C. Circuit upheld § 1.3(d)'s limitation on the use of Federal project data as consistent with the DBA's purpose and legislative history—if not necessarily its plain text—and therefore a valid exercise of the Administrator's broad discretion to administer the Act.[103]

As a result of § 1.3(d)'s limitation on the use of Federal project data in calculating prevailing wage rates applicable to building and residential construction, WHD first attempts to calculate a prevailing wage based on non-Federal project survey data at the county level—*i.e.,* survey data that includes data from private projects or projects funded by State and local governments without assistance under the DBRA, but that excludes data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements. *See* 29 CFR 1.3(d), 1.7(a); Manual of Operations at 38; *Coal. for Chesapeake Hous. Dev.,* ARB No. 12–010, 2013 WL 5872049, at *4 (Sept. 25, 2013) (*Chesapeake Housing*). If there is insufficient non-Federal project survey data for a particular classification in that county, then WHD considers survey data from Federal projects in the county if such data is available.

Under the current regulations, WHD expands the geographic scope of the data that it considers when it is making a county wage determination when data is insufficient at the county level. This procedure is described below in the discussion of the ''scope of consideration'' regulation at § 1.7. For wage determinations for building and residential construction projects, WHD currently integrates Federal project data into this procedure at each level of geographic aggregation in the same manner it is integrated at the county level: If the combined Federal and non-Federal survey data received from a particular county is insufficient to establish a prevailing wage rate for a classification in a county, then WHD attempts to calculate a prevailing wage rate for that county based on non-Federal wage data from a group of surrounding counties. *See* 29 CFR 1.7(a), (b). If non-Federal project survey data from the surrounding-counties group is insufficient, then WHD includes Federal project data from all the counties in that group. If both non-Federal project and Federal project data for a surrounding-counties group is still insufficient to determine a prevailing wage rate, then WHD may expand to a ''super group'' of counties or even to the statewide level. *See Chesapeake Housing,* ARB No. 12–010, 2013 WL 5872049, at *6; PWRB, Davis-Bacon Surveys, at 6.[104] At each stage of data expansion for building and residential wage determinations, WHD first attempts to determine prevailing wages based on non-Federal project data; however, if there is insufficient non-Federal data, WHD will consider Federal project data.

As reflected in the plain language of § 1.3(d) as well as WHD's implementation of that regulatory provision, the current formulation of § 1.3(d) does not prohibit the use of Federal project data in establishing prevailing wage rates for building and residential construction projects subject to Davis-Bacon requirements; rather, it limits the use of such data to circumstances in which ''there is insufficient wage data to determine the prevailing wages in the absence of such data.'' 29 CFR 1.3(d). As the Department explained in the NPRM, WHD often uses Federal project data in calculating prevailing wage rates applicable to residential construction due to insufficient non-Federal data. By contrast, because WHD's surveys of building construction typically have a higher participation rate than residential surveys, WHD uses Federal project data less frequently in calculating prevailing wage rates applicable to building construction projects covered by the DBRA. For example, the 2011 GAO Report analyzed 4 DBA surveys and found that over two-thirds of the residential rates for 16 key job classifications (such as carpenter and common laborer) included Federal project data because there was insufficient non-Federal project data, while only about one-quarter of the building wage rates for key classifications included Federal project data. 2011 GAO Report, at 26.[105]

Notwithstanding the use of Federal project data in calculating prevailing wage rates for building and residential construction, the Department noted in the NPRM that some interested parties may believe that § 1.3(d) imposes an absolute barrier to the use of Federal project data in determining prevailing wage rates. As a result, survey participants may not submit Federal project data in connection with WHD's surveys of building and residential construction, thereby reducing the amount of data that WHD receives in response to its building and residential surveys. The Department therefore strongly encouraged robust participation in Davis-Bacon prevailing wage surveys, including building and residential surveys, and it urged interested parties to submit Federal project data in connection with building and residential surveys with the understanding that such data will be used in calculating prevailing wage rates if insufficient non-Federal project data is received. The Department specifically observed that in the absence of such Federal project data, for example, a prevailing wage rate may be calculated at the surrounding-counties group or even statewide level when it would have been calculated based on a smaller geographic area if more Federal project data had been submitted.

Although increased submission of such Federal project data thus could be expected to contribute to more robust wage determinations even without any change to § 1.3(d), the Department recognized in the NPRM that revisions to § 1.3(d) might nonetheless be warranted. The Department therefore solicited comments regarding whether to revise § 1.3(d) in a way that would permit WHD to use Federal project data more frequently when it calculates building and residential prevailing wages. For example, particularly given the challenges that WHD has faced in achieving high levels of participation in residential wage surveys—and given the number of residential projects that are subject to Davis-Bacon labor standards under Related Acts administered by HUD—the Department noted in the NPRM that it might be appropriate to expand the amount of Federal project data that is available to use in setting prevailing wage rates for residential construction.

The Department also observed that there might be other specific circumstances that particularly warrant greater use of Federal project data and that, more generally, if the existing limitation on the use of Federal project data were removed from § 1.3(d), WHD could in all circumstances establish Davis-Bacon prevailing wage rates for building and residential construction based on all usable wage data in the relevant county or other geographic area, without regard to whether particular wage data was ''Federal'' and whether there was ''insufficient'' non-Federal project data. The Department also noted in the alternative that § 1.3(d) could be revised in order to provide a definition of ''insufficient wage data,'' thereby providing increased clarity regarding when Federal project data may and may not be used in establishing prevailing wage rates for building or residential construction. The Department specifically invited

[103] *Id.* at 621–22.

[104] *See* note 19, *supra.*

[105] *See* note 10, *supra.*

comments on these and any other issues regarding the use of Federal project data in developing building and residential wage determinations.

Numerous commenters expressed support for a regulatory change that would result in increased use of Federal project data to establish prevailing wage rates for building and residential construction. LIUNA, the International Union of Operating Engineers (IUOE), UBC, CEA, SMACNA, NABTU, and III–FFC expressed support for returning to the Department's approach prior to the 1981–1982 rulemaking, when the Department used Federal project data in all instances in determining prevailing wage rates for building and residential construction. MCAA similarly supported allowing and perhaps even routinely using Federal project data in building and residential wage determinations. LIUNA, NABTU, and UBC, in particular, criticized the limitation on the use of Federal project data that was imposed by the 1981–1982 rulemaking and contended that the limitation has resulted in the exclusion of a significant amount of data on worker compensation in Davis-Bacon wage surveys. LIUNA and other commenters recognized that § 1.3(d) permits use of Federal project data in determining prevailing wage rates for building and residential construction when private project data is insufficient, but contended that the WHD Administrator's reliance on various sufficiency standards over the years to determine when Federal project data may be used has often caused large swaths of local wage data to be excluded based solely on a disproportionately de minimis amount of private data. LIUNA, NABTU, and III–FFC posited that using Federal project data in all circumstances would increase the amount of usable data and thereby increase the likelihood that wage rates could be calculated based on a substantial amount of wage data and/or at the county level.

The IUOE and III–FFC similarly commented that allowing greater use of Federal project data would promote clarity and efficiency and resolve some of the challenges associated with insufficient data. Relatedly, LIUNA and III–FFC observed that the current exclusion of Federal project data discourages the submission of such data in the first place, particularly since some interested parties believe that § 1.3(d) imposes an absolute barrier to the consideration of Federal project data, and that removing the limitation set forth in § 1.3(d) therefore would promote greater survey participation. The UBC, the IUOE, and MCAA further commented that revising § 1.3(d) to provide for broader use of Federal project data would be consistent with the purpose of the DBA. The IUOE and III–FFC also commented that building projects that are likely to be subject to DBRA requirements include detention facilities, institutional buildings, museums, post offices, and schools, and that it is essential that data from such projects are included in Davis-Bacon wage surveys as such data reflects the wages paid by skilled and experienced contractors on these types of projects.

Finally, NABTU encouraged the Department, should it decide to retain the current restriction on the use of Federal project data in residential and building construction wage determinations, to expressly state in § 1.3(d) that when the Department receives insufficient data for an individual county, it will first look to Federal and federally assisted projects before expanding its search to nearby counties. In proposing this regulatory revision, NABTU recognized that this has been a longstanding policy of WHD, but that it is not codified in the regulations and therefore, NABTU asserted, is not always uniformly applied in Davis-Bacon wage surveys.

SMART and SMACNA included a lengthy discussion of § 1.3(d) and noted that they support unrestricted use of Federal project data in building surveys but that, to be responsive to the NPRM's requests for specific information, they were also identifying ''specific circumstances that particularly warrant greater use of Federal project data'' and discussed the possibility of including a definition of ''insufficient wage data'' in § 1.3(d). They noted that the Federal government plays a significant role in building and residential construction in local labor markets and that ''[s]ince the goal of the DBA is to prevent use of the federal government's purchasing power to depress labor standards, it makes little sense to ignore the federal government's impact on local markets in determining prevailing rates.'' SMART and SMACNA further commented that if the Department ''decides not to rescind § 1.3(d),'' the Department should, at minimum, define the term ''insufficient wage data'' in the regulation so that it takes into account the total value of Davis-Bacon projects in a county relative to the total value of the private projects in the county.'' SMART and SMACNA also noted that ''a dearth of private data in two-thirds of residential surveys and in building surveys in isolated, sparsely-populated rural counties necessitates the use of federal and federally funded data in these surveys.''

In contrast to these comments in favor of revising § 1.3(d), numerous commenters opposed any change to § 1.3(d). Citing the DBA's legislative history, IEC contended that the DBA was intended to reflect prevailing rates established by private industry, and that to revise § 1.3(d) to allow for broader use of Federal project data in establishing prevailing wage rates for building and residential construction would violate the DBA's purpose and established case law. MBA (in comments submitted jointly with 10 other organizations) and NAHRO posited that the use of Federal project data in establishing prevailing wage rates for building and residential construction in all instances would skew prevailing wages upward and result in rates that would not reflect actual prevailing wages for residential and/or building construction. The NAHB, in addition to joining the comment submitted by the MBA, recommended that the Department maintain its policy of not factoring Davis-Bacon wages from covered projects in its initial calculation of prevailing wages. AGC similarly commented that they were not aware of any significant deficiencies in the sources of private data for building and residential construction that would necessitate a change in the current practice or regulation. Finally, the Small Business Administration (SBA) Office of Advocacy expressed opposition to greater use of Federal project data, though they (like certain other commenters) misinterpreted the NPRM as expressly proposing a regulatory change, when in fact the Department simply solicited comments in the NPRM as to whether a regulatory change was warranted.

After considering the comments supporting and opposing a regulatory change, the Department has decided not to revise § 1.3(d) and to continue to consider submitted Federal project data in all instances when calculating prevailing wage rates for heavy and highway construction and, in calculating prevailing wage rates for building and residential construction, to consider Federal project data whenever ''it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data.'' 29 CFR 1.3(d). As the current regulatory text reflects, § 1.3(d) does not erect an absolute barrier to considering Federal project data when determining prevailing wage rates for building and residential construction, but rather provides that Federal project data will be used whenever the Department has

determined that there is insufficient private data to determine such prevailing rates. The Department therefore will continue to solicit and receive Federal project data in all Davis-Bacon wage surveys of building and residential construction, and, consistent with § 1.3(d) and existing practice, will use such data in determining prevailing wage rates for those categories of construction whenever insufficient private data has been received. Moreover, in light of certain comments confirming that some stakeholders apparently believe that § 1.3(d) imposes an absolute barrier to the consideration of Federal project data, the Department will ensure that guidance materials and communications specific to Davis-Bacon wage surveys properly emphasize that the Department seeks the submission of Federal project data in all instances and that it will use such data to determine prevailing wage rates whenever appropriate under § 1.3(d).

In deciding not to revise § 1.3(d) to permit the use of Federal project data in all instances, the Department considers it significant that current § 1.3(d) does not prohibit in all circumstances the use of Federal project data in calculating prevailing wage rates for building and residential construction, but rather requires the use of such data whenever there is insufficient private data. In interpreting § 1.3(d), the Department's ARB has held repeatedly that the determination of whether or not there is ''insufficient'' private project data for purposes of § 1.3(d) depends on the circumstances, and that Federal project data should not be disregarded simply because the quantum of private data received minimally satisfied WHD's subregulatory sufficiency threshold for determining a prevailing wage rate (currently wage data for six workers employed on three projects). *See Road Sprinkler Fitters Local Union No. 669,* ARB No. 10–123, 2012 WL 2588591, at *7 (June 20, 2012) (''[I]t seems illogical to conclude that data from merely three workers in a metropolitan county for a common job is 'sufficient data' to eliminate the need to . . . include data from federal jobs, as permitted by the DBA and its implementing regulations.''); *Plumbers Local Union No. 27,* ARB No. 97–106, 1998 WL 440909, at *5 (July 30, 1998) (under § 1.3(d), WHD could not establish a prevailing wage for the plumber classification by solely considering data reflecting the wages paid to six plumbers on private projects when the record indicated that WHD had received wage data for hundreds of plumbers on federally funded projects). The Department agrees with this interpretation and believes that this precedent supports retaining § 1.3(d) as presently drafted rather than revising the provision to mandate the use of Federal project data in determining all prevailing wage rates.

The Department likewise has concluded that it is unnecessary to adopt the specific proposals, short of a complete rescission of the limitation on the use of Federal project data in determining prevailing wage rates for building and residential conduction, that commenters identified. In response to NABTU's alternative recommendation that § 1.3(d) be revised to codify WHD's longstanding policy of looking to Federal project data before expanding its search to nearby counties when the Department receives insufficient data for an individual county, the Department believes that codifying the order of operations in determining prevailing wage rates for building and residential construction at this level of detail is not necessary. The existing text of § 1.3(d), which directs the use of Federal project data whenever there is insufficient private data, already provides for the consideration of Federal project data at the county level whenever there is insufficient county-level private data. Moreover, established WHD policies and procedures expressly provide that if there is insufficient non-Federal project survey data for a particular classification in a county, then WHD will consider available survey data from Federal projects in the county and will likewise integrate Federal project data at each level of geographic aggregation to the same extent and in the same manner it is integrated at the county level. Manual of Operations at 38; *Chesapeake Housing,* ARB No. 12–010, 2013 WL 5872049, at *4. The Department appreciates the importance of adhering to this order of operations in all circumstances, however, and it will therefore continue to emphasize, through subregulatory guidance such as the Manual of Operations and internal and external communications, that, for building and residential construction wage surveys, Federal project data must always be considered when there is insufficient private data at the county level, and that a similar process of considering Federal project data must be followed each time the geographic area is expanded in accordance with the governing regulations and WHD's policies and procedures.

The Department also declines to adopt SMART and SMACNA's alternative proposal that the Department define the term ''insufficient wage data'' in the regulation so that it takes into account the total value of Davis-Bacon projects in a county relative to the total value of the private projects in the county. WHD has long determined prevailing wages based on the wage data for workers on ''projects of a character similar'' that WHD receives through its wage survey program 40 U.S.C. 3142(b). As a general matter, projects of significantly greater value will employ more workers than smaller projects, and the size or value of a particular project for which wage data is submitted thus can be expected to influence the calculation of prevailing wages. To determine sufficiency based on general data regarding aggregate project values in a county without regard to the specific wage data received in a particular Davis-Bacon wage survey would represent a significant and complex shift away from WHD's current method of determining prevailing wage rates. The Department therefore believes that the sufficiency or insufficiency of private project data should continue to be determined based on WHD's ''compiling of wage data,'' § 1.3(d), rather than on distinct, extra-survey information regarding relative project values. The current regulatory text, particularly as interpreted by the ARB, thus provides sufficient and appropriate direction to the Department in determining when Federal project data may be used to determine prevailing wage rates on building and residential construction. *See Road Sprinkler Fitters,* ARB No. 10–123, 2012 WL 2588591, at *7; *Plumbers Local Union No. 27,* ARB No. 97–106, 1998 WL 440909, at *5.

(C) 29 CFR 1.3(f)—Frequently Conformed Rates

The Department is also proposing changes relating to the publication of rates for labor classifications for which conformance requests are regularly submitted when such classifications are missing from wage determinations. The Department's proposed changes to this paragraph are discussed below in section III.B.1.xii (''Frequently conformed rates''), together with proposed changes to § 5.5(a)(1).

(D) 29 CFR 1.3(g)–(j)—Adoption of State/Local Prevailing Wage Rates

In the NPRM, the Department proposed to add new paragraphs (g), (h), (i), and (j) to § 1.3 to permit the Administrator, under specified circumstances, to determine Davis-Bacon wage rates by adopting prevailing wage rates set by State and local governments. The Department explained that this proposal was intended to reduce reliance on outdated

Davis-Bacon wage rates while enabling the WHD to avoid performing costly and duplicative prevailing wage surveys when a State or locality has already performed similar work.

About half of the States, as well as many localities, have their own prevailing wage laws (sometimes called ''little'' Davis-Bacon laws).[106] Additionally, a few states have processes for determining prevailing wages in public construction even in the absence of such State laws.[107] Accordingly, the Administrator has long taken prevailing wage rates set by States and localities into account when making wage determinations. Under the current regulations, one type of information that the Administrator may ''consider[ ]'' in determining wage rates is ''[w]age rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation.'' 29 CFR 1.3(b)(3). Additionally, for wage determinations on federally funded highway construction projects, the Administrator is required by the FAHA statute to ''consult'' with ''the highway department of the State'' in which the work is to be performed, and to ''giv[e] due regard to the information thus obtained.'' 23 U.S.C. 113(b); *see* 29 CFR 1.3(b)(4).

In reliance on these provisions, WHD has sometimes adopted and published certain states' highway wage determinations in lieu of conducting wage surveys in certain areas. According to a 2019 report by the OIG, WHD used highway wage determinations from 15 states between fiscal years 2013 and 2017. *See* 2019 OIG Report, at 10.

This same OIG report expressed concern about the high number of out-of-date Davis-Bacon wage rates, particularly non-union rates, noting, for example, that some published wage rates were as many as 40 years old. *Id.* at 5. The OIG report further noted that at the time, 26 states and the District of Columbia had their own prevailing wage laws, and it recommended that WHD ''should determine whether it would be statutorily permissible and programmatically appropriate to adopt [S]tate or local wage rates other than those for highway construction.'' *Id.* at 10–11. WHD indicated to OIG that in the absence of a regulatory revision, it viewed adoption of State rates for non-highway construction as in tension with the definition of prevailing wage in § 1.2(a) and the ARB's *Mistick* decision. *Id.* at 10.

In the NPRM, the Department explained that it shared OIG's concerns regarding out-of-date rates, and that a regulatory revision would best ensure that WHD can incorporate State and local wage determinations when doing so would further the purposes of the Davis-Bacon labor standards. As noted above, the current regulations permit WHD to ''consider'' State or local prevailing wage rates among a variety of sources of information used to make wage determinations and require WHD to give ''due regard'' to information obtained from State highway departments for highway wage determinations. *See* 29 CFR 1.3(b)(3)–(4). However, they also provide that any information WHD considers when making wage determinations must ''be evaluated in the light of [the prevailing wage definition set forth in] § 1.2(a).'' 29 CFR 1.3(c). While some States and localities' definitions of prevailing wage mirror the Department's regulatory definition, many others' do not. Likewise, because the current regulations at §§ 1.2(a) and 1.3(c), as well as the ARB's decision in *Mistick,* suggest that any information (such as State or local wage rates) that WHD obtains and ''consider[s]'' under § 1.3(b) must be filtered through the definition of ''prevailing wage'' in § 1.2, the Department proposed a regulatory change to clarify that WHD may adopt State or local prevailing wage determinations under certain circumstances even where the State or locality's definition of prevailing wage differs from the Department's.

Under the Department's proposal, WHD would only be permitted to adopt State or local prevailing wage rates if the Administrator, after reviewing the rate and the processes used to derive the rate, concludes that they meet certain listed criteria. The criteria the Department proposed, which were included in proposed new § 1.3(h), were as follows:

First, the Department proposed that the State or local government must set prevailing wage rates, and collect relevant data, using a survey or other process that generally is open to full participation by all interested parties. This proposed requirement was intended to ensure that WHD will not adopt a prevailing wage rate where the process to set the rate unduly favors certain entities, such as union or non-union contractors. Rather, the State or local process must reflect a good-faith effort to derive a wage that prevails for similar workers on similar projects within the relevant geographic area within the meaning of the Davis-Bacon Act statutory provisions. The phrase ''survey or other process'' in the proposed regulatory text was intended to permit the Administrator to incorporate wage determinations from States or localities that do not necessarily engage in surveys but instead use a different process for gathering information and setting prevailing wage rates, provided that this process meets the required criteria.

Second, the Department proposed requiring that a State or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, and that each of these can be calculated separately. Thus, the Department explained that WHD must be able to confirm during its review process that both figures are prevailing for the relevant classification(s) and list each figure separately on its wage determinations. This reflects the statutory requirement that a prevailing wage rate under the Davis-Bacon Act must include fringe benefits, 40 U.S.C. 3141(2)(B); 29 CFR 5.20, and that ''the Secretary is obligated to make a separate finding of the rate of contribution or cost of fringe benefits.'' 29 CFR 5.25(a). This requirement also would ensure that WHD could determine the basic or regular rate of pay to determine compliance with the CWHSSA and the Fair Labor Standards Act (FLSA).

Third, the Department proposed that the State or local government must classify laborers and mechanics in a manner that is recognized within the field of construction.[108] The proposed rule explained that this standard is intended to ensure that the classification system does not result in lower wages than are appropriate by, for example, assigning duties associated with skilled classifications to a classification for a general laborer.

Finally, the Department proposed that the State or local government's criteria for setting prevailing wage rates must be

[106] A list of such states, and the thresholds for coverage, can be found here: ''Dollar Threshold Amount for Contract Coverage,'' U.S. Dep't of Lab., Wage and Hour Div., *https://www.dol.gov/agencies/whd/state/prevailing-wages.*

[107] These states include Iowa, North Dakota, and South Dakota.

[108] In the NPRM, the Department explained that it recognizes that differences in industry practices mean that the precise types of work done and tools used by workers in particular classifications may not be uniform across states and localities. For example, in some areas, a significant portion of work involving the installation of heating, ventilation, and air conditioning (HVAC) duct work may be done by an HVAC Technician, whereas in other areas such work may be more typically performed by a Sheet Metal Worker. Unlike in the case of the SCA, WHD does not maintain a directory of occupations for the Davis-Bacon Act. However, under this proposed rule, in order for WHD to adopt a State or locality's wage rate, the State or locality's classification system must be in a manner recognized within the field of construction.

substantially similar to those the Administrator uses in making wage determinations under 29 CFR part 1. The proposed regulation provided a non-exclusive list of factors to guide this determination, including, but not limited to, the State or local government's definition of prevailing wage; the types of fringe benefits it accepts; the information it solicits from interested parties; its classification of construction projects, laborers, and mechanics; and its method for determining the appropriate geographic area(s). Thus, the more similar a State or local government's methods are to those used by WHD, the greater likelihood that its corresponding wage rate(s) will be adopted. While the proposed regulation listed the above factors as guidelines, it ultimately directed that the Administrator's determination in this regard will be based on the totality of the circumstances. The reservation of such discretion in the Administrator was intended to preserve the Administrator's ability to make an overall determination regarding whether adoption of a State or local wage rate is consistent with both the language and purpose of the DBA, and thereby is consistent with the statutory directive for the Secretary (in this case, via delegation to the Administrator), to determine the prevailing wage. *See* 40 U.S.C. 3142(b).

The Department proposed in § 1.3(g) to permit the Administrator to adopt State or local wage rates with or without modification. The Department explained that this was intended to encompass situations where the Administrator reviews a State or local wage determination and determines that although the State or local wage determination might not satisfy the above criteria as initially submitted, it would satisfy those criteria with certain modifications. For example, the Administrator may obtain from the State or local government the State or locality's wage determinations and the wage data underlying those determinations, and, provided the data was collected in accordance with the criteria set forth earlier (such as that the survey was fully open to all participants), may determine, after review and analysis, that it would be appropriate to use the underlying data to adjust or modify certain classifications or construction types, or to adjust the wage rate for certain classifications. Consistent with the Secretary's authority to make wage determinations, the regulation permits the Administrator to modify a State or local wage rate as appropriate while still generally relying on it as the primary source for a wage determination. For instance, before using State or local government wage data to calculate prevailing wage rates under the DBA, the Administrator could regroup counties, apply the definition of ''prevailing wage'' set forth in § 1.2, disregard data for workers who do not qualify as laborers or mechanics under the DBA, and/or segregate data based on the type of construction involved. The Department explained that the Administrator would cooperate with the State or locality to make the appropriate modifications to any wage rates.

In proposed § 1.3(i), the Department proposed requiring the Administrator to obtain the wage rates and any relevant supporting documentation and data from the State or local entity before adopting a State or local government prevailing wage rate.

Finally, § 1.3(j) of the proposed rule explained that nothing in proposed § 1.3(g), (h), or (i) precludes the Administrator from considering State or local prevailing wage rates in a more holistic fashion, consistent with § 1.3(b)(3), or from giving due regard to information obtained from State highway departments, consistent with § 1.3(b)(4), as part of the Administrator's process of making prevailing wage determinations under 29 CFR part 1. For example, under the proposed rule, as under the current regulations, if a State or locality were to provide the Department with the underlying data that it uses to determine wage rates, even if the Administrator determines not to adopt the wage rates themselves, the Administrator may consider or use the data as part of the process to determine the prevailing wage within the meaning of 29 CFR 1.2, provided that the data is timely received and otherwise appropriate. The purpose of proposed § 1.3(j) was to clarify that the Administrator may, under certain circumstances, adopt State or local wage rates, and use them in wage determinations, even if the process and rules for State or local wage determinations differs from the Administrator's.

A diverse array of commenters—including labor unions, worker advocacy organizations, contractors, contractor associations, State government officials, and various members of Congress—expressed support for the Department's proposals to expand WHD's authority to adopt State or local prevailing wage rates. The most common reason offered for such support was that the adoption of State or local rates could help ensure that Davis-Bacon rates remain up to date. For example, FFC and NCDCL stated in their comments that wage determinations by the State of California are updated with ''significantly greater frequency'' than WHD's. These commenters and others, such as NABTU, asserted that incorporation of more current State and local wage rates would help attract workers to the construction industry, which they viewed as an important policy priority in light of the increased number of construction projects financed by IIJA.

Other commenters expressed support for an expanded incorporation of State and local prevailing wage rates for efficiency reasons. For example, COSCDA said that the proposals may ''avoid delays in identifying certain federal prevailing wages,''[109] while Pennsylvania government officials commented that ''the proposal would streamline the wage determination process . . . and align DBRA wages with State and local rates for projects covered by both sets of laws.'' CEA, NECA, and SMACNA identified this proposal as among those from the Department's proposed rule that would greatly improve the overall efficiency of the Act. IUOE, MCAA, and UBC asserted that the proposals would allow WHD to conserve its resources for improved administration and enforcement of the DBA, with MCAA characterizing the proposals as ''sound good-government policy.'' MBA remarked that ''[t]he added flexibility afforded to the Administrator in the proposed rule is a positive step in getting a deeper understanding of the relevant wages,'' and urged the Department to ''go a step further'' by ''[e]xpanding the use of the data, not just when WHD does not have sufficient data to determine a wage, but in all circumstances . . . [to] provide a comparative wage and help gain a greater understanding whenever there are material discrepancies or when the overall respondent rate is low for a wage determined through the Davis-Bacon survey.''

Several commenters expressed more qualified support for the Department's proposals regarding the incorporation of State and local prevailing wage rates. For example, the UA acknowledged that it ''makes sense to use state and local rates . . . as a fall-back option for combatting stale rates,'' but

[109] While opposing the Department's proposals for other reasons, FTBA acknowledged that ''[the] adoption of prevailing rates set by state or local officials has some appeal given the time intensive survey process which has resulted in delays in surveys and consequently delays in the issuance of new wage determinations based on updated wages and benefits data.''

''encourage[d] [the Department] to continue to prioritize its own wage surveys as the first and best option.'' Similarly, Contractor Compliance & Monitoring, Inc. (CC&M) ''agree[d] with using state or local prevailing wage rate for wage rates, but only where there is otherwise insufficient information from BLS.'' AGC stated that ''[a]dopting state and local wage rates could improve the accuracy and timeliness of rates if done properly,'' but opined that ''[t]he viability and practicality of this proposal depends almost entirely on how much confidence one has in state procedures for collecting wage rate data and calculating prevailing wages.'' NABTU cautioned that ''[the Department] must . . . conduct meaningful independent review of local rates to avoid engaging in an impermissible delegation of authority,'' [110] and ''[a]bove all . . . retain the final decision-making authority over rates.''

While some commenters specifically approved of the limiting criteria specified in proposed § 1.3(h), *see, e.g.,* Fair Contracting Foundation of Minnesota and MCAA, others asked the Department to codify additional limitations on WHD's discretion to adopt State or local prevailing wage rates. For example, several labor unions and worker advocacy organizations, including III–FFC, LCCHR, and UBC, requested the final rule to prohibit the use of State or local rates lower than an alternative Federal rate.[111] In support of this proposal, III–FFC asserted that ''[a]dopting rates that are lower than those derived from the Department's own methodology would run counter to the purpose of the Davis-Bacon Act to establish rates 'for the benefit of construction workers.' *Binghamton Constr. Co.,* 347 U.S. at 178.'' Other commenters expressed concern about the risks of low State or local prevailing wage rates but stopped short of requesting the Department to categorically reject the adoption of lower State or local rates. For example, IUOE requested the Department to ''add a clause to the final rule that the Administrator shall closely scrutinize a state's submissions if the state cannot demonstrate a 5-year history of successfully administering such a prevailing wage program,'' explaining that such scrutiny would ''allow the Administrator to not accept such wages if they significantly lower the wages already listed on the WD.''

Other commenters suggested methodological modifications. NABTU and the UA requested the Department to limit its adoption of State or local rates to communities where WHD has not completed a wage survey in the area for the applicable type of construction in more than 3 years.[112] NAHB urged the Department not to adopt wage rates from State and local governments that use a methodology that permits the cross-consideration of rural and metropolitan wage rates, asserting that wages resulting from such a methodology are not appropriately representative of a given area. And ABC requested that the Department modify proposed § 1.3(h)(1) to require that the State or local government ''use appropriate statistical methods, such as sampling, weighting, or imputation, to obtain statistically representative results,'' or, in the alternative, ''clarify that statistically representative sampling, where all respondents have a proportionate likelihood of inclusion in the sample, qualifies as 'full participation by all interested parties' within the meaning of the regulation.''

The Department identified at least five comments which opposed an expanded use of State or local prevailing wage rates, submitted by AWHA, FTBA, IEC, NAHB, and the group of U.S. Senators, respectively. Unlike some of the commenters that voiced concern about the potential adoption of lower State or local wage rates, FTBA, IEC, and the group of U.S. Senators were chiefly concerned that the proposal could result in the adoption of State or local wage rates that are inappropriately high. For example, the group of U.S. Senators cited research asserting that New York's prevailing wage law has inflated state and local construction costs by 13 to 25 percent, depending on the region. The group of U.S. Senators elaborated that ''[m]any state prevailing wage laws, such as New York's, base their definition of prevailing rate of wage directly on compensation levels set in [a] CBA, rather than voluntary surveys, allowing contract administrative costs and union work rules to further inflate wages, at great detriment to the taxpayer.''

AWHA and FTBA expressed a different concern that expanding the use of State and local prevailing wage rates might inappropriately reduce WHD's need or desire to regularly perform Federal wage surveys.[113] AWHA asserted that State and local governments ''face similar, if not more pronounced, capacity and outreach challenges in conducting methodologically rigorous wage and hour surveys,'' and further objected that the Department's proposal to use local prevailing wage rates even in cases where the definitions and methods are different than the Federal standard was ''at odds with the given rationale to return to the three-step process.'' Highlighting the requirement in proposed § 1.3(h)(4) that State or local rates must be derived from ''substantially similar'' criteria to those the Administrator uses in making wage determinations under part 1, IEC asserted that ''the ability to merely adopt—rather than consider—state and local wage determinations converts key provisions of the regulations governing wage determinations into mere suggestions.'' And, as previously discussed, NAHB relayed concerns about incorporation of State or local rates to the extent that those rates are derived from methodologies that permit cross-consideration of rural and metropolitan areas.

Having considered the feedback in response to the proposed expansion of the use of State and local prevailing wage rates, the Department agrees with the 2019 OIG report and the overwhelming majority of the commenters that addressed these proposals that expanding WHD's ability to incorporate State and local wage rates would be a significant improvement to the current regulations. Specifically, the Department believes that the provisions in proposed § 1.3(g)–(j) will give the Department an important tool to keep DBRA prevailing wage rates accurate and up to date, with appropriate safeguards to guard against the adoption of excessively high or low State or local rates. Accordingly, the final rule adopts new paragraphs (g), (h), (i), and (j) in § 1.3 as proposed in the NPRM.

[110] III–FFC similarly cautioned that ''DOL . . . must include an independent review process that ensures these [State and local] wage determination programs are methodologically sound and consistent with the requirements of Davis-Bacon labor standards,'' but expressed its view that the NPRM ''contain[s] a solid framework with relevant criteria to help DOL review state and local processes for setting prevailing wage rates.''

[111] LIUNA supported this proposed restriction, and additionally requested the Department to prohibit ''replac[ing] a federal wage determination based on a collective bargaining agreement subject to annual updating with one that cannot be so escalated.''

[112] NABTU specifically requested the Department to ''limit its adoption of local rates to communities where the SU rates are more than three years old *and* where such local rates are established through a data collection process that: (1) prioritizes the modal wage rate and utilizes weighed averages, means or medians as a last resort; (2) is carried out no less frequently than every three years; (3) is open to participation by, at least, those interested parties listed in 29 CFR 1.3(a); and (4) accepts the types of fringe benefits that DOL accepts.''

[113] FTBA additionally asserted that the proposal might reduce WHD's need to consult with the highway department of the State in which a project in the Federal-aid highway system is to be performed.

The Department declines to adopt additional limitations on its discretion to adopt State or local prevailing wage rates beyond those specified in the proposed rule. The final rule provides the Administrator with the ultimate responsibility to make an affirmative determination to adopt a State or local wage rate. This contemplates that WHD will engage in a careful and individualized review of State and local prevailing wages, and the criteria specified in proposed § 1.3(h) accomplish that objective while also providing appropriate safeguards. For example, the Department disagrees with NABTU and the UA's suggestion to prohibit the adoption of State or local prevailing wage rates where an applicable Federal rate exists that was determined from the prior 3 years. Although the Department agrees that in general, it will be less likely to adopt a State or local rate if the applicable wage determination is derived from more recent data, the Department believes that individual decisions whether or not to adopt particular rates are best left to the Administrator to determine on a case-by-case basis.

Similarly, the Department declines to adopt a categorical prohibition on the adoption of State or local prevailing wage rates that are lower than those provided in the most recent Federal wage determination. First, the Department expects that this outcome will be exceedingly rare, because one of the primary purposes of the new adoption provision is to fill in gaps in areas where WHD is unable to conduct regular surveys due to resource constraints. Thus, in most or all cases in which a State or local wage determination is adopted, WHD will not have a recent wage rate to use for comparison. Moreover, the purpose of a wage determination is to accurately reflect wages that prevail in the locality. As such, if the Administrator determines that a State or local rate is the most appropriate or accurate rate to use, it would not be appropriate to reject the State or local rate simply because it happens to be lower than the analogous rate in the most recent (and potentially outdated) WHD survey. In any event, as noted above, the Department anticipates that the regulatory criteria for adoption will prevent the adoption of rates that would deviate significantly from those that would apply if the Department were to conduct a wage survey itself.

The Department declines ABC's request to restrict the pool of State and local prevailing wages eligible for incorporation to those that ''use appropriate statistical methods, such as sampling, weighting, or imputation, to obtain statistically representative results.'' This restriction does not apply to WHD's own wage determination process, and the Department declines to impose it on State and local wage determinations. In response to ABC's concern that the language in proposed § 1.3(h)(1) referring to ''full participation by all interested parties'' could be read to only permit a process in which participants self-select into a survey, as noted above, the phrase ''survey or other process'' is specifically intended to permit the Administrator, where otherwise appropriate, to adopt not only wage rates that are set using surveys, but also rates set using a different process. The Department reaffirms that the intent of § 1.3(h)(1) is to ensure that WHD will not adopt a State or local rate where the process that the State or locality uses to determine the rate unduly favors certain entities.

The Department declines NAHB's request to require that State and local governments bar the cross-consideration of rural and metropolitan wage data. As explained in greater detail in section III.B.1.vii.A, the Department is eliminating this prohibition in connection with its own wage determination process, and likewise does not believe that imposing such a ban in new § 1.3(h) to limit the pool of State and local rates eligible for adoption would be necessary or helpful. As explained in section III.B.1.vii, the removal of the prohibition on cross-consideration of rural and metropolitan data in the context of WHD's own Davis-Bacon surveys provides for such cross-consideration in limited and appropriate circumstances, as described in that section, and will not lead to the widespread mixing of metropolitan and rural data in determining prevailing wages. Similarly, the extent to which State or local prevailing wage rates reflect the combining of metropolitan and rural data in limited circumstances of the type contemplated in § 1.7(b), as opposed to a significantly broader combining of metropolitan and rural data, would be a factor that the Administrator could consider in determining whether it would be appropriate to adopt or not adopt the State or local rates, or, alternatively, to obtain the underlying State or local data and reconfigure the data based on county groupings that are similar or identical to those used by the Administrator in analogous contexts. The Department also notes that consistent with § 1.3(d), the Administrator will also review the extent to which a State or local building or residential prevailing rate is derived using Federal project data, but that a State or locality's use of such data to a greater or lesser extent than WHD uses such data in its own wage determinations will not categorically preclude adoption of the State or locality's rates. The Department also declines CC&M's suggestion to adopt State or local rates only when there is insufficient data from BLS. For the reasons explained at length above, the Department does not believe that the use of BLS data to set DBRA wage rates is generally appropriate. The Department notes that to the extent that a State or locality's system for making wage determinations raises similar concerns, such concerns would weigh significantly against the Department's adoption of such rates.

The Department appreciates commenter concerns about the adoption of inappropriately high State or local prevailing wage rates but believes that the criteria specified in new § 1.3(h) will serve as a safeguard against such outcomes. Moreover, WHD's expanded authority to adopt State and local rates under new § 1.3(g) is wholly discretionary, and may be done ''with or without modification'' of an underlying rate. While the Department acknowledges that the adoption of State or local rates will in many cases result in increases to the applicable Davis-Bacon prevailing wage rates due to the replacement of outdated and artificially low rates with more current State or local rates, such increases are entirely appropriate and result in rates that better reflect wages that actually prevail in the relevant locality. As a general matter, states and localities that conduct wage surveys more frequently than WHD may have stronger relationships with local stakeholders, enabling those bodies to determine prevailing wage rates with greater participation.[114] A wide swath of commenters—including contractors, contractor associations, and contracting agencies—agreed that with that reasoning, and asserted that the proposals would benefit the construction industry as a whole.

The Department disagrees that expanding WHD's ability to adopt State or local prevailing wage rates will hamper its ability or willingness to conduct Federal wage surveys. To the contrary, empowering WHD to adopt State and local rates in appropriate cases will give WHD the flexibility to better allocate its limited resources to

[114] The Department explained this in the NPRM, *see* 87 FR 15699–700, and several comments, including from III–FFC and the LCCHR and other civil rights and worker advocacy organizations, made similar arguments in support of the Department's proposals.

the classifications and localities most in need of attention.[115] As other commenters noted, an expanded use of State and local prevailing wages may achieve efficiencies that improve WHD's overall administration and enforcement of the DBRA.

The Department also disagrees that increased flexibility to adopt State and local rates is inconsistent with the final rule's restoration of the ''three-step process'' when WHD conducts its own wage surveys. Both regulatory revisions seek to further the same goal: the adoption of prevailing wage determinations that better reflect wages that are currently prevailing in a locality. Moreover, the final rule requires WHD to consider the extent to which a state's methodology is similar to, or deviates from, WHD's when determining whether to adopt a State or local rate, and whether to do so with or without modification. As the Department emphasized in the NPRM, the new provisions require the Administrator to make an affirmative determination that the criteria enumerated in § 1.3(h) have been met in order to adopt a State or local wage rate, and to do so only after careful review of both the rate and the process used to derive the rate. The criteria are intended to allow WHD to adopt State and local prevailing wage rates where appropriate while also ensuring that adoption of such rates is consistent with the statutory requirements of the Davis-Bacon Act and does not create arbitrary distinctions between jurisdictions where WHD makes wage determinations by using its own surveys and jurisdictions where WHD makes wage determinations by adopting State or local rates.[116] Thus, under the final rule, the Department may not simply accept State or local data with little or no review. Such actions would be inconsistent with the Secretary's statutory responsibility to ''determine[ ]'' the wages that are prevailing. 40 U.S.C. 3142(b). Adoption of State or local rates after appropriate review, however, is consistent with the authority Congress granted to the Department in the Davis-Bacon Act. The DBA ''does not prescribe a method for determining prevailing wages.'' *Chesapeake Housing,* ARB No. 12–010, 2013 WL 5872049, at *4. Rather, the statute ''delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.'' *Donovan,* 712 F.2d at 616. The D.C. Circuit has explained that the DBA's legislative history reflects that Congress ''envisioned that the Secretary could establish the method to be used'' to determine DBA prevailing wage rates. *Id.* (citing 74 Cong. Rec. 6516 (1931) (remarks of Rep. Kopp) (''A method for determining the prevailing wage rate might have been incorporated in the bill, but the Secretary of Labor can establish the method and make it known to the bidders.'')).

Reliance on prevailing wage rates calculated by State or local authorities for similar purposes is a permissible exercise of this broad statutory discretion. In areas where states or localities are already gathering reliable information about prevailing wages in construction, it may be inefficient for the Department to use its limited resources to perform the same tasks. As a result, the Department is finalizing its proposal to use State and local wage determinations under specified circumstances where, based on a review and analysis of the processes used in those wage determinations, the Administrator determines that such use would be appropriate and consistent with the DBA. Such resource-driven decisions by Federal agencies are permissible. *See, e.g., Hisp. Affs. Project* v. *Acosta,* 901 F.3d 378, 392 (D.C. Cir. 2018) (upholding Department's decision not to collect its own data but instead to rely on a ''necessarily . . . imprecise'' estimate given that data collection under the circumstances would have been ''very difficult and resource-intensive''); *Dist. Hosp. Partners, L.P.* v. *Burwell,* 786 F.3d 46, 61–62 (D.C. Cir. 2015) (concluding that an agency's use of an ''imperfect[ ]'' data set was permissible under the Administrative Procedure Act).[117]

For the above reasons, the final rule adopts these revisions as proposed.

iv. Section 1.4 Report of Agency Construction Programs

Section 1.4 currently provides that, to the extent practicable, agencies that use wage determinations under the DBRA shall submit an annual report to the Department outlining proposed construction programs for the coming year. The reports described in § 1.4 assist WHD in its multiyear planning efforts by providing information that may guide WHD's decisions regarding when to survey wages for particular types of construction in a particular locality. These reports are an effective way for the Department to know where Federal and federally assisted construction will be taking place, and therefore where updated wage determinations will be of most use.

Notwithstanding the importance of these reports to the program, contracting agencies have not regularly provided them to the Department. As a result, after consideration, the Department proposed to remove the language in the regulation that currently allows agencies to submit reports only ''to the extent practicable.'' Instead, proposed § 1.4 would require Federal agencies to submit the construction reports.

The Department also proposed to adopt certain elements of two prior AAMs addressing these reports. In 1985, WHD updated its guidance regarding the agency construction reports, including by directing that Federal agencies submit the annual report by April 10 each year and providing a recommended format for such agencies to submit the report. *See* AAM 144 (Dec. 27, 1985). In 2017, WHD requested that Federal agencies include in the reports proposed construction programs for an additional 2 fiscal years beyond the upcoming year. *See* AAM 224 (Jan. 17, 2017). The proposed changes to § 1.4 would codify these guidelines in the regulations.

The Department also proposed new language requiring Federal agencies to include notification of any expected options to extend the terms of current construction contracts. The Department proposed this change because—like a new contract—the exercise of an option requires the incorporation of the most current wage determination. *See* AAM 157 (Dec. 9, 1992); *see also* 48 CFR 22.404–12(a). Receiving information concerning expected options to extend the terms of current construction contracts therefore will help the Department assess where updated wage determinations are needed for Federal and federally assisted construction,

[115] Fair Contracting Foundation of Minnesota opined that the Department's proposals would ''free[ ] up precious agency resources to focus on states that lack the requisite public infrastructure to conduct their own surveys.''

[116] For example, in response to AWHA's expressed concern about the adoption of ''wage rates that have substantively different methods than those mandated at the federal level,'' the Department notes that § 1.3(h) requires that a State or local government's criteria for setting prevailing wage rates must be ''substantially similar'' to that used by the Administrator in order for the State or local wage rate to be adopted.

[117] The Federal Highway Administration's (FHWA) independent statutory obligation for the Department to consider and give ''due regard'' to information obtained from State highway agencies for highway wage determinations does not prohibit WHD from adopting State or local determinations, either for highway construction or for other types of construction, where appropriate. Rather, this language imposes a minimum requirement for the Secretary to consult with states and consider their wage determinations for highway construction. *See Virginia, ex rel., Comm'r, Virginia Dep't of Highways and Transp.* v. *Marshall,* 599 F.2d 588, 594 (4th Cir. 1979) (''Section 113(b) requires that the Secretary 'consult' and give 'due regard' to the information thus obtained.'').

which will in turn contribute to the effectiveness of the Davis-Bacon wage survey program. The Department also proposed that Federal agencies include the estimated cost of construction in their reports, as this information also will help the Department prioritize areas where updated wage determinations will have the broadest effects.

In addition, the Department proposed to require that Federal agencies include in the annual report a notification of any significant changes to previously reported construction programs. In turn, the Department proposed eliminating the current directive that agencies notify the Administrator mid-year of any significant changes in their proposed construction programs. Such notification would instead be provided in Federal agencies' annual reports.

Finally, the Department proposed deleting the reference to the Interagency Reports Management Program because the requirements of that program were terminated by the General Services Administration (GSA) in 2005. *See* 70 FR 3132 (Jan. 19, 2005).

The Department explained that these proposed changes would not result in significant burdens on contracting agencies, as the proposed provisions request only information already on hand. Furthermore, any burden resulting from the new proposal should be offset by the proposed elimination of the current directive that agencies notify the Administrator of any significant changes in a separate mid-year report. The Department also sought comment on any alternative methods through which the Department may obtain the information and eliminate the need to require the agency reports.

A number of contractors, unions, and industry associations that submitted comments expressed general support for the Department's proposed change to require that reports include construction program information for an additional 2 fiscal years beyond the upcoming year and include notification of options to extend terms of current construction contracts or any significant changes to construction programs. *See, e.g.,* Minnesota State Building and Construction Trades Council; SMACNA; and Smith-Boughan, Inc. NECA supported the changes as necessary for ensuring that the Department is informed of where Federal and federally assisted construction will take place.

The UA supported the proposed change and further suggested that the reports be posted online to improve transparency or that the Department ''provide a streamlined mechanism for interested parties to request the reports.'' While appreciating the UA's interest in transparency, the Department does not believe codification of such a procedure is necessary, particularly given the amount of information regarding agency construction programs that is already in the public domain and available through resources such as USAspending.gov and agency operating plans.

The Department of the Army's Labor Advisor supported the proposal to change agency construction reports' due date to April 10, stating that the April date is ''considerably more practicable than October 1,'' as contracting agency activity ''is especially busy at the start of each fiscal year.'' This commenter, however, noted that the proposed language is confusing because it characterizes the requirement as one that is ''[a]t the beginning of each fiscal year,'' even though fiscal years for the Federal government run from October 1 through September 30. The Department agrees that the proposed language may lead to confusion and has changed the description to require the reports ''[o]n an annual basis.''

The Department received a few comments expressing concerns about additional burdens from the proposal to remove the language in the regulation that currently allows agencies to submit reports only ''to the extent practicable.'' NAHRO expressed concern that if agencies are required to submit reports, additional burdens will be placed on public housing authorities and other housing and community development organizations that provide information to HUD. The National Community Development Association was also concerned that the Department's proposal would result in HUD needing to impose additional information collection requirements on grantees and recommended that agencies only be required to report on projects ''of such a scale as to be relevant to the stated goal of assisting [the Department] decide where updated wage determinations are needed or would be of most use.'' The Department of the Army's Labor Advisor recommended the Department add clarifying language that construction reports be ''based on information already on hand.'' In response to comments received, and specifically in order to address the stated concerns about imposing potentially burdensome information collection requirements on recipients of Federal financial assistance, the Department has added language at the end of the opening sentence in § 1.4 of the regulatory text to clarify that a Federal agency's report should be based on information in the Federal agency's possession at the time it furnishes its report. This language is intended to clarify that a Federal agency is not required to impose additional information collection requirements on grantees in order to fulfill the Federal agency's duty to submit construction program reports to the Department.[118]

Having considered the comments both supporting and opposing the proposed changes to the agency construction reporting requirements, the Department continues to believe it is appropriate to remove the language allowing the reporting to occur only ''to the extent practicable.'' Accordingly, the final rule adopts the proposed revisions to § 1.4, with the limited changes specified above.

v. Section 1.5 Publication of General Wage Determinations and Procedure for Requesting Project Wage Determinations

The Department proposed a number of revisions to § 1.5 to clarify the applicability of general wage determinations and project wage determinations. Except as noted below, these revisions are consistent with longstanding Department practice and subregulatory guidance.

First, the Department proposed to re-title § 1.5, currently titled ''Procedure for requesting wage determinations,'' as ''Publication of general wage determinations and procedure for requesting project wage determinations.'' The proposed revision better reflects the content of the section as well as the distinction between general wage determinations, which the Department publishes for broad use, and project wage determinations, which are requested by contracting agencies on a project-specific basis. The Department also proposed to add titles to each paragraph in § 1.5 to improve readability.

Additionally, the Department proposed to add language to § 1.5(a) to explain that a general wage determination contains, among other information, a list of wage rates determined to be prevailing for various classifications of laborers and mechanics for specified type(s) of construction in a given area. Likewise, the Department proposed to add language to § 1.5(b) to explain circumstances under which an agency

[118] While this rule change does not require Federal agencies to impose additional information collection requirements on grantees or other recipients of federal assistance, this language does not prevent them from doing so to the extent that additional or modified information requests may be helpful. The details of such information collection requests, however, are outside of the scope of this rulemaking.

may request a project wage determination, namely, where (1) the project involves work in more than one county and will employ workers who may work in more than one county; (2) there is no general wage determination in effect for the relevant area and type of construction for an upcoming project; or (3) all or virtually all of the work on a contract will be performed by one or more classifications that are not listed in the general wage determination that would otherwise apply, and contract award or bid opening has not yet taken place. The first of these three circumstances conforms to the proposed revision to the definition of ''area'' in § 1.2 that would permit the issuance of project wage determinations for multicounty projects where appropriate. The latter two circumstances reflect the Department's existing practice. *See* PWRB, Davis-Bacon Wage Determinations, at 4–5.

The Department also proposed to add language to § 1.5(b) clarifying that requests for project wage determinations may be sent by means other than the mail, such as email or online submission, as directed by the Administrator. Additionally, consistent with the Department's current practice, the Department proposed to add language to § 1.5(b) requiring that when requesting a project wage determination for a project that involves multiple types of construction, the requesting agency must attach information indicating the expected cost breakdown by type of construction. *See* PWRB, Davis-Bacon Wage Determinations, at 5. The Department also proposed to clarify that in addition to submitting the information specified in the regulation, a party requesting a project wage determination must submit all other information requested in the Standard Form (SF) 308. The Department proposed to discuss the time required for processing requests for project wage determinations in § 1.5(b)(5).

Finally, the Department proposed to clarify the term ''agency'' in § 1.5. In proposed § 1.5(b)(2) (renumbered, currently § 1.5(b)(1)), which describes the process for requesting a project wage determination, the Department proposed to delete the word ''Federal'' that precedes ''agency.'' This proposed deletion, and the resulting incorporation of the definition of ''agency'' from § 1.2, clarifies that, as already implied elsewhere in § 1.5, non-Federal agencies may request project wage determinations. *See, e.g.,* § 1.5(b)(3) (proposed § 1.5(b)(4)) (explaining that a State highway department under the Federal-Aid Highway Acts may be a requesting agency).

The Department received no substantive comments on these proposals other than comments regarding the availability of project wage determinations for multicounty projects; these comments were discussed above in the review of comments on the definition of ''area'' in § 1.2. The final rule adopts these changes as proposed, with one non-substantive change. The proposed language in § 1.5(b)(5), to address processing times for requests for project wage determinations, inadvertently duplicated language already found in § 1.5(c). Therefore, the final rule removes existing § 1.5(c) to avoid duplication.

vi. Section 1.6 Use and Effectiveness of Wage Determinations

(A) Organizational, Technical and Clarifying Revisions

(1) Terminology and Organization

The Department proposed to reorganize, rephrase, and/or renumber several regulatory provisions and text in § 1.6. These proposed revisions included adding headings to paragraphs for clarity; changing the order of some of the paragraphs so that discussions of general wage determinations precede discussions of project wage determinations, reflecting the fact that general wage determinations are (and have been for many years) the norm, whereas project wage determinations are the exception; adding the word ''project'' before ''wage determinations'' in locations where the text refers to project wage determinations but could otherwise be read as referring to both general and project wage determinations; using the term ''revised'' wage determination to refer both to cases where a wage determination is modified, such as due to updated CBA rates, and cases where a wage determination is reissued entirely (referred to in the current regulatory text as a ''supersedeas'' wage determination), such as after a new wage survey; consolidating certain paragraphs that discuss revisions to wage determinations to eliminate redundancy and improve clarity; revising the regulation so that it references the publication of a general wage determination (consistent with the Department's current practice of publishing wage determinations online), rather than publication of notice of the wage determination (which the Department previously did in the **Federal Register**); and using the term ''issued'' to refer, collectively, to the publication of a general wage determination or WHD's provision of a project wage determination.

The Department did not receive any comments on these proposed changes to terminology and the organization of the section. The final rule therefore adopts these changes as proposed.

(2) Use of Inactive Wage Determinations

The Department also proposed minor revisions regarding wage determinations that are no longer current, referred to in current regulatory text as ''archived'' wage determinations. First, the Department proposed to revise the regulatory text to instead refer to such wage determinations as ''inactive'' to conform to the terminology currently used on SAM. Second, the Department proposed to clarify that there is only one appropriate use for inactive wage determinations, namely, when the contracting agency initially failed to incorporate the correct wage determination into the contract and subsequently must incorporate the correct wage determination after contract award or the start of construction (a procedure that is discussed in § 1.6(f)). In that circumstance, even if the wage determination that should have been incorporated at the time of the contract award has since become inactive, it is still the correct wage determination to incorporate into the contract. Third, the Department also proposed that agencies should notify WHD prior to engaging in incorporation of an inactive wage determination, and that agencies may not incorporate the inactive wage determination if WHD instructs otherwise. While the existing regulation requires the Department to ''approv[e]'' the use of an inactive wage determination, the proposed change would permit the contracting agency to use an inactive wage determination under these limited circumstances as long as it has notified the Administrator and has not been instructed otherwise. The proposed change was intended to ensure that contracting agencies incorporate omitted wage determinations promptly rather than waiting for approval.

The Department did not receive any comments on the proposed revisions relating to inactive wage determinations. Accordingly, the final rule adopts these changes as proposed.

(3) Incorporation of Multiple Wage Determinations Into a Contract

The Department also proposed revisions to § 1.6(b) to clarify when contracting agencies must incorporate multiple wage determinations into a contract. The proposed language stated

that when a construction contract includes work in more than one ''area'' (as the term is defined in § 1.2), and no multi-county project wage determination has been obtained (as contemplated by the proposed revisions to § 1.2), the applicable wage determination for each area must be incorporated into the contract so that all workers on the project are paid the wages that prevail in their respective areas, consistent with the DBA. The Department also proposed language stating that when a construction contract includes work in more than one ''type of construction'' (as the Department has proposed to define the term in § 1.2), the contracting agency must incorporate the applicable wage determination for each type of construction where the total work in that type of construction is substantial. This corresponds with the Department's longstanding guidance published in AAM 130 (Mar. 17, 1978) and AAM 131 (July 14, 1978).[119] The Department also proposed to continue interpreting the meaning of ''substantial'' in subregulatory guidance.[120] The Department requested comments on the above proposals, including potential ways to improve the standards for when and how to incorporate multiple wage determinations into a contract.

The Department did not receive any comments on the proposed language relating to the incorporation of multiple general wage determinations when the construction contract includes work in more than one area, other than those comments regarding the use of multi-county areas that are addressed above in the discussion of the definition of area in § 1.2, and therefore the final rule adopts that language as proposed.

In contrast, the Department received comments related to the proposed language on the incorporation of multiple wage determinations when a construction contract includes work in more than one type of construction. CC&M expressed support for the Department's position reflected in AAM 236 (Dec. 14, 2020) that work in another category of construction is generally considered substantial when it exceeds either $2.5 million or 20 percent of total project costs. *See supra* note 118. While not explicitly taking a position on the proposed language or the existing subregulatory guidance, the UA recommended that the Department provide either regulatory or subregulatory guidance clarifying when it is appropriate for work to be classified as heavy or building in multiple wage determination situations.

MBA and National Council of State Housing Agencies (NCSHA) expressed opposition to the proposed language's application to multifamily housing projects, recommending that the regulations instead specify that only a single residential wage determination should apply to such projects. These commenters asserted that HUD policy has long been that only a single residential wage determination need be applied to residential projects and that application of multiple wage determinations would be unnecessarily complex because it would require contractors to track when workers are performing work in different categories of construction and pay different rates accordingly. MBA further asserted that the use of a single residential rate in these scenarios would also be consistent with the Department's own guidance and that work in other categories of construction on residential projects is actually of a character similar to residential work because wage rates for such work are more similar to residential wage rates, and are therefore more likely to be included in residential wage determinations. In the alternative, MBA argued that if multiple wage determinations are applied to multifamily housing projects, the threshold for substantiality should be increased to $15 million, because current HUD standards consider Federal Housing Administration-insured loans to be large loans when the loan exceeds $75 million ($15 million is 20 percent of $75 million). MBA also suggested $5 million as a potential threshold. Finally, MBA requested that the Department provide more details as to the process that will be used to re-evaluate annually whether an update to the substantiality threshold is warranted, as provided for in AAM 236.

The final rule adopts the language relating to the application of multiple categories of wage determinations as proposed. As an initial matter, the Department has decided to continue to interpret the meaning of ''substantial'' in its subregulatory guidance in accordance with its longstanding practice. With respect to the monetary threshold in particular, WHD anticipates issuing an AAM or other guidance containing additional information regarding both the methodology and frequency of updates to the threshold.

The Department appreciates the UA's suggestion that the distinctions between building and heavy construction should be more precisely delineated and MBA's suggestion that the Department should more precisely describe the methods used to update the dollar threshold, and will consider these suggestions when developing further guidance on this issue and when updating the threshold in the future. The Department also notes that stakeholders are always welcome to provide input as to data and methods that should be used in interpreting the meaning of ''substantial'' and updating the dollar threshold.

While the Department appreciates MBA's and NCSHA's goal of encouraging the development of multifamily housing projects, the Department declines the suggestion to exempt such projects from the requirement to incorporate wage determinations from multiple categories when a project has a substantial amount of work in another category of construction. Although HUD previously suggested that a single residential wage determination could be used in such circumstances, it has since issued guidance clarifying that multiple wage determinations should be incorporated into construction contracts for multifamily housing when there is a substantial amount of work in another category of construction, consistent with longstanding Department policy and this rulemaking. *See* U.S. Dep't of Hous. & Urb. Dev., Labor Relations Letter on Applicability of Department of Labor Guidance Concerning 'Projects of a Similar Character' (Jan. 15, 2021).[121]

Moreover, the Department's existing guidance does not support an exception; rather, AAM 130 and 131 apply the substantiality standard to residential projects to the same extent as other types of projects. While MBA contends in its comment that language in AAM

[119] AAM 130 states that where a project ''includes construction items that in themselves would be otherwise classified, a multiple classification may be justified if such construction items are a substantial part of the project . . . . [But] a separate classification would not apply if such construction items are merely incidental to the total project to which they are closely related in function,'' and construction is incidental to the overall project. AAM 130, at 2 n.1. AAM 131 similarly states that multiple schedules are issued if ''the construction items are substantial in relation to project cost[s].'' However, it further explains that ''[o]nly one schedule is issued if construction items are 'incidental' in function to the overall character of a project . . . and if there is not a substantial amount of construction in the second category.'' AAM 131, at 2 (emphasis omitted).

[120] Most recently, on Dec. 14, 2020, the Administrator issued AAM 236 (Dec. 14, 2020), which states that ''[w]hen a project has construction items in a different category of construction, contracting agencies should generally apply multiple wage determinations when the cost of the construction exceeds either $2.5 million or 20% of the total project costs,'' but that WHD will consider ''exceptional situations'' on a case-by-case basis. AAM 236, at 1–2.

[121] *https://www.hud.gov/sites/dfiles/OCHCO/documents/LR_21-01.pdf.*

130 stating that residential construction includes ''all incidental items, such as site work, parking areas, utilities, streets and sidewalks'' indicates that a single residential wage determination may be applied to any such work related to a residential project, AAM 130 similarly describes ''incidental grading, utilities, and paving'' in building construction projects and states that highway construction excludes projects ''incidental to residential or building construction.'' These references to ''incidental'' work in AAM 130 (and similar references in AAM 131 and the Manual of Operations) reflect the policy explained in those documents that a single wage determination for a project involving more than one type of construction is only appropriate when construction items in the non-primary category are '' 'incidental' in function,'' ''*and* . . . there is not a substantial amount of construction in the second category.'' AAM 131, at 2; *see also* AAM 130, at 2 n.1; Manual of Operations, at 29. Thus, although, as AAM 130 and the Manual of Operations suggest, site work and the construction of parking areas, utilities, streets, and sidewalks are often incidental in function to residential construction, these construction items may or may not be substantial in relation to a particular project's overall cost. Nothing in those guidance documents suggests that residential projects are to be treated any differently from other types of projects in this regard or that substantial work in other categories should be assigned a residential wage determination.[122]

The Department also does not agree with MBA's contention that the data on the rates paid to workers who perform work in another category of construction, where work in that other category of construction is substantial, are likely to be included in the applicable residential wage determination. To the contrary, when wage data submitted to the Department in connection with a Davis-Bacon wage survey reflects that a project in one category includes substantial construction in another category, the Department excludes the wage data for the work in the second category from the dataset that will be used to establish prevailing wage rates for the primary category of construction, including in surveys for residential construction. Moreover, MBA has not provided any data to support its assertion that workers who perform the types of work in other categories of construction commonly found on residential projects are typically paid residential wage rates rather than the wage rates generally applicable to those categories of construction. Similarly, MBA has not provided any data suggesting that the local wages in other categories of construction are somehow more shielded from the potential impact on wages of a substantial amount of work in that category of construction on residential projects than on other types of projects.

Finally, the Department disagrees that any added complexity from the application of multiple wage determinations to multifamily housing projects justifies an exception. Davis-Bacon contractors across all types of projects are required to track the hours worked and to pay the corresponding prevailing wage rates due. These rates necessarily vary depending on the work performed, because workers work in different classifications and sometimes in different construction categories. The ''substantiality'' threshold for work in a second category of construction seeks to balance the benefits of applying the appropriate wage determinations—including the preservation of locally prevailing wages—against any associated administrative burden, by requiring that additional wage determinations be incorporated only where the work in the non-primary category is of a sufficient magnitude. There is no indication that this balance should be any different for multifamily housing projects.

For these reasons, the final rule adopts the language relating to the application of multiple categories of wage determinations as proposed and declines to create an exception for multifamily housing contractors.

(4) Clarification of Responsibilities of Contracting Agencies, Contractors, and Subcontractors

The Department also proposed to add language to § 1.6(b) clarifying and reinforcing the responsibilities of contracting agencies, contractors, and subcontractors with regard to wage determinations. Specifically, the Department proposed to clarify in § 1.6(b)(1) that contracting agencies are responsible for making the initial determination of the appropriate wage determination(s) for a project. In § 1.6(b)(2), the Department proposed to clarify that contractors and subcontractors have an affirmative obligation to ensure that wages are paid to laborers and mechanics in compliance with the DBRA labor standards.

The Department did not receive any comments on these proposed revisions, and therefore the final rule adopts these changes as proposed.

(5) Consideration of Area Practice

The Department also proposed to revise language in § 1.6(b) that currently states that the Administrator ''shall give foremost consideration to area practice'' in resolving questions about ''wage rate schedules.'' In the Department's experience, this language has created unnecessary confusion because stakeholders have at times interpreted it as precluding the Administrator from considering factors other than area practice when resolving questions about wage determinations. Specifically, the Department has long recognized that when ''it is clear from the nature of the project itself in a construction sense that it is to be categorized'' as either building, residential, heavy, or highway construction, ''it is not necessary to resort to an area practice survey'' to determine the proper category of construction. AAM 130, at 2; *see also* AAM 131, at 1 (''[A]rea practice regarding wages paid will be taken into consideration together with other factors,'' when ''the nature of the project in a construction sense is not clear.''); *Chastleton Apartments,* WAB No. 84–09, 1984 WL 161751, at *4 (Dec. 11, 1984) (because the ''character of the structure in a construction sense dictates its characterization for Davis-Bacon wage purposes,'' where there was a substantial amount of rehabilitation work being done on a project similar to a commercial building in a construction sense, it was ''not necessary to determine whether there [was] an industry practice to recognize'' the work as residential construction). The proposed rule explained that the regulatory directive to give ''foremost consideration to area practice'' in determining which wage determination to apply to a project arguably is in tension with the Department's longstanding position and has resulted in stakeholders contending on occasion that WHD or a contracting agency must in every instance conduct an exhaustive review of local area practice as to how work is classified, even if the nature of the project in a construction sense is clear. The proposed language would resolve this perceived inconsistency and would streamline determinations

[122] Similarly, the absence of a specific example of a residential project in the examples of projects with multiple wage determinations in AAM 130 and AAM 131 in no way indicates that residential construction projects cannot have a substantial amount of work in another category of construction. The examples listed in AAM 130 and 131 were not intended to be an exclusive list of all possible situations in which a project might require the application of multiple wage determinations. AAM 131 plainly states that beyond the listed examples, ''the same principles are applied to other categories.''

regarding construction types by making clear that while the Administrator should continue considering area practice, the Administrator may consider other relevant factors, particularly the nature of the project in a construction sense. This proposed regulatory revision also would better align the Department's regulations with the FAR, which does not call for ''foremost consideration'' to be given to area practice in all circumstances, but rather provides, consistent with AAMs 130 and 131, that ''[w]hen the nature of a project is not clear, it is necessary to look at additional factors, with primary consideration given to locally established area practices.'' 48 CFR 22.404–2(c)(5).

The Department received one comment on this proposal. VDOT recommended that the Department retain the language in the existing regulation, expressing concern that if area practice is not the primary factor to be considered when determining what wage determinations are to be applied to a project, the Department could determine that a project is one type of construction even if area practice is to pay wage rates from another category of construction. VDOT opined that this would be contrary to the purpose of the DBA, which is to establish prevailing wage rates based on actual wage rates that contractors pay for a type of construction project.

While the Department recognizes VDOT's concerns, it does not believe they warrant deviating from the proposed rule. The Davis-Bacon labor standards require that covered workers receive at least the locally prevailing wages that are paid on projects of a similar character. As explained above, where the character of a project in a construction sense is clear, it is not necessary or appropriate to survey area practice to determine what category of construction applies; the applicable category is based on the nature of construction even if area practice is to pay wage rates associated with a different category. *See 2900 Van Ness Street,* WAB No. 76–11, 1977 WL 24827, at *2 (Jan. 27, 1977) (''The test of whether a project is of a character similar to another project refers to the nature of the project itself in a construction sense, not to whether union or non-union wages are paid or whether union or non-union workers are employed.''); *Lower Potomac Pollution Control Plant,* WAB No. 77–20, 1977 WL 24840, at *1 (Sept. 30, 1977) (''When it is clear from the nature of the project itself in a construction sense that it is to be categorized as either building, heavy or highway construction . . . [t]he area practice with respect to wages could not convert what is clearly one category of construction into another category.''). A highway cannot be a building, for example, regardless of how similar the wages paid on highway projects in a locality may be to the wages paid on building projects. The Department believes that the revision to the ''area practice'' language better reflects that principle by eliminating any implication that area practice could somehow outweigh the clear character of a project.

In contrast, the revision reflects that when it is unclear how a project should be categorized, while the Department considers area practice as to wage rates to assist in determining that project's category, area practice is not the only relevant information. As indicated in AAM 131, ''area practice regarding wages paid will be taken into consideration *together with other factors*'' when there is a genuine question as to the correct category of construction for a project (emphasis added). *See also Tex. Heavy-Highway Branch,* WAB No. 77–23, 1977 WL 24841, at *4 (Dec. 30, 1977) (''Wages, however, are only one indication. It is also necessary to look at other characteristics of the project, including the construction techniques, the material and equipment being used on the project, the type of skills called for on the project work and other similar factors which would indicate the proper category of construction.''). The proposed language is consistent with these principles and simply clarifies that area practice information is relevant to determining the type of construction project involved only when there is a genuine question as to the applicable category of construction, and that other relevant information is not excluded from consideration when making such a determination. The final rule therefore adopts the language as proposed.

(6) Section 1.6(e) and (g)

In § 1.6(e), the Department proposed to clarify that if, prior to contract award (or, as appropriate, prior to the start of construction), the Administrator provides written notice that the bidding documents or solicitation included the wrong wage determination or schedule, or that an included wage determination was withdrawn by the Department as a result of an ARB decision, the wage determination may not be used for the contract, regardless of whether bid opening (or initial endorsement or the signing of a housing assistance payments contract) has occurred. Current regulatory text states that under such circumstances, notice of such errors is ''effective immediately'' but does not explain the consequences of such effect. The proposed language is consistent with the Department's current practice and guidance. *See* Manual of Operations, at 35.

The Department did not receive any comments on these proposed revisions, and therefore the final rule adopts the changes as proposed, except that in a technical correction, the Department has moved certain language from § 1.6(e)(2) into § 1.6(e), as the language was intended to encompass the entire paragraph.

In § 1.6(g), the Department proposed a number of additional clarifying revisions. It proposed to clarify that under the Related Acts, if Federal funding or assistance is not approved prior to contract award (or the beginning of construction where there is no contract award), the applicable wage determination must be incorporated retroactive to the date of the contract award or the beginning of construction. The Department also proposed to delete language indicating that a wage determination must be ''requested,'' as such language appears to contemplate a project wage determination, which in most situations will not be necessary as a general wage determination will apply. The Department also proposed to revise § 1.6(g) to clarify that it is the head of the applicable Federal agency who must request any waiver of the requirement that a wage determination provided under such circumstances be retroactive to the date of the contract award or the beginning of construction. The current version of § 1.6(g) uses the term ''agency'' and is therefore ambiguous as to whether it refers to the Federal agency providing the funding or assistance or the state or local agency receiving it. The proposed clarification that this term refers to Federal agencies was intended to reflect both the Department's current practice and its belief that it is most appropriate for the relevant Federal agency, rather than a State or local agency, to bear these responsibilities, including assessing, as part of the waiver request, whether non-retroactivity would be necessary and proper in the public interest based on all relevant considerations.

The Department did not receive any comments on these proposed revisions, and therefore the final rule adopts these changes as proposed.

(B) Requirement To Incorporate Most Recent Wage Determinations Into Certain Ongoing Contracts

The Department's longstanding position has been to require that

contracts and bid solicitations contain the most recently issued revision to the applicable wage determination(s) to the extent that such a requirement does not cause undue disruption to the contracting process. *See* 47 FR 23644, 23646 (May 28, 1982); *U.S. Army,* ARB No. 96–133, 1997 WL 399373, at *6 (July 17, 1997) (''The only legitimate reason for not including the most recently issued wage determination in a contract is based upon disruption of the procurement process.''). Under the current regulations, a wage determination is generally applicable for the duration of a contract once incorporated. *See* 29 CFR 1.6(c)(2)(ii), 1.6(c)(3)(vi). For clarity, the NPRM proposed to add language to § 1.6(a) to state this affirmative principle.

The Department also proposed to add a new paragraph, § 1.6(c)(2)(iii), to clarify two circumstances where the principle that an incorporated wage determination remains applicable for the life of a contract does not apply. First, the Department proposed to explain that the most recent version of any applicable wage determination(s) must be incorporated when a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract. The proposed change was consistent with the Department's guidance, case law, and historical practice, under which such modifications are considered new contracts. *See U.S. Army,* 1997 WL 399373, at *6 (noting that the Department has consistently ''required that new DBA wage determinations be incorporated . . . when contracts are modified beyond the obligations of the original contract''); *Iowa Dep't of Transp.,* WAB No. 94–11, 1994 WL 764106, at *5 (Oct. 7, 1994) (''A contract that has been 'substantially' modified must be treated as a 'new' contract in which the most recently issued wage determination is applied.''); AAM 157 (explaining that exercising an option ''requires a contractor to perform work for a period of time for which it would not have been obligated . . . under the terms of the original contract,'' and as such, ''once the option . . . is exercised, the additional period of performance becomes a new contract''). The Department proposed that under these circumstances, the most recent version of any wage determination(s) must be incorporated as of the date of the change or, where applicable, the date the agency exercises its option to extend the contract's term. These circumstances do not include situations where the contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

Additionally, the Department proposed a revision to address modern contracting methods that frequently involve a contractor agreeing to perform construction as the need arises over an extended time period, with the quantity and timing of the construction not known when the contract is awarded.[123] Examples of such contracts would include, but are not limited to: a multiyear indefinite-delivery-indefinite-quantity (IDIQ) contract to perform repairs to a Federal facility when needed; a long-term contract to operate and maintain part or all of a facility, including repairs and renovations as needed;[124] or a schedule contract or BPA whereby a contractor enters into an agreement with a Federal agency to provide certain products or services (either of which may involve work subject to Davis-Bacon coverage, such as installation) or construction at agreed-upon prices to various agencies or other government entities, who can order from the schedule at any time during the contract. The extent of the required construction, the time, and even the place where the work will be performed may be unclear at the time such contracts are awarded.

Particularly when such contracts are lengthy, using an outdated wage determination from the time of the underlying contract award instead of the most current wage determination is a departure from the intent of the Davis-Bacon labor standards because it does not sufficiently ensure that workers are paid prevailing wages. Additionally, in the Department's experience, agencies are sometimes inconsistent as to how they incorporate wage determination revisions into these types of contracts. Some agencies do so every time additional Davis-Bacon work is obligated, others do so annually, others only incorporate applicable wage determinations at the time the original, underlying contract is awarded, and sometimes no wage determination is incorporated at all. This inconsistency can prevent the payment of prevailing wages to workers and can disrupt the contracting process.

Accordingly, the Department proposed to require, for these types of contracts, that contracting agencies incorporate the most up-to-date applicable wage determination(s) annually on each anniversary date of a contract award or, where there is no contract, on each anniversary date of the start of construction, or another similar anniversary date where the agency has sought and received prior approval from the Department for the alternative date. This proposal was consistent with the rules governing wage determinations under the SCA, which require that the contracting agency obtain a wage determination prior to the ''[a]nnual anniversary date of a multiyear contract subject to annual fiscal appropriations of the Congress.'' *See* 29 CFR 4.4(a)(1)(v). The Department further proposed that when any construction work under such a contract is obligated, the most up-to-date wage determination(s) incorporated into the underlying contract be included in each task order, purchase order, or any other method used to direct performance. Once the applicable wage determination revision is included in such an order, that revision would generally apply to the order until the construction items called for by that order are completed. With this proposal, the Department intended that a wage determination correctly incorporated into such an order would not need to be updated even if the duration of the order extends past the next anniversary date of the master contract (when the wage determination in the master contract is updated), unless the order itself involves the exercise of an option or is changed to include additional, substantial construction, alteration, and/or repair work not within the original scope of work, in accordance with proposed § 1.6(c)(2)(iii)(A). The NPRM explained that consistent with this discussion, if an option is exercised for one of these types of contracts, the most recent version of any wage determination(s) would still need to be incorporated as of the date the agency exercises its option to extend the contract's term (subject to the exceptions set forth in proposed § 1.6(c)(2)(ii)), even if that date did not coincide with the anniversary date of the contract.

By proposing these revisions, the Department sought to ensure that workers are being paid prevailing wages

[123] Depending on the circumstances, these types of contracts may be principally for services and therefore are subject to the SCA, but contain substantial segregable work that is covered by the DBA. *See* 29 CFR 4.116(c)(2).

[124] The Department of Defense, for example, enters into such arrangements pursuant to the Military Housing Privatization Initiative, 10 U.S.C. 2871 *et seq.*

within the meaning of the Act; provide certainty and predictability to agencies and contractors as to when, and how frequently, wage rates in these types of contracts can be expected to change; and bring consistency to agencies' application of the Davis-Bacon labor standards. The Department also proposed to include language noting that contracting and ordering agencies remain responsible for ensuring that the applicable updated wage determination(s) are included in task orders, purchase orders, or other similar contract instruments issued under the master contract.

After consideration of the comments received, for the reasons detailed below, the final rule adopts these revisions as proposed with minor revisions and clarifications. The Department received several comments generally supporting the proposed changes. The Minnesota State Building and Construction Trades Council stated that these changes would improve the efficiency of enforcement and help make sure that prevailing wages paid to workers remain current. III–FFC stated that the proposed changes reflected existing guidance, case law, and historical practice, were consistent with the SCA requirements, and would better ensure workers are paid current prevailing wage rates on Davis-Bacon projects, consistent with the statutory purpose. The UA indicated that it strongly supported regulatory language that would ensure that wage determinations in such contracts remain up-to-date, but suggested a slight change to the proposed language to clarify that the requirement applies to both the unilateral exercise of options and the mutual exercise of options. The Department appreciates the UA raising this issue, as the intent was not to exclude mutually exercised options from the obligation to update wage determinations, but rather to make clear that the obligation applies even when the contracting agency exercises a unilateral option. The proposed language has therefore been adjusted to clarify that the requirement applies whenever an option is exercised generally.

A few commenters opposed the proposed change or alternatively suggested revisions. FTBA stated that contracting agencies and contractors generally cannot know at the bidding stage whether a contract is going to be extended or amended or what the prevailing wage rates will be when and if the contract is amended, further noting that many contracts are now being extended due to global supply issues beyond either the contracting agency or the contractor's control. FTBA stated that if the proposed change is retained, the Department should add a price adjustment clause to require that contractors are reimbursed for additional costs resulting from the incorporation of updated wage determinations into their contracts or funding agreements. CC&M suggested that the price adjustment should be a 150 percent increase change order. MnDOT argued that the proposed changes would place an additional administrative burden on contracting agencies, requiring change orders, changes to contract terms, and increases or decreases in contract funding, and would probably impact contractors' bids. MnDOT suggested that rather than requiring an annual update of wage determinations for multiyear IDIQ contracts, the Department instead require contracting agencies to annually increase the applicable prevailing wage rates for each classification by a percentage (*e.g.,* 2 percent of base and fringe rates) to allow contractors and contracting agencies to predict the potential increases at the time of bidding.

As an initial matter, the Department does not believe that these changes will affect contracts that are simply extended due to supply chain issues or other circumstances that interfere with the timely completion of a contract. Such circumstances expressly fall within the events described in the rule that do not require the incorporation of a new wage determination, namely, situations where the contractor is simply given additional time to complete the construction that the contractor committed to perform at the time of the initial award.

Regarding the comments on how the proposed changes will affect pricing and cost, the Department recognizes that contracting agencies and contractors may not know at the bidding stage or even at initial contract award whether that contract will be extended or amended, or, in the case of IDIQ and other similar contracts, how much work will ultimately be requested by the agency and performed by the contractor. However, the Department believes that issues related to budgeting, pricing, and costs associated with these types of contracts can be addressed between the contractor and the agency as part of the contracting process. For example, where a contract is amended to require the contractor to perform additional construction work or to perform work for an additional time period not originally obligated, agencies and contractors can come to an agreement about what additional compensation the contractor will receive for this additional work and will be able to take the updated wage determination into account during such negotiations. Where a contract includes option clauses or involves construction of an unknown amount and at unknown times over an extended period, this will be clear when the contract is solicited and at the time of contract award, allowing for the inclusion of contractual provisions for any increases to the compensation due to the contractor to reflect updated wage determinations. *See, e.g.,* 48 CFR 52.222–32 (price adjustment clause applicable to FAR-based DBA-covered contracts, providing that the contracting officer will ''adjust the contract price or contract unit price labor rates to reflect'' the contractor's ''actual increase . . . in wages and fringe benefits to the extent that the increase is made to comply with . . . [i]ncorporation of the Department of Labor's Construction Wage Rate Requirements wage determination applicable at the exercise of an option to extend the term of the contract'').[125]

The Department similarly appreciates MnDOT's concern about the logistics of inserting wage determinations in multiyear IDIQ contracts annually. However, the Department declines to adopt MnDOT's alternative approach of an across-the-board percentage increase. While the Department has provided in this rule for the periodic adjustment of out-of-date non-collectively bargained wage rates during the interval between wage surveys, the Department does not believe that creating a separate mechanism for wage rate increases of the type proposed by MnDOT would be necessary or appropriate given that the Department will have already published revised wage determinations that are available to be incorporated into such contracts. Additionally, the Department's position is that contracting agencies can include language in agency procurement policies, bid documents, and contract specifications that would give both contractors and contracting agencies notice, and an expectation from the time of bid solicitation planning, about the anticipated timing of updated wage determinations in multiyear IDIQ contracts and the likely potential for DBRA prevailing wage increases, even

[125] While the Department does not have information as to the universe of existing contracts to which this revision will apply, many such contracts may well have mechanisms requiring the contracting agency to compensate the contractor for increases in labor costs over time generally. *See, e.g., id.* Where outdated wage determination rates have been applied, it is similarly difficult to quantify the cost differential between updated prevailing wage wages and wage rate increases that contractors have already made due to labor market factors.

though the precise amount of those increases will not be known at the outset. Finally, contracting agencies have long administered a similar requirement for SCA contracts, *see* 29 CFR 4.4(c)(5), and the Department believes that it will be similarly feasible to do so for DBRA-covered construction contracts.

Naval Facilities Engineering Command Southwest (NAVFAC SW) did not comment on the proposed changes to § 1.6(c)(2)(iii) but proposed an additional related change to § 1.6(c)(2)(ii). Specifically, NAVFAC SW suggested that the provision applicable to sealed [126] bidding procedures, § 1.6(c)(2)(ii)(D) —which permits contracting agencies to decline to incorporate modifications published fewer than 10 calendar days before the opening of bids when there is not sufficient time available before bid opening to notify bidders of the modification—should be expanded to include negotiated contracts, which do not involve sealed bidding. While negotiated contracts are currently required to include the most recent applicable wage determination modifications up to the date of contract award, NAVFAC SW proposed permitting agencies to not include a wage determination modification issued fewer than 10 days prior to award date, where the agency finds that there is not a reasonable time still available before contract award to notify all offerors that have not been eliminated from the competition and provide them a reasonable opportunity to amend their proposals. NAVFAC SW argued that incorporating wage determination modifications shortly before the award date is administratively difficult, takes additional time and resources, and may delay award of the contract, and that these costs outweigh the benefits of what may be only minimal changes to wage rates in the updated wage determination. An individual commenter also made a similar request.

The Department appreciates that the incorporation of an updated wage determination within a few days of contract award may be challenging. However, as the Department did not propose a change to the provisions relating to the required timeline for the pre-award incorporation of applicable wage determinations into contracts, the Department believes that such a change would be beyond the scope of this rulemaking. The Department will, however, consider these comments in future rulemakings, and welcomes the opportunity to discuss the points raised by NAVFAC SW with other stakeholders.

MBA proposed a different change to § 1.6(c)(2)(ii). This provision currently located at § 1.6(c)(3)(ii), states that for projects assisted under the National Housing Act, a revised wage determination must be applied to the project if it is issued prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first. MBA suggested that this provision should be changed to instead only require the incorporation of a revised wage determination when it is published before the date that the developer submits an application for a firm commitment, or the start of construction, whichever comes first. MBA stated that such updates can trigger a need to revisit previously completed procedural steps, both for the developer and for HUD, resulting in potential disruption for the affected multifamily housing project. MBA stated that this proposed change would reduce the risk that the need to incorporate a revised wage determination would inhibit the successful completion of multifamily housing projects, though it also acknowledged that changes in the applicable wage determination would still be disruptive prior to the submission of an application. NAHB and NCHSA also critiqued what they described as disruptive cost changes due to revised wage determinations that are assigned late in the application process.

The Department finds that a change to the provisions in § 1.6(c)(2)(ii) for the initial incorporation of wage determinations into contracts would be beyond the scope of this rulemaking and does not believe such a change would be appropriate. It is well established that a prevailing wage should be a current wage. As a result, the regulations specifying the circumstances under which the most current wage determination need not be applied generally reflect the principle that only disruption of the contracting process justifies a failure to include the most recent prevailing wages as of, typically, the date of contract award or bid opening. *See, e.g., Modernization of the John F. Kennedy Fed. Bldg,* WAB No. 94–09, 1994 WL 574115 (Aug. 19, 1994); *Iowa Dep't of Transp.,* WAB No. 94–11, 1994 WL 764106. As such, in both the current and proposed regulations, the Department has sought to strike a balance between requiring the payment of current, prevailing wages to the extent feasible while also minimizing disruption in the contracting process. To that end, the regulations' use of the initial endorsement date for certain housing contracts already reflects an earlier lock-in date for the application of wage determination modifications than the date of contract award or the bid opening date, which are the lock-in dates that apply to most other types of contracts. Pushing this date back even further to the time when the housing developer first applies for Related Act funding would undermine worker protections by using even more outdated wage rates for DBRA-covered laborers and mechanics on these projects. In addition, it would not be administratively practical to use so early a date. Initial endorsement occurs when all parties have agreed upon the design and costs. Prior to initial endorsement, and certainly at so early a point as the developer's application for a firm commitment to funding, the project design and costs may undergo significant alterations, resulting in changes to the classifications and potentially even to the categories of wage determinations that may be applicable.

It would be impractical to lock in the modification of a wage determination at a time when the applicable wage determination itself may yet be subject to change. It would also be inappropriate to lock in a particular wage determination before it is even clear whether the project will entail substantial construction in multiple categories of construction, and hence require the application of multiple wage determinations.

The Department also made additional minor revisions to the proposed regulatory text. After further consideration, the Department has decided to revise the scope of the potential exceptions to this process that contracting agencies may request. As proposed, the regulatory language would only permit agencies to request the Department's approval for an alternative anniversary date for the updating of wage determinations. However, the requirement that wage determinations be updated annually for certain contracts applies to a wide variety of contracting mechanisms, and input from Federal contracting agencies suggests that it would be helpful to allow the updating process to be tailored in appropriate circumstances to the specific contracting mechanisms. Accordingly, the Department has revised this language to permit agencies to request the Department's prior written approval for alternative updating processes, where such an

[126] The current regulation refers to ''competitive'' bidding procedures in this provision; in a non-substantive change, this rule changes the term to ''sealed.''

exception is necessary and proper in the public interest or to prevent injustice and undue hardship. After further consideration, the Department also clarified the language stating that the contracting and ordering agencies must include the updated wage determination revision into any task orders, purchase orders, or other similar contract instruments issued under these master contracts. To prevent any confusion, the revised language now clearly states that the contracting agency is responsible for ensuring that the master contract directs the ordering agency to include the applicable updated wage determination in such task orders, purchase orders, or other similar contract instrument while the ordering agency must accordingly incorporate the applicable update wage determinations into such orders.

In addition, the Department added language further clarifying whether wage determination revisions, once properly incorporated into a task order, purchase order, or similar contract instrument from the master contract, must be further updated. Once a wage determination revision has been properly incorporated into such an order, it will generally remain applicable for the duration of the order without requiring further updates, in accordance with the proposed language stating that the annually updated wage determination revision will apply to any construction work that begins or is obligated under such a contract during the 12 months following that anniversary date until such construction work is completed, even if the completion of that work extends beyond the 12-month period. The revised language notes this general principle, as well as two exceptions. The first exception notes that if such an order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work, the wage determination must be updated as set forth in paragraph (c)(2)(iii)(A). The second exception states that if the task order, purchase order, or similar contract instrument itself includes the exercise of options, the updated applicable wage determination revision, as incorporated into the master contract, must be included when an option is exercised on such an order.

The Department also provided additional clarification regarding master contracts that both call for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project and also include the exercise of options. As explained in the NPRM and discussed above in this section, contracts calling for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project may also include the exercise of options, and if so, the wage determination must be updated when the option is exercised. The Department revised the regulatory text to also include this requirement, while also clarifying that where this type of contract has extended base or option periods, wage determinations must still be incorporated on an annual basis in years where an option is not exercised.

Accordingly, for the foregoing reasons, the final rule adopts the changes to § 1.6(c)(2) as proposed with the two minor clarifications discussed.

(C) 29 CFR 1.6(c)(1)—Periodic Adjustments

The Department proposed to add a provision to 29 CFR 1.6(c)(1) to expressly provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates. The Department proposed that such rates (both base hourly wages and fringe benefits) would be updated between surveys so that they do not become out-of-date and fall behind wage rates in the area.

(1) Background

Based on the data that it receives through its prevailing wage survey program, WHD generally publishes two types of prevailing wage rates in the Davis-Bacon wage determinations that it issues: (1) modal rates, which under the current regulations must be paid to a majority of workers in a particular classification, and (2) weighted average rates, which under the current regulations are published whenever the wage data received by WHD reflects that no single wage rate was paid to a majority of workers in the classification. *See* 29 CFR 1.2(a)(1).

Under the current regulations, modal wage rates often reflect collectively bargained wage rates. When a CBA rate prevails on a general wage determination, WHD updates that prevailing wage rate based on periodic wage and fringe benefit increases in the CBA. Manual of Operations at 74–75; *see also Mistick Constr.,* ARB No. 04–051, 2006 WL 861357, at *7 n.4.[127] However, when the prevailing wage is set through the weighted average method based on non-collectively bargained rates or a mix of collectively bargained rates and non-collectively bargained rates, or when a non-collectively bargained rate prevails, such wage rates (currently designated as ''SU'' rates) on general wage determinations are not updated between surveys and therefore can become out-of-date. The Department's proposal would expand WHD's current practice of updating collectively bargained prevailing wage rates between surveys to include updating non-collectively bargained prevailing wage rates.

In the NPRM, the Department emphasized that WHD's goal is to conduct surveys in each area every 3 years in order to avoid prevailing wage rates becoming out-of-date. WHD also noted that because of the resource-intensive nature of the wage survey process and the vast number of survey areas, many years can pass between surveys conducted in any particular area. The 2011 GAO Report found that, as of 2010, while 36 percent of ''nonunion-prevailing rates'' [128] were 3 years old or less, almost 46 percent of these rates were 10 or more years old. 2011 GAO Report, at 18.[129] As a result of lengthy intervals between Davis-Bacon surveys, the real value of the effectively frozen rates erodes as compensation in the construction industry and the cost-of-living rise. The resulting decline in the real value of prevailing wage rates may adversely affect construction workers whom the DBA was intended to protect. *See Coutu,* 450 U.S. at 771 (''The Court's previous opinions have recognized that '[o]n its face, the Act is a minimum wage law designed for the benefit of construction workers.' '' (citations omitted)).

Program stakeholders have previously raised this issue with the GAO. According to several union and contractor officials interviewed in connection with the GAO's 2011 report, the age of the Davis-Bacon ''nonunion-prevailing rates'' means they often do not reflect actual prevailing wages in a particular area. 2011 GAO Report, at 18.[130] As a result, the stakeholders said it is ''more difficult for both union and nonunion contractors to successfully bid on federal projects because they cannot recruit workers with artificially low wages but risk losing contracts if their bids reflect more realistic wages.''

[127] WHD similarly updates weighted average rates based entirely on collectively bargained rates (currently designated as ''UAVG'' rates) using periodic wage and fringe benefit increases in the CBAs.

[128] ''Nonunion-prevailing rates,'' as used in the GAO report, is a misnomer, as it refers to weighted average rates that, as noted, are published whenever the same wage rate is not paid to a majority of workers in the classification, including when much or even most of the data reflects union wages, just not that the same union wage was paid to a majority of workers in the classification.

[129] *See* note 10, *supra.*

[130] *See* note 10, *supra.*

Id. Regularly updating these rates would alleviate this situation and better protect workers' wage rates. The Department anticipates that updated rates would also better reflect construction industry compensation in communities where federally funded construction is occurring.

The Department explained in the NPRM that the proposal to update non-collectively bargained rates is consistent with, and builds upon, the current regulatory text at 29 CFR 1.6(c)(1), which provides that wage determinations ''may be modified from time to time to keep them current.'' This regulatory provision provides legal authority for updating wage rates, and has been used as a basis for updating collectively bargained prevailing wage rates based on CBA submissions between surveys. *See* Manual of Operations at 74–75. The Department proposed to extend the practice of updating prevailing wage rates to include non-collectively bargained rates based on ECI data. The Department stated its belief that ''chang[ed] circumstances''—including an increase in the use of weighted average rates—and the lack of an express mechanism to update non-collectively bargained rates between surveys under the existing regulations support this proposed ''extension of current regulation[s]'' to better effectuate the DBRA's purpose. *State Farm,* 463 U.S. at 42; *see also In re Permian Basin Area Rate Cases,* 390 U.S. 747, 780 (1968) (explaining the Court was ''unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes'' absent ''compelling evidence that such was Congress' intention'').

The proposal also is consistent with the Department's broad authority under the Act to ''establish the method to be used'' to determine DBA prevailing wage rates. *Donovan,* 712 F.2d at 616. The Department stated its belief that the new periodic adjustment proposal will ''on balance result in a closer approximation of the prevailing wage'' for these rates and therefore is an appropriate extension of the current regulation. *Id.* at 630 (citing *Am. Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.,* 387 U.S. 397, 416 (1967)).

The Department emphasized that this proposed new provision is particularly appropriate because it seeks to curb a practice the DBA and Related Acts were enacted to prevent: payment of ''substandard'' wages (here, out-of-date non-collectively bargained prevailing wage rates) on covered construction projects that are less than current wages paid for similar work in the locality. Regularly increasing non-collectively bargained prevailing wage rates that are more than 3 years old would be consistent with the DBA's purpose of protecting local wage standards by updating significantly out-of-date non-collectively bargained prevailing wage rates that have fallen behind currently prevailing local rates. The Department emphasized that updating such out-of-date construction wages would better align with the DBRA's main objective.

The Department further explained that periodically updating existing non-collectively bargained prevailing wage rates is intended to keep such rates more current in the interim period between surveys. The Department asserted that it is reasonable to assume that non-collectively bargained rates, like other rates that the Secretary has determined to prevail, generally increase over time like other construction compensation measures. *See, e.g.,* Table A (showing recent annual rates of union and non-union construction wage increases in the United States); Table B (showing ECI changes from 2001 to 2020).

TABLE A—CURRENT POPULATION SURVEY (CPS) WAGE GROWTH BY UNION STATUS—CONSTRUCTION

Year	Median weekly earnings		Percentage of differential	
	Members of unions	Non-union	Members of unions (%)	Non-Union (%)
2015	$1,099	$743		
2016	1,168	780	6	5
2017	1,163	797	0	2
2018	1,220	819	5	3
2019	1,257	868	3	6
2020	1,254	920	0	6
2021	1,344	922	7	0
Average			3	4

Source: Current Population Survey, Table 43: Median weekly earnings of full-time wage and salary workers by union affiliation, occupation, and industry, BLS, *https://www.bls.gov/cps/cpsaat43.htm* (last modified Jan. 20, 2022).
Note: Limited to workers in the construction industry.

TABLE B—ECI, 2001–2020, TOTAL COMPENSATION OF PRIVATE WORKERS IN CONSTRUCTION, AND EXTRACTION, FARMING, FISHING, AND FORESTRY OCCUPATIONS

[Average 12-month percent changes (rounded to the nearest tenth)]

Year	Average annual total compensation, 12-month % change
2001	4.5
2002	3.5
2003	3.9
2004	4.5
2005	3.1
2006	3.5
2007	3.5
2008	3.6
2009	1.7

TABLE B—ECI, 2001–2020, TOTAL COMPENSATION OF PRIVATE WORKERS IN CONSTRUCTION, AND EXTRACTION, FARMING, FISHING, AND FORESTRY OCCUPATIONS—Continued

[Average 12-month percent changes (rounded to the nearest tenth)]

Year	Average annual total compensation, 12-month % change
2010	1.9
2011	1.6
2012	1.4
2013	1.8
2014	2.0
2015	2.0
2016	2.4
2017	2.7
2018	2.2
2019	2.8
2020	2.4
2021	3.0

Source: ECI Historical Listing Volume III, Table 5: ECI for total compensation, for private industry workers, by occupational group and industry, BLS, *https://www.bls.gov/web/eci/eci-current-nominal-dollar.pdf* (updated Mar. 2022).

(2) Periodic Adjustment Proposal

In the NPRM, the Department noted that the proposal sought to update non-collectively bargained prevailing wage rates that are 3 or more years old by adjusting them regularly based on total compensation data to keep pace with current construction wages and fringe benefits. Specifically, the Department proposed to add language to § 1.6(c)(1) to expressly permit adjustments to non-collectively bargained prevailing rates on general wage determinations based on BLS ECI data or its successor data. The Department's proposal provided that non-collectively bargained rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication, continuing until the next survey results in a new general wage determination. This proposed interval would be consistent with WHD's goal to increase the percentage of Davis-Bacon wage rates that are 3 years old or less. Under the proposal, non-collectively bargained prevailing wage rates (wages and fringe benefits) would be adjusted from the date the rate was originally published and brought up to their present value. Going forward, any non-collectively bargained prevailing wage rates published after this rule becomes effective may be updated if they are not re-surveyed within 3 years after publication. The Department anticipates implementing this new regulatory provision by issuing modifications to general wage determinations.

The Department stated its belief that ECI data is appropriate for these rate adjustments because the ECI tracks both wages and fringe benefits and may be used as a proxy for changes in construction compensation over time. Therefore, the Department proposed to use a compensation growth rate based on the change in the ECI total compensation index for construction, extraction, farming, fishing, and forestry occupations to adjust non-collectively bargained prevailing wage rates (both base hourly and fringe benefit rates) published in 2001 or after.[131]

In addition, because updating non-collectively bargained prevailing wage rates would be resource-intensive, the Department did not anticipate making all initial adjustments to such rates that are 3 or more years old simultaneously, but rather considered it more likely that such adjustments would be made over a period of time (though as quickly as is reasonably possible). Similarly, the Department stated that particularly due to the effort involved, the process of adjusting non-collectively bargained rates that are 3 or more years old was unlikely to begin until approximately 6–12 months after a final rule implementing the proposal became effective.

The Department sought comments on the proposal and invited comments on alternative data sources to adjust non-collectively bargained prevailing wage rates. The Department considered proposing to use the Consumer Price Index (CPI) but noted that the CPI is less appropriate to use to update non-collectively bargained prevailing wage rates because the CPI measures movement of consumer prices as experienced by day-to-day living expenses, unlike the ECI, which measures changes in the costs of labor in particular. The CPI does not track changes in wages or benefits, nor does it reflect the costs of construction workers nationwide. The Department nonetheless invited comments on use of the CPI to adjust non-collectively bargained rates.

The Department received many comments about the proposal. Most of the commenters expressed general support for the proposal, and many of them supported the proposal in its entirety. Other commenters recommended modifications to the Department's proposal, and several commenters opposed the proposal entirely. In general, there was an overarching consensus about the need to regularly update out-of-date non-collectively bargained prevailing wage rates. For example, NABTU and WA BCTC gave examples of outdated non-collectively bargained wage rates, including some that reflected amounts less than the local minimum wage. AGC noted that periodic adjustments can improve the accuracy of ''woefully out-of-date open shop rates.'' FTBA stated that updating non-collectively bargained rates would help eliminate the widening compensation gap between collectively bargained prevailing wage rates that are updated at least annually, and non-collectively bargained rates that are frozen in time, sometimes for a decade or longer.

The Economic Policy Institute (EPI) noted that this proposal is critical to ensure that DBRA prevailing wage rates

[131] Because this particular index is unavailable prior to 2001, the Department proposed to use the compensation growth rate based on the change in the ECI total compensation index for the goods-producing industries (which includes the construction industry) to bring the relatively small percentage of non-collectively bargained prevailing wage rates published before 2001 up to their 2000 value. The Department would then adjust the rates up to the present value using the ECI total compensation index for construction, extraction, farming, fishing, and forestry occupations.

contribute to stabilizing rather than eroding workers' wages, which EPI stated have been lower in inflation-adjusted terms than they were in 1970 despite decades of economic growth and a higher national income. LIUNA stated that weighted averages are susceptible to annual wage erosion as inflation eats away at worker earnings. The IUOE made a similar point, noting that the lengthy stagnation and lack of escalation of non-collectively bargained prevailing wage rates dilute the value of such rates. IUOE pointed to the 2019 OIG Report's identification of decades-old rates that were applicable to particular DBRA projects, highlighted the OIG's recommendation that WHD use a wage escalator (like the CPI) to bring non-collectively bargained rates current, and applauded the Department for proposing to do so.

A number of supporting commenters concurred that periodic updates would appropriately implement the Department's broad authority to curb a practice the DBA and Related Acts were enacted to prevent: payment of ''substandard'' wages (here, out-of-date non-collectively bargained rates). Such commenters noted that while it is preferable for Davis-Bacon prevailing wage rates to reflect actual wages paid to workers in their communities and not weighted averages, where the Department's wage determination is based on weighted averages it is critical that the Department not allow those rates to become stagnant. *See* Brick and Allied Craftworkers Local4 INKY, Building and Construction Trades Council of Northern Nevada (BAC NNV), III–FFC, and WA BCTC. DMCA commented that prevailing rates in North and South Dakota are often very old and not reflective of actual wages being paid—a problem that the updates should help fix by providing rates more reflective of the marketplace. Similarly, the North Dakota State Building and Construction Trade Union supported this ''critical'' proposal so rates do not become stagnant and gave examples of North Dakota non-collectively bargained rates that are over 22 years old. The joint SMART and SMACNA comment identified some non-collectively bargained rates that were roughly equivalent to collectively bargained rates that prevailed for similar classifications at the time these rates were published. SMART and SMACNA then observed that whereas the non-collectively bargained rates became stale during the long intervals between Davis-Bacon surveys, the collectively bargained rates increased during that time, resulting in a growing disparity between the two types of prevailing wage rates.

Various commenters provided additional justification for the proposal, including benefits for the regulated community. COSCDA asserted that workers, contractors, and program administrators would all benefit from the proposal. LIUNA similarly noted that the proposal should reduce uncertainty for contracting agencies and contractors who rely upon published wage determinations for bidding and awarding contracts under DBRA. UBC likewise supported the proposal's anticipated relief for workers and improved competitiveness for contractor-bidders who had already been granting increases in wages and benefits. MCAA remarked that among member mechanical contractor firms that do not currently compete for prevailing wage work, low and out-of-date wage determinations were part of the reason they did not bid on these projects.

Supporters and opponents agreed about the need to address the construction labor shortage, particularly in light of the IIJA, which is expected to further increase demand for construction workers. *See, e.g.,* BAC NNV, NABTU, ABC. Supporters asserted that updating non-collectively bargained rates under the proposal would reflect labor market changes and improve contractors' ability to attract, develop, and retain skilled workers. *See, e.g.,* III–FFC. Brick and Allied Craftworkers Local #15 MO-KS-NE commented that it is critical that survey rates are not allowed to become stagnant because stagnant rates both undermine the purpose of the DBA to protect local area wages and discourage new workers from considering a career in the trades. Several other union commenters likewise emphasized the importance of keeping non-collectively bargained prevailing wage rates up-to-date because outdated and artificially low wages could discourage workers from entering the construction workforce. These organizations commented that this circumstance is particularly problematic in an industry in which workers' average age, 61, is approaching retirement age.

Various union, labor-management, and contractor group commenters such as LIUNA, III–FFC, and IEC supported using BLS ECI to update non-collectively bargained rates. LIUNA noted the ECI's suitability because it captures both wage and benefit data. AGC observed that the ECI has a large sample size, is calculated using ''scientifically sound principles,'' and is publicly released quarterly.

In response to the Department's NPRM request for comments about using data sources other than the ECI, such as the CPI, MCAA opposed using the CPI and III–FFC preferred ECI to the CPI for urban consumers because the ECI reflects labor market trends and includes fringe benefits. LIUNA also preferred the ECI instead of a consumer-based index. The MBA, *et al.,* on the other hand, opposed the Department's proposal to adopt the ECI, stating that the ECI's participation rate over the past 10 years had dropped. They also noted that it is unclear whether the ECI's Construction industry category covers residential construction and whether the index includes both CBA and non-CBA wages.

Several commenters that supported the proposal also recommended additional regulatory provisions. NABTU and LIUNA recommended that the ECI should be used only to increase, not decrease, non-collectively bargained rates, and III–FFC and UBC suggested changing the proposed regulation to require more frequent periodic updates—at least every 3 years, instead of no sooner than every 3 years. These two commenters explained that more frequent adjustments would help ensure that DBA rates do not stagnate.

Other commenters recommended using ECI data to update non-collectively bargained rates only as a method of last resort, noting that the ECI does not capture actual wages paid to workers in their home communities. *See* NABTU, NCDCL, and UA. These commenters instead recommended replacing out-of-date non-collectively bargained prevailing wage rates with existing state and local prevailing wage rates derived through methods that closely resemble the Department's method. The UA also emphasized that the Department's proposal is no substitute for greater efforts to conduct surveys within 3 years and encouraged the Department to continue to prioritize its own wage surveys as the first and best option. The UA recognized the Department's improvements in the survey process—citing the 2019 OIG report's finding that the Department's ''time to complete a wage survey decreased from an average of five-to-seven years in 2002 to 2.6 years in 2015''—but also welcomed the fallback option of using ECI data to update rates when necessary since surveys are time consuming and the Department's resources are limited.

A number of commenters—both that supported and opposed the proposal—expressed concerns about using ECI data. NABTU, AGC, FTBA, and ABC took exception to using nationwide data

such as the ECI data the Department anticipated using. FTBA preferred that the Department use county-specific data that is the ''legal lynchpin for the setting of prevailing wages under the [DBA].'' FTBA and AGC expressed concern that the ECI includes certain payments that are statutorily excluded from Davis-Bacon fringe benefits, such as disability insurance, unemployment insurance, employer taxes, workers compensation, overtime, and non-production bonuses. The group of U.S. Senators criticized the ECI for merely accounting for the net increase or decrease in the cost of labor, but for not ''as the DBRA commands, account[ing] for prevailing wages paid to 'corresponding classes of laborers and mechanics.' '' The MBA, *et al.* cautioned that ''indexing a wage rate that is potentially forty years old is problematic as the validity of that wage is unknown.''

Several commenters, some of whom did not expressly oppose the proposal, asserted that it was inconsistent or arbitrary of the Department to update certain non-collectively bargained prevailing wage rates with ECI data from BLS while not also using BLS data to determine the underlying prevailing wages. For example, while NAHB did not endorse using BLS data to set prevailing wages, NAHB stated that it would be inconsistent to use BLS data for periodic updates but not to calculate the underlying prevailing wage rates using BLS data. NAHB also criticized the Department's Davis-Bacon wage methodology as being greatly flawed and argued that the proposed periodic updates would only allow WHD's flawed survey methodology to persist. AFP–I4AW opposed the proposal, which they asserted would mix two different methodologies for determining prevailing wages and use an unrelated BLS escalator to unjustifiably inflate what they claimed to be unreliable and inaccurate rates.

Among the commenters opposing the proposal in its entirety, AFP–I4AW, ABC, the group of U.S. Senators, a group of members of the U.S. House of Representatives Committee on Labor & Employment, and a few individuals objected to the proposal in the context of an overall criticism of WHD's survey method, which they recommended replacing with BLS data to determine prevailing wages. ABC, for example, suggested using BLS data to determine prevailing wages because it asserted BLS data is more timely and accurate. ABC stated that BLS surveys are conducted scientifically, have high response rates from large sample sizes, and therefore are superior to WHD's wage survey process. By comparison, ABC contended the Department's proposal to adjust certain non-collectively bargained prevailing wage rates on a rolling basis no more frequently than every 3 years would be less effective and less accurate than using BLS data to determine prevailing wages in the first place. ABC also argued, along with the group of U.S. Senators and the group of members of the U.S. House of Representatives Committee on Labor & Employment, that this periodic adjustment proposal would only serve to perpetuate the *status quo* with inaccurate wage determinations remaining after the updates. *See* section III.B.1.ii.A.(1) for a discussion of why the Department has declined to replace WHD's Davis-Bacon wage survey program with data from the BLS.

Commenters raised other general concerns about the proposal. While NAHB agreed that a mechanism is needed to update ''grossly outdated wage rates,'' they thought the proposal implied less incentive for WHD to conduct wage surveys more often moving forward. The Construction Industry Roundtable (CIRT) said that the proposal could work but would ''require constant updates across dozens if not hundreds of individual salary scales'' to keep up with the proposed cycles.

After considering the comments received on the proposed new periodic updates to certain non-collectively bargained prevailing rates, the Department adopts without modification the proposed new language in § 1.6(c)(1). By expressly authorizing the Department to periodically adjust non-collectively bargained prevailing wage rates between surveys under specified circumstances in order to maintain the currency of those rates, this section plays an important role in WHD's efforts to improve the Davis-Bacon prevailing wage program. As the Department emphasized in the NPRM, this new provision advances the DBA's purpose of maintaining local wage standards and protecting construction workers—in this case by safeguarding against a decline in the real value of prevailing wage rates over time. This periodic adjustment rule implements a concrete and incremental mechanism to address the criticism, noted by various commenters, that as non-collectively bargained prevailing rates become out-of-date, they decreasingly reflect the prevailing rates currently paid. The periodic adjustment of non-collectively bargained wage rates is particularly important given that the change to the definition of ''prevailing wage'' in the 1981–1982 rulemaking has resulted in the increasing overuse of weighted average wage rates, most of which are the very type of rates that are not adjusted under the Department's current procedures. This change warrants extending the express regulatory authority under which WHD updates collectively bargained prevailing wage rates between surveys based on CBA submissions to non-collectively bargained rates updated based on ECI data. The Department anticipates that periodic adjustments will occur less often over time, as it conducts surveys more frequently and adopts more state or local prevailing wage rates.

While the Department has considered the suggested changes to its proposal, the Department declines to adopt the suggestions. Specifically, the Department declines to adopt the recommendation to limit periodic updates to increases only. The ECI historically has increased over time, and it appears unlikely that the compensation growth index would result in a decrease over a 3-year interval. Moreover, the purpose of this provision is to periodically adjust otherwise out-of-date non-collectively bargained prevailing wage rates. In the unlikely event that a downward adjustment of an otherwise stagnant rate were warranted based on a 3-year period of ECI data on which the Department would be relying, making such an adjustment would be appropriate and consistent with wage rate changes resulting from an entirely new prevailing wage survey, which can result in both increases and decreases in published prevailing wage rates.

The Department also declines to require that the periodic updates occur more frequently than every 3 years and maintains that this provision of the final rule will not reduce WHD's incentive to conduct Davis-Bacon wage surveys. This provision to periodically update out-of-date non-collectively bargained prevailing wage rates that are 3 or more years old enables the Department to adjust such rates between surveys based on total compensation data, allowing prevailing wage rates to better keep pace with construction wage and benefit growth and remain more in line with local prevailing rates. The proposed 3-year minimum interval is consistent with WHD's goal to increase—primarily through the wage survey program—the percentage of Davis-Bacon wage rates that are 3 years old or less and therefore would not need to be periodically updated. The periodic adjustments will be effectuated in conjunction with WHD's other efforts to increase the frequency with which the results of new wage surveys are published, including

surveys conducted under State or local law and adopted by the Department under the circumstances specified in section III.B.1.iii.D. The Department, therefore, has calibrated the frequency of periodic updates so that they better align with these other changes to the Davis-Bacon wage survey program. In addition, more frequent updating might disincentivize stakeholders from participating in the Davis-Bacon survey process.

The Department agrees with LIUNA that ECI data should only be used for the narrow purpose specified in this proposed rule. The new periodic adjustment rule will ''on balance result in a closer approximation of the prevailing wage,'' *Donovan,* 712 F.2d at 630, for these out-of-date non-collectively bargained rates and, therefore, is an appropriate extension of the authority reflected in current § 1.6(c)(1) to modify wage determinations ''from time to time to keep them current.'' The periodic adjustments will update certain existing non-collectively bargained prevailing rates, supplementing, but not replacing, the Department's survey-based wage determination process which the Department is committed to continuing and striving to improve as discussed in this section below and in section III.B.1.ii.A.

The Department notes that various commenters, such as ABC, the group of U.S. Senators, and the group of members of the U.S. House of Representatives Committee on Education & Labor, opposed the proposal and urged the Department to use BLS data instead of WHD's wage survey program to determine prevailing wages. The Department declines to adopt the suggestion of such commenters that WHD should have chosen to, or is required to, use BLS data for its wage survey process in its entirety, instead of using ECI data for the limited purpose of periodic adjustments. For the reasons discussed below and in section III.B.1.ii.A.1, the Department's decision to use the rule's periodic adjustment mechanism to incrementally improve the quality of certain underlying prevailing wage rates is reasonable and within its broad statutory discretion, and it does not require that WHD adopt BLS data as the sole method of determining prevailing wage rates to begin with.

The DBA authorizes the Administrator to choose the method for determining prevailing wage rates. As a threshold matter, the DBA does not prescribe a method that the Administrator must or should use for determining prevailing wages, but rather ''delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.'' 712 F.2d at 616. The Secretary, thus, has broad discretion to determine the prevailing wage. Even though there may be multiple methods of determining prevailing wages under the DBA, WHD may choose which method to use to do so.

The Department disagrees with the premise underlying the claims of the group of U.S. Senators, ABC, and the MBA, *et al.* that it is inappropriate to adjust an underlying wage rate that is allegedly flawed, as the Department's wage survey methodology operates comfortably within the authority granted by the DBA and constitutes a reasonable method of determining prevailing wage rates for laborers and mechanics on covered construction projects.

WHD has used and may continue to use various regulatory and subregulatory tools intended to refine and improve its prevailing wage survey process. Such tools include this rule's periodic adjustments of certain non-collectively bargained rates with ECI data. WHD's survey method for determining prevailing wages is not static. The agency consistently strives to improve its Davis-Bacon wage survey program and has made improvements over the years. For example, as of March 2019, WHD had successfully reduced the amount of time it takes to complete a wage survey by more than 50 percent since 2002 and was continuing to implement process improvements to reduce the time it takes to complete a survey. *See* 2019 OIG Report, at 34 app. B.

Other efforts to improve WHD's DBRA wage survey program include this rule's use of a modal prevailing wage rate when 30 percent or more of the wages are the same, and the provision regarding variable rates that are functionally equivalent, both of which seek to more closely reflect the prevailing (*i.e.,* predominant) wages paid to workers in an area and to decrease the prevalence of weighted average rates. Another recent endeavor is the June 2022 and March 2023 solicitations of comments about the proposed revision of the wage survey form (WD–10 form), which WHD uses to solicit information that is used to determine locally prevailing wages. *See* 87 FR 36152–53; 88 FR 17629 (Mar. 23, 2023) (Notice of availability; request for comments). Outside this rulemaking, the Department's proposed changes to the WD–10 form would improve the overall efficiency of the DBA survey process and aim to streamline the collection of data required for the survey and make the collection less burdensome for respondents. 87 FR 36153. The Department also proposed to add a new WD–10A collection instrument to be used pre-survey to identify potential respondents that performed construction work within the survey period in the survey area. *Id.; see also* 88 FR 17629–30.

The Department acknowledges that the ECI data it has selected includes wages and fringe benefit information for construction-related occupations nationwide, and that ECI benefits include some employer costs that are not bona fide fringe benefits under the DBA. Nevertheless, these ECI data characteristics, while not identical, are consistent with the DBA's statutory requirements. As discussed in this section and section III.B.1.ii.A, the Department has developed its underlying methodology for determining prevailing wages to be consistent with the Act's directive to determine prevailing wages for ''corresponding classes'' of workers on ''projects of a character similar'' within ''civil subdivision[s] of the State'' in which the work is to be performed. 40 U.S.C. 3142(b). This rule supplements WHD's methodology. The ECI will be used to adjust prevailing wage rates only after WHD has determined the underlying rates for specific classifications of workers on projects of a similar character within the relevant locality. Moreover, the ECI simply reflects the rate of change in employer labor costs over time. Given the Department's statutory and regulatory authority, the Department's use of the ECI is reasonable even though the ECI may not mirror in every respect changes to certain labor costs on a classification-by-classification, project-by-project, and location-by-location basis.

The Department disagrees with the commenters who suggested that the index used for periodic updates must have the same level of detail that the Department uses to make its wage determinations in the first place. The ECI data that the Department has selected, while not perfect, is a reasonable option for the task. ECI contains data for construction-related occupations and includes both wages and fringe benefits. While the data is not delineated by county and the mix of fringe benefits is different than that required to be considered by the DBRA, the ECI's general data characteristics are sufficient for the purpose of keeping certain non-collectively bargained rates better aligned with compensation changes over time, and better than any other index that the Department has

considered or commenters have suggested for periodic adjustments under the DBRA.

The Department's broad discretion about how to determine prevailing wages comfortably encompasses this mechanism to periodically update certain out-of-date survey-based prevailing wages pending completion of the next wage survey. Further, the DBA's legislative history supports this manner of trying to keep certain prevailing wage rates more current. Congress recognized that ''[a] method for determining the prevailing wage rate might have been incorporated in the bill, but the Secretary of Labor can establish the method and make it known to the bidders.'' 74 Cong. Rec. 6516 (Feb. 28, 1931) (remarks of Rep. Kopp).

The Department also disagrees that using ECI or its successor data to periodically update certain non-collectively bargained wages while continuing to use the Department's longstanding survey process is arbitrary. The periodic adjustments are tethered to existing prevailing wage rates and seek to better approximate current prevailing rates. As stated in the NPRM, ECI data is appropriate for these proposed rate adjustments because the ECI tracks both wages and benefits and may be used to approximate the changes in construction compensation over time.

The Department notes in response to comments that the ECI data to be used includes private industry union and non-union workers, residential and non-residential construction, and is not seasonally adjusted. ECI data is a reasonable proxy for construction compensation growth to first bring non-collectively bargained rates that are more than 3 years old up to their present value, and then to update these rates no more often than every 3 years going forward. For these and the other reasons explained in this section, the final rule adopts this proposal without modification.

(D) 29 CFR 1.6(f)

Section 1.6(f) addresses post-award determinations that a wage determination has been wrongly omitted from a contract. The Department's proposed changes to this paragraph are discussed below in section III.B.3.xx (''Post-award determinations and operation-of-law''), together with proposed changes to §§ 5.5 and 5.6.

vii. Section 1.7 Scope of Consideration

The Department's regulations in § 1.7 address two related concepts. The first is the level of geographic aggregation of wage data that should be the default ''area'' for making a wage determination. The second is how the Department should expand that level of geographic aggregation when it does not have sufficient wage survey data to make a wage determination at the default level. In the NPRM, the Department proposed changes to this paragraph to more clearly describe WHD's process for expanding the geographic scope of survey data and to modify the regulations by eliminating the current bar on combining wage data from ''metropolitan'' and ''rural'' counties when the geographic scope is expanded.

In the 1981–1982 rulemaking, the Department codified its practice of using the county as the default area for making a wage determination. 47 FR 23644, 23647 (May 28, 1982). Thus, while the definition of the term ''area'' in § 1.2 allows the Administrator to use other civil subdivisions of a State for this purpose, § 1.7(a) specifies that the area for a wage determination will ''normally be the county.'' 29 CFR 1.7(a).

The use of the county as the default ''area'' means that in making a wage determination the WHD first considers the wage survey data that WHD has received from projects of a similar character in a given county. The Department typically collects the county-level data by construction type (*e.g.,* building, residential, highway, heavy) to account for the statutory requirement to determine prevailing wages on projects of a similar ''character.'' 40 U.S.C. 3142(b); *see also* AAM 130 (Mar. 17, 1978) (discussing construction types). If there is sufficient county-level data for a classification of covered workers (*e.g.,* laborers or painters) working on those projects, WHD then makes a determination of the prevailing wage rate for that classification on that construction type in that county. *See* 40 U.S.C. 3142(b) (requiring prevailing wages to be determined for ''corresponding classes'' of laborers or mechanics); 29 CFR 1.7(a). In determining whether there is sufficient current wage data, WHD can use data on wages paid on current projects or, where necessary, projects under construction up to one year before the beginning of the survey. 29 CFR 1.7(a).

The second concept addressed in § 1.7 is the procedure that WHD follows when it does not receive sufficient current wage data at the county level to determine a prevailing wage rate for a given classification of workers in a given construction type. This process is described in detail in the 2013 *Chesapeake Housing* ARB decision. ARB No. 12–010, 2013 WL 5872049. In short, if there is insufficient data to determine a prevailing wage rate for a classification of workers in a given county, WHD will determine that county's wage-rate for that classification by progressively expanding the geographic scope of data (still for the same classification of workers) that it uses to make the determination. First, WHD expands to include a group of surrounding counties at a ''group'' level. *See* 29 CFR 1.7(b) (discussing consideration of wage data in ''surrounding counties''); *Chesapeake Housing,* ARB No. 12–010, 2013 WL 5872049, at *2–3. If there is still not sufficient data at the group level, WHD considers a larger grouping of counties in the State, which has been called a ''super group,'' and thereafter may use data at a statewide level. *Chesapeake Housing,* ARB No. 12–010, 2013 WL 5872049, at *3; *see* 29 CFR 1.7(c).[132]

In the 1981–1982 rulemaking, the Department imposed a limitation on this process. The Department included, in § 1.7(b), a strict bar on combining data from ''metropolitan'' and ''rural'' counties when there is insufficient wage data in a given county. *See* 47 FR 23647. That proviso stated that projects in ''metropolitan'' counties may not be used as a source of data for a wage determination in a ''rural'' county, and vice versa. 29 CFR 1.7(b). The regulation did not define the terms metropolitan and rural.

To be consistent with the prohibition on cross-consideration in § 1.7(b), WHD developed a practice of using designations from the Office of Management and Budget (OMB) to identify whether a county is ''metropolitan'' or ''rural.'' The OMB designations WHD has used for this purpose are called the core based statistical area (CBSA) standards. *See* 86 FR 37770 (July 16, 2021). As part of the CBSA designations, OMB identifies two types of statistical areas: metropolitan statistical areas (MSAs) and micropolitan statistical areas. The OMB standards do not specifically identify counties as ''rural.'' However, because OMB identifies counties that have metropolitan characteristics as part of MSAs, the practice of the WHD Administrator has been to designate counties as ''metropolitan'' if they are within an OMB-designated MSA and

[132] For residential and building construction types, this expansion of the scope of data considered also involves the use of data from Federal and federally assisted projects subject to Davis-Bacon labor standards at each county-grouping level when data from non-Federal projects is not sufficient. *See* 29 CFR 1.3(d). Data from Federal and federally assisted projects subject to Davis-Bacon labor standards is used in all instances to determine prevailing wage rates for heavy and highway construction. *Id.*

''rural'' if they are not. *See Mistick Constr.,* ARB No. 04–051, 2006 WL 861357, at *8. If OMB designates a county as a micropolitan statistical area, WHD will identify the county as rural, even if it is contiguous with a nearby MSA. The ARB has determined that such proxy designations are reasonable. *See id.*[133]

The ban on combining metropolitan and rural county data that was implemented in the 1981–1982 rulemaking did not apply explicitly to the consideration of data above the surrounding-counties level. *See* 29 CFR 1.7(c). After that rulemaking, however, the Department implemented procedures that did not mix metropolitan and rural county data at any level in the expansion of geographic scope, including even at the statewide level.

(A) ''Metropolitan'' and ''Rural'' Wage Data in Surrounding Counties

In the NPRM, the Department proposed to eliminate the language in § 1.7(b) barring the cross-consideration of metropolitan and rural wage data at the surrounding-counties level. In explaining this proposal, the Department noted prior feedback that the blanket bar had not adequately considered the heterogeneity of commuting patterns and local labor markets between and among counties that may be designated overall as ''rural'' or ''metropolitan.'' In its 2011 report, for example, the GAO noted criticism of the DBA program for using ''arbitrary geographic divisions,'' given that the relevant regional labor markets, which are reflective of area wage rates, ''frequently cross county and state lines.'' 2011 GAO Report, at 24.[134]

The NPRM explained that the Department understood the point in the GAO report to be that actual local labor markets are not constrained by or defined by county lines, and that the point applies even to those lines between counties identified (by OMB or otherwise) as ''metropolitan'' or ''rural.'' The Department noted that this is particularly the case for the construction industry, in which workers tend to have longer commutes than other professionals, resulting in geographically larger labor markets. *See, e.g.,* Keren Sun et al., ''Hierarchy Divisions of the Ability to Endure Commute Costs: An Analysis based on a Set of Data about Construction Workers,'' J. of Econ. & Dev. Stud., Dec. 2020, at 4.[135] Even within the construction industry, workers in certain trades have greater or lesser tolerance for longer commutes. Keren Sun, ''Analysis of the Factors Affecting the Commute Distance/Time of Construction Workers,'' Int'l J. of Arts & Humanities, June 2020, at 43.[136]

By excluding a metropolitan county's wage rates from consideration in a determination for a bordering rural county, the strict ban implemented in the 1981–1982 rulemaking disregarded the potential for projects in neighboring counties to compete for the same supply of construction workers and be in the same local construction labor market. In many cases, the workers working on a metropolitan county's projects may themselves live across the county line in a neighboring rural county and commute to the metropolitan projects. In such cases, under the current bar, the Department cannot use the wage rates of these workers to determine the prevailing wage rate for projects in the rural county in which they live, even where there is otherwise no data from that rural county to rely on. Instead, WHD would import wage rates from other ''rural''-designated counties, potentially somewhere far across the State. As the Department noted in the NPRM, this practice can result in Davis-Bacon wage rates that are lower than the wage rates that actually prevail in a cross-county metropolitan-rural labor market.

For these reasons, the Department stated in the NPRM that it believed that limitations based on binary rural and metropolitan designations at the county level can result in geographic groupings that at times do not fully account for the realities of relevant construction labor markets. To address this concern, the Department considered the possibility of using smaller basic units than the county as the initial area for a wage determination and expanding to labor market areas that do not directly track county lines. This could include cities or their equivalents, or even census blocks, which as noted above, are the basic units for the Census Bureau's urban-rural classifications. The Department, however, concluded that continuing the longstanding practice of using counties as the civil subdivision basis unit is more administratively feasible.[137] As a result, the NPRM instead proposed to eliminate the metropolitan-rural bar in § 1.7(b) and to allow the agency to use metropolitan data in appropriate circumstances to help set rural county prevailing wage rates where the survey has not resulted in sufficient current wage data from the rural county. Eliminating the bar will also allow the Department to use data from adjacent rural counties to help set a metropolitan county's rates in circumstances where the survey has not resulted in sufficient current wage data from the metropolitan county.

The Department explained that eliminating the strict bar could have other benefits in addition to allowing WHD to account for actual construction labor market patterns. It could allow WHD to publish more rates at the surrounding-counties group level rather than having to rely on data from larger geographic areas, because it could increase the number of counties that may be available to supply data at that initial group level. Eliminating the bar could also allow WHD to publish more rates for more classifications overall by authorizing the use of both metropolitan and rural county data together when the Department must rely on statewide data. Combining rural and metropolitan data at the State level would be a final option for geographic expansion when otherwise the data could be insufficient to identify any prevailing wage at all. The Department stated that the purposes of the Act may be better served by using such combined statewide data to allow prevailing wages to be determined more often.

The Department also explained that eliminating the strict rural-metropolitan bar would result in a program that would be more consistent with the Department's original practice between 1935 and the 1981–1982 rulemaking as well as the text and legislative history of the DBA. Congressional hearings shortly after the passage of the initial 1931 Act suggest that Congress understood the DBA as allowing the Secretary to refer to metropolitan rates where rural rates were not available, including by looking to the nearest city when there was insufficient construction in a village or ''little town'' to determine a prevailing wage. *See* 75 Cong. Rec. at 12366, 12377 (1932) (remarks of Rep. Connery). Likewise, the Department's original 1935 regulations directed the Department to ''the nearest large city'' when there had been no

[133] The OMB standards are different from the Census Bureau's classification of urban and rural areas. The OMB standards use counties or county-equivalents as the basic building blocks of their MSA designations. The Census Bureau's urban-rural classification uses smaller ''census blocks'' as the ''analysis unit (or geographic building block)'' of its classification process. *See* Urban Area Criteria for the 2020 Census-Final Criteria, 87 FR 16706, 16709 (Mar. 24, 2022).

[134] *See* note 8, *supra.*

[135] *http://jedsnet.com/journals/jeds/Vol_8_No_4_December_2020/1.pdf.*

[136] *http://ijah.cgrd.org/images/Vol6No1/3.pdf.*

[137] The Department also considered this option in the 1981–1982 rulemaking, but similarly concluded that the proposal to use the county as the basic unit of a wage determination was the ''most administratively feasible.'' *See* 47 FR 23647.

similar construction in the locality in recent years. *See* Labor Department Regulation No. 503 section 7(2) (1935).[138]

In the NPRM, in addition to eliminating the metropolitan-rural proviso language in § 1.7(b), the Department also discussed other potential changes to the methods for describing the surrounding-counties groupings procedure. Because the term ''surrounding counties'' was not defined in the 1981–1982 rulemaking, it has from time to time led to confusion about whether a county can be considered ''surrounding'' if it does not share a border with the county for which more data is needed. As noted, WHD's current method of creating surrounding-counties groupings is to use OMB-designed MSAs to create pre-determined county groupings. This method does not require that all counties in the grouping share a border with (in other words, be a direct neighbor to) the county in need. Rather, at the surrounding-counties grouping, WHD will include counties in a group as long as they are all a part of the same contiguous area of either metropolitan or rural counties, even though each county included may not be directly adjacent to every other county in the group.[139]

For example, in the *Chesapeake Housing* case, one group of ''surrounding counties'' that WHD had compiled included the areas of Portsmouth, Virginia Beach, Norfolk, and Suffolk. ARB No. 12–010, 2013 WL 5872049, at *1 n.1. That was appropriate because those jurisdictions all were part of the same contiguous OMB-designated MSA, and each jurisdiction thus shared a border with at least one other in the group—even if they did not all share a border with every other jurisdiction in the group. *See id.* at *5–6. Thus, by using the group, WHD combined data from Virginia Beach and Suffolk at the surrounding-counties level, even though Virginia Beach and Suffolk do not themselves share a border. The ARB concluded that this grouping strategy—of relying on OMB MSA designations—was consistent with the term ''surrounding counties.'' *See Mistick Constr.,* ARB No. 04–051, 2006 WL 861357, at *7–8.

In the NPRM, the first option for the surrounding-counties group level that the Department discussed was to maintain the current group description without further amendment. The Department noted that the term ''surrounding counties'' itself is not so ambiguous and devoid of meaning that it requires additional definition. The Department stated that the term has been reasonably read to require that such a grouping be of a contiguous grouping of counties as the Department currently requires in its use of OMB MSAs (as described above), with limited exceptions. Thus, while the elimination of the metropolitan-rural proviso would allow a nearby rural county to be included in a surrounding-counties grouping with metropolitan counties that it borders, it would not allow WHD to append a faraway rural county to a surrounding-counties grouping made up entirely of metropolitan counties with which the rural county shares no border at all. Conversely, the term ''surrounding counties'' does not allow the Department to consider a faraway metropolitan county to be part of a surrounding-counties grouping of rural counties with which the metropolitan county shares no border at all.

The second and third options the Department outlined in the NPRM were to add more precise definitions to the term ''surrounding.'' The second option was to limit ''surrounding counties'' to solely those counties that share a border with the county for which additional wage data is sought. The Department noted that this proposal would generally ensure that the surrounding-counties grouping would not expand beyond the commuting range of the construction workers who would work on projects in the county at issue. However, the Department explained, the narrowness of such a limitation would also be a drawback, as it could lead to fewer wage rates being set at the surrounding-counties group level. It also would have a significant drawback in that it would not allow for the use of pre-determined county groupings that would be the same for a number of counties, because each county may have a different set of counties with which it alone shares a border. This could result in a substantial burden on WHD in developing far more county-grouping rates than it currently develops.

The third option was to include language that would define ''surrounding counties'' as a grouping of counties that are all a part of the same ''contiguous local construction labor market'' or some comparable definition. The Department noted that, in practice, this methodology could result in similar (but not identical) groupings as the current methodology, as the Department could decide to use OMB designations to assist in determining what counties are part of the contiguous local labor market. Without the strict metropolitan-rural proviso, however, this option would allow the Department to use additional evidence on a case-by-case basis to determine whether the OMB designations—which do not track construction markets specifically—are too narrow for a given construction market.

(1) Comments Regarding Metropolitan and Rural Wage Data

A number of union and contractor association commenters generally agreed with the Department's proposed changes to § 1.7(b). Commenters such as FTBA, MCAA, and NABTU supported eliminating the strict prohibition on combining data from rural and metropolitan areas, because eliminating the prohibition would allow the Department's wage determinations to better reflect the complexities of the construction industry. As NCDCL noted, rural areas are frequently economically interconnected to nearby metropolitan areas. For this reason, commenters explained, the proposal is common sense because it does not limit the Department to the use of ''arbitrary geographic designations.''

Several commenters supporting the proposal emphasized that it is important that the Department have the flexibility to create groupings instead of being bound by a rigid rule. SMART and SMACNA, for example, stated that the task of figuring out how to properly expand geographic scope is a complicated one ''for which regional and demographic differences necessitate solutions that reflect the realities of local markets.'' They agreed that ''county lines do not dictate local labor markets'' and that there is great diversity on a state-by-state basis in how county lines are drawn. SMART and SMACNA stated that under the bar on cross-consideration, the Department has effectively treated all rural counties as a ''monolith'' instead of as diverse entities with differing levels of integration with metropolitan counties and a wide range of populations and economic activity.[140]

[138] *See also* 29 CFR 1.8(b) (1982) (if no similar construction is in area, ''wage rates paid on the nearest similar construction may be considered''); 21 FR 5801, 5802 (1956) (same).

[139] In addition, in certain limited circumstances, WHD has allowed the aggregation of counties at the ''surrounding counties'' level that are not part of a contiguous grouping of all-metropolitan or all-rural counties. This has been considered appropriate where, for example, two rural counties border an MSA on different sides and do not themselves share a border with each other or with any other rural counties. Under WHD's current practice, those two rural counties could be considered to be a county group at the ''surrounding counties'' level even though they neither share a border nor are part of a contiguous group of counties.

[140] *See, e.g.,* Haya El Nasser, ''More Than Half of U.S. Population in 4.6 Percent of Counties,'' *Census.gov:* Big and Small America (Oct. 24, 2017),

They noted that ''there is no single, universally preferred definition of rural'' and no ''single rural definition that can serve all policy purposes.'' That variability makes ''rigid rules banning the use of metropolitan data in rural counties unreasonable.'' [141] LIUNA criticized the Department's current ''absolutist'' approach that ''prevents the Administrator from properly considering labor markets in instances where discretion is required.''

A number of the commenters, including LIUNA and NABTU, agreed with the Department's reasoning in the NPRM that the strict bar has had a depressive effect in particular on the prevailing wage rates for rural counties that border—and have a level of labor-market integration with—metropolitan areas. The commenters noted that the Department's rural county groupings have combined data from metropolitan-adjacent rural counties with other rural counties that may be geographically remote and have no connection to any metropolitan area. UBC, likewise, explained that this practice is counterintuitive given that wage rates are higher in metropolitan-adjacent counties than in remote rural counties because projects in the metropolitan-adjacent counties have to compete for the same workers as projects in the neighboring metropolitan areas. The UA asserted that eliminating the strict bar in § 1.7(b) should increase the accuracy of wage determinations for these types of metropolitan-adjacent counties by better reflecting actual labor markets and commuting patterns.

Several union commenters, including IUOE, West Central Illinois Building and Construction Trades Council, and others, agreed with the Department that the current binary approach to categorizing counties does not account for ''realities of the construction industry, in which workers tend to commute longer distances than other professionals.'' These commenters explained that this fact is in part related to the ''cyclical nature of construction employment.'' When one project ends, they explained, workers are forced to follow the next project that will provide gainful employment, even if it means traveling to surrounding communities.

A number of commenters, including industry associations such as ABC, NAHB, and IEC, opposed the Department's proposal to eliminate the strict bar. These commenters asserted that adoption of higher average wages reflected in metropolitan county data will likely result in inflated wages in nearby rural counties that do not reflect local area prevailing wage rates. Numerous individual commenters, as part of an organized campaign, stated that the elimination of the bar, in combination with other aspects of the Department's proposed rule, was likely to ''further distort the accuracy'' of WHD wage determinations. ABC issued a survey to its members and stated that only 14.4 percent of respondents agreed that ''aggregating metropolitan and rural wage data'' would ''increase the accuracy'' of wage determinations. IEC and the group of U.S. Senators stated that construction unions tend to be more heavily concentrated in metropolitan areas than in rural areas, so the proposal would lead to higher union rates being applied to rural areas that may not have a high union density. Several commenters opposing the proposal, including ABC and the group of U.S. Senators, said that the importation of metropolitan wages that may be higher than wages actually paid in a rural county would be inconsistent with the purpose and congressional intent underlying the DBRA.

Commenters opposing the proposal also stated that increased prevailing wage rates in rural counties would have negative effects. NAHB stated that increased wage rates would decrease production of affordable housing. IEC stated that ''by equating rates between metropolitan and rural areas, the rule would disincentivize workers from taking on higher-paying jobs in metropolitan areas, which have numerous additional out-of-pocket expenses for such workers, including but not limited to commuting, parking, subsistence, and other related costs.'' IEC further stated this would create a shortage of workers being willing to incur these expenses for work in metropolitan areas, thus driving up costs of metropolitan projects even further to attract workers. IEC also stated that using a metropolitan county's wage rate for a rural county would inflate rural wage rates above what the local economy can support and would ''undermine existing methods of incentivizing rural construction, such as subsistence pay to offset food and lodging.'' The comment from the Senators argued that the proposal would ''upset the local wage structure'' and result in small local contractors being ''excluded from bidding on Federal projects.''

Commenters opposing the Department's proposal also criticized the Department's reasoning in the NPRM for proposing the change. NAHB argued that the Department's explanation—that construction workers travel long distances for work and that nearby counties with different designations may be competing for the same supply of workers—is one that ''contradicts'' the system of MSAs set up by OMB. NAHB noted that OMB already analyzes commuting data in order to capture local labor markets when it designates MSAs, and that these areas are treated as ''authoritative'' and used by a variety of government agencies for important programs. They argue that these labor market definitions should not be ignored or contradicted without substantial evidence.

NAHB also stated that the two academic studies on construction-worker commuting time that the Department referenced were not persuasive because they were based on evidence from one city in California, did not show that construction commutes were substantially longer than the next longest commutes, and that any lengthier commute times could be explained by the need for workers to travel to different construction sites rather than to a single central office, and therefore do not necessarily mean commute times extend outside of metropolitan areas. NAHB also noted one of the two papers stated that construction workers travel long distances to projects in search of higher wages, and this, NAHB stated, did not support the idea that workers in metropolitan counties would travel to nearby rural counties for work.

The comment from the group of U.S. Senators criticized the proposal as allowing for rural wage determinations to be governed by ''locality-distinct metropolitan wages'' from metropolitan areas that may be ''lacking both commonality and contiguousness with the rural locality.'' The comment also argued that the process of geographic expansion at all—even the current process allowing the use of MSAs at the group level—inflates prevailing wages compared to the ''actual prevailing wage BLS calculated.'' ABC argued that ''combining data from rural and metropolitan counties cannot improve accuracy so long as the underlying wage data comes from a self-selected, statistically unrepresentative sample.''

Various commenters supporting and opposing the proposal disagreed about the extent to which the Department's

https://www.census.gov/library/stories/2017/10/big-and-small-counties.html.

[141] SMART and SMACNA cited an Issue Brief prepared for the Rural Policy Research Institute Health Panel that compared OMB and Census bureau statistical area designations and noted that 30 million ''Census Bureau-defined rural people live in OMB-defined metropolitan areas, and 20 million urban people live in nonmetropolitan areas.'' Andrew F. Coburn, et al., ''Choosing Rural Definitions: Implications for Health Policy,'' Rural Pol'y Rsch. Inst. 3 (Mar. 2007).

historical practice supports the proposal. On one hand, the comment from the group of U.S. Senators argued that the Department mischaracterized in the NPRM that the bar on combining data has existed only since the 1982 rulemaking. They noted that, as early as 1977, the Secretary's Operations Manual for the Issuance of the Wage Determinations Under the DBRA instructed that ''[g]enerally, a metropolitan county should not be used to obtain data for a rural county (or visa [sic] versa).'' *Donovan,* 712 F.2d at 618.[142] They cited the Carter Administration regulations that were suspended before enactment in 1981 as seeking to ''formalize such a prohibition,'' and they cited a WAB decision from 1977 for the proposition that the WAB had warned against importing rates from non-contiguous counties.

On the other hand, a number of commenters supporting the proposal agreed with the Department that eliminating the strict bar was consistent with the legislative history of the DBA and the Department's historical practice from the enactment of the Act until the 1981–1982 rulemaking. NABTU stated that the legislative history ''supports the proposition that [the Department] should first consider neighboring communities'' when there is not sufficient wage data in a non-metropolitan area. The Iron Workers noted in particular the exchange in the 1932 hearings regarding amending the DBA where Congressman William Connery, the manager of the bill, used the example of the construction of the Hoover Dam (then referred to as the Boulder Dam) near the Arizona-Nevada line. *See* 75 Cong. Rec. at 12366, 12377 (1932) (remarks of Rep. Connery). Rep. Connery had explained how at the time there may have been a need to go 500 miles to find a city large enough to provide a sufficient amount of wage data to determine what prevailing wage rates should be for the project. As the Iron Workers explained, Rep. Connery's statement supports the conclusion that Congress intended to give the Secretary discretion to determine the necessary scope of geographic aggregation where there was insufficient wage data—to aggregate from a geographic scope that is ''large enough to include wage data from a sufficient number of similar projects.'' SMART and SMACNA noted that the Department then, until the 1981–1982 rulemaking, consistently relied on data from more populous areas in deriving prevailing rates for thinly-populated areas in appropriate circumstances.[143]

Commenters supporting and opposing the proposal also disagreed about whether the D.C. Circuit's decision in *Donovan* supports the proposal. The *Donovan* decision considered the reasons that the Department had provided in its 1981–1982 rulemaking for enacting the strict bar on cross-consideration and ultimately upheld the Department's rule as a permissible exercise of its discretion. 712 F.2d at 618. The comment by the group of U.S. Senators argued that the Department's reasons for enacting the bar in the 1981–1982 rulemaking had been ''compelling,'' and that the D.C. Circuit had validated those reasons by stating that they ''make sense.'' The Senators asserted that the Department's reasoning now is similar to the reasoning of the unions and others who opposed the 1981–1982 rulemaking, and that these arguments were ''dismissed'' by the D.C. Circuit. ABC stated that the Department's justifications now are inadequate in light of the *Donovan* decision.

The Iron Workers, on the other hand, emphasized that the D.C. Circuit's decision about the metropolitan-rural bar in *Donovan* was based on a deferential standard of review. The import of the decision, according to the Iron Workers, is that the Department is not bound by prior practice and can adopt new rules regarding geographic aggregation as long as they are consistent with the purposes of the DBA and not arbitrary. The Iron Workers and SMART and SMACNA also noted that the development of the program after the 1981–1982 rulemaking (and the *Donovan* decision) supports revisiting the strict bar. The 2011 GAO Report analyzed a group of surveys and found that in those surveys, the Department received increasingly insufficient current wage data at the county and surrounding-counties levels, which caused the Department to rely more heavily on super-group and statewide data to calculate prevailing wage rates. *See supra* note 10, at 21. This circumstance, the commenters argued, showed that the Department was too often relying on far-away county data when the better alternative would be adding neighboring counties to the surrounding-counties group level and thus relying on data from within local construction labor markets.

(2) Department's Decision Regarding Metropolitan and Rural Wage Data

The Department generally agrees with the commenters supporting the proposal. Given the wide variation in counties and construction labor markets, the current bar on cross-consideration of the binary categories of ''metropolitan'' and ''rural'' county data unnecessarily limits the Department's geographic aggregation methodology. Accordingly, the Department has decided to revert to the prior approach, pre-dating the 1981–1982 rulemaking, under which the regulations do not strictly bar the Administrator from using data from metropolitan counties to help set prevailing wage rates in other counties in appropriate circumstances. In doing so, the Department will be able to better distinguish between metropolitan-adjacent counties that are part of a larger metropolitan construction market and those rural counties that are not economically integrated with any nearby metropolitan areas, will be able to set more wage determinations at smaller levels of geographic aggregation, and will be able to include more classifications in wage determinations overall.

Some of the criticism of the Department's proposal may reflect underlying misunderstandings. The geographic aggregation provisions of § 1.7 apply only when there is not sufficient current wage data in a county to determine a prevailing wage for a particular classification for that county. This can happen for a variety of reasons. As one commenter, a Professor of Economics from the University of Utah, stated, there may be insufficient wage data in some counties because they are simply ''too small to provide adequate numbers of survey responses,'' which is not uncommon given that there are counties in the United States with populations as low as 64 people. As this commenter noted, this challenge can also be common regardless of county size for specialized subclassifications on complex heavy construction projects (such as dams) because these types of projects ''are often non-repeating, vast and unique in their design so that obtaining sufficient comparable wage data in one county is challenging.'' Only where there is not sufficient current wage data for a particular classification in a particular county will WHD expand

[142] In their comment, the U.S. Senators left out the word ''generally'' from their recitation of the language from the Manual. *See Donovan,* 712 F.2d at 618.

[143] For the Oahe Reservoir constructed in rural South Dakota in 1954, the Solicitor of Labor explained that ''[t]he labor force for the project obviously had to be drawn from the entire state and beyond,'' since there were ''no projects of a character similar in the civil subdivisions involved.'' Charles Donahue, ''The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions,'' 29 Law & Contemp. Probs. 488, 510 (1964).

its geographic scope of consideration to consider data from other counties.[144]

The corollary of this structure is that the geographic aggregation provisions do not apply when there is already sufficient wage data for a classification at the county level in a WHD survey. It may be helpful to consider the example of a core metropolitan county, County A, and an outlier county, County B, that shares a border with County A. If the Department's wage survey produces sufficient current wage data for a certain classification in County A and separately produces sufficient current wage data for that classification in County B, then the Department's proposal would not result in any combination of data for the two counties. The proposal would only potentially apply if the wage survey did not produce sufficient current wage data for a classification in County A or County B. In that circumstance, the Department would need to consider how to set the prevailing wage rate for that classification and would look to wage data from outside of that county for that purpose.

The Department disagrees with ABC that the proposal to eliminate the strict bar on cross-consideration is a ''dramatic change'' from the 1981–1982 rulemaking. While eliminating the strict bar, the final rule does not require fundamental changes to the general underlying procedure for geographic aggregation described above. Under the final rule, as under current practice, the geographic aggregation provisions of § 1.7 apply only when there is not sufficient current wage data in a county to determine a prevailing wage rate for a particular classification for that county. *See* 29 CFR 1.7(b). In these circumstances, as under the current practice, the Department would first aggregate data from ''surrounding counties'' to set the prevailing wage for the county with insufficient data. *Id.* Further geographic aggregation would occur only if sufficient data is still not available at the ''surrounding counties'' group level. In that circumstance, the Department could aggregate data from other ''comparable counties or groups of counties.'' *Id.* § 1.7(c). Finally, and only if there is no sufficient current wage data for the classification at this intermediate level, the Department could aggregate statewide data for the classification to set the prevailing wage rate in that county.

In addition, the elimination of the strict bar does not require WHD to abandon the use of OMB designations as helpful references in the aggregation process. As noted above, the Department's current use of OMB designations to identify appropriate counties for geographic aggregation has been found to be consistent with the term ''surrounding counties'' and a reasonable method of addressing circumstances where there is insufficient wage data for a classification in a given county. The final rule will allow the Department to continue this practice, although the rule will not require it. It will also allow the Department to consider additional information on a case-by-case basis to avoid artificially or unreasonably depressing prevailing wage rates in counties that are adjacent to metropolitan areas but not designated as part of the MSA by OMB and to enable the calculation of more prevailing wages at the surrounding-counties group level rather than based on data from larger, more disparate super group or even statewide areas.

The Department disagrees with NAHB that cross-consideration of data from outside of the same MSA ''contradicts'' these OMB designations. As an initial matter, OMB itself notes that ''[c]ounties included in metropolitan and micropolitan statistical areas may contain both urban and rural territory and population.'' 86 FR 37772. It also disclaims that its standards ''produce an urban-rural classification.'' *Id.* at 37776. OMB requires counties to achieve a relatively high level of economic integration in order to be included in the same MSA. An outlying county will only be included in an MSA if 25 percent or more of the workers living in the county work in the central county or counties of the MSA or 25 percent or more of the employment in the county is accounted for by workers who reside in the central or county or counties. *Id.* Given that construction workers may generally commute longer distances than other workers, it is reasonable that counties that are economically integrated—but to a somewhat lesser extent than are MSAs—may still be a part of the same local construction labor market.

One example that would be permissible under the final rule would be for the Department to take a new approach with counties that OMB designates as micropolitan statistical areas. As OMB notes, metropolitan and micropolitan statistical areas are ''conceptually similar to each other, but a micropolitan area features a smaller nucleus.'' 86 FR 37771.[145] The Department, however, has generally considered counties designated as micropolitan to be ''rural'' and thus not appropriately included in a metropolitan ''surrounding county'' grouping even where the micropolitan county shares a border with an MSA. Under the final rule, the Department could analyze micropolitan counties on a case-by-case basis to determine how to include them in surrounding-counties groupings.

Where a micropolitan county is not adjacent to any MSA, and is surrounded by rural counties with no urban population, the Department could continue (as it generally does under the existing strict bar) to include such a county within a surrounding-counties grouping of other adjacent and contiguous ''rural'' counties. In such circumstances, there would be no combining of metropolitan and ''rural'' data at the county or surrounding-counties group level for that county. However, where a micropolitan county is adjacent to one or more metropolitan counties, the Department might reasonably consider it to be a part of the same surrounding-counties grouping as those nearby counties within the MSA for the purpose of geographic aggregation. OMB's ''combined statistical areas'' concept could be useful in such a circumstance. OMB creates combined statistical areas by appending micropolitan counties to adjacent MSAs where there is a sufficient ''employment interchange'' between the two areas. 86 FR 37777–78. Although the final rule does not require as much, it would permit the Department to use data from metropolitan counties to set prevailing wages for micropolitan counties (for which there is not sufficient current wage data for a classification at the micropolitan county level) that are within the same combined statistical area.

Given the wide variety of counties and local construction labor markets, the Department does not believe it is appropriate to set overly simplistic rules that apply rigidly throughout the country. Rather, depending on resource availability, the Department should be permitted to analyze data and other evidence on a state-by-state basis to determine appropriate county groupings. For example, Rice County in Minnesota is a micropolitan county that is adjacent to the Minneapolis-St. Paul

[144] In addition, as the Department noted in the NPRM, if more interested parties participate in the wage survey, then there will be fewer counties without sufficient wage data for which the § 1.7 expansion process becomes relevant.

[145] An MSA is ''based on Urban Areas of 50,000 or more population,'' and a micropolitan statistical area is ''based on Urban Areas of at least 10,000 population but less than 50,000 population.'' 86 FR 37776.

MSA. In the most recent DBA wage determination process, the Department considered Rice County to be rural and therefore did not use any wage data from Minneapolis-St. Paul to assist in wage determinations. Because it satisfies the threshold for employment integration, however, OMB considers Rice County to be part of the Minneapolis-St. Paul Combined Statistical Area.[146] Likewise, Rice is also within the same union jurisdiction for various construction crafts as the metropolitan counties in the adjacent MSA. In a future survey, if there are classifications in Rice County for which there is not sufficient current wage data, it would be reasonable under these circumstances for the Department to expand to a surrounding-counties grouping that includes the other counties within the same Minneapolis-St. Paul Combined Statistical Area.

The Department has considered and disagrees with NAHB's criticism of the two academic papers that the Department used to illustrate that construction labor markets can be geographically larger than the average occupation's labor market. NAHB stated that the papers were not persuasive, but it did not cite to any studies or other data that contradicted them. NAHB first stated these papers were unconvincing because the average commute time they cited for construction workers—while the highest of all occupational groups—was only 1.6 minutes higher than the next highest occupational group. By comparing the commute times to the next highest number, however, NAHB ignored that the average commute times for construction workers in the study are significantly longer than many other common occupations. For example, they are 31 percent higher than sales workers, 44.5 percent higher than education workers, and nearly 52 percent higher than food service workers. *See* Sun et al. (Dec. 2020) *supra* note 135, at 1, 4.

NAHB also stated that any lengthier commute times for construction workers could be explained by the need for workers to travel to different construction sites rather than to a single central office, and therefore do not necessarily mean commute times extend outside of metropolitan areas. The Department agrees that lengthy construction worker commutes may in part be a result of commuting to project sites instead of a central office.[147] However, the Department is not persuaded that such a distinction is relevant to whether these longer commutes cross metropolitan-rural county borders and reflect a larger construction labor market. The two academic papers, moreover, note a high percentage of particularly long commutes in the study area: 40 percent of the workers in the study commuted more than 50 miles from home to the project site, and 12 percent of workers commuted more than 80 miles. *See* Sun et al. (June 2020), *supra* note 136, at 40. It is reasonable to assume that commutes of this length can often extend across metropolitan-rural county borders.[148]

Finally, NAHB also noted that construction workers travel long distances to projects in search of higher wages, and this, they stated, did not support the idea that workers in metropolitan counties would travel to nearby rural counties for work. The Department agrees that as a general matter, construction contractors may need to pay a premium to motivate workers to commute longer distances. This does not, however, undermine the Department's reasoning. To the contrary, it suggests that if a rural county is within commuting distance of a metropolitan area and the rural county does not itself have sufficient construction workers in a particular classification, workers from the metropolitan area may need to be paid a premium to be willing to commute to the job. This is the concept underlying the ''zone pay'' premiums in CBAs, which are discussed above in section III.B.1.ii.(A)(4).[149]

The Department has also considered the comments from opponents of the proposal that the elimination of the strict bar will likely result in ''inflated'' wages in the rural counties in which metropolitan data is newly used. In support of this argument, the comment from the group of U.S. Senators referenced statements in the 1979 GAO Report and by then-Comptroller General Staats that criticized the importation of rates from one county to another. Also supporting this argument, NAHB cited testimony from an NAHB member asserting that it had constructed two projects—one in the Philadelphia metropolitan area and the other ''outside of the Philadelphia area'' that was ''described as a more complex project''—and that the labor costs and cost-per-unit had been higher on the metropolitan project. NAHB, in addition, pointed to litigation over certain DBA rates in Nevada, where geographic aggregation led to the adoption of Las Vegas metropolitan rates in a smaller metropolitan area in Northern Nevada that included Reno.

The Department does not find the reference to the 1979 GAO Report to be persuasive. The GAO Report was criticizing the importation of rates from other counties ''even though an adequate basis generally existed for issuing prevailing rates based on the labor force and construction data in the locality.'' 1979 GAO Report, at 50. Later, the GAO referenced a project where it stated that the Department had not even attempted to survey a rural county and instead adopted a wage rate from a metropolitan county that did not even share a border with the rural county. *Id.* at 174.[150] This is not what the Department proposed in the NPRM. Rather, the proposal would not change the fundamental threshold for

[146] *See* U.S. Census Bureau, ''Minnesota: 2020 Core Based Statistical Areas and Counties,'' *https://www2.census.gov/programs-surveys/metro-micro/reference-maps/2020/state-maps/27_Minnesota_2020.pdf*.

[147] As another paper noted, it is reasonable to assume that commute times are higher for construction workers because commute times will generally be longer for workers (like construction workers) who have ''greater uncertainty about future job location.'' Randall Crane and Daniel G. Chatman, ''As Jobs Sprawl, Whither the Commute?,'' ACCESS Mag., Fall 2003, at 14, 17.

[148] NAHB also criticized the two papers because they were based only on data from one city in California. The Department, however, does not find that criticism to be persuasive. The average commute times discussed in the papers were not local numbers, but were numbers derived from the nationwide U.S. Census data in the 2014 American Community Survey. *See* Sun et al. (Dec. 2020) *supra* note 135 (citing Dan Kopf, ''Which Professions Have the Longest Commutes?,'' Priceonomics (Feb. 23, 2016), *https://priceonomics.com/which-professions-have-the-longest-commutes/*). While the commute mileage numbers were from a single California city, the Department's proposal is to increase the Administrator's flexibility to treat different construction labor markets differently. Thus, the potential that data from other cities in the country could show different commuting patterns for construction workers does not undermine the rationale for the proposal.

[149] A comment from The Pacific Companies, an affordable housing developer and owner of affordable housing, provided another example of this phenomenon. The comment noted that it prefers to use modular construction to reduce the need for labor and offset labor costs in rural areas ''where labor is more scarce and costs can be higher.''

[150] Similarly, the U.S. Senators cited to the WAB decision in *Texas Paving & Utilities Rates,* WAB No. 77–19, 1977 WL 24839 (Dec. 30, 1977), to support the argument that importing wage rates could violate the plain language of the DBRA by ''establishing new wage rates rather than reflecting local wages.'' In the *Texas Paving* decision, however, the Administrator had not surveyed the area at issue and set rates notwithstanding the lack of a survey. This would not be an issue under the proposed scope-of-consideration rule, as the Department's current methodology requires the use of surveys, and geographic aggregation only occurs if a survey has resulted in insufficient current wage data in the county at issue.

geographic expansion in the regulation at § 1.7(b), which only expands the scope when the Department has surveyed a county and the survey has not resulted in sufficient current wage data to make a wage determination.

The Senators also cite language in the GAO Report stating that ''the use of wage rates from another area is not in accord with the act's intent[.]'' 1979 GAO Report, at 50. The Department interprets this statement as referencing the practices that the GAO was criticizing—of using rates from another area without even attempting to survey the county at issue—and not a broader statement that the use of wage rates from another area is never permitted. However, to the extent that the GAO Report intended a broader rejection of the practice of geographic aggregation, that position was subsequently undermined by the D.C. Circuit in the *Donovan* decision upholding the geographic aggregation provisions in § 1.7. In *Donovan,* the D.C. Circuit concluded from the legislative history of the DBA that the practice of using data from outside the area where necessary was permissible and consistent with the statute. As the court explained ''if a prevailing wage could not be set in a given county by looking only to projects in that county, it was essential to the attainment of the general purpose of Congress—the predetermination of locally prevailing wages—that another mechanism be found.'' 712 F.2d at 618.

The Department also does not agree that the proposal will lead to an impermissible adoption of inaccurate and ''inflated'' wage rates. The Department agrees that different areas can have different wage structures; that is the basic concept underlying the Act. However, as the D.C. Circuit noted, the Department is tasked with finding a way to make wage determinations even where there is not sufficient current wage data from a given county to make the determination. *Donovan,* 712 F.2d at 618. In such circumstances, the Department must consider a number of factors in determining how to proceed, including consistency with local area practice, as well as administrative feasibility, publishing as many wage determinations as possible, and reducing the need for conformances. As the Department noted in the NPRM, there is no perfect solution for identifying county groupings in the geographic aggregation procedure. However, on balance, the Department has concluded that the better approach is not to constrain the agency with strict limits based on an overly simplistic binary categorization of counties.

The Department agrees that there is a possibility that increased flexibility may lead to higher prevailing wage rates in certain counties that are adjacent to metropolitan areas. The Department agrees with the commenters that supported the proposal that the current geographic aggregation methodology can have a depressive effect on the prevailing wage rates for rural counties that border—and have a level of labor-market integration with—metropolitan areas.

Conversely, however, increased flexibility in geographic aggregation may in other circumstances lead to lower prevailing wage rates. Under the current ban, where a survey does not result in sufficient current wage data for a classification in a metropolitan county, the Department may need to use a super group of metropolitan counties from different parts of the state to make a wage determination for that classification. This can result in relying on data from far away metropolitan areas that may have less in common with the metropolitan county than neighboring micropolitan counties (that are currently treated as ''rural''). Without the ban, the Department could instead look to the adjacent rural county that is within commuting distance from the metropolitan county for which there is not sufficient current wage data for the classification at issue. The result in that instance could be a lower rate in the wage determination, but one that might better reflect the prevailing wage in the specific local construction labor market.[151]

A similar effect can be anticipated for rural areas that are adjacent to small metropolitan areas. Under the current approach, if there were insufficient data in a rural metropolitan-adjacent county, the Department would look to other ''rural'' areas elsewhere in the state where wage rates might be driven by rates in micropolitan counties with markedly higher rates. For example, in a recent survey of Utah, WHD determined that the combined prevailing wage and fringe benefit rate in a smaller metropolitan county, Weber County, for a Laborer: Mason Tender/Cement Concrete was $14.93. In neighboring Rich County, a rural county, there was no sufficient current wage data, and WHD calculated the prevailing wage for the same classification by looking to other rural counties statewide, resulting in a determination of $19.33. If instead WHD had been able to combine the metropolitan data from neighboring Weber County with the rural Rich County, the prevailing wage in Rich County would be lower than it has been calculated under the existing strict bar on cross-consideration of ''metropolitan'' and ''rural'' data.

This same phenomenon can occur even when the metropolitan area is not a particularly small one. For example, in a recent survey of Tennessee, WHD determined that the prevailing wage for an Electrician in a number of counties within the MSA of Nashville-Davidson-Murfreesboro was $22.53. In neighboring Lawrence County, a micropolitan county that is part of the larger combined statistical area, but still considered to be a ''rural'' county under the current rules, there was not sufficient wage data to make a wage determination for the Electrician classification. WHD thus calculated the prevailing wage for Electricians in Lawrence County by looking to other ''rural'' counties at a super-group level, resulting in a determination of $26.25. If instead WHD had been able to combine the ''metropolitan'' data from the neighboring MSA with micropolitan Lawrence County, the prevailing wage in Lawrence would have been lower.

Overall, while it is reasonable to expect that ending the strict bar on cross-consideration may in some counties lead to increases in the published prevailing wage rates, the Department does not agree that such increases would be unwarranted or inaccurate, or that they would have significant negative effects that outweigh their benefits. In addressing these questions, the Department has considered the arguments that were made during the 1981–1982 rulemaking and subsequent litigation, as well as the comments received on the current proposal. Many of these arguments are similar, and many mirror the arguments that the same commenters made regarding the proposed reversion to the 30-percent rule, such as NAHB's statement that increased wage rates would decrease production of affordable housing, and IEC's statement that using a metropolitan county's wage rate for a rural county would inflate rural wage rates ''above what the local economy

[151] The same is true for prevailing wage rates based on CBAs. IEC speculated that the end of the absolute bar could lead to metropolitan area CBA rates being applied to neighboring rural counties. However, it is equally as likely that small metropolitan MSAs that have insufficient data and would be subject to a CBA-based rate at a metropolitan ''super group'' level under the existing regulations, will, under the final rule, have the potential to instead reach sufficiency at the surrounding-counties group level with a combination of metropolitan and rural county data that may not be CBA-based.

can support.'' [152] The Department does not find these arguments to be persuasive for the same reason that they are not persuasive with regard to the 30-percent rule. *See* section III.B.1.ii.

The comments identifying potential negative effects on rural contractors also do not provide persuasive reasons to reject the proposal. The Department does not agree with the comment from the Senators that eliminating the strict bar would result in small local contractors being ''excluded from bidding on Federal projects.'' In support of this argument, the Senators cited the 1979 GAO Report in which the GAO speculated that for certain contracts in rural counties, the lack of local contractors could be attributed to these contractors declining to bid on contracts with higher ''metropolitan'' prevailing wage rates because they did not want to ''disrupt their wage structures.'' 1979 GAO Report, at 73–74. In addition, the Department's 1981–1982 NPRM noted a comment from the National Utility Contractors Association that ''in the past'' the ''importation'' of metropolitan rates into rural areas had ''disrupted labor relations in rural areas, because employees who received high wages on a Davis-Bacon project were unwilling to return to their usual pay scales after the project was completed.'' 47 FR 23647.

The Department is not persuaded by the concerns about ''labor disruption'' for several reasons. As an initial matter, the comment assumes a significant discrepancy between the wage that construction workers are paid in a rural county and the prevailing wage that the Department would set through the geographic aggregation process. Among the counties that the Department has identified as potentially affected by this rule change are metropolitan-adjacent counties—within commuting distance of the metropolitan core—in which the Department does not have sufficient current wage data from the county to make a determination. In many or most such circumstances, it will be reasonable to assume that the wage rate from a neighboring county is not significantly different and therefore that there is no reason to assume labor disruption from setting the same prevailing wage rate. Moreover, where non-metropolitan counties are next to metropolitan areas, the workers in these counties generally already live within commuting range of earning the metropolitan rates that could potentially be designated as prevailing. Thus, it does not follow that the potential for additional projects—all within the same commuting range—to be governed by these rates would result in a disruption of labor relations.[153]

It also does not follow that the requirement to pay certain higher base rates would, as the IEC asserts, ''undermine existing methods of incentivizing rural construction, such as subsistence pay to offset food and lodging.'' Prevailing wage rates do not operate as a maximum rate that can be paid; if contractors provide additional pay to cover food and lodging so as to ensure that metropolitan-based workers are willing to commute to a rural job, then they are permitted to provide such additional incentives above and beyond the prevailing wage rate.

Finally, even if using wage rates from a metropolitan county to set the prevailing wage rate in an adjacent rural area were to result in a higher prevailing wage rate than under the current policy, such a result would not ''exclude'' any bidders. As noted above in response to the Senators' comments on the 30-percent rule proposal, a higher required prevailing wage rate does not exclude bidders because all bidders are equally required to pay the same wage rate. *See* section III.B.1.ii.A. The potential that some contractors might choose not to bid on covered contracts is also not a persuasive reason to abandon the proposal. In any type of county, not just rural counties, it may be possible that contractors that derive competitive advantage only by paying the lowest wages might be disincentivized from bidding on contracts covered by prevailing wage requirements. Studies have shown, however, that this potential may be generally offset by the incentive that prevailing wage requirements provide for higher-skilled contractors to bid where they might not otherwise. *See* section V.F.1.[154] This conclusion is also supported by commenters on the current proposal. Many comments from contractor associations supporting the current proposal stated that appropriate enforcement of prevailing wage requirements provides more contractors with the ability to pay their workers fairly and bid on contracts on the basis of skill and quality instead of on which contractor will pay the lowest wage rates. Accordingly, the Department is not convinced that the elimination of the strict bar will have net negative effects on local rural contractors or rural construction workers generally.

Although commenters did not expressly assert as much, the Department also considered whether the concerns about ''disruption'' of rural wage structures (and other comments regarding the scope-of-consideration regulation at § 1.7) amounted to assertions of reliance interests in the current regulations that would weigh against adopting the changes in the final rule. Contractors have not asserted, and the Department does not believe, that the rural wage rates or practices that the commenters have mentioned have been set in reliance on the Davis-Bacon wage determination methodology. However, to the extent they have been, and required prevailing wage rates may rise as a result of the rulemaking, the barriers for such contractors to increase wage rates when working on DBRA-covered projects are not unreasonably high, given that any new wage rates will apply only to new contracts—with limited exceptions reflected in § 1.6(c)(2)(iii) and discussed in section III.C. (''Applicability Date'') below—and contractors can adjust their bids or future negotiations on contract pricing as necessary to accommodate them. In instances where required wage rates may fall instead of rise, and specifically where they may fall from a CBA rate, the potential for disruption may be greater. In those circumstances, it is possible that contractors who have agreed to be bound by a CBA may have done so in part relying on the existence of CBA-based prevailing rates for work on Federal contracts. Notwithstanding this possibility, the Department has determined that it is preferable to eliminate the absolute bar on cross-consideration to allow the determination of wage rates to more often occur based on smaller geographic groupings.

The Department has also considered that the concern about labor disruption was discussed by the D.C. Circuit when it upheld the strict bar in 1983. *See Donovan,* 712 F.2d at 618–19. The *Donovan* decision noted the Department's apparent reliance on the labor-disruption argument in the 1981–1982 rulemaking, and the court then

[152] Similarly, the comment from the group of U.S. Senators stated that wages would be inflated if they were compared to ''actual prevailing wage[s] BLS calculated,'' and ABC argued that the proposal regarding metropolitan and rural data cannot improve accuracy so long as the Department continues to use its current voluntary survey process.

[153] The Department notes that IEC, while generally disagreeing with the Department's proposal, agreed that the labor disruption argument is not at issue where the cross-consideration of rates is occurring within the same commuting area.

[154] In 1979, when the GAO sought the Department's comment on its preliminary findings, the Department criticized GAO's conclusion that the Department was implementing the Act in a way that harmed local contractors in rural counties. *See* 1979 GAO Report, at 224–225 (appending letter from the Department). The Department stated that the GAO has based its conclusions on a statistically insignificant sample of projects and on mistaken understandings about the specific projects.

broadly stated that the Department's reasoning ''makes sense.'' *Id.* at 619. The underlying holding in *Donovan,* however, was that situations ''where there is insufficient data from a given civil subdivision to determine a prevailing wage,'' represent ''interstitial areas'' of the statute, regarding which Congress had granted the Department broad authority to ''implement[ ] the Act in the way necessary to achieve its purposes.'' *Id.* at 618.

Under these circumstances, a prior holding that a rule was reasonable does not prohibit the Department from coming to a different conclusion at a later date. *See Home Care Ass'n of Am.* v. *Weil,* 799 F.3d 1084, 1092 (D.C. Cir. 2015) (holding that the Supreme Court's decision that prior rule was ''reasonable'' did not preclude different approach in new rule, where the matter was interstitial in nature and within the agency's discretion). Likewise, two opposing arguments can both ''make sense.'' Where they do, the Department has to determine what it believes to be the best course, taking into consideration its expertise and any new factual circumstances that have arisen after the earlier decision. As various commenters have correctly observed, the strict bar in the 1981–1982 rulemaking has led to an increasing reliance on data from super group and statewide levels to calculate prevailing wage rates. *See* 2011 GAO Report, at 21. Considering this trend, the Department has concluded that the better option is to allow a more case-by-case analysis of local construction labor markets—and thus increase the number of wage determinations that can be made with smaller geographical aggregations of data.

The Department disagrees with the Senators' comment that the proposal is not permissible or reasonable because the D.C. Circuit in *Donovan* ''dismissed'' the arguments that the Department is now making regarding the need to have flexibility in geographic aggregation because of heterogeneity in commuting patterns. In the 1981–1982 rulemaking, unions had argued that ''importing'' rates from nearby metropolitan areas is justified because workers from metropolitan areas often perform the work in rural areas due to shortages of skilled labor in rural areas. 47 FR 23647. The Department had responded, stating that if those commenters were correct that ''large numbers'' of workers from metropolitan areas typically work at higher metropolitan wage rates on projects in rural areas, then ''those higher wages would be found and receive proper weight in surveys of wages paid in such areas.'' *Id.* The D.C. Circuit's did not ''dismiss'' the reasonableness of the unions' argument or suggest that Department would have been prohibited from agreeing with the unions. To the contrary, the court acknowledged that ''it might be true'' in some cases that looking to far away rural counties ''would not reveal the higher wages that should be paid in the project county.'' 712 F.2d at 619. The court held, however that the unions had not provided a sufficient factual basis to ''overturn the Secretary's informed exercise of authority.'' *Id.*

In the years since the *Donovan* decision, the practical experience of making wage determinations based on the strict bar has highlighted a flaw in the Department's prior reasoning. The Department's hypothetical during the 1981–1982 rulemaking, and the court's analysis of it, did not grapple with factual circumstances in which the geographical aggregation rule in fact applies. In practice, the question of cross-consideration of metropolitan and rural county data only arises when a wage survey finds that there is not sufficient current wage data in a county to determine a prevailing wage rate for a particular classification. Only then does the Department consider looking to ''surrounding counties'' for comparable data. The fact that there may not have been sufficient similar projects in a county during the most recent survey period, as measured by the wage survey, however, does not reflect on what the wage rates are or would be on such projects when they do occur. In such a circumstance, the relevant question is not whether ''large numbers'' of workers from the metropolitan county have been working in the adjacent county during the survey period at metropolitan rates sufficient to set the prevailing wage. Rather, the question is whether the metropolitan-adjacent rural county is sufficiently part of a local construction labor market that it is reasonable to set the prevailing wage rate closer to the rates in the nearby metropolitan counties that are also part of that labor market than to a lower (or higher) rate of a farther-away rural county. As noted, wage rates in a metropolitan-adjacent rural county may be similar to a nearby metropolitan county not only because metropolitan-county workers may routinely travel to the adjacent county to work, but also because workers who live in the rural county can command a similar wage rate to the adjacent metropolitan area because the rural county is sufficiently economically intertwined with it.

At the time this question reached the D.C. Circuit in *Donovan,* it was sufficiently abstract that the court reasonably deferred to the Department's expertise. However, the imposition of the strict bar has given rise to many examples where the Department has overlooked indicia of economic integration solely because a county is not a part of an OMB-designated MSA. As discussed above, one example is where a micropolitan county is part of a combined statistical area with a neighboring MSA—thus sharing a certain level of measurable economic integration—or where there is evidence that a particular contractor community operates regularly in a geographic area that transcends an MSA's boundaries. Under such circumstances, there is sufficient reason to use data from the neighboring MSA to set wage rates where there otherwise is not sufficient current wage data in the county. The D.C. Circuit's decision in *Donovan* does not suggest otherwise.

The Department has also considered IEC's argument that the proposal would incentivize workers to work on rural projects instead of taking jobs in metropolitan areas, leading to an increase in the costs of metropolitan projects to attract workers. The Department agrees with the principle underlying IEC's comment—that if two projects are in counties that are within commuting distance, then they will likely be competing for the labor of many of the same construction workers. This principle explains why the Department believes it can be appropriate to consider a metropolitan county's wage rates when there is not sufficient data in a neighboring rural county instead of relying on a farther away rural county or counties that may have much more limited connections to any metropolitan labor market.

The Department, however, does not believe that adopting a metropolitan county's prevailing wage rates for an adjacent rural county will have the broad effect IEC anticipates so as to warrant maintaining the strict bar. The first problem with IEC's argument is that it begins with the assumption that the ''true'' prevailing rate in the rural county is significantly different than the rate in the neighboring metropolitan county, even though the two counties may be within commuting distance of one another and therefore within the same local construction labor market. As a related matter, IEC also necessarily must be assuming that most construction workers in the two-county market live in the rural county and would therefore be willing to accept a lower rate in order to avoid commuting. While this may be true in some labor markets, it will not be true in others. If

most skilled construction workers reside in populous metropolitan counties, it may already be necessary for projects in nearby rural counties to pay wages commensurate with metropolitan rates (or even a premium above metropolitan rates) to attract sufficient workers from the metropolitan core, as is exemplified by the structure of many CBA ''zone rates,'' discussed in section III.B.1.ii.(A).(4). Finally, IEC's hypothetical assumes a finite number of workers, which ignores the potential that additional significant construction projects (and any related increase in wage rates) may attract new workers to a labor market. In sum, there is significant variation in construction labor markets, and this variation suggests that the Department should have the flexibility to create county groupings through which it can attempt to account for these differences.

The D.C. Circuit's decision in *Donovan* is helpful for addressing the question that the Senators raised regarding whether the proposal to relax the strict bar is consistent with the legislative history of the Act and with the Department's historical practice prior to the 1981–1982 rulemaking. In *Donovan,* the district court had struck down the strict bar, as the D.C. Circuit explained, ''almost exclusively on what it saw as a longstanding and consistent administrative practice contrary to the proposed regulations.'' 712 F.2d at 619 (citing the two district court decisions below). The D.C. Circuit noted that the Department's administrative practice had not been ''quite as consistent'' as the district court had stated. *Id.* (citing the 1977 Manual of Operations and the Carter Administration rule). Nonetheless, the D.C. Circuit opinion did not turn on this question. Rather, it stated that ''[m]ore fundamentally'' it was reversing the district court and upholding the strict bar because ''prior administrative practice carries much less weight when reviewing an action taken in the area of discretion,'' such as the interstitial question of how to make wage determinations in counties that do not have sufficient current wage data. *Id.*

In any case, the current proposal to relax the strict bar is consistent with the Department's prior practice before the 1981–1982 rulemaking. In that rulemaking, the Department acknowledged that the strict bar was a departure from the prior status quo, stating that the Department had determined ''that its past practice of allowing the use of wage data from metropolitan areas in situations where sufficient data does not exist within the area of a rural project is inappropriate.'' 47 FR 23647. As both the D.C. Circuit and the Senators noted, although there was no strict bar on cross-consideration from 1935 until the 1981–1982 rulemaking, the Department's procedures were not necessarily uniform over that time period. In the late 1970s, while no strict bar existed in the regulations, the Department's Manual of Operations document provided that ''generally'' it would not mix such data. *See* 712 F.2d at 619 (citing the 1977 Manual of Operations). This description, however, would be a fair description of the expected effects of the Department's current proposal.

There are two reasons why, as a practical matter, the Department will ''generally'' not combine metropolitan and rural data under the current proposal. First, aside from the exceptions of multi-county projects and highway projects described above, no cross-consideration will occur for any county (rural or metropolitan) for which a survey results in sufficient current wage data to make a wage determination. Second, even when there is no sufficient current wage data in a rural county, the Department will generally not need to combine the available rural wage data with metropolitan data as part of the surrounding-counties grouping. For rural counties surrounded by other rural counties, the Department will usually look only to these neighboring rural counties as part of the surrounding-counties grouping. The only cross-consideration at the surrounding-counties grouping will generally be where a ''rural county'' shares a border with a metropolitan county and reasonably can be considered to be part of the local construction labor market.

While the Department's proposal may not be exactly the same as prior administrative practice, *Donovan* instructs that the Department is not bound to apply geographic aggregation only in the same way as it has before as long as the Department has a reasonable basis for a new proposal that is consistent with the purposes of the Act. The Department believes that it is more consistent with the purpose of the Act to maintain sufficient flexibility in the wage determination process so as to adequately consider the heterogeneity of ''rural counties'' and avoid unnecessarily depressing (or increasing) prevailing wage rates in metropolitan-adjacent counties by referring to faraway rural counties before considering whether neighboring metropolitan county rates might reasonably be considered to prevail under the circumstances. It is also more consistent with the Act to seek to make prevailing wage determinations at smaller levels of geographic aggregation in order to better track local area practices.

(3) Defining ''Surrounding Counties''

A number of commenters responded to the Department's request for comment regarding whether there was a need for additional definition within the regulatory text of the first level of geographic aggregation, which is currently referred to in the regulations as ''surrounding counties.'' 29 CFR 1.7(b). Of the three options that the Department presented in the NPRM, commenters favored either Option 1 (to leave the description the same) or Option 3 (to include in the regulatory text a definition of ''surrounding counties'' as a ''contiguous local construction labor market'').[155]

The III–FFC supported defining ''surrounding counties'' as contiguous construction labor markets because it would give the Department the flexibility to use OMB designations, but also allow the use of additional evidence on a case-by-case basis to determine if OMB designations are too narrow for a given construction market. III–FFC also supported this option because, unlike the second option the Department had proposed, it would allow the Department to make predetermined county groupings or make determinations on a case-by-case basis. The NCDCL noted that the California State prevailing wage rules contain a similar definition, instructing the consideration of rates ''in the nearest labor market area.'' Cal. Lab. Code section 1773.9(b)(1). NCDCL commented that a county grouping methodology based on the nearest labor market area is the best way to effectuate the purpose of the DBRA by ''ensur[ing] that prevailing wage rates actually reflect the wages paid to workers in the labor market they work in.'' The FTBA

[155] No commenters favored the second option, which would have relied only on counties sharing a border with the county in need. As noted, that option would have made predetermined groupings virtually impossible—even groupings based solely on OMB's statistical area designations as under current procedures. The Department is not adopting the second option for that reason. In the NPRM, the Department also stated that it was considering one more option of more explicitly tailoring the ban on combining metropolitan and rural data so that it applies only at the ''surrounding counties'' level, but not at the statewide level or an intermediate level. The Department received no comments regarding this option. While limiting the ban to ''surrounding counties'' but allowing cross-consideration at higher levels would be more beneficial than the current regulations, it would not allow the Department the flexibility of identifying metropolitan-adjacent rural counties that can reasonably be added to metropolitan surrounding-counties groupings. Accordingly, the final rule does not adopt that option.

supported this definition as the best for reflecting the most relevant wage and benefits data ''in areas in which the labor pool is not limited to a single county.''

Commenters opposed to the Department's proposal stated that none of the Department's proposed options adequately explained what other approaches it would be using (instead of relying on OMB ''metropolitan'' designations) to expand geographic aggregation when necessary. AGC stated generally that ''metro and rural data should not be mixed''; it clarified, however, that it may be appropriate to combine county data when counties ''are economically related and part of the same sphere of influence.'' AGC also asserted that the Department should ''retain flexibility in this matter instead of prescriptiveness'' because ''[e]very state, county, city and especially construction market is unique.'' With regard to the Department's specific proposals, AGC requested that the Department set specific definitions and limitations to how it would identify a ''contiguous local construction labor market'' and recommended the Department instead use ''defined market approaches.''

The Department has elected to retain the reference to ''surrounding counties'' without further definition in the regulatory text, given that the term already has accrued meaning through litigation in the ARB. *See Chesapeake Housing,* ARB No. 12–010, 2013 WL 5872049. As noted, a surrounding-counties grouping generally should be a contiguous group of counties that approximate a local labor market, either through the adoption of OMB designations or on the basis of some other appropriate evidence of economic relationship between the included counties. The Department agrees with AGC that construction markets can be unique, and it makes sense to retain flexibility and avoid prescriptiveness.[156] Accordingly, while the Department has identified certain potentially appropriate types of surrounding-counties groupings (for example, following the lines of OMB ''combined statistical areas''), there may be other methodologies to identify whether counties are reasonably within the same local construction labor market and thus can be appropriately grouped together as ''surrounding counties.'' For example, as the Department noted in the NPRM, the Department could rely on county groupings in use by State governments for state prevailing wage laws, as long as they are contiguous county groupings that reasonably can be characterized as ''surrounding counties.'' Notwithstanding this flexibility, it will generally not be appropriate to include noncontiguous counties within a surrounding-counties grouping; all of the counties within a first-level grouping should border at least one other county in the grouping.

Having considered the comments received regarding the proposal to eliminate the strict bar and to retain the surrounding-counties grouping, the Department has decided to adopt the language of § 1.7(a) and (b) as proposed in the NPRM.

(B) Other Proposed Changes to § 1.7

The Department proposed several other changes to § 1.7. These included non-substantive changes to the wording of each paragraph in § 1.7 to clarify that the threshold for expansion in each one is insufficient ''current wage data.'' The Department also sought comment on whether the existing definition of ''current wage data'' should be retained or amended to narrow or expand its scope. The existing regulation now defines ''current wage data'' in § 1.7(a) as ''data on wages paid on current projects or, where necessary, projects under construction no more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate.'' The Department did not receive any comments regarding the definition or these non-substantive changes, and the final rule has accordingly adopted the non-substantive changes as proposed and does not modify the definition of ''current wage data.''

The Department also proposed amendments to § 1.7(c) to better describe the process for expanding from the surrounding-counties level to consider data from an intermediary level (such as the current super-group level) before relying on statewide data. In the proposed regulatory text, the Department described this second level of county groupings as ''comparable counties or groups of counties in the State.'' The Department stated that this proposed ''comparable counties'' language in § 1.7(c) would allow the Department to continue to use the procedure described in *Chesapeake Housing* of combining various surrounding-counties groups (such as MSAs) or various non-contiguous groups of rural counties to create super groups. The proposal also included reference in § 1.7(c) to the use of statewide data, but only ''if necessary.''

The Department received only a few substantive comments regarding the proposal for clarifying the use of intermediate and statewide county groupings in § 1.7(c). The labor organization REBOUND requested additional information about how intermediate groupings would be selected and expressed concern that the analysis for determining comparable counties could involve statistical analyses that could be the subject of political manipulation. NAHB expressed concern about eliminating the bar on cross-consideration of rural and urban data at the super group and statewide level. They stated that the proposal did not provide sufficient clarity about whether at each level it would adopt a single rate that combines both metropolitan and rural data. The comment from the group of U.S. Senators disagreed with the Department's reasoning that the purposes of the Act are better served by using combined statewide data to determine the prevailing wage, when the alternative could be to fail to publish a wage rate at all. Conversely, NCSHA supported the proposal, stating that it is important in particular in rural areas to ensure that as much data as possible can be considered so that there are more classifications published on wage determinations.

The Department intended the proposed changes to § 1.7(c) to be clarifying as opposed to substantive. The current regulation does not specifically mention the intermediate super-group county grouping. Rather, as the ARB stated in the *Chesapeake Housing* case, the existing regulations ''implicitly'' permit their use. ARB No. 12–010, 2013 WL 5872049, at *1. In the *Chesapeake Housing* case, the ARB explained that WHD's practice was to create ''super groups'' by using the same OMB designations that are currently used at the surrounding-counties level to create super groups of either rural or metropolitan counties. *Id.* at *3. If there were still not sufficient data, WHD would expand further to a statewide level, still divided along metropolitan and rural lines, combining data for all rural counties or all metropolitan counties in the state. *Id.* While the ARB found that the existing regulations permitted the use of super groups, the Department believes it is preferable to have regulatory language that expressly notifies parties of the practice and provides basic guidance regarding how

[156] AGC did not explain what it meant by its suggestion to use ''defined market'' approaches. The Department interprets AGC comment as opposing the second option posed in the NPRM (of using only neighboring counties to the county with insufficient data), because such a policy would not allow the use of predetermined county groups that are the same for all of the counties in the group. The Department agrees that the second option would have been administratively infeasible and has not adopted it for that reason.

these intermediate groupings will be identified.

The Department, however, does not agree with REBOUND that further specificity is needed regarding the composition of intermediate groupings. The Department intends the word ''comparable'' in proposed § 1.7(c) to apply both to ''counties'' and ''groups of counties.'' Thus, in order for counties or groups of counties to be grouped together in an intermediate grouping for the purposes of § 1.7(c), WHD will need to identify county characteristics that are similar between the grouped-together counties and justify grouping them together as a fallback if there is not sufficient current wage data at the surrounding-counties group level. As with the surrounding-counties grouping, it would be consistent with this language to continue to identify intermediate groupings using OMB designations. Further specificity in the regulatory text is unwarranted because of the wide variety in size and composition of the states in which wage determinations are conducted. For some smaller states, as in the Virginia survey at issue in *Chesapeake Housing,* the intermediate groupings may effectively be statewide groupings of counties that share an OMB designation.[157] For others, there may be a sufficient number of counties and variation among them to justify the creation of intermediate groupings of counties that do not encompass all of a certain OMB-designated (or otherwise specified) category of counties in a state.

The Department anticipates that the intermediate county groupings discussed in § 1.7(c) will generally be composed of combinations of comparable surrounding-counties groupings. Thus, if there are several surrounding-counties groupings in a state that are each based on an MSA-anchored combined statistical area, then it may be appropriate to create intermediate groupings by grouping together all of the counties that are included within those combined statistical areas. Likewise, intermediate groupings may be formed out of groups of counties that are included in multiple surrounding-counties groups that are made up solely of ''rural'' counties that are not included in any combined MSA. Depending on the size of the State, number of counties, and complexity of local construction labor markets, it may also be appropriate to create multiple levels of intermediate groupings that initially combine only the most similar surrounding-counties groupings, before making larger intermediate-grouping combinations.

With regard to the final grouping—statewide data—NAHB requested clarification regarding whether ''metropolitan'' and ''rural'' counties will be grouped together statewide before (or instead of) considering a single rate that combines all counties. The proposal did not require a particular procedure. Given the flexibility discussed for the intermediate county groupings, the Department does not believe that there is need to specify that statewide data must be considered along binary ''rural'' and ''metropolitan'' lines before it is ultimately combined as a last fallback before older data can be used. This is because the highest level of intermediate grouping the Department can design will effectively be statewide grouping of comparable counties. The Department would only use fully combined statewide data (combining all counties in a state, without regard for any designation) if current wage data at the intermediate grouping level is not sufficient to make a wage determination.[158] The Department agrees with NCSHA that the proposal (and, specifically, the possibility of using fully combined statewide data) provides a valuable benefit of making it possible for the Department to publish more classifications on rural wage determinations in particular.

Having considered the comments regarding the intermediate and statewide county groupings procedure in § 1.7(c), the Department adopts the language of § 1.7(c) as proposed.

viii. Section 1.8 Reconsideration by the Administrator

In the NPRM, the Department proposed to revise §§ 1.8 and 5.13 to explicitly provide procedures for reconsideration by the Administrator of decisions, rulings, or interpretations made by an authorized representative of the Administrator. Parts 1 and 5 both define the term ''Administrator'' to mean the WHD Administrator or an authorized representative of the Administrator. *See* 29 CFR 1.2(c), 5.2(b). Accordingly, when parties seek rulings, interpretations, or decisions from the Administrator regarding the Davis-Bacon labor standards, it is often the practice of the Department to have such decisions made in the first instance by an authorized representative. After an authorized representative issues a decision, the party may request reconsideration by the Administrator. The decision typically provides a time frame in which a party may request reconsideration by the Administrator, often within 30 days.

To provide greater clarity and uniformity, the Department proposed to codify this practice and clarify how and when a reconsideration may be sought. First, the Department proposed to amend § 1.8, which concerns reconsideration of wage determinations and related decisions under part 1. The Department proposed to provide that if a decision for which reconsideration is sought was made by an authorized representative of the Administrator, the interested party seeking reconsideration may send such a request to the WHD Administrator. The Department proposed that requests for reconsideration must be submitted within 30 days from the date the decision is issued, and that this time period may be extended for good cause at the Administrator's discretion upon a request by the interested party. Second, the Department proposed to amend § 5.13, which concerns rulings and interpretations under parts 1, 3, and 5, to similarly provide for the Administrator's reconsideration of rulings and interpretations issued by an authorized representative. The Department proposed to apply the same procedures for such reconsideration requests in § 5.13 as apply to reconsideration requests under § 1.8. The Department also proposed to divide §§ 1.8 and 5.13 into paragraphs for clarity and readability, and to add email addresses for parties to submit requests for reconsideration and requests for rulings or interpretations.

The Department received two comments regarding this proposal, one from REBOUND, a non-profit organization; and another from a former director of REBOUND. These comments did not oppose the proposed changes, but suggested that the regulations also explicitly provide for a level of review prior to review by the Administrator, and that such review be conducted by an individual who was not connected in any way with the original decision. The comments indicated that intermediate review often occurs under current practice, but rarely results in reversal of the original decision because the individuals who perform such review

[157] In *Chesapeake Housing,* WHD had used a ''super group'' intermediate grouping that consisted of all metropolitan counties and independent cities in eastern Virginia including those from the DC MSA, the Richmond MSA, and the Norfolk-Virginia Beach MSA. ARB No. 12–010, 2013 WL 5872049, at *3. The ARB noted that this grouping was in fact the same as it would have been had the Department used ''statewide'' data segregated along metropolitan and rural county lines, because the ''super group'' included all of the MSAs in the state. *Id.* at *5–6.

[158] In addition, the language of § 1.7(c) in the final rule permits, but does not require, the use of statewide data.

are often either the same individuals who rendered the original decision or their managers. The comments agreed that if done properly, intermediate review can resolve cases more promptly without the need to appeal to the Administrator, but suggested that without a requirement that such review be independent, it will not accomplish this goal because reviewers will be reluctant to overturn decisions that they made in the first instance.

After considering the comments above, the Department retains the language as proposed. The final rule permits an intermediate level of review without requiring it, and, as the commenters noted, in many instances an intermediate level of review is provided. The language similarly allows for reconsideration requests to be considered by agency personnel who were or were not involved in the original decision, as the circumstances warrant. The Department believes that it is important for the regulations to preserve such administrative flexibility when handling reconsideration requests so that the Department can properly allocate its resources. Agency staff are able to consider and help respond to reconsideration requests with objectivity regardless of whether they played any role in the underlying decision, and resource constraints make it infeasible to adopt a blanket rule that intermediate review cannot be handled by anyone who participated in the original decision. Moreover, as the commenters note, intermediate decisions are appealable to the Administrator. The Department therefore declines to codify specific procedures or requirements for intermediate-level reconsideration and adopts the change as proposed.

ix. Section 1.10 Severability

The Department proposed to add a new § 1.10, titled ''Severability.'' The proposed severability provision explained that each provision is capable of operating independently from one another, and that if any provision of part 1 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intended that the remaining provisions remain in effect.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed. An expanded discussion of severability is below in section III.B.5.

x. References to Website for Accessing Wage Determinations

The Department proposed to revise §§ 1.2, 1.5, and 1.6 to reflect, in more general terms, that wage determinations are maintained online, without a reference to a specific website.

The current regulations reference Wage Determinations OnLine (WDOL), previously available at *https://www.wdol.gov*, which was established following the enactment of the E-Government Act of 2002, Public Law 107–347, 116 Stat. 2899 (2002). *WDOL.gov* served as the source for Federal contracting agencies to use when obtaining wage determinations. *See* 70 FR 50887 (Aug. 26, 2005). *WDOL.gov* was decommissioned on June 14, 2019, and SAM, specifically *https://sam.gov/content/wage-determinations*, became the authoritative and single location for obtaining DBA general wage determinations.[159] The transition of wage determinations onto SAM was part of the Integrated Award Environment (IAE), a government-wide initiative administered by GSA to manage and integrate multiple online systems used for awarding and administering Federal financial assistance and contracts.[160] To avoid outdated website domain references in the regulations should the domain name change in the future, the Department proposed to use the more general term ''Department of Labor-approved website,'' which would refer to any official government website the Department approves for posting wage determinations.

The Department received a question from Montana Lines Inc. asking how the location of the Department-approved website would be communicated to contractors. The Department currently publicizes the online location of wage determinations, SAM, in various resource materials (fact sheets, frequently asked questions, and WHD's PWRB) and in multiple prominent locations on the Department's website. Promptly following publication of this final rule, WHD will update the PWRB and other resources to refer to the SAM website. Should there be a change in domain, the Department would announce such change and make changes to appropriate materials and websites. The Department believes that such an approach is preferable to codifying the website location in regulatory text that can become outdated if the location changes.

HarringtonMitova LLC requested that the Department make all DBRA relevant information, presumably including wage determinations, accessible from a single website. The Department notes that while this specific proposal is beyond the scope of this rulemaking, WHD's website contains extensive, well-organized materials regarding the DBRA, including information regarding Davis-Bacon wage surveys and compliance principles, and that general wage determinations are available through a single, government-wide website (specifically SAM, the official website of the U.S. Government for the Federal award process) for the ease and convenience of the contracting community. NFIB commented that the website for viewing wage determinations should be ''at no cost and without any condition of access such as registration, a unique identifier, or submission of any information.'' NFIB also suggested that such language be added to § 1.5(a). SAM, the current website, is an improved and streamlined government-wide website administered by GSA that integrates multiple online systems used for awarding and administering Federal financial assistance and contracts. Access to search or obtain wage determinations on this website is free and does not require registration or the submission of any information other than the details of the wage determination being requested (project location and/or construction type). The Department intends to maintain these features in the future and does not believe it is necessary to codify them in the regulations.

The UA commented that the proposal does not substantively alter the practice for publication of wage determinations and suggested that the Department require the applicable wage determination(s) for a specific project, as well as any conformances that were granted for the project, to be published online. Although the Department appreciates this suggestion, it is beyond the scope of the current rulemaking, which did not address whether to require the online publication of the specific wage determinations and conformances applicable to each particular DBRA-covered project. The Department also notes that interested parties such as contracting agencies and contractors should be able to identify the wage determination that applies to a given project, as such wage determinations are included in the contract documents, and that 29 CFR

[159] ''*WDOL.gov* Decommissioning Approved by IAE Governance: System Set to Transition to beta.*SAM.gov* on June 14, 2019,'' GSA Interact (May 21, 2019), *https://interact.gsa.gov/blog/wdolgov-decommissioning-approved-iae-governance-system-set-transition-betasamgov-june-14-2019*.

[160] About This Site, System for Award Management, *https://sam.gov/content/about/this-site*.

5.5(a)(1)(i) already requires contractors and subcontractors to post wage determinations, including conformed classifications and wage rates, in a prominent and accessible place at the site of the work where it can be easily seen by the workers.

The final rule therefore adopts this change as proposed.

xi. Appendices A and B to Part 1

The Department proposed to remove Appendices A and B to 29 CFR part 1 and make conforming technical edits to sections that reference those provisions. Appendix A lists statutes related to the Davis-Bacon Act that require the payment of wages at rates predetermined by the Secretary of Labor, and Appendix B lists local offices of the WHD. As the Department explained in the NPRM, these appendices are no longer current and updated information contained in both appendices can be found on WHD's website at *https://www.dol.gov/agencies/whd/*. Specifically, a listing of statutes requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act can be found at *https://www.dol.gov/agencies/whd/government-contracts*, and a listing of WHD local offices can be found at *https://www.dol.gov/agencies/whd/contact/local-offices*.

The Department received one comment in response to this proposal. The UA supported the Department's approach, stating that outdated information presents problems, such as suggesting a narrower scope of Davis-Bacon coverage (Appendix A), or directing potential complainants to incorrect resources (Appendix B). The Department agrees and adopts this change as proposed.

xii. Frequently Conformed Rates

The Department proposed to revise §§ 1.3 and 5.5 to provide that, where WHD has received insufficient data through its wage survey process to publish a prevailing wage for a classification for which conformance requests are regularly submitted, WHD nonetheless may list the classification and wage and fringe benefit rates for the classification on the wage determination, provided that the three basic criteria for conformance of a classification and wage and fringe benefit rate have been satisfied: (1) the work performed by the classification is not performed by a classification in the wage determination; (2) the classification is used in the area by the construction industry; and (3) the wage rate for the classification bears a reasonable relationship to the wage rates contained in the wage determination. The Department specifically proposed that the wage and fringe benefit rates for these classifications be determined in accordance with the ''reasonable relationship'' criterion that is currently used in conforming missing classifications pursuant to current 29 CFR 5.5(a)(1)(ii)(A). The Department welcomed comments regarding all aspects of this proposal.

WHD determines DBA prevailing wage rates based on wage survey data that contractors and other interested parties voluntarily provide. *See* 29 CFR 1.1–1.7. When WHD receives robust participation in its wage surveys, it is able to publish wage determinations that list prevailing wage rates for numerous construction classifications. However, in some instances survey participation may be limited, particularly in surveys for residential construction or in rural areas, thereby preventing WHD from receiving sufficient wage data to publish prevailing wage rates for various classifications generally necessary for a particular type of construction.

When a wage determination lacks a wage rate for a classification of work that is necessary for performance of DBRA-covered construction, the missing classification and an appropriate wage rate must be added to the wage determination on a contract-specific basis through the conformance process. Conformance is the process by which a classification and wage and fringe benefit rate are added to an existing wage determination applicable to a specific DBRA-covered contract. *See* 29 CFR 5.5(a)(1)(ii)(A). When, for example, a wage determination lists only certain skilled classifications such as carpenter, plumber, and electrician (because they are the skilled classifications for which WHD received sufficient wage data through its survey process), the conformance process is used at the request of a contracting agency to provide a contractor that has been awarded a contract with minimum wage rates for other necessary classifications (such as, in this example, painters and bricklayers).

''By design, the Davis-Bacon conformance process is an expedited proceeding created to 'fill in the gaps' '' in an existing wage determination, with the ''narrow goal'' of establishing an appropriate wage rate for a classification needed for performance of the contract. *Am. Bldg. Automation, Inc.,* ARB No. 00–067, 2001 WL 328123, at *3 (Mar. 30, 2001). As a general matter, WHD is given ''broad discretion'' in setting a conformed wage rate, and the Administrator's decisions ''will be reversed only if inconsistent with the regulations, or if they are unreasonable in some sense[.]'' *Millwright Loc. 1755,* ARB No. 98–015, 2000 WL 670307, at *6 (May 11, 2000) (internal quotations and citations omitted). *See, e.g., Constr. Terrebonne Par. Juvenile Justice Complex,* ARB No. 17–0056, 2020 WL 5902440, at *2–4 (Sept. 4, 2020) (reaffirming the Administrator's ''broad discretion'' in determining appropriate conformed wage rates); *Courtland Constr. Corp.,* ARB No. 17–074, 2019 WL 5089598, at *2 (Sept. 30, 2019) (same).

The regulations require the following criteria be met for a proposed classification and wage rate to be conformed to a wage determination: (1) the work to be performed by the requested classification is not performed by a classification in the wage determination; (2) the classification is used in the area by the construction industry; and (3) the proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates in the wage determination. *See* 29 CFR 5.5(a)(1)(ii)(A).

Pursuant to the first conformance criterion, WHD may approve a conformance request only where the work of the proposed classification is not performed by any classification on the wage determination. WHD need not ''determine that a classification in the wage determination actually is the prevailing classification for the tasks in question, only that there is evidence to establish that the classification actually performs the disputed tasks in the locality.'' *Am. Bldg. Automation,* 2001 WL 328123, at *4. Even if workers perform only a subset of the duties of a classification, they are still performing work that is covered by the classification, and conformance of a new classification thus would be inappropriate. *See, e.g., Fry Bros. Corp.,* WAB No. 76–06, 1977 WL 24823, at *6 (June 14, 1977). In instances where the first and second conformance criteria are satisfied and it has been determined that the requested classification should be added to the contract wage determination, WHD will address whether the third criterion has also been satisfied, *i.e.,* whether ''[t]he proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates'' in the wage determination.

WHD typically receives thousands of conformance requests each year. In some instances, including instances where contractors are unaware that the work falls within the scope of work performed by an established

classification on the wage determination, WHD receives conformance requests where conformance plainly is not appropriate because the wage determination already contains a classification that performs the work of the proposed classification. In other instances, however, conformance is necessary because the applicable wage determination does not contain all of the classifications that are necessary to complete the project. The need for conformances due to the absence of necessary classifications on wage determinations reduces certainty for prospective contractors in the bidding process, who may be unsure of what wage rate must be paid to laborers and mechanics performing work on the project, and taxes WHD's resources. Such uncertainty may cause contractors to underbid on construction projects and subsequently pay less than the required prevailing wage rates to workers.

To address this issue, the Department proposed to revise 29 CFR 1.3 and 5.5(a)(1) to expressly authorize WHD to list classifications and corresponding wage and fringe benefit rates on wage determinations even when WHD has received insufficient data through its wage survey process. Under this proposal, for key classifications or other classifications for which conformance requests are regularly submitted,[161] the Administrator would be authorized to list the classification on the wage determination along with wage and fringe benefit rates that bear a ''reasonable relationship'' to the prevailing wage and fringe benefit rates contained in the wage determination, using essentially the same criteria under which such classifications and rates are currently conformed by WHD pursuant to current § 5.5(a)(1)(ii)(A)(3). In other words, for a classification for which conformance requests are regularly submitted, and for which WHD received insufficient data through its wage survey process, WHD would be expressly authorized to essentially ''pre-approve'' certain conformed classifications and wage rates, thereby providing contracting agencies, contractors, and workers with advance notice of the minimum wage and fringe benefits required to be paid for those classifications of work. WHD would list such classifications and wage and fringe benefit rates on wage determinations where: (1) the work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined; (2) the classification is used in the area by the construction industry; and (3) the wage rate for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination. The Administrator would establish wage rates for such classifications in accordance with proposed § 5.5(a)(1)(iii)(A)(3). Contractors would be required to pay workers performing work within such classifications at no less than the rates listed on the wage determination. Such classifications and rates on a wage determination would be designated with a distinct term, abbreviation, or description to denote that they essentially reflect pre-approved conformed rates rather than prevailing wage and fringe benefit rates that have been determined through the Davis-Bacon wage survey process.

These rates would apply to the applicable classification without the need to submit a conformance request in accordance with current § 5.5(a)(1)(ii)(A)–(C). However, if a contracting agency, contractor, union, or other interested party has questions or concerns about how particular work should be classified—and, specifically, whether the work at issue is performed by a particular classification included on a wage determination (including classifications listed pursuant to this proposal) as a matter of local area practice or otherwise, the contracting agency should submit a conformance request in accordance with § 5.5(a)(1) or seek guidance from WHD pursuant to 29 CFR 5.13. Moreover, under the proposal, contracting agencies would still be required to submit conformance requests for any needed classifications not listed on the wage determination, which would be approved, modified, or disapproved as warranted after award of the contract, as required by the regulatory provisions applicable to conformance requests.

The Department also proposed to add language to § 5.5(a)(1) to state that the conformance process may not be used to split or subdivide classifications listed in the wage determination, and that conformance is appropriate only where the work which a laborer or mechanic performs under the contract is not within the scope of any classification listed on the wage determination, regardless of job title. This language reflects the principle that conformance is not appropriate when the work of the proposed classification is already performed by a classification on the wage determination. *See* 29 CFR 5.5(a)(1)(ii)(A)(1). Even if workers perform only some of the duties of a classification, they are still performing work that is covered by the classification, and conformance of a new classification thus would be inappropriate. *See, e.g., Fry Bros. Corp.,* WAB No. 76–06, 1977 WL 24823, at *6 (contractor could not divide carpentry work between carpenters and carpenter tenders in order to pay a lower wage rate for a portion of the work; under the DBA, it is not permissible to divide the work of a classification into several parts according to the contractor's assessment of each worker's skill and to pay for such division of the work at less than the specified rate for the classification). The proposed regulatory language is also in line with the principle that WHD must base its conformance decisions on the work to be performed by the proposed classification, not on the contractor's own classification or perception of the workers' skill. *See* 29 CFR 5.5(a)(1)(i) (''Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits . . . for the classification of work actually performed, without regard to skill . . . .''); *see also, e.g., Tele-Sentry Sec., Inc.,* WAB No. 87–43, 1987 WL 247062, at *7 (Sept. 11, 1987) (workers who performed duties falling within the electrician classification must be paid the electrician rate regardless of the employer's classification of workers as laborers). The Department encouraged comments on this proposal.

The Department also proposed to make non-substantive revisions to current § 5.5(a)(1)(ii)(B) and (C) to more clearly describe the conformance request process, including by providing that contracting officers should submit the required conformance request information to WHD via email using a specified WHD email address.

The Department also proposed changes relating to the publication of

[161] As explained in WHD's PWRB, WHD has identified several ''key classifications'' normally necessary for one of the four types of construction (building, highway, heavy, and residential) for which WHD publishes general wage determinations. *See supra* note 19, Davis-Bacon Surveys at 6. The PWRB contains a table that lists the key classifications for each type of construction. The table, which may be updated periodically as warranted, currently identifies the key classifications for building construction as heat and frost insulators, bricklayers, boilermakers, carpenters, cement masons, electricians, iron workers, laborers (common), painters, pipefitters, plumbers, power equipment operators (operating engineers), roofers, sheet metal workers, tile setters, and truck drivers; the key classifications for residential construction as bricklayers, carpenters, cement masons, electricians, iron workers, laborers (common), painters, plumbers, power equipment operators (operating engineers), roofers, sheet metal workers, and truck drivers; and the key classifications for heavy and highway construction as carpenters, cement masons, electricians, iron workers, laborers (common), painters, power equipment operators (operating engineers), and truck drivers. *Id.*

rates for frequently conformed classifications. The Department's proposed changes to this paragraph are discussed in section III.B.1.xii (''Frequently conformed rates''), together with proposed changes to § 1.3.

The Department also proposed to add language to the contract clauses at § 5.5(a)(1)(vi), (a)(6), and (b)(4) requiring the payment of interest on any underpayment of wages or monetary relief required by the contract. This language is consistent with and would be subject to the proposed discussion of interest in 29 CFR 5.10 (Restitution, criminal action), which requires that calculations of interest be carried out at the rate specified by the Internal Revenue Code for underpayment of taxes and compounded daily.

(A) Discussion of Comments

A number of contractors, unions, industry trade associations, and elected officials expressed support for the proposed change. *See, e.g.,* Braswell DM; International Brotherhood of Electrical Workers (IBEW); NABTU; SMACNA; several members of the U.S. House of Representatives from Illinois. Many unions, associations, and individual commenters stated that proactively adding ''missing classifications to wage determinations using existing standards under the conformance process, will guard against abuses, and enhance predictability in bidding.'' International Union of Bricklayers and Allied Craftworkers; *see also* West Central Illinois Building and Construction Trades Council. Many of these same commenters also stated that the Department's proposal is in line with Congressional intent to preserve key craft classifications, quoting the admonition in *Fry Brothers* that there would be little left of the Davis-Bacon Act if contractors were permitted to ''classify or reclassify, grade or subgrade traditional craft work'' as they wished. WAB No. 76–06, 1977 WL 24823, at *6. Many commenters also voiced concern that unscrupulous contractors frequently subdivide classifications listed on wage determinations under the current system in order to fabricate low wage subclassifications. *See, e.g.,* Affiliated Construction Trades Foundation. In expressing support for the Department's proposal, these commenters stated that proactively adding missing classifications to wage determinations when survey data is insufficient will help guard against such abuse.

III–FFC highlighted that ''[p]re-approving frequently conformed rates will significantly improve a process that otherwise causes unnecessary delay and is an inefficient use of WHD resources.'' They also stated that the Department's proposal ''will significantly improve the conformance process to the benefit of all parties involved with Davis-Bacon covered projects.'' The Department agrees.

Several commentors agreed with the proposed changes but also offered suggestions for improvement. The Related Urban Development Group suggested that classifications for which conformance requests are regularly submitted ''should more closely reflect industry standards,'' and said, for example, that glazing/windows, when delivered to a worksite, should be installed by carpenters and not glazers. The Department notes that all relevant factors, including local area practice, are considered when resolving questions regarding the type of work performed by a classification. The Department reiterates that if a contracting agency, contractor, union, or other interested party has questions or concerns about how particular work should be classified—and, specifically, whether the work at issue is performed by a particular classification included on a wage determination (including classifications listed pursuant to this regulatory revision) as a matter of local area practice or otherwise—the contracting agency should submit a conformance request in accordance with § 5.5(a)(1) or seek guidance from WHD pursuant to 29 CFR 5.13.

AWHA encouraged the Department to identify in wage determinations which classifications and wage rates were pre-approved. The Department stated in the NPRM that such classifications and rates on a wage determination would be designated with a distinct term, abbreviation, or description to denote that they essentially reflect pre-approved conformed rates rather than prevailing wage and fringe benefit rates that have been determined through the Davis-Bacon wage survey process. AWHA also urged the Department to ''set a clear timeline for responding to the contracting entity'' in cases where there is no pre-approved conformance and the Department still must respond to a conformance request The Department notes that current 29 CFR 5.5(a)(1)(ii)(C) (which is being recodified at 29 CFR 5.5(a)(1)(iii)(C)) already states that the Administrator, or an authorized representative, will issue a determination within 30 days of receipt or will notify the contracting officer within the 30-day period if additional time is necessary.

While generally supportive of the Department's proposal, the International Union of Elevator Constructors (IUEC) misinterpreted the Department's proposal to apply only to classifications that are considered a ''key classification,'' *i.e.,* one that is ''normally necessary for one of the four types of construction.'' Based on this misinterpretation, IUEC requested the Department acknowledge elevator mechanic as a ''key classification'' for at least building construction. As noted in its proposal, adding pre-approved classifications to wage determinations is not limited to ''key classifications.'' Rather, the Department's proposal also encompassed other classifications for which conformance requests are regularly submitted.

AGC agreed that the proposal to include frequently conformed rates in wage determinations constituted a ''logical preemptive action by the Department to provide contractors more information upfront in the contract bidding and award process.'' AGC, however, encouraged the Department to revise its wage survey process to increase the ''collection of accurate utilizable wage data'' through increased survey participation.

Several commentors generally supported the revisions to §§ 1.3(f) and 5.5(a)(1)(ii) and requested stakeholder involvement prior to implementation. LIUNA, for example, requested that pre-approved conformed rates not be designated unless stakeholders have an opportunity in advance to provide input to WHD. COSCDA similarly encouraged WHD to involve stakeholders and suggested a pilot or trial development on a smaller scale to help address any issues ahead of a wider launch. Other commenters requested additional clarification on the precise methodology that would be employed for pre-approving certain conformed classifications and wage rates. The FTBA asked whether the Department would set rates based on previously conformed rates and ''whether or how conformed rates would be updated on wage determinations.'' SMART and SMACNA suggested adopting safeguards to ensure that the pre-approval process does not result in the ''deskilling'' of highly skilled trades. SMART and SMACNA proposed to include a prohibition (similar to proposed § 5.5(a)(1)(B)) against using the pre-approval process to split or subdivide classifications in § 1.3(f). SMART and SMACNA, while noting that AAM 213 was an improvement in WHD's administration of conformances, cautioned that WHD's use of an ''overly broad 'skilled crafts' category advantages some trades and disadvantages others depending upon the relative skill levels of individual

trades.'' Concerned that AAM 213 does not accurately address the disparity in skill sets among skilled crafts, SMART and SMACNA recommended the regulatory text be revised to explicitly require WHD to determine which classification already listed in the wage determination is ''most comparable in terms of skill'' to the class of employee being conformed.

As stated in the NPRM, the Department will ensure that (1) the work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined; (2) the classification is used in the area by the construction industry; and (3) the wage rate for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination. The Administrator would establish wage rates for such classifications in accordance with proposed § 5.5(a)(1)(iii)(A)(3).

The Department believes that the conformance process, including the reasonable relationship process already discussed in detail in AAM 213 and in other publicly available resource materials, is responsive to the concerns commenters raised. AAM 213 states that ''to determine a 'reasonable relationship,' the requested additional classification is compared to the classifications on the applicable wage determination within the same category.'' AAM 213 illustrates that a ''proposed skilled craft classification is compared to skilled classifications in the wage determination; a proposed laborer classification is compared to existing laborer classifications; a proposed power equipment operator classification is compared to existing power equipment operator classifications; and a proposed truck driver classification is compared to existing truck driver classifications.'' AAM 213 further clarifies that when considering a conformance request for a skilled classification, WHD generally considers the entirety of the rates for the skilled classifications on the applicable wage determination and looks to where the proposed wage rate falls within the rates listed on the wage determination. AAM 213 notes that whether the wage rates in the applicable category (skilled craft, laborer, power equipment operator, truck driver, etc.) in the wage determination are predominantly union prevailing wage rates or predominantly weighted average wage rates should be considered when proposing rates for an additional classification. For example, if a wage determination contains predominantly union prevailing wage rates for skilled classifications, it typically would be appropriate to look to the union sector skilled classifications in the wage determination and the rates for those classifications when proposing a wage rate for the additional classification. Conversely, if a wage determination contains predominantly weighted average wage rates for skilled classifications, it typically would be appropriate to look to the weighted average/non-union sector skilled classifications in the wage determination and the rates for those classifications when proposing a wage rate for the additional classification. The Department believes that the process for determining reasonable relationship is sufficiently explained in existing materials and does not need to be expanded in the regulation, particularly since the ARB has repeatedly affirmed WHD's application of AAM 213. *See System Tech, Inc.,* ARB No. 2020–0029, at *4 (ARB May 25, 2021); *Constr. Terrebonne Par. Juvenile Justice Complex,* ARB No. 2017–0056, 2020 WL 5902440, at *2; *Courtland Construction Corp.,* ARB No. 17–074, 2019 WL 5089598, at *2; *Velocity Steel, Inc.,* ARB No. 16–060 (ARB May 29, 2018). Additional clarification, if needed, will be through subregulatory guidance.

Similarly, although the Department does not plan to implement this regulatory change on a pilot or trial basis, or to provide for stakeholder review of pre-approved conformed wage rates before they are issued, the Department will be available to respond to questions and concerns regarding particular rates, and interested parties may also challenge particular classifications pursuant to 29 CFR 1.8 and/or seek a formal response to questions or concerns regarding conformed wage rates pursuant to 29 CFR 5.13. In response to SMART and SMACNA's specific concerns about the potential subdivision of classifications, the Department notes that classification decisions will be made in accordance with relevant legal precedent and subregulatory guidance, including the decision in *Fry Brothers* and other precedent regarding classification and subregulatory guidance such as AAM 213. The Department thus declines SMART and SMACNA's proposal to revise the regulatory text to explicitly require WHD to determine which classification already listed in the wage determination is ''most comparable in terms of skill'' to the class of employee being conformed; rather, determinations of the appropriate wage rate will be made in accordance with currently established principles, including those reflected in the existing conformance regulations, as revised by this rule, and AAM 213 and similar guidance.

The IEC opposed the proposal, contending that ''this change eliminates contractors' rights to dispute a proposed classification and wage rate, currently found at 29 CFR 5.5(a)(1)(ii)(C).'' Although the dispute mechanism cited by the IEC will not apply to pre-approved classifications and wage rates, the Department notes that, as reflected above, interested parties have the right to dispute these classifications and wage rates prior to contract award pursuant to 29 CFR 1.8.

CC&M did not state whether they supported or opposed adding conformed rates to wage determinations, but they provided suggestions on how to improve the conformance process and related matters. In particular, this commenter proposed that contractors seeking a conformance be required to submit scopes of work and backup documentation relating to wage and fringe benefits proposed; that contractors should be allowed to apply a wage classification and rate from one wage determination to another type of work without submitting a conformance when multiple wage determinations are applicable to a project; and that contractors should be allowed to adopt conformed wage rates from the same county that are contained in a different determination, presumably including from wage determinations that are not included in the DBRA-covered contract. The Department is not adopting such suggestions, which could be viewed as beyond the scope of this rulemaking, as they would require regulatory changes that were not proposed, and which are contrary to established procedures and requirements applicable to conformed classifications and wage rates, including the settled principle that a contractor ''may not rely on a wage determination granted to another party regardless of the similarity of the work in question'' and also may not prospectively rely on WHD's prior approval of conformed classifications and rates for application to a different contract performed at the same location. *E&M Sales, Inc.,* WAB No. 91–17, 1991 WL 523855, at *2–3 (Oct. 4, 1991); *see also Inland Waters Pollution Control, Inc.,* WAB No. 94–12, 1994 WL 596585, at *5 (Sept. 30, 1994). As for CC&M's separate proposal that ''once a conformance is granted, it could be included in the next update for the prevailing wage determination in that particular jurisdictional area,'' the Department notes that the conformance-related regulatory change it is adopting concerns only classifications for which

conformance requests are frequently occurring, not all conformance requests. In certain instances, where conformance requests pertaining to a classification are sufficiently recurring, WHD may in fact publish a pre-approved conformed wage rate on the next modification of a particular wage determination.

In opposition to the Department's proposal, ABC stated that the Department can better meet its objectives in §§ 1.3 and 5.5(a)(1) by calculating missing prevailing wage rates using BLS data and using statistical modeling. The Department has explained in section III.B.1.ii.A.1 why the Department declines to use BLS data to determine prevailing wages. For the same reasons, using BLS data to determine a reasonable relationship to rates on the wage determination is inappropriate.

The Department does not believe additional language or further changes are necessary and the final rule adopts § 5.5(a)(1)(ii) and new § 1.3(f) as proposed.

2. 29 CFR Part 3

''Anti-kickback'' and payroll submission regulations under section 2 of the Act of June 13, 1934, as amended, 40 U.S.C. 3145, commonly known as the Copeland Act, are set forth in 29 CFR part 3. This part details the obligations of contractors and subcontractors relative to the weekly submission of statements regarding the wages paid on work covered by the Davis-Bacon labor standards; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work; and delineates the methods of payment permissible on such work.

i. Corresponding Edits to Part 3

The Department proposed multiple revisions to various sections in part 3 to update language and ensure that terms are used in a manner consistent with the terminology used in 29 CFR parts 1 and 5, update websites and contact information, and make other similar, non-substantive changes. The Department also proposed conforming edits to part 3 to reflect proposed changes to part 5, such as revising § 3.2 to clarify existing definitions or to add new defined terms also found in parts 1 and 5. The Department similarly proposed to change certain requirements associated with the submission of certified payrolls to conform to changes made to the recordkeeping requirements in § 5.5(a)(3).

To the extent that those proposed changes were substantive, the changes, and any comments associated with them, are discussed below in §§ 5.2 and 5.5. The Department did not receive any comments regarding the incorporation of conforming changes to part 3. Accordingly, the Department adopts these changes as proposed, along with additional conforming changes to reflect revisions to corresponding language in part 5 in the final rule.

The Department requested comment on whether it should further consolidate and/or harmonize the definitions in §§ 1.2, 3.2, and 5.2 in a final rule, such as by placing all definitions in a single regulatory section applicable to all three parts. The Department received one comment in support of such a change. UBC noted that many of the same words and phrases are defined similarly across the different parts and supported consolidating the sections. UBC further noted in their comment that harmonizing the definitions will ''benefit understanding and application of the rule by the regulated community and will thus decrease implementation costs.'' The Department appreciates UBC's input on this issue but declines to make this change at this time. While the Department received many comments specifically in response to proposed revisions to defined terms, no other commenters expressed support for consolidating all definitions in a single regulatory section. Particularly in the absence of any indication from other commenters that consolidating all definitions in a single section would be preferable to setting forth the relevant definitions at the beginning of each of the key parts of the DBRA's implementing regulations, the Department believes that the regulated community will find it helpful to have the relevant definitions set forth at the beginning of parts 1, 3, and 5. Accordingly, the Department will maintain definitions in §§ 1.2, 3.2, and 5.2.

The Department also proposed to remove § 3.5(e) regarding deductions for the purchase of United States Defense Stamps and Bonds, as the Defense Stamps and Bonds are no longer available for purchase. Similarly, the Department proposed to simplify the language regarding deductions for charitable donations at § 3.5(g) by eliminating references to specific charitable organizations and instead permitting voluntary deductions to charitable organizations as defined by 26 U.S.C. 501(c)(3). The Department received no comments on these proposals. The final rule therefore adopts these changes as proposed.

Finally, the Department proposed to add language to § 3.11 explaining that the requirements set forth in part 3 are considered to be effective as a matter of law, whether or not these requirements are physically incorporated into a covered contract, and cross-referencing the proposed new language discussing incorporation by operation of law at § 5.5(e). These proposed changes, and the comments related to them, are discussed further in the sections on operation-of-law.

3. 29 CFR Part 5

The regulations at 29 CFR part 5 establish rules providing for the payment of minimum wages, including fringe benefits, to covered workers engaged in construction activity covered by the Davis-Bacon and Related Acts, as well as establishing rules for the enforcement of these prevailing wage obligations. The regulations at this part also set forth contract clauses to be included in all covered contracts that specify contractors' prevailing wage and other obligations on such contracts.

i. Section 5.1 Purpose and Scope

The Department proposed minor technical revisions to § 5.1 to update statutory references and delete the listing of laws requiring Davis-Bacon labor standards provisions, given that any such list inevitably becomes out-of-date due to statutory revisions and the enactment of new Related Acts. In lieu of this listing in the regulation, the Department proposed to add new paragraph (a)(1) to refer to the current WHD website (*https://www.dol.gov/agencies/whd/government-contracts*) or its successor website on which a listing of laws requiring Davis-Bacon labor standards provisions is currently found and regularly updated.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

ii. Section 5.2 Definitions

(C) Agency, Agency Head, Contracting Officer, Secretary, and Davis-Bacon Labor Standards

The Department proposed to revise the definitions of ''agency head'' and ''contracting officer'' and to add a definition of ''agency'' to reflect more clearly that State and local agencies enter into contracts for projects that are subject to the Davis-Bacon labor standards and that they allocate Federal assistance they have received under a Davis-Bacon Related Act to sub-recipients. These proposed definition changes also were intended to reflect that, for some funding programs, the responsible Federal agency has delegated administrative and

enforcement authority to states or local agencies. When the existing regulations referred to the obligations or authority of agencies, agency heads, and contracting officers, they were referring to Federal agencies and Federal contracting officers. However, as noted above, State or local agencies and their agency heads and contracting officers exercise similar authority in the administration and enforcement of Davis-Bacon labor standards. Because the existing definitions defined ''agency head'' and ''contracting officer'' as particular ''Federal'' officials or persons authorized to act on their behalf, which did not clearly reflect the role of State and local agencies in effectuating Davis-Bacon requirements, including by entering into contracts for projects subject to the Davis-Bacon labor standards and inserting the Davis-Bacon contract clauses in such contracts, the Department proposed to revise these definitions to reflect the role of State and local agencies. The proposed revisions also enabled the regulations to specify the obligations and authority held by both State or local and Federal agencies, as opposed to obligations that are specific to one or the other.

The Department received no comments on this proposal. The final rule therefore adopts these changes as proposed.

The Department also proposed to define the term ''Federal agency'' as a sub-definition of ''agency'' to distinguish those situations where the regulations refer specifically to an obligation or authority that is limited solely to a Federal agency that enters into contracts for projects subject to the Davis-Bacon labor standards or allocates Federal assistance under a Davis-Bacon Related Act.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

The Department also proposed to add the District of Columbia to the definition of ''Federal agency.'' The DBA states in part that it applies to every contract in excess of $2,000, to which the Federal Government ''or the District of Columbia'' is a party. *See* 40 U.S.C. 3142(a). As described above, Reorganization Plan No. 14 of 1950 authorizes the Department to prescribe regulations to ensure that the Act is implemented in a consistent manner by all agencies subject to the Act. *See* 15 FR 3176, 5 U.S.C. app. 1. Accordingly, the proposed change to the definition of ''Federal agency'' in § 5.2 clarified that the District of Columbia is subject to the DBA and the regulations implemented by the Department pursuant to Reorganization Plan No. 14 of 1950.[162] The proposed change was also consistent with the definition of ''Federal agency'' in part 3 of this title, which specifically includes the District of Columbia. *See* 29 CFR 3.2(g). The proposed change simply reflected the DBA's applicability to the District of Columbia and was not intended to reflect a broader or more general characterization of the District of Columbia as a Federal Government entity.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

The Department also proposed a change to the definition of ''Secretary'' to delete a reference to the Deputy Under Secretary for Employment Standards. As noted, the Employment Standards Administration was eliminated in a reorganization in 2009, and its authorities and responsibilities were devolved into its constituent components, including WHD.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

Lastly, the Department proposed a minor technical edit to the definition of ''Davis-Bacon labor standards'' that reflected proposed changes to § 5.1, discussed above. The Department also made a clarifying, non-substantive change to the term ''labor standards'' by calling that term ''Davis-Bacon labor standards.''

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

(B) Building or Work

(1) Energy Infrastructure and Related Activities

The Department proposed to modernize the definition of the terms ''building or work'' by including solar panels, wind turbines, broadband installation, and installation of electric car chargers to the non-exclusive list of construction activities encompassed by the definition. These proposed additions to the definition were clarifications intended to reflect the significance of energy infrastructure and related projects to modern-day construction activities subject to the Davis-Bacon and Related Acts, as well as to illustrate the types of energy-infrastructure and related activities that are encompassed by the definition of ''building or work.''

The Department received multiple comments on these proposed additions, several of which favored the proposed language. III–FFC strongly supported the proposal, stating that the inclusion of energy infrastructure projects on the non-exclusive list of examples of buildings or works ensures that Davis-Bacon definitions more accurately reflect the modern construction industry and will help ensure that workers on such projects will receive Davis-Bacon prevailing wages when applicable. SMART noted that the proposed additions will make it clear to the regulated community that such projects are considered buildings or work, thereby preventing potential litigation. LIUNA stated that this clarification will be helpful as Federal funding for such construction, generally performed by construction workers, has been increasing in recent years. Three LIUNA local chapters also commented that the proposed language was a useful clarification of coverage, as did the Alaska District Council of Laborers. The NCDCL also noted that the proposed clarifications were consistent with long-standing policy and that such projects were clearly construction work.

In contrast, other commenters opposed the proposed additions. ABC stated that the proposed language expanded coverage to green energy projects, creating a large administrative burden for developers and small contractors that would in turn inhibit the construction of such projects. In support of their claim, they cited to a 2010 GAO report and a 2010 U.S. Department of Energy (DOE) OIG report, stating that both reports indicated that the expansion of Davis-Bacon coverage to green energy and weatherization projects due to American Reinvestment and Recovery Act of 2009 (ARRA) funding delayed construction of such projects and increased costs.[163] An ABC

[162] The 1973 Home Rule Act, Public Law 93–198, transferred from the President to the District of Columbia the authority to organize and reorganize specific governmental functions of the District of Columbia, but does not contain any language removing the District of Columbia from the Department's authority to prescribe DBA regulations pursuant to Reorganization Plan No. 14 of 1950.

[163] The GAO report stated that four Federal funding agencies and several State and local funding recipients indicated that because their programs had not previously received any Related Act funding prior to receiving funding to ARRA, they had to establish internal infrastructure and procedures to allow them to handle the large increase in funding and manage the accompanying Davis-Bacon requirements. GAO report ''Project Selection and Starts Are Influenced by Certain Federal Requirements and Other Factors.'' Feb. 2010. The DOE OIG report indicated that the need to determine prevailing wages for weatherization work and develop guidance for funding sub-

Continued

member write-in campaign similarly mentioned the proposed language as one of several changes that they asserted would increase the inflationary effects of prevailing wage requirements and increase the regulatory burden on contractors, as did two individual commenters. CIRT stated that the inclusion of green energy projects within the scope of Davis-Bacon coverage would be beyond the scope of the statute. A comment by the group of members of the U.S. House Committee on Education & Labor also stated that including green energy projects within the definition of building or work would increase the number of small businesses subject to the Davis-Bacon requirements, subjecting such small businesses to additional costs and uncertainty.

After considering these comments, the final rule adopts the revisions as proposed. As noted in the proposed rule, the inclusion of these energy infrastructure projects in the non-exclusive list of examples of a building or work simply provides clarification that such projects are among the types of buildings or works that may be covered by the DBRA, and therefore that Federal or federally assisted construction of these projects will be subject to Davis-Bacon prevailing wage requirements when all other requirements are met, including that the work is pursuant to a Federal contract under the DBA or federally funded under a Related Act, that the project is for construction, prosecution, completion, and/or repair, and that the work is performed by laborers and mechanics and, if required under the relevant statute, is done at the site of the work.

Opposing comments appear to be based on the assumption that such projects were not previously considered to be buildings or works that could be subject to Davis-Bacon coverage, and that the inclusion of these projects as examples of a building or work would expand this definition to previously uncovered energy projects. However, this is an inaccurate presumption, as such projects already clearly fit within the existing definition of a building or work, which includes ''without limitation, buildings, structures, and improvements of all types.'' The GAO and DOE OIG reports cited by ABC clearly show that energy infrastructure projects are already understood to be within the existing definition of building or work. For example, ARRA did not change the definition of building or work; rather, it was a Related Act that provided that projects funded under its provisions, including various improvements to energy infrastructure, are covered by the Davis-Bacon labor standards. *See* ARRA sec. 406, 1606. Likewise, a number of other Related Acts cover government-funded energy projects,[164] and the existing regulation's inclusion of projects such as dams, plants, power lines, and heavy generators makes clear that ''building or work'' has long included the construction of energy infrastructure projects. Because those energy infrastructure projects already were buildings or works under the existing definition, the additional Related Act funding triggered Davis-Bacon prevailing wage requirements for these energy infrastructure projects. Had such projects not already fit within the definition of building or work, however, Davis-Bacon prevailing wage requirements would not have applied. Therefore, pursuant to its authority under Reorganization Plan No. 14 of 1950 ''to prescribe appropriate standards, regulations, and procedures'' for the DBRA and to eliminate any potential confusion as to whether energy infrastructure projects should be considered buildings or works, and to provide some examples of those types of projects in the non-exhaustive list, the final rule retains the proposed language.

(2) Coverage of a Portion of a Building or Work

The Department proposed to add language to the definitions of ''building or work'' and ''public building or public work'' to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. The definition of ''building or work'' already states that the terms ''building'' and ''work'' ''generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work,'' and includes ''without limitation, buildings, structures, and improvements of all types.'' 29 CFR 5.2(i). In addition, the regulation already provides several examples of construction activity included within the term ''building or work'' that do not constitute an entire building, structure, or improvement, such as ''dredging, shoring, . . . scaffolding, drilling, blasting, excavating, clearing, and landscaping.'' *Id.* Moreover, the current regulations define the term ''construction, prosecution, completion, or repair'' to mean ''all types of work done on a particular building or work at the site thereof . . . including, without limitation . . . [a]ltering, remodeling, installation . . . ; [p]ainting and decorating.'' *Id.* § 5.2(j).

However, to further make plain that ''building or work'' includes not only construction activity involving an entire building, structure, or improvement, but also construction activity involving a portion of a building, structure, or improvement, or the installation of equipment or components into a building, structure, or improvement, the Department proposed to add a sentence to this definition stating that ''[t]he term building or work also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.'' The Department also proposed to include additional language in the definition of ''public building or public work'' to clarify that a ''public building'' or ''public work'' includes the construction, prosecution, completion, or repair of a portion of a building or work that is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public, even where construction of the entire building or work does not fit within this definition.

The Department explained that these proposed revisions are consistent with the Davis-Bacon Act. The concepts of alteration or repair presuppose that only a portion of a building, structure, or improvement will be affected. By specifically including the alteration or repair of public buildings or works within its scope of coverage, the Davis-Bacon Act itself necessitates that construction activity involving merely a portion of a building or work may be subject to coverage.

The Department also noted that these proposed revisions are consistent with the Department's longstanding policy that a ''public building'' or ''public work'' includes construction activity involving a portion of a building or work, or the installation of equipment or components into a building or work when the other requirements for Davis-Bacon coverage are satisfied. *See, e.g.,* AAM 52 (July 9, 1963) (holding that the upgrade of communications systems at a military base, including the installation of improved cabling, constituted the construction, alteration or repair of a public work); Letter from Sylvester L. Green, Dir., Div. of Cont. Standards Operations, to Robert Olsen, Bureau of Reclamation (Mar. 18, 1985) (finding that the removal and

recipients on Davis-Bacon requirements delayed states' use of ARRA weatherization funding.

[164] *See https://www.dol.gov/agencies/whd/government-contracts* (List of Current Davis-Bacon and Related Acts).

replacement of stator cores in a hydroelectric generator was covered under the Davis-Bacon Act as the alteration or repair of a public work); Letter from Samuel D. Walker, Acting Adm'r, to Edward Murphy (Aug. 29, 1990) (stating that ''[t]he Department has ruled on numerous occasions that repair or alteration of boilers, generators, furnaces, etc. constitutes repair or alteration of a 'public work' ''); Letter from Nancy Leppink, Deputy Adm'r, to Armin J. Moeller (Dec. 12, 2012) (finding that the installation of equipment such as generators or turbines into a hydroelectric plant is considered to be the improvement or alteration of a public work).

The Department further explained that the proposed revisions are consistent with the Department's longstanding position that a ''public building'' or ''public work'' may include structures, buildings, or improvements that will not be owned by the Federal government when construction is completed, so long as the construction is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public. Accordingly, the Department has long held that the Davis-Bacon labor standards provisions may apply to construction undertaken when the government is merely going to have the use of the building or work, such as in lease-construction contracts, depending upon the facts and circumstances surrounding the contract. *See* Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Admin.'s Lease of Med. Facilities, 18 Op. O.L.C. 109, 119 n.10 (May 23, 1994) (''1994 OLC Memorandum'') (''[T]he determination whether a lease-construction contract calls for construction of a public building or public work likely will depend on the details of the particular arrangement.''); FOH 15b07. In AAM 176 (June 22, 1994), WHD provided guidance to the contracting community regarding the DBA's application to lease-construction contracts, and specifically advised that the following non-exclusive list of factors from the 1994 OLC Memorandum should be considered in determining the scope of DBA coverage: (1) the length of the lease; (2) the extent of Government involvement in the construction project (such as whether the building is being built to Government requirements and whether the Government has the right to inspect the progress of the work); (3) the extent to which the construction will be used for private rather than public purposes; (4) the extent to which the costs of construction will be fully paid for by the lease payments; and (5) whether the contract is written as a lease solely to evade the requirements of the DBA.

In sum, as noted above, the term ''building or work'' has long been interpreted to include construction activity involving only a portion of a building, structure, or improvement. As also noted above, a public building or public work is not limited to buildings or works that will be owned by the Federal Government, but may include buildings or works that serve the general public interest, including spaces to be leased or used by the Federal Government. Accordingly, it necessarily follows that a contract for the construction, alteration, or repair of a portion of a building, structure, or improvement may be a DBA-covered contract for construction of a ''public building'' or ''public work'' where the other requirements for coverage are met, even if the Federal Government is not going to own, lease, use, or otherwise be involved with the construction of the remaining portions of the building or work. For example, as WHD has repeatedly explained in connection with one contracting agency's lease-construction contracts, where the Federal Government enters into a lease for a portion of an otherwise private building—and, as a condition of the lease, requires and pays for specific tenant improvements requiring alterations and repairs to that portion to prepare the space for government occupancy in accordance with government specifications—Davis-Bacon labor standards may apply to the tenant improvements or other specific construction activity called for by such a contract. In such circumstances, the factors discussed in AAM 176 must be considered to determine if coverage is appropriate, but the factors would be applied specifically with reference to the leased portion of the building and the construction required by the lease.

Finally, the Department noted that these proposed revisions would further the remedial purpose of the DBA by ensuring that the Act's protections apply to contracts for construction activity for which the government is responsible. *Walsh* v. *Schlecht,* 429 U.S. 401, 411 (1977) (reiterating that the DBA ''was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects'') (citation and internal quotation marks omitted); 1994 OLC Memorandum, 18 Op. O.L.C. at 121 (''[W]here the government is financially responsible for construction costs, the purposes of the Davis-Bacon Act may be implicated.''). If the Davis-Bacon Act were only applied in situations where the Federal Government is involved in the construction of the entire (or even the majority of the) building or work, coverage of contracts would be dependent on the size of the building or work, even if two otherwise equivalent contracts involved the same square footage and the government was paying for the same amount of construction. Such an application of coverage would undermine the statute's remedial purpose by permitting publicly funded construction contracts for millions of dollars of construction activity to evade coverage merely based on the size of the overall structure or building.

Accordingly, and as noted above, the Department proposed revisions to the definitions of ''building or work'' and ''public building or public work'' that served to clarify rather than change existing coverage requirements. However, the Department recognized that in the absence of such clarity under the existing regulations, contracting agencies have differed in their implementation of Davis-Bacon labor standards where construction activity involves only a portion of a building, structure, or improvement, particularly in the context of lease-construction contracts. Thus, as a practical matter, the proposed revisions would result in broader application of Davis-Bacon labor standards. The Department therefore invited comment on the benefits and costs of these proposed revisions to private business owners, workers, and the Federal Government, particularly in the context of leasing. After consideration of the comments received, for the reasons detailed below, the Department is adopting these proposed revisions in this final rule, with one additional clarification.

Several commenters expressed their general support for the proposed changes, indicating that they agreed that the proposed changes would provide additional clarification of Davis-Bacon coverage. More specifically, IUOE stated that this was an important change that helps bring Davis-Bacon coverage into the 21st century, allowing Davis-Bacon labor standards to continue to apply to public buildings and public works despite the increase in non-traditional funding and contracting methods such as public-private partnerships, complex bond finance schemes, leasing agreements, and other sorts of private involvement in public buildings and works. III–FFC and the UA both noted that the proposed changes would result in Davis-Bacon coverage being more consistently applied to contracts for construction activity for which the

government is responsible. UBC also commented favorably on the proposed changes, noting that they clarify that Davis-Bacon coverage can exist even when the building or work will not be owned by the Federal Government, while also suggesting revising the proposed language in the definition of ''public building or public work'' to include ''the construction, prosecution, completion, *installation of equipment (where appropriate) of components,* or repair. . . .'' [proposed addition in italics], to harmonize the proposed definition of ''public building or public work'' with the proposed language for ''building or work.'' [165]

SMART agreed with the Department that Davis-Bacon coverage should not be determined by the size of the building or work, or portion of the building or work, and stated that the proposed changes would ensure that the entire regulated community would have consistent information as to Davis-Bacon applicability when bidding for government contracts and meeting prevailing wage obligations. SMART also found the legal authority cited in support of the proposed change persuasive, noting that not only did the authority involve the application of Davis-Bacon coverage to portions of a building or work or the installation of equipment, but also that none of the cases considered the fact that the construction only involved a portion of a building or work to be in any way worthy of comment when applying coverage. SMART further agreed that the concept of alteration or repair, included in the DBA itself, pre-supposes that coverage is applicable to a portion of a building or work, pointing out that this position is ''fully consistent with decades of interpretations of dozens of work functions and construction activities.'' SMART further recommended that the Department amend the proposed definition of building or work to state that ''[t]he term building or work also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work *at a primary construction site or a secondary construction site*'' [proposed addition in italics]. SMART stated that this proposed addition would clarify that the installation of equipment or components into a building or work being constructed at another site should be included in determining whether a ''significant portion'' of the building or work is being constructed at that other site, such that it should be considered a secondary site of work. SMART also requested that the Department add language stating that the proposed definition of ''portion'' in ''building or work,'' with no size parameter or limitation, has the same meaning in the definition of the ''site of the work,'' such that the construction of a ''portion,'' regardless of size, is covered work whether it takes place on the primary or secondary site.

The Department agrees with the above comments that the changes proposed by the Department codify long-standing principles of Davis-Bacon coverage, will result in a more consistent application of Davis-Bacon coverage, and will support the remedial purpose of the DBA. The Department analyzes the additional regulatory changes proposed by these commenters at the end of this section.

Some commenters disagreed with the Department's proposal based on assertions that the proposed change conflicts with the decision of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *District of Columbia* v. *Dep't of Labor,* 819 F.3d 444 (D.C. Cir. 2016) (*CityCenterDC*). In particular, ABC stated that the court in *CityCenterDC* ''found that lease agreements similar to agreements described in the NPRM did not qualify as 'contracts for construction' even though construction was contemplated on portions of buildings pursuant to the lease(s)'' and that imposing Davis-Bacon ''coverage in the absence of federal funding was unlawful.'' AGC similarly asserted that *CityCenterDC* held that the ''DBA cannot reasonably be read to cover construction contracts to which the [Federal government] is not a party,'' and claimed that the proposed changes would unlawfully eliminate the coverage requirement that the Federal Government must be a party to a contract for construction. NAHB expressed the view that the portion of the existing definition of ''public building or public work,'' which provides that a public building or work must be ''carried on directly by authority of or with funds of a Federal agency *to serve the interest of the general public*'' (emphasis added), was inconsistent with *CityCenterDC,* on the grounds that *CityCenterDC* made clear that DBA coverage applies to publicly-funded construction projects and/or those which are owned or operated by the government, and not to projects that merely serve the ''public interest.''

The Department does not find the comments relating to *CityCenterDC* persuasive. In that case, private developers leased land *from* the District of Columbia and entered into development agreements under which the land would be used as the site of a new mixed-use development, to include shops, restaurants, a hotel, other private retail business, and private residential units. *CityCenterDC,* 819 F.3d at 447. The developers paid the District of Columbia for the lease of the land, so that money flowed from the developers to the government rather than from the government to the developers. *Id.* The District of Columbia (1) did not provide any funding for the construction of the project, through a lease or any other contractual arrangement, as the developers were leasing from and paying money to the government, (2) would not own or operate any portion of the project upon its completion, and (3) did not propose to occupy any portion of the space or offer any services there. *Id.* On these unusual facts, the D.C. Circuit held that the District did not enter into a contract for construction of the project. *Id.* at 450–51 (explaining that the District entered into contracts that ''refer[red] to the eventual construction that *the Developers would pay for*'' (emphasis added)); *id.* at 453 (''DC did not expend funds for the construction of *CityCenterDC.* Quite the opposite. The Developers make substantial rental payment *to DC*''). In reaching this conclusion, the court observed that a finding of Davis-Bacon coverage would constitute a ''sudden[] exten[sion]'' of the Act. *Id.* at 450. The court therefore explicitly distinguished the *CityCenterDC* situation from various other cases where, over the course of decades, the DBA had been held applicable to leases, because those other cases involved situations where, ''unlike [*CityCenterDC*], the Government was the lessee not the lessor, and the leases required construction for which the Government would pay de facto through its rental payments.'' [166] *Id.* at 450 n.3.

[165] In suggesting this additional regulatory language, UBC indicated that this language was already contained in the Department's proposed definition of ''building or work.'' However, the Department's proposed definition of ''building or work''—specifically, the language ''*installation (where appropriate) of equipment or components*''—is slightly different than the language proposed by UBC. The Department interprets UBC's comment as intending to propose that the Department include ''*installation (where appropriate) of equipment or components*'' in the definition of ''public building or public work.''

[166] In distinguishing these cases, the court did not express disagreement with the Department's longstanding interpretation that a contract is for construction if ''more than an incidental amount of construction-type activity is involved in the performance of a government contract.'' *Mil. Hous., Fort Drum,* WAB No. 85–16, 1985 WL 167239, at *4 (Aug. 23, 1985) (determining that contracts to lease housing units for military families that were to be built on private land to the specifications of the Department of the Army were contracts for construction for purposes of the DBA). *See, e.g.,*

Separately from its conclusion that the District did not enter into a contract for construction, the D.C. Circuit determined that *CityCenterDC* was not a covered project for the independent reason that *CityCenterDC* was not a public building or work, stating that a project must at least have either public funding or government ownership or operation to be considered a public building or public work, and that *CityCenterDC* had neither. *Id.* at 451–54.

The proposed changes to the definition of a public building or work, adopted in this final rule, do not eliminate the requirement that the Federal Government enter into a contract for construction for the DBA to be applicable. As reflected not only in the *CityCenterDC* decision but also in the statute itself, coverage under the DBA applies to ''every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works.'' 40 U.S.C. 3142(a). The requirement that the Federal Government enter into a contract for construction and the requirement that such a contract for construction must be for a public building or public work are two distinct requirements, both of which must be satisfied for the DBA to apply to a contract. The changes to the definitions of ''building or work'' and ''public building or public work'' described here simply provide that the construction of a portion of a building or work may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by a Federal agency. These revisions do not eliminate or affect the separate requirement under the DBA that the Federal government enter into a ''contract . . . for construction.''

Moreover, contrary to commenters' contentions, *CityCenterDC* did not hold that lease-construction contracts like those discussed in the NPRM are not contracts for construction. As mentioned, the D.C. Circuit explicitly distinguished the *CityCenterDC* development from contracts in which the Federal Government or District of Columbia pays a third party to lease land and requires construction, alteration, or repair as a condition of the lease. *CityCenterDC,* 819 F.3d at 450 & n.3; AAM 222 (Jan. 11, 2017), at 7. Specifically, in *CityCenterDC,* the District of Columbia was leasing land *to* a private developer that was paying the government to use the land to build a new mixed-use development entirely for private use. There was no agreement that the District of Columbia would own, operate, lease, or even use any portion of the development once completed, and therefore there was no agreement requiring construction of a government-owned, operated or leased portion. In contrast, in the NPRM's lease-construction agreement example, the Federal Government leases a portion of a building *from* a private developer or owner—and, as a condition of the lease, requires and pays for specific tenant improvements requiring alterations and repairs to the leased portion to ensure that the space meets the requirements for government occupancy or use.

The Department similarly does not agree that the proposed revisions extend Davis-Bacon coverage to any project involving a portion of a building or work that is in the general public interest. The revised definitions still require the construction, prosecution, completion, or repair of that portion of the building or work to be carried on directly by authority of or with funds of a Federal agency and that the construction of the portion of the building or work serve the interest of the general public.

Nor does the Department agree that maintaining the requirement that construction projects must serve the public interest contradicts the holding in *CityCenterDC.* The D.C. Circuit held that, at minimum, a public building or work must have *either* public funding *or* government ownership or operation, consistent with the existing definition and the proposed changes. *See CityCenterDC,* 819 F.3d at 452 n.5, 453 n.6 (suggesting that 29 CFR 5.2(k) requires public funding for construction but not government ownership or operation but explicitly noting that the court was not resolving the question of whether either one of the two characteristics was alone sufficient for a project to be a public work). By stating that the construction of the building or work must serve the general public interest, the definition recognizes that while government ownership or operation is one indication that the building or work serves the public interest sufficiently to be considered a public building or work, a project that receives Federal funding without government ownership or operation may still fulfill a significant need or goal of the relevant Federal agency and serve the general public interest. *See* AAM 222, at 8; *see also United States ex rel. Noland Co.* v. *Irwin,* 316 U.S. 23, 28 (1942) (holding that a privately-owned library building at Howard University was a public work for purposes of the Miller Act, relying on the definition of ''public works'' in the National Industrial Recovery Act, Public Law 73–90, 48 Stat. 201 (June 16, 1933)—from which the Department's regulatory definition is derived—because the project received Federal funding and because the ''education of youth in the liberal arts and sciences'' fulfills a public interest).

Some commenters also expressed concerns with the proposed changes on grounds that were unrelated to the *CityCenterDC* decision. NAHB noted that the proposed language does not include a threshold for the amount of or degree of work that must be performed to trigger Davis-Bacon requirements for buildings where the construction of a portion of the building is ''carried on by authority of . . . a Federal agency to serve the interest of the general public.'' NAHB recommended that such a limitation, similar to the ''significant portion'' language in the existing and proposed ''site of the work'' definition, be incorporated into the proposed ''building or work'' definition, or alternatively that the Department should adopt a monetary threshold. NAHB noted that although the proposed changes might be intended to clarify coverage, confusion among contracting agencies may still arise if agencies are inconsistent in their interpretation of the added language regarding Davis-Bacon coverage of portions of a building or work, or misunderstand the other elements of the definition, and that subregulatory interagency guidance therefore may also be needed to address such potential confusion. Commenters participating in a write-in campaign also expressed concern about the applicability of Davis-Bacon requirements to improvements to private buildings or works, with governmental leasing as one of multiple listed items that the commenters

Phx. Field Off., Bureau of Land Mgmt., ARB No. 01–010, 2001 WL 767573, at *8–9 (June 29, 2001) (concluding that the DBA applied to a lease by the Bureau of Land Management of a building and storage facility to be built for the Bureau's use); *Crown Point, Ind. Outpatient Clinic,* WAB No. 86–33, 1987 WL 247049, at *2–3 (June 26, 1987) (holding that Davis-Bacon coverage applied to the Veteran Administration's lease of an outpatient clinic to be constructed under the terms of the lease), *enforced sub nom., Bldg. & Constr. Trades Dep't, AFL–CIO* v. *Turnage,* 705 F. Supp. 5, 6 (D.D.C. 1988). *See also, e.g., Choctawhatchee Elec. Coop., Inc.,* ARB Case No. 2017–0032, 2019 WL 3293926, at *6 (June 14, 2019) (*CHELCO*) (distinguishing *CityCenterDC* based on its ''controversial facts'' and affirming WHD Administrator's determination that an electric utility privatization contract was a ''contract for construction'' under the DBA where the privatization contract called for significant construction that was at least heavily funded by the Federal government).

contended would increase regulatory burdens and costs for contractors on projects that have not typically been subject to Davis-Bacon coverage. Such commenters, however, did not express any specific concerns regarding the definitions of ''building or work'' or ''public building or public work.''

The Department also does not agree with NAHB's assertion that the inclusion of an additional size or dollar threshold in the definition of ''public building or public work'' is necessary, because the DBA already imposes a dollar threshold for coverage. The revised definition does not alter this threshold, but instead merely clarifies that where the construction of a portion of a building or work is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public, that portion of a building or work is a public building or public work to which DBA coverage applies if the Act's $2,000 dollar threshold is satisfied. The revised definition does not automatically extend DBA coverage in this scenario to construction not called for in the contract, *i.e.,* of the entire building or work. Nor does it alter the long-standing requirements and analysis needed to determine whether an entire building or work is a public building or public work. In other words, where the government has entered into a contract in excess of $2,000 for the construction, alteration, or repair of a public building or public work, the contract will be subject to DBA requirements regardless of whether the contract applies only to a portion of a building or work or to an entire building or work. To apply an additional threshold beyond the statutory $2,000 threshold to contracts for construction of a portion of a building or work would result in the arbitrary exclusion of otherwise-covered contracts from Davis-Bacon coverage.

The Department does not agree with SMART's suggestion to add language to the regulation stating that the proposed definition of ''portion'' in ''building or work'', without any size parameter or other threshold, has the same meaning as the word ''portion'' in the term ''significant portion'' in the existing definition of ''site of the work.'' The term ''portion'' is not defined, and the Department simply intends that it be given its ordinary meaning, that is, a part of a whole. However, the final rule specifically defines the term ''significant portion'' for purposes of the definition of a ''secondary construction site.'' The final rule explains that ''significant portion'' is limited to instances where an entire portion or module of a building or work, such as a completed room or structure, is constructed offsite with minimal construction work remaining. This term is necessarily more limiting than ''portion,'' and is used in a specific context, and therefore Department does not believe it would be helpful to insert any language that could be read to suggest that the two terms are equivalent.

The Department also declines to adopt SMART's suggestion to amend the proposed definition of building or work to state that ''[t]he term building or work also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work *at a primary construction site or a secondary construction site*'' [proposed addition in italics]. Although the Department agrees, as explained above, that the installation of components and equipment into a building or work or portion thereof is construction work, the Department does not believe that it would be appropriate to incorporate references to ''site of the work'' elements into the definition of ''building or work.'' This is because the ''building or work'' requirement applies even under statutes whose application is not limited to the site of the work and so applies to all work performed by laborers and mechanics in the development of a project, as discussed further below.

Finally, the Department agrees with UBC's suggestion to revise the proposed definition of ''public building or public work'' to include the installation (where appropriate) of equipment or components in order to harmonize the revised definition of ''public building or public work'' with the revised definition of ''building or work.'' As the examples discussed in the NPRM and earlier in this section clearly indicate, installation of equipment or components has long been considered to be covered construction activity, and the Department agrees that including corresponding language in both definitions may clarify that such installation may similarly be considered a public building or work when the other requirements are met. In such circumstances, the installation may be considered a public building or work even where the equipment or components are being installed in a larger structure that may not be a public building or work. For example, where the installation of equipment such as wind turbines or electric car chargers is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public, such installation would be considered a public building or work even where such installation takes place at a private facility. Similarly, when a Federal agency enters into a long-term lease of office space in an otherwise privately owned and occupied building, and the lease provides for the installation of equipment, at government expense and in accordance with government specifications, in the portion of the building that the Federal Government is leasing and occupying in order to provide public services, the installation of such equipment would be the construction of a public building or public work subject to Davis-Bacon labor standards.

Accordingly, for the reasons discussed, the Department is adopting the proposed definitions of ''building or work'' and ''public building or public work'' in this final rule, with one clarification to the definition of ''public building or public work,'' as explained.

(C) Construction, Prosecution, Completion, or Repair

The final rule also adds a new sub-definition to the term ''construction, prosecution, completion, or repair'' in § 5.2, to better clarify when demolition and similar activities are covered by the Davis-Bacon labor standards.

As explained in the proposed rule, in general, the Davis-Bacon labor standards apply to contracts ''for construction, alteration or repair . . . of public buildings and public works.'' 40 U.S.C. 3142(a). Early in the DBA's history, the Attorney General examined whether demolition fits within these terms and concluded that ''[t]he statute is restricted by its terms to 'construction, alteration, and/or repair,'' and that this language ''does not include the demolition of existing structures'' alone. 38 Op. Atty. Gen. 229 (1935). However, the Attorney General expressly distinguished, and declined to decide the question of whether the Davis-Bacon labor standards apply to ''a razing or clearing operation provided for in a building contract, to be performed by the contractor as an incident of the building project.'' *Id.*

Consistent with the Attorney General's opinion, the Department has long maintained that standalone demolition work is generally not covered by the Davis-Bacon labor standards. *See* AAM 190 (Aug. 29, 1998); WHD Opinion Letter SCA–78 (Nov. 27, 1991); WHD Opinion Letter DBRA–40 (Jan. 24, 1986); WHD Opinion Letter DBRA–48 (Apr. 13, 1973); AAM 54 (July 29, 1963); FOH 15d03(a). However, the Department has understood the Davis-Bacon labor standards to cover demolition and removal under certain circumstances.

First, demolition and removal activities are covered by Davis-Bacon labor standards when such activities in and of themselves constitute construction, alteration, or repair of a public building or work. For example, the Department has explained that removal of asbestos or paint from a facility that will not be demolished—even if subsequent reinsulating or repainting is not considered—is covered by Davis-Bacon because the asbestos or paint removal is an ''alteration'' of the facility. *See* AAM 153 (Aug. 6, 1990). Likewise, the Department has explained that Davis-Bacon labor standards can apply to certain hazardous waste removal contracts, because ''[s]ubstantial excavation of contaminated soils followed by restoration of the environment'' is ''construction work'' under the DBA and because the term ''landscaping'' as used in the DBA regulations includes ''elaborate landscaping activities such as substantial earth moving and the rearrangement or reclamation of the terrain that, standing alone, are properly characterized as the construction, restoration, or repair of a public work.'' AAM 155 (Mar. 25, 1991); *see also* AAM 190 (noting that ''hazardous waste removal contracts that involve substantial earth moving to remove contaminated soil and recontour the surface'' can be considered DBA-covered construction activities).

Second, the Department has consistently maintained that if future construction that will be subject to the Davis-Bacon labor standards is contemplated at the location where the demolition occurs—either because the demolition is part of a contract for such construction or because such construction is contemplated as part of a future contract, then the demolition of the previously existing structure is considered part of the construction of the subsequent building or work and therefore within the scope of the Davis-Bacon labor standards. *See* AAM 190. This position is also articulated in the Department's SCA regulations at 29 CFR 4.116(b). Likewise, the Department has explained that certain activities under hazardous waste removal and remediation contracts, including ''the dismantling or demolition of buildings, ground improvements and other real property structures and . . . the removal of such structures or portions of them'' are covered by Davis-Bacon labor standards ''*if* this work will result in the construction, alteration, or repair of a public building or public work at that location.'' AAM 187, attach., at 1–2 (Nov. 18, 1996).

As noted in the proposed rule, while the Department has addressed these distinctions to a degree in the SCA regulations and in subregulatory guidance, the Department believes that clear standards for the coverage of demolition and removal and related activities in the DBA regulations will assist agencies, contractors, workers, and other stakeholders in identifying whether contracts for demolition are covered by the DBA. This, in turn, will ensure that Davis-Bacon contract clauses and wage determinations are incorporated into contracts where warranted, thereby providing contractors with the correct wage determinations prior to bidding and requiring the payment of Davis-Bacon prevailing wages where appropriate.[167]

Accordingly, the Department proposed to add a new paragraph (2)(v) to the definition of ''construction, prosecution, completion, or repair'' to assist agencies, contractors, workers, and other stakeholders in identifying when demolition and related activities fall within the scope of the DBRA. Specifically, the Department proposed to clarify that demolition work is covered under Davis-Bacon in any of three circumstances: (1) Where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing public building or work; (2) where subsequent construction covered in whole or in part by Davis-Bacon labor standards is planned or contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract; or (3) where otherwise required by statute.[168]

While a determination of whether demolition is performed in contemplation of a future construction project is a fact-specific question, the proposed rule also included a non-exclusive list of factors that can inform this determination, including the existence of engineering or architectural plans or surveys; the allocation of, or an application for, Federal funds; contract negotiations or bid solicitations; the stated intent of the relevant government officials; the disposition of the site after demolition (*e.g.,* whether it is to be sealed and abandoned or left in a state that is prepared for future construction); and other factors. Based on these guidelines, Davis-Bacon coverage may apply, for example, to the removal and disposal of contaminated soil in preparation for construction of a building, or the demolition of a parking lot to prepare the site for a future public park. In contrast, Davis-Bacon likely would not apply to the demolition of an abandoned, dilapidated, or condemned building to eliminate it as a public hazard, to reduce likelihood of squatters or trespassers, or to make the land more desirable for sale to private parties for purely private construction.

The Department received several comments supporting the proposed revisions regarding demolition. LIUNA, for example, noted that providing clear guidance on when demolition is covered by the DBRA will ensure workers on covered projects receive the protections of the DBRA. LIUNA noted its ongoing concern that contracting agencies incorrectly classify demolition activities as not covered by the DBRA because of insufficient or conflicting guidance from the contracting agency and the Department. Other commenters, including the III–FFC, the IUOE, and Public Employees Local 71, Alaska, echoed these concerns and supported the proposed language as a means of clarifying the circumstances under which demolition work is covered, ensuring workers receive the protections of the Davis-Bacon labor standards when appropriate.

Conversely, the National Demolition Association (NDA) opposed the proposed revision and expressed concern that it would ''expand the scope of demolition activities that could be subject to the Davis-Bacon Act requirements.'' NDA also stated that the proposed change would add complexity to the implementation of the DBRA and pose an undue burden on small contractors. Other commenters, including ABC member campaign comments, also voiced opposition and termed the proposed revisions an ''expansion'' of coverage.

In the final rule, the Department adopts the language regarding demolition as proposed. As explained in the proposed rule, the revised language is not an expansion of Davis-Bacon coverage, but rather a codification and clarification of current Department policy that is already reflected in current DBRA subregulatory guidance and in SCA regulations. Thus, the revisions will not expand coverage or increase burdens or complexity. To the contrary, they will simplify and

[167] The Department notes that under Federal contracts and subcontracts, demolition contracts that do not fall within the DBA's scope are instead service contracts covered by the SCA, and the Department uses DBA prevailing wage rates as a basis for the SCA wage determination. *See* AAM 190. However, federally funded demolition work carried out by State or local governments that does not meet the criteria for coverage under a Davis-Bacon Related Act would generally not be subject to Federal prevailing wage protections.

[168] This third option accounts for Related Acts when broader language may provide greater coverage of demolition work.

streamline compliance efforts by explicitly setting these principles out in the DBRA regulations themselves so that contractors and contracting agencies can look to those regulations to determine whether or not the Davis-Bacon labor standards apply to particular demolition activities. This will improve the accuracy and consistency of coverage determinations prior to the submission of bids or the commencement of work, thus mitigating the need for investigations and costly corrective actions after work has started on a project. The change will also help ensure that all contractors have a better understanding of the circumstances under which demolition work is covered when bidding on federally funded or assisted construction projects.

(D) Contract, Contractor, Prime Contractor, and Subcontractor

The Department proposed non-substantive revisions to the definition of ''contract'' and also proposed new definitions in § 5.2 for the terms ''contractor,'' ''subcontractor'' and ''prime contractor.'' The definitions would apply to 29 CFR part 5, including the DBRA contract clauses in § 5.5(a) and (b) of this part.

(1) Definition of ''Contract''

While neither the DBA nor CWHSSA contains a definition of the word ''contract,'' the language of the Davis-Bacon and Related Acts makes clear that Congress intended the prevailing wage and overtime requirements to apply broadly, to both prime contracts executed directly with Federal agencies as well as any subcontracts through which the prime contractors carry out the work on the prime contract. *See* 40 U.S.C. 3142(c); 40 U.S.C. 3702(b), (d). Thus, the Department's existing regulations define the term ''contract'' as including ''any prime contract . . . and any subcontract of any tier thereunder.'' 29 CFR 5.2(h). The current definition of ''contract'' also states that it applies to prime contracts which are subject wholly or in part to the labor standards of any of the acts listed in § 5.1. This definition reinforces that it is intended to apply equally to direct Federal contracts covered by the DBA and also to contracts between Federal, State, or local government entities administering Federal assistance and the direct recipients or beneficiaries of that assistance, where such assistance is covered by one of the Related Acts—as well as the construction contracts and subcontracts of any tier financed by or facilitated by such a contract for assistance. *See id.*

In the NPRM, the Department stated that it was considering the creation of an expanded definition for the term ''contract'' in § 5.2, similar to the way that the term is defined in other Department regulations applying to Federal contracting statutes and Executive orders. In the regulations implementing Executive Order 13658 (Establishing a Minimum Wage for Contractors), for example, the Department defined contract as ''an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law'' and listed many types of specific instruments that fall within that definition. 29 CFR 10.2. The Department's SCA regulations, while containing a definition of ''contract'' that is similar to the current Davis-Bacon regulatory definition at 29 CFR 5.2(h), separately specify that ''the nomenclature, type, or particular form of contract used . . . is not determinative of coverage'' at 29 CFR 4.111(a).

In the NPRM, the Department noted that the term ''contract'' in the Davis-Bacon and Related Acts has been interpreted in a similarly broad manner, with the common law of contract as the touchstone. For example, in its 1994 memorandum, the OLC cited the basic common-law understanding of the term to explain that, for the purposes of the DBA, ''[t]here can be no question that a lease is a contract, obliging each party to take certain actions.'' 1994 OLC Memorandum, 18 Op. O.L.C. at 113 n.3 (citing 1 Arthur Linton Corbin, Corbin on Contracts §§ 1.2–1.3 (rev. ed. 1993)); *see also Bldg. & Const. Trades Dep't, AFL–CIO* v. *Turnage,* 705 F. Supp. 5, 6 (D.D.C. 1988) (''The Court finds that it is reasonable to conclude, as the WAB has done, that the nature of the contract is not controlling so long as construction work is part of it.''). The Davis-Bacon and Related Acts thus have been routinely applied to various types of agreements that meet the common-law definition of a ''contract''—such as, for example, leases, utility privatization agreements, individual job orders or task letters issued under basic ordering agreements, and loans or agreements in which the only consideration from the agency is a loan guarantee—as long as the other elements of DBRA coverage are satisfied.

In the NPRM, the Department also stated that it intends the use of the term ''contract'' in the DBRA regulations to apply also to any agreement in which the parties intend for a contract to be formed, even if (as a matter of the common law) the contract may later be considered to be void ab initio or otherwise fail to satisfy the elements of the traditional definition of a contract. Such usage, the Department explained, follows from the statutory requirement that the relevant labor standards clauses must be included not just in ''contracts'' but also in the advertised specifications that may (or may not) become a covered contract. *See* 40 U.S.C. 3142(a).

In light of this discussion, the Department sought comments on whether it is necessary to include in the regulatory text itself a similarly detailed recitation of the types of agreements that may be considered to be contracts. The Department also proposed, in a non-substantive change, to move a sentence addressing whether governmental entities are ''contractors'' from the current definition of ''contract'' to the new definition of ''contractor.''

Several commenters, including CEA, SMACNA, and the National Alliance for Fair Contracting (NAFC), expressed general support for the proposed definition of ''contract'' in the NPRM. No comments were submitted expressing a position regarding whether the proposed definition of contract should include the detailed list of agreements or legal instruments that could be considered to be ''contracts'' under the definition. As the Department noted in the NPRM, inclusion of a detailed list of types of contracts should not be necessary, given that such a list would follow directly from the use of the term ''contract'' in the statute.[169] Thus, the final rule adopts the definition of ''contract'' as proposed, with one conforming edit to ensure that the definition and the contract clauses that apply the defined term reflect the principle that employers meeting the definition of ''material supplier'' are not covered.[170] *See* section III.B.3.ii.(G).(1).c (''Material supplier exception''). While the Department has not included a list in the regulatory text of all of the various types of agreements that may be considered to be ''contracts'' under the definition, it continues to interpret the DBRA as applying broadly to any contract that fits within the common law definition, as well as to contracts-implied-in-law where the parties intended to enter into such a contract, as long as the contract satisfies the other

[169] The Restatement (First) of Contracts, published in 1932, defined a ''contract'' as ''a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.'' Restatement (First) of Contracts section 1 (Am. L. Inst. 1932).

[170] This conforming edit mirrors the language that the Department proposed, and adopts in the final rule, to similarly limit the definition of ''contractor.''

statutory and regulatory elements of coverage.

(2) Definition of ''Contractor''

The Department proposed to include a new definition of the term ''contractor'' in § 5.2. The word ''contractor'' is not defined in the DBA or CWHSSA, and the existing DBRA regulations use the term ''contractor'' but do not define it. Paralleling the definition of ''contract,'' the Department proposed a definition of ''contractor'' to clarify that, where used in the regulations, it applies to both prime contractors and subcontractors. In addition, the proposed definition sought to clarify that sureties may also—under appropriate circumstances—be considered ''contractors'' under the regulations. As noted in the NPRM, this is consistent with the Department's longstanding interpretation. *See Liberty Mut. Ins.,* ARB No. 00–018, 2003 WL 21499861, at *6 (June 30, 2003) (finding that the term ''contractor'' included sureties completing a contract pursuant to a performance bond). As the ARB explained in the *Liberty Mutual* case, the term ''contractor'' in the DBA should be interpreted broadly in light of Congress's ''overarching . . . concern'' in the 1935 amendments to the Act that the new withholding authority included in those amendments would ensure workers received the pay they were due. *Id.* (citing S. Rep. No. 74–1155, at 3 (1935)).

The proposed definition of ''contractor'' contained additional clarifications. It contained language reflecting the long-held interpretation that bona fide ''material suppliers'' are generally not considered to be contractors under the DBRA, subject to certain exceptions. As noted above, the Department also moved two sentences from the existing definition of ''contract'' to the new definition of ''contractor.'' This language clarifies that State and local governments generally are not regarded as contractors or subcontractors under the Related Acts in situations where construction is performed by their own employees. The exception is the subset of Related Act statutes that more broadly require payment of Davis-Bacon prevailing wages to all laborers and mechanics employed in the project's development regardless of their employment by a contractor or subcontractor.[171] The Department proposed to supplement the language regarding State and local governments to explain (as the Department has similarly clarified in the SCA regulations) that the U.S. Government, its agencies, and instrumentalities are also not contractors or subcontractors for the purposes of the Davis-Bacon and Related Acts. *Cf.* 29 CFR 4.1a(f).[172]

Several commenters, including CEA, SMACNA, and NAFC, expressed general support for the proposed definition of ''contractor'' in the NPRM. The Department did not receive any comments opposing the inclusion of sureties within the definition of ''contractor'' or opposing any of the other specific elements of the definition.[173] AGC did not oppose the proposed definition of contractor, but they sought clarification on the status of ''business owners'' in the definition of ''contractor,'' ''prime contractor,'' and ''subcontractor.'' Citing to FOH 15f06, AGC asserted that individuals who meet the definition of a ''business owner'' in the FLSA regulation at 29 CFR 541.101 are ''exempt from DBA coverage'' and should therefore not be included in the definition of contractor.

AGC's comment appears to conflate two concepts: ''contractors'' and ''laborers or mechanics.'' If a person or business is a ''contractor,'' they have responsibilities under the DBRA contract clauses and regulations to ensure that any workers they employ (or whose labor they contract for by subcontract) are paid the required prevailing wage. If a person is a ''laborer or mechanic,'' then they must be paid a prevailing wage by the contractor or subcontractor for whom they work. FOH 15f06 addresses whether an individual is a ''laborer or mechanic,'' not whether they are a ''contractor.''

Under the current DBRA regulations, the FLSA exemption from the minimum wage and overtime requirements for a ''business owner'' is relevant to whether an individual is a ''laborer or mechanic'' under the DBRA who therefore must receive the prevailing wage. The DBRA regulations define ''laborer or mechanic'' in part with a reference to the part 541 FLSA regulations that provide tests for the administrative, professional, and executive exemptions from the minimum wage and overtime requirements under the FLSA. 29 CFR 5.2(m); 29 CFR 541.0. The ''business owner'' regulation at § 541.101 is a method of identifying employees who may be exempt under the FLSA exemption for executive employees.

Unlike the definition of ''laborer or mechanic,'' the DBRA definition of ''contractor'' does not involve the consideration of whether an individual or entity is a business owner under 29 CFR 541.101. The Department defines the term ''contractor'' as a person that ''enters into or is awarded a contract'' covered by the DBRA. If a person enters into a covered prime contract or subcontract, that person is a ''contractor'' to whom the DBRA requirements for contractors apply—requiring that they ensure that any laborers or mechanics they employ (or contract for) on the project are paid a prevailing wage.

Accordingly, the Department has not amended the definition of ''contractor'' to discuss the FLSA ''business owner'' exemption, and the final rule adopts the definition of ''contractor'' as proposed.

(3) Definition of ''Prime Contractor''

The Department also proposed to add a definition for the term ''prime contractor'' as it is used in part 5 of the regulations. Consistent with the ARB's decision in *Liberty Mutual,* ARB No. 00–018, 2003 WL 21499861, at *6, the Department proposed a broad definition of prime contractor that would prioritize the appropriate allocation of responsibility for contract compliance and enhance the effectiveness of the withholding remedy. The proposed definition would clarify that the label an entity gives itself is not controlling; rather, an entity is considered to be a ''prime contractor'' based on its contractual relationship with the Government, its control over the entity holding the prime contract, or the duties it has been delegated.

The proposed definition began by identifying as a prime contractor any person or entity that enters into a covered contract with an agency. This would include, under appropriate circumstances, entities that may not be understood in lay terms to be ''construction contractors.'' For example, where a non-profit organization, owner/developer, borrower or recipient, project manager, or single-purpose entity contracts with a State or local government agency for covered financing or assistance with the construction of housing—and the other required elements of the relevant

[171] As discussed in section III.B.3.ii.G.2.e, the Department is including a new defined term, ''development statute,'' in the final rule, which refers to the Related Acts that have this broader scope of coverage.

[172] The Department has also considered work by Tribal governments using their own employees to be excluded from DBRA coverage in a similar manner and for the same reasons as work by the Federal agencies and instrumentalities and by State or local recipients of Federal assistance. Under the final rule, the Department will continue to interpret DBRA coverage in this manner.

[173] Several commenters opposed the Department's definition of ''material supplier'' (which is incorporated into the definitions of contractor and subcontractor) as too narrow and therefore expanding the types of companies treated as DBRA-covered ''contractors'' or ''subcontractors.'' The Department has addressed these comments in the discussion of the definition of material supplier.

Related Act statute are satisfied—that owner/developer or recipient entity is considered to be the ''prime contractor'' under the regulations. This is so even if the entity does not consider itself to be a ''construction contractor'' and itself does not employ laborers and mechanics and instead subcontracts with a general contractor to complete the construction. *See, e.g., Phoenix Dev. Co.,* WAB No. 90–09, 1991 WL 494725, at *1 (Mar. 29, 1991) (''It is well settled that prime contractors ('owners-developers' under the HUD contract at hand) are responsible for the Davis-Bacon compliance of their subcontractors.''); *Werzalit of Am., Inc.,* WAB No. 85–19, 1986 WL 193106, at *3 (Apr. 7, 1986) (rejecting petitioner's argument that it was a loan ''recipient'' standing in the shoes of a State or local government and not a prime ''contractor'').

The proposed definition of ''prime contractor'' also included the controlling shareholder or member of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, any contractor (*e.g.,* a general contractor) that has been delegated all or substantially all of the responsibilities for overseeing and/or performing the construction anticipated by the prime contract, and any other person or entity that has been delegated all or substantially all of the responsibility for overseeing Davis-Bacon labor standards compliance on a prime contract. Under this definition, more than one entity on a contract—for example, both the owner/developer and the general contractor—could be considered to be ''prime contractors'' on the same contract. Accordingly, the proposal also explained that any of these related legal entities would be considered to be the ''same prime contractor'' for the purposes of cross-withholding.

Although the Department had not previously included a definition of prime contractor in the implementing regulations, the proposed definition was consistent with the Department's prior enforcement of the DBRA. In appropriate circumstances, for example, the Department has considered a general contractor to be a ''prime contractor'' that is therefore responsible for the violations of its subcontractors under the regulations—even where that general contractor does not directly hold the contract with the Government (or is not the direct recipient of Federal assistance), but instead has been hired by the private developer that holds the overall construction contract. *See Palisades Urb. Renewal Enters. LLP.,* ALJ No. 2006–DBA–00001, slip op. at 16 (Aug. 3, 2007), *aff'd,* ARB No. 07–124, 2009 WL 2371237 (July 30, 2009); *Milnor Constr. Corp.,* WAB No. 91–21, 1991 WL 494763, at *1, *3 (Sept. 12, 1991); *cf. Vulcan Arbor Hill Corp.* v. *Reich,* 81 F.3d 1110, 1116 (D.C. Cir. 1996) (referencing agreement by developer that ''its prime'' contractor would comply with Davis-Bacon standards). Likewise, where a joint venture holds the contract with the government, the Department has characterized the actions of the parties to that joint venture as the actions of ''prime contractors.'' *See Big Six, Inc.,* WAB No. 75–03, 1975 WL 22569, at *2, *4 (July 21, 1975).

The proposed definition of prime contractor was also similar to the broad definition of the term ''contractor'' in the FAR part 9 regulations that govern suspension and debarment across a broad swath of Federal procurement contracts. In that context, where the Federal Government seeks to protect its interest in effectively and efficiently completing procurement contracts, the FAR Council has adopted an expansive definition of contractor that includes affiliates or principals that functionally control the prime contract with the government. *See* 48 CFR 9.403. Under the FAR part 9 definition, ''Contractor'' means any individual or entity that ''[d]irectly or indirectly (*e.g.,* through an affiliate)'' is awarded a Government contract or ''[c]onducts business . . . with the Government as an agent or representative of another contractor.'' *Id.*[174] The Department has a similar interest here in protecting against the use of the corporate form to avoid responsibility for the Davis-Bacon labor standards.

The Department sought comment on the proposed definition of ''prime contractor,'' in particular, as it would affect the withholding contract clauses at § 5.5(a)(2) and (b)(3), the prime contractor responsibility provisions at § 5.5(a)(6) and (b)(4), and the proposed provisions in § 5.9 regarding the authority and responsibility of contracting agencies for satisfying requests for cross-withholding.

Several commenters, including LIUNA, UBC, and UA, expressed support for the proposed definition of ''prime contractor.'' These commenters supported the proposed definition of ''prime contractor'' because they believe the definition—in tandem with the modifications to the withholding contract clause—will help address violations on DBRA contracts by expanding the Department's ability to recover back wages. Commenters emphasized that there has been documentation of widespread labor violations in the construction industry in recent decades, and that this problem has been exacerbated by various enforcement shortcomings.[175] As the UBC noted, the lack of meaningful enforcement in the industry has in turn led to ''a breakdown of industry self-policing.'' Commenters also stated that there has been an increase in recent

[174] The definition section in 48 CFR 9.403 specifies that it applies only ''as used in this subpart''—referring to subpart 9.4 of the FAR. It thus applies only to the general suspension and debarment provisions of the FAR and does not apply to the regulations within the FAR that implement the Davis-Bacon labor standards, which are located in FAR part 22 and the contract clauses in FAR part 52. The DBRA-specific provisions of the FAR are based on the Department's regulations in parts 1, 3, and 5 of subtitle 29 of the CFR, which are the subject of this rulemaking. The Department does not anticipate that this rulemaking will affect FAR subpart 9.4.

[175] WA BCTC and LIUNA, for example, pointed to the Department's recent data showing that the construction industry is consistently one of the top two low-wage, high violation industries. *See https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.* The comment from the Leadership Conference on Civil & Human Rights and other civil rights and worker advocacy organizations pointed to various studies showing that a significant number of construction employers misclassified workers as independent contractors or otherwise working ''off-the-books.'' *See, e.g.,* Mark Erlich, ''Misclassification in Construction: The Original Gig Economy,'' 74 Indus. & Lab. Rel. Rev. 1202 (2021); Nat'l Emp. L. Project, ''Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries '' (Oct. 2020), *https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020;* Nathaniel Goodell & Frank Manzo IV, ''The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois: Impacts on Workers and Taxpayers '' (Jan. 2021), *https://midwestepi.files.wordpress.com/2020/10/mepi-ilepi-costs-of-payroll-fraud-in-wi-mn-il-final.pdf*; Mandy Locke, et. al., ''Taxpayers and Workers Gouged by Labor-Law Dodge,'' Miami Herald (Sept. 4, 2014), *https://www.miamiherald.com/latest-news/article1988206.html*; Russell Ormiston et al., *supra* note 70, at 75–113 (summarizing widespread labor violations in the residential construction industry). A comment from two Professors of Economics noted that the research documenting worker misclassification and wage theft in the U.S. construction industry is ''extensive.'' They noted one estimate using government data found between 12.4 percent and 20.5 percent of the U.S. construction workforce is misclassified, while other studies imply the proportion exceeds 30 percent in some locations. *See* Russell Ormiston et. al., ''An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry'' (2020) at 37, *http://iceres.org/wp-content/uploads/2020/06/ICERES-Methodology-for-Wage-and-Tax-Fraud.pdf*; Workers Defense Project, ''Building a Better Texas: Construction Conditions in the Lone Star State'' (2013) at 2, *https://workersdefense.org/wpcontent/uploads/2020/10/research/Build%20a%20Better%20Texas.pdf*; Clayton Sinai et al., ''The Underground Economy and Wage Theft,'' Catholic Labor Network (2021) at 7,*https://catholiclabor.org/wpcontent/uploads/2021/04/Underground-Economy-and-Wage-Theft-Report-4.14.pdf.*

decades in the use of ''contracting vehicles,'' such as single-purpose limited liability companies (LLCs). NCDCL and FFC stated that they had witnessed the use of these vehicles by contractors to avoid liability for wage violations. According to the UA, it is ''vital'' that the Department clarify liability for back wages for those contractors that ''jump from one project to the next under various names.''

As the comment from the LCCHR and other civil rights and worker advocacy organizations stated, the expanded definition of ''prime contractor'' will ensure that any person or entity that is entirely or mostly responsible for overseeing the contract will be accountable for following the law. Referencing the proposal, COSCDA stated that they concurred generally with the Department's efforts to recover back wages. III–FFC stated that the prime contractor definition, as incorporated into the proposed cross-withholding provision, would help to protect workers against wage theft and will help to achieve the fundamental purpose of the Davis-Bacon Act.

Other commenters opposed the proposed definition. The Illinois Road & Transportation Builders Association (IRTBA), the Ohio Contractors Association (OCA), the Southern Illinois Builders Association (SIBA), and the American Pipeline Contractors Association (APCA) submitted comments arguing that the proposed definition would place an undue burden on contractors, increase their risk, and discourage them from bidding on work covered by the DBRA, thus making it harder for the government to find qualified contractors. These commenters, along with the FTBA, also argued that the new definition would not improve enforcement of the Davis-Bacon Act, and that the Department had not presented any evidence that the current standards for imposing liability are either ineffective or unworkable. The FTBA asserted that the Department's sole justification was to create a ''broader pot of funds if needed for withholding purposes.''

Other commenters did not directly oppose the definition of ''prime contractor,'' but they expressed concerns or requested additional clarification. NAHB expressed concern that the proposed definition of ''prime contractor'' (among other proposals) would introduce uncertainty as to liability for homebuilders, particularly multifamily builders that are highly dependent on subcontractors. In their comment, NAHB suggested that the definitions of ''prime contractor'' and ''subcontractor'' seem to remove the ''defining line'' between general contractor and subcontractor liability. NAHB stated that the Department should clarify that the apportionment of liability between multiple entities should be governed by the ''joint employer'' standard under the FLSA. Likewise, AGC, in a manner similar to its comment regarding the definition of ''contractor,'' did not specifically oppose the proposed definition of ''prime contractor,'' but requested clarification that a ''business owner'' under the FLSA regulations is not included in the definition. Several other commenters opposed the Department's cross-withholding provisions but did not expressly oppose the definition of ''prime contractor.''

The Department agrees with the commenters that supported the proposed definition of ''prime contractor'' because it will promote compliance with the DBRA by specifying which entities are properly defined as prime contractors. As these commenters explained, recent studies have shown that there is widespread noncompliance with basic wage and hour laws in the construction industry as a whole, and in the residential construction industry in particular.[176] Under these circumstances, and given the very large number of DBRA-covered contracts for which the Department is in charge of enforcement, it is important that the regulations and contract clauses appropriately incentivize compliance.[177] By codifying a definition of ''prime contractor,'' the Department clarifies which entities may be held liable for noncompliance of subcontractors. Doing so puts these entities on notice that they will be held liable for violations of subcontractors on the contract under the liability and flow-down provisions of the contract clauses at § 5.5(a)(6) and (b)(4), which create an incentive for the prime contractors to ensure that subcontractors on the project will be in compliance with the DBRA before work commences.

The Department disagrees with commenters that opposed the proposed definition on the basis that the Department lacked sufficient evidence or analysis showing that the new definition is necessary. As noted above, the widespread compliance problems in the construction industry are well documented, *see supra* note 175, and, as explained in the NPRM, the Department has noted that the use of single-purpose LLC entities and similar joint ventures and teaming agreements has been increasing in recent decades. *See, e.g.,* John W. Chierichella & Anne Bluth Perry, ''Teaming Agreements and Advanced Subcontracting Issues,'' TAASI GLASS–CLE A, at *1–6 (Fed. Publ'ns LLC, 2007); A. Paul Ingrao, ''Joint Ventures: Their Use in Federal Government Contracting,'' 20 Pub. Cont. L.J. 399 (1991). This confluence of trends in construction contracting has created significant enforcement challenges for the Department, at times requiring exhaustive investigations and litigation to pierce the corporate veil.[178] One of the key reforms that experts analyzing these types of problems in the construction industry have recommended is a clarification of liability among upper-level entities that have control over the workplace.[179]

The Department also does not agree that the proposed definition would cause undue burdens or introduce uncertainty for contracting entities. The regulations in § 5.5(a)(6) and (b)(4) have long held prime contractors responsible for compliance by their subcontractors, and the Department has long interpreted the Act as allowing for piercing the corporate veil in appropriate circumstances. Codifying the proposed definition of prime contractor does not change the obligations of a prime contractor on a DBRA project; rather, it provides clarity on which entity or entities are properly identified as the prime contractor. The definition uses well understood terms, including ''controlling shareholders or members'' and ''joint venturers or partners.'' It also states that contractors have been delegated ''all or substantially all of the responsibilities for overseeing any construction'' will be considered prime contractors. This language provides clarity so that entities can recognize ahead of time whether they may bear potential liability for violations on a DBRA-covered contract and can protect themselves by using care in the choice of subcontractors and using indemnification agreements and similar instruments that will adequately address any increased risk.

The Department disagrees with NAHB that the liability of prime contractors should be limited to any liability as ''joint employers'' under the FLSA. Such a limitation on liability would be inconsistent with the longstanding interpretation of the DBRA of holding

[176] *See supra* note 175.

[177] The Department also addresses these arguments in its discussion of the cross-withholding provision in the DBRA contract clause, in section III.B.3.xxiii.

[178] *See, e.g.,* Letter from Cheryl M. Stanton, Adm'r to Hal J. Perloff (Sept. 17, 2020) (piercing the veil in DBRA matter involving a Military Housing Privatization Initiative project).

[179] *See, e.g.,* Ormiston et al. (2020), supra note 70 at 100–101.

prime contractors responsible for any back wages that are owed to the employees of subcontractors regardless of whether there is any employment relationship or even any knowledge of the violations that have taken place. *See* 29 CFR 5.5(a)(6); *M.A. Bongiovanni, Inc.,* WAB No. 91–08, 1991 WL 494751, at *1 (Apr. 19, 1991). This longstanding interpretation follows from the Congressional intent in the DBRA that the Act ensure that laborers and mechanics that are employed on the site of the work are paid the required prevailing wage. *Bongiovanni,* 1991 WL 494751, at *1.

The Department also does not agree with AGC that a person who may be a ''business owner'' under the FLSA regulations cannot be a ''prime contractor'' under the DBRA definition. As noted above with regard to the definition of ''contractor,'' AGC's comment appears to conflate two concepts: first, whether an individual or business is a ''prime contractor'' and therefore must ensure that covered workers on the project are paid the required prevailing wage; and second, whether an individual is a ''laborer or mechanic'' to whom a prevailing wage must be paid. The provision of the FOH referenced by the AGC in its comment (FOH 15f06) addresses the latter question, not the former.

While the Department declines to limit the definition of prime contractor with reference to the FLSA regulations, the Department has decided that the definition should be amended to limit ambiguity in one respect. In the proposal, the definition included ''any other person or entity that has been delegated all or substantially all of the responsibility for overseeing Davis-Bacon labor standards compliance on a prime contract.'' This language could have extended the definition to cover individual employees of a contractor regardless of their ownership interests, which was beyond the scope that the Department intended for the definition. This language has been removed from the definition in the final rule.

Other than the modification noted above, the final rule adopts the definition of prime contractor in § 5.2 as proposed.

(4) Definition of ''Subcontractor''

In addition to new definitions of ''contractor'' and ''prime contractor,'' the Department also proposed a new definition of the term ''subcontractor.'' The definition, as proposed, affirmatively stated that a ''subcontractor'' is ''any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1.'' Like the current definition of ''contract,'' the proposed definition of ''subcontractor'' also reflects that the Act covers subcontracts of any tier—and thus the proposed definition of ''subcontractor'' stated that the term includes subcontractors of any tier. *See* 40 U.S.C. 3412; *Castro* v. *Fid. & Deposit Co. of Md.,* 39 F. Supp. 3d 1, 6–7 (D.D.C. 2014). The proposed definition of ''subcontractor'' necessarily excluded material suppliers (except for narrow exceptions), because such material suppliers are excluded from the definition of ''contractor,'' as proposed, and that definition applies to both prime contractors and subcontractors. Finally, the proposed definition of ''subcontractor'' stated that the term did not include laborers or mechanics for whom a prevailing wage must be paid.

Several commenters expressed general support for the Department's definition of ''subcontractor.'' The Department did not receive any comments expressly opposed to the definition. NAHB and AGC, however, expressed similar concerns about the definition as their concerns about the definitions of ''contractor'' and ''prime contractor.'' NAHB suggested that the definition removed defining lines around traditional concepts of subcontractor liability. AGC sought to clarify that ''business owners'' are ''exempt'' from being considered covered subcontractors.

In light of the comments from NAHB and AGC, the Department has reconsidered one aspect of the definition of subcontractor. The proposed definition excluded from inclusion as ''subcontractors'' those ''ordinary laborers or mechanics to whom a prevailing wage must be paid regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.'' This language was borrowed from the 1935 amendment to the DBA, which requires the payment of a prevailing wage ''regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.'' 40 U.S.C. 3142(c)(1). This language has been interpreted to ensure that the requirement to pay a prevailing wage extends beyond the traditional common-law employment relationship. *See* section III.B.3.xxii (discussing the definition of ''Employed'').

Upon further consideration, the Department's recitation of this statutory language in the proposed definition of ''subcontractor'' could have been misconstrued as having the opposite of the intended effect. By including that language in the 1935 amendment to the DBA, Congress intended to emphasize that an individual could be a laborer or mechanic—and therefore be due a prevailing wage—regardless of whether they might be called a subcontractor or independent contractor. *See Bldg. & Const. Trades Dep't, AFL–CIO* v. *Reich,* 40 F.3d 1275, 1288 (D.C. Cir. 1994) (analyzing House and Senate reports for the 1935 DBA amendments). In other words, an individual can both be referred to as a ''subcontractor'' who contracts for a portion of the work on the prime contract and also be a laborer who must be paid a prevailing wage by the prime contractor or upper-tier subcontractor that has brought them onto the project.

The conclusion that an individual can have dual roles as ''subcontractor'' and ''laborer or mechanic'' is consistent with the Department's guidance on this issue. *See* DBRA–185 (July 28, 1993); DBRA–178 (July 31, 1992). In those letters, the Department responded to a request concerning the payment of prevailing wages to ''independent contractors who are owners or working foremen.'' After analyzing the statutory text of the DBA, the Department concluded that ''individuals [or partners] who subcontract to perform a portion of a Davis-Bacon contract and who simultaneously meet the regulatory definition of a laborer or mechanic must be compensated at the prevailing wage rate by the prime contractor for any work so performed.'' *Id.*[180]

[180] The Department's guidance regarding ''working subcontractors'' has not been a model of clarity. In the 1950's, the Department concluded that the statutory language of the 1935 amendments clearly indicated that individuals could be both owner-operators and also ''laborers or mechanics'' owed a prevailing wage—a position with which the Attorney General agreed. *See* Federal Aid Highway Program-Prevailing Wage Determination, 41 U.S. Op. Atty. Gen. 488, 489–503 (1960). Subsequently, after issuing several letters with similar positions, the Department then issued an AAM regarding ''working subcontractors'' in 1976, *see* AAM 123 (May 19, 1976), only to immediately revoke it, *see* AAM 125 (Aug. 30, 1976). The Department promised subsequent guidance, but in the meantime reminded contracting agencies of the statutory language that the DBRA requirements must be met ''regardless of any contractual relationship[.]'' AAM 125. The Department did not issue a new AAM, but instead issued the 1981–1982 rulemaking, and then the subsequent ruling letters that clarified that individuals can be both ''subcontractors'' and ''laborers or mechanics.'' DBRA–185 (July 28, 1993); DBRA–178 (July 31, 1992). *See also Griffin* v. *Sec'y of Lab.,* ARB Nos. 00–032, 00–033, 2003 WL 21269140, at *4, *7 (May 30, 2003) (noting that the Department ''considers even bona fide owner-operators performing DBA-covered work on a DBA-covered project to be due the prevailing rate.''), *aff'd sub nom Phoenix-Griffin Grp. II, Ltd.* v. *Chao,* 376 F. Supp. 2d 234, 242

AGC's comment regarding the ''business owners'' exemption in § 541.101 of the FLSA regulations throws this hypothetical circumstance into sharper relief. The Department's DBRA regulations explain that individuals ''employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics.'' 29 CFR 5.2(h). The FLSA ''business owner'' regulation at § 541.101 is one method under part 541 of identifying an employee that fits within the FLSA's exemption from minimum wage and overtime pay requirements for ''executive employees.'' *Id.* § 541.101(a). That FLSA regulation language provides that an ''employee'' falls under the executive exemption if the employee ''owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.'' *Id.* The subsequent section of the FLSA regulations, § 541.102, defines ''management'' as ''[g]enerally'' including a variety of different duties, largely (though not solely) related to hiring and supervising employees.

The DBA statute itself provides important context for responding to AGC's question regarding ''business owners.'' As the Department highlighted in the NPRM, the DBA contains express language conveying Congress's concern that the payment of prevailing wages to workers on covered projects should not be evaded by characterizing workers as owner operators or subcontractors. *See BCTD* v. *Reich,* 40 F.3d at 1288; DBRA–185; DBRA–178. The statute requires the payment of prevailing wage ''regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.'' 40 U.S.C. 3142(c)(1). This language was intended to ''eliminat[e] an evasive device whereby individual laborers formed partnerships under which the member partners received less than the prevailing wage.'' *BCTD,* 40 F.3d at 1280 (citing the 1935 House and Senate reports).

Accordingly, to find that an individual is not a ''laborer or mechanic'' and is not due the prevailing wage, it is not sufficient to simply assert that an individual has an ownership interest in a business. Rather, to be excepted from coverage under the DBRA, an individual must be employed in a ''bona fide'' executive capacity under the FLSA part 541 regulations. 29 CFR 5.2(h). In carrying out this analysis, the Department is mindful of the Congressional intent regarding the use of corporate entities and partnerships underpinning the 1935 amendments to the DBA.[181]

In any case, as with the definitions of ''contractor'' and ''prime contractor,'' AGC has conflated the question of whether an individual may be exempt from being paid the prevailing wage as a ''laborer or mechanic'' with the question of whether an individual may be a ''subcontractor.'' The FLSA definition of ''business owner'' is relevant to the ''laborer or mechanic'' definition under the DBRA, but is wholly distinct from whether an individual or entity is a ''subcontractor'' with associated duties under the DBRA, its regulations, and its contract clauses.[182]

Accordingly, the final rule adopts the proposed definition of ''subcontractor,'' amended as discussed above to eliminate the reference to the statutory language from 40 U.S.C. 3142(c)(1).

(E) Apprentice and Helper

The Department proposed to amend the current regulatory definition in § 5.2(n) of ''apprentice, trainee, and helper'' to remove references to trainees. A trainee is currently defined as a person registered and receiving on-the-job training in a construction occupation under a program approved and certified in advance by the Employment and Training Administration (ETA) as meeting its standards for on-the-job training programs, but ETA no longer reviews or approves on-the-job training programs, so this definition is unnecessary. *See* section III.B.3.iii.(C) (''29 CFR 5.5(a)(4) Apprentices''). The Department also proposed to modify the definition of ''apprentice and helper'' to reflect the current name of the office designated by the Secretary of Labor, within the Department, to register apprenticeship programs.

The Department received three comments in response to this proposal. CEA and SMACNA both agreed that ETA no longer reviews or approves on-the-job training programs and supported the Department's proposal to remove references to trainees. The Illinois Asphalt Pavement Association (IAPA) opposed the Department's proposal and stated that ''eliminating trainees from the Davis[-]Bacon Act may have unintended consequences.'' IAPA noted that the Illinois Department of Transportation has a ''Highway Construction Careers Training Program'' with the U.S. Department of Transportation's (USDOT) Federal Highway Administration (FHWA), in which individuals receive intensive training in highway construction-related skills.[183] IAPA cautioned that these student trainees may not be able to work on Davis-Bacon projects if the trainee language is removed.

The Department notes that the proposed regulatory definition in § 5.2 retains the text currently found in § 5.2(n)(3), which states that the regulatory provisions do not apply to trainees employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c). The Department believes that retention of this language makes clear that student

(D.R.I. 2005). The Department, however, has also stated that ''as a matter of administrative policy'' the requirements of the DBRA and CWHSSA are not applied to the wages of truck owner-operators who are bona fide independent contractors, even though they are laborers or mechanics within the meaning of the Acts. DBRA–54 (Nov. 1, 1977). The Department has explained in FOH 15e17 that this policy does not apply to owners of other equipment such as bulldozers, and that, as part of the policy, any employees hired by truck owner-operators are subject to the DBRA in the usual manner.

[181] The FOH provision that AGC cites emphasizes the narrowness of the exemption. It states that regardless of ownership interest, an individual ''who is required to work long hours, makes no management decisions, supervises no one and has no authority over personnel does not qualify for the executive exemption.'' FOH 15f06.

[182] Although not for the reason AGC asserted, it may be unlikely that an individual may be both a ''subcontractor'' under the DBRA and a ''business owner'' under the FLSA regulations. This is because the definition of ''business owner'' in the FLSA regulations includes any ''employee'' who owns a bona fide interest of at least 20 percent in ''the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization[.]'' 29 CFR 541.101. Under this language, an individual must actually be an employee of an enterprise or organization for which the individual has an ownership interest for the exemption to apply. This is so because of the terms of the regulation and because the FLSA's minimum wage and overtime pay requirements (the requirements from which part 541 provides exemptions) apply only to employees and not to bona fide independent contractors. The ''business owner'' exemption thus does not apply to an individual who is in business only as a bona fide sole proprietor or is not otherwise an employee of the enterprise or organization in which the individual has the ownership interest. Thus, to the extent such a sole proprietor (as opposed to an LLC or corporation) may subcontract for a portion of the prime contract, the individual would not meet the requirements for exemption as a ''business owner'' under § 541.101.

[183] *See* Ill. Dep't of Transp., ''Highway Construction Careers Training Program,'' *https://idot.illinois.gov/Assets/uploads/files/About-IDOT/Pamphlets-&-Brochures/PA%20HCCTP%20story%201%20kg.pdf* (including ''job site readiness, carpentry, concrete flatwork, blueprint reading orientation, introduction to tools, forklift operation and Occupational Safety and Health Administration 10 certification'').

trainees who are enrolled in such programs may continue to work on Davis-Bacon projects as a recognized category of workers at wage rates determined by the Secretary of Transportation in accordance with 23 U.S.C. 113(c). Accordingly, the Department adopts the change to § 5.2 as proposed.

(F) Laborer or Mechanic

(1) Gender-Neutral Terminology

The Department proposed to amend the regulatory definition of ''laborer or mechanic'' to remove the reference to trainees and to replace the term ''foremen'' with the gender-neutral term ''working supervisors.'' [184] The Department received several comments on this proposal.

The General Contractors Association of New York (GCA), while appreciative of efforts to introduce gender-neutral terminology, recommended using the term ''foreperson'' instead of ''working supervisor'' as the latter term may be confused with managerial positions. ARTBA also recommended the term ''foreperson'' instead, as the term ''working supervisor'' is ''nebulous and could apply to multiple people on a construction site.'' Several commenters objected to the term ''working supervisor,'' noting that the term ''working supervisor'' does not appropriately describe the years of training and skill attainment necessary to achieve the stature of ''journeyperson.'' *See, e.g.,* SMART and SMACNA. This commenter also noted that the word ''supervisor'' has a specific meaning under the National Labor Relations Act (NLRA) and cautioned against importing the word into Davis-Bacon regulations.

Having considered the comments, the final rule adopts the proposed revision with modification. Rather than replacing the term ''foremen'' with ''working supervisor,'' the Department adopts the gender-neutral term ''foreperson.''

(2) Survey Crews

The Department did not propose any additional substantive changes to this definition, but because it frequently receives questions pertaining to the application of the definition of ''laborer or mechanic''—and thus the application of the Davis-Bacon labor standards—to members of survey crews, the Department provided information in the preamble of the NPRM to clarify when survey crew members are laborers or mechanics under the existing definition of that term. The Department adopts that guidance in the preamble to this final rule, with an additional clarification in response to comments received.

Specifically, the NPRM stated that the Department has historically recognized that members of survey crews who perform primarily physical and/or manual work on a DBA or Related Acts covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers or mechanics subject to the Davis-Bacon labor standards.[185] Whether or not a specific survey crew member is covered by these standards is a question of fact, which takes into account the actual duties performed and whether these duties are ''manual or physical in nature,'' including the ''use of tools or . . . work of a trade.'' When considering whether a survey crew member performs primarily physical and/or manual duties, it is appropriate to consider the relative importance of the worker's different duties, including (but not solely) the time spent performing these duties. Thus, survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics (provided that they are not exempt as professional, executive, or administrative employees under part 541). If their work meets other required criteria (*i.e.,* it is performed on the site of the work, where required, and immediately prior to or during construction in direct support of construction crews), it would be covered by the Davis-Bacon labor standards.

The Department sought comment on issues relevant to the application of the current definition to survey crew members, especially the range of duties performed by, and training required of, survey crew members who perform work on construction projects and whether the range of duties or required training varies for different roles within a survey crew based on the licensure status of the crew members, or for different types of construction projects.

The Department received a number of comments in response to the clarifying information provided in the NPRM despite proposing no changes to the definition of ''laborer or mechanic'' that would impact the application of this term to members of survey crews. Many commenters misunderstood the information provided to mean that the Department was proposing to categorically deem members of survey crews to be ''laborers or mechanics'' subject to the Davis-Bacon labor standards and wrote to support or oppose such a change. The Department did not make such a proposal and reiterates that whether a specific survey crew member is covered by the Davis-Bacon labor standards is a question of fact based largely on the actual duties performed. Similarly, some commenters opined that the work performed by survey crew members is ''manual or physical in nature,'' and thus within the definition of ''laborer or mechanic,'' or that such work is ''mental'' or ''intellectual'' in nature, and thus not within the definition, without addressing the range of duties performed by, and training required of, survey crew members who perform work on construction projects. However, the Department has long recognized that work performed by survey crew members ''immediately prior to or during construction in direct support of construction crews'' involves a range of duties, which are evaluated to determine whether a specific survey crew member or category of survey crew members are ''laborers or mechanics.'' AAM 16 (July 25, 1960); AAM 39 (Aug. 6, 1962); AAM 212 (Mar. 22, 2013).[186]

The duties of survey crew members described by commenters varied widely. As a preliminary matter, several commenters distinguished between the surveying work that typically occurs in direct support of construction crews and other work that survey crews may perform. The California Land Surveyors Association (CLSA) noted that ''construction and construction-related land surveying work is a very small fraction of any land surveyor[']s work.'' It further noted that ''[c]onstruction land surveying field work is comprised of an ability to read engineering and architecture plans and convey this information to construction contractor's tradesman so they may self-perform their land surveying work,'' explaining that ''[c]ontractors have the full capacity, due to technology, to perform

[184] The proposal addressing trainees is discussed in greater detail below in section III.B.3.iii.(C) (''29 CFR 5.5(a)(4) Apprentices.'').

[185] 87 FR 15729 (citing AAM 212 (Mar. 22, 2013)).

[186] Commenters that characterize the Department's position as ''flipflopping'' on the issue of survey crew coverage fail to recognize the fact-specific nature of this coverage question. For example, AGC contended that the Department extended coverage to survey crew members in AAM 212 and ''confirmed that surveying work is not covered'' when it rescinded AAM 212. While AAM 212 was rescinded to allow the Department to seek a broader appreciation of the coverage issue and due to its incomplete implementation, *see* AAM 235 (Dec. 14, 2020), its rescission did not change the applicable standard, which is the definition of ''laborer or mechanic'' as currently set forth in 29 CFR 5.2(m), or the Department's position that coverage depends on the range of duties performed.

any prospective land surveying work limited to manual or physical duties related to construction.'' This was echoed by III–FFC, which explained that ''survey work on a construction project is distinct from professional land surveying activities such as marking land boundaries or preparing a description for title or real property rights,'' and by ARTBA, which described the need to ''distinguish between the survey work performed by design professionals and the essential surveying tasks that take place as part of construction activities.'' GCA similarly ''distinguish[ed] between the survey work performed by licensed professionals who often work for design or consulting firms, and the survey work performed by construction crews that are essential to any construction project,'' opining that the latter should ''continue to be covered by prevailing wage requirements.'' An individual commenter noted that as the technology has become more readily available, ''construction companies have been able to purchase equipment and train individuals in their rudimentary measurements functions.'' Another noted that many construction companies now have surveyors on staff.

The Department recognizes that survey work performed ''immediately prior to or during construction in direct support of construction crews'' may differ from survey work performed in other contexts and may vary in complexity. The Department has kept this in mind while reviewing the duties described by commenters, focusing on the duties performed by survey crew members on Davis-Bacon covered contracts. For instance, several commenters described work performed off the site of the work, including preliminary office work, such as preparing design information for use in the field; uploading design information to the total station, GPS device, or data collector; research; and postliminary office work, such as downloading and reviewing information from that day's field work. IAPA; Illinois Professional Land Surveyors Association (IPLSA); IRTBA; OCA. Because such duties would not generally be performed on the site of the work, and thus would not be subject to the Davis-Bacon labor standards, the Department did not consider such duties to be an integral part of the work performed for the purposes of determining whether survey crew members are ''laborers or mechanics'' for the purposes of 29 CFR 5.2(m). Conversely, IAPA pointed out that the Department did not include in the clarifying information in the NPRM its previous determination from AAM 212 that only survey crew members employed by contractors or subcontractors on a project may be covered laborers or mechanics. The Department agrees that only survey crew members employed by contractors or subcontractors on a project may be covered laborers or mechanics.

A number of commenters described the survey work performed on construction sites immediately prior to or during construction in direct support of construction crews. For instance, several commenters explained that this includes reestablishing land boundary monuments and control points, doing construction layout, and placing wooden stakes (known as lath and hubs) that mark the contours of the construction project. IAPA, IPLSA, IRTBA, Michigan Department of Transportation (MDOT), OCA, SIBA. ''A general description of survey work on horizontal construction (*e.g.,* a highway, road, or runway project) begins with laying out the control points provided on the engineer's plans. Next, a survey crew or worker locates, marks, and installs lath and hub with a hammer and/or sledgehammer at certain points across the jobsite (*e.g.,* every 25, 50, or 100 feet) for the initial excavation. A worker may initially use a GPS unit to measure for a 'rough grade.' Then, after initial excavation, the worker may use a robotic instrument for more accurate positioning and elevation and continue to mark various layers of subgrade, including utilization of robotics and GPS positioning for machine control (*e.g.,* excavation, paving, drilling, and pile driving). Throughout the day the worker is physically driving lath and hubs into the earth or carrying, setting up and using equipment around the construction site. From start to finish on a construction project, survey crew members work in direct support of construction crews.'' III–FFC. Of these duties, GCA explained that construction crews can perform duties ''essential to any construction project,'' including ''layout for neat lines, rough excavation, footings, piers, piles, caissons anchor bolts, base plates, walls, major imbedded items, slurry walls, and other procedures that require layout of all lines and grades for vertical and horizonal control.''

Some commenters emphasized aspects of the work requiring the exercise of professional judgment, such as the need to ''observe the progress of the project, read and interpret design data and methods on the construction plans, calculate and determine if the current site conditions meet the intent of the design, and recalculate and/or design a solution in the field that satisfies the plans.'' Michigan Society of Professional Surveyors (MSPS); *see also* MDOT. These commenters also emphasized the need to complete forms, perform calculations and technical and mentals tasks, and the need to use complex electronic devices. MDOT; MSPS.

Other commenters emphasized physical and manual aspects of surveying work, including the use of tools. III–FFC explained: ''To perform their job, survey crew members use data collectors, GPS units, robotic instruments (*i.e.,* robotic total stations), total stations, transits, drones, scanners, and ground penetrating radar. This equipment is used for construction purposes such as: survey control; building control including grid line layout, electrical, plumbing, communications, foundations, and heating, ventilation, and air conditioning (HVAC) systems; clearing; slope staking; rough grade; final/finish grade; drainage and utility layout; curb, sidewalk and other hardscape surface improvements; subdrains; structures; walks; channels' culverts; and stakes or measurements for other related items . . . . Workers on a survey crew also use a variety of tools commonly associated with construction work, including sledgehammers to drive lath and hubs into the ground, hammers, nails, shovel, folding rule, scribe, tool belt, spray paint and ribbon . . . . While some methods have changed with technical advances, the physical nature of survey work has not.'' Similarly, IUOE explained that ''members of Surveyor Crews are on their feet most of the workday, often walking several miles a shift up and down slope. Crew members are often expected to carry 30–40 lbs. worth of equipment with them to perform their task including but not limited to: GPS receivers [and] staff, lathe rub and hack bag, sledgehammer, and shovel. Additionally, Survey Crew members are expected to carry manual tools on utility belts including a 16 oz hammer, gloves, goggles, hand tape and knives. Surveyors are often tasked with navigating rough terrain and working with a GPS to sink stakes, lathes, and hubs with a sledgehammer into the ground for equipment operators to use as a guide for excavating or grading.'' Additionally, they noted that surveyors ''are often tasked with chiseling into concrete with steel hammers to mark where other trades are to locate walls and put-up machinery.'' A professional land surveyor and small business owner opined that ''[c]onstruction survey personnel's duties are considerably

more physically demanding and dangerous than those of power equipment operators who have always been considered labor. While providing construction surveying services does involve significant mental calculations in the interpretation of engineering plans, setting 100 to 1000 stakes per day on an active construction site is nothing but laborious.''

Commenters were also divided as to the impact that technological developments have had on survey crew members duties. IAPA, Professional Land Surveyors of Ohio, and several individual commenters stated that the use of sophisticated technology and field computers has reduced the amount of physical labor required and increased the intellectual requirements. One individual commenter noted that ''such manual labor is now uncommon for our crews, who by the virtue of technology spend nearly all their time in intellectual labor with extremely complex, delicate and very expensive equipment.'' CLSA explained that ''technology has allowed contractors to perform their construction work with less involvement of a land surveyor. Machine guidance—GPS mounted to construction equipment for the purposes of determining precise grading—has eliminated the mass grading work and underground utilities staking work previously performed by land surveyors. Contractors rely on a land surveyor's expertise in the limited capacities of establishment of three-dimension project control, development of digital design models, specialized training and certifications of the contractors' work, such as building pad elevation and foundation form certifications.''

The wide range of duties described, as well as the differences between the scope of work performed by survey crews employed by surveying or design firms versus survey crews employed by construction companies, highlights the need to evaluate the specific duties performed by the survey crew members on a project. The Department reiterates its view set forth in the NPRM that whether a specific survey crew member is covered by these standards is a question of fact, which takes into account the actual duties performed and whether these duties are ''manual or physical in nature,'' including the ''use of tools or . . . work of a trade.'' Consideration of tool use is particularly important given the technological developments in surveying. The Department notes that while the computerized equipment used in surveying today is more sophisticated than the hand tools of the past, certain uses of this new technology have made it easier for those with less training and academic background to perform surveying tasks required on construction jobsites. *See* ARTBA, CLSA, GCA. In light of these developments, the Department continues to believe that survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics (provided that they are not exempt as professional, executive, or administrative employees under part 541, as discussed). If their work meets other required criteria—*i.e.,* it is performed on the site of the work (where required) and immediately prior to or during construction in direct support of construction crews—it would be likely covered by the Davis-Bacon labor standards. Similarly, the Department considers duties such as walking and carrying equipment and setting stakes to be physical or manual for the purposes of determining whether a survey crew member is a ''laborer or mechanic.''

A number of commenters, particularly those associated with professional surveying organizations, expressed strong disagreement with the Department's view that survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics. *See, e.g.,* CLSA, IPLSA, National Society of Professional Surveyors (NSPS). In support of their position, they cite AAM 39 (which they refer to as the ''Goldberg Standard''), characterizing it as ruling that members of survey crews were exempt from Davis-Bacon, and that such workers are covered only to the extent to which they ''perform manual work, such as clearing brush and sharpening stakes.'' NSPS. They further asserted that ''[s]taking by survey crews on a job site is 1% the physical and manual task of putting a stake in the group and 99% collecting and analyzing data and making judgments for determining where to set a stake.'' NSPS. IPLSA contends that the NPRM was ''the first time that the Department has ever referenced taking measurements as a physical or manual task.'' IPLSA.

These characterizations of the Department's proposal are somewhat overstated. Two years prior to issuing AAM 39, the Department issued AAM 16, in which it concluded that survey crew members who acted as ''chainmen,'' ''rodmen,'' and ''instrument men'' were laborers or mechanics for the purposes of applying the Davis-Bacon labor standards (in contrast, the party chief was considered a bona fide supervisor excluded from the definition of ''laborer or mechanic''). In reaching its decision, the Department evaluated the duties performed by these survey crew members. In addition to clearing brush and sharpening stakes, the determination noted that ''chainmen and rodmen'' also set stakes, handled the rod and tape, and performed other comparable duties. In evaluating the ''instrument men'' role, the Department considered that it involved, among other physical tasks, ''occasionally perform[ing] the physical work of rodmen or chainmen,'' ''carry[ing] and plac[ing] the instruments . . . [and] operat[ing] them,'' ''mak[ing] the sighting and tak[ing] and record[ing] the readings,'' as well as being required ''to exercise discretion, judgment, and skill involving problems encountered in the field.'' Notably, these physical tasks include several examples of using surveying tools.

While AAM 39 appears to take a narrower view of the duties performed by laborers and mechanics, reliance on this AAM is misplaced. As demonstrated by the numerous comments received, the duties performed by survey crew members are far different from those described in AAM 39 (even the earlier AAM 16 described a wider array of duties). Moreover, as several commenters indicated, the more sophisticated equipment available today actually makes them easier for survey crew members with less training and academic background to use. Finally, it is not clear that the narrow reading of ''laborer or mechanic'' in AAM 39 is consistent with the common meaning of those terms when the Davis-Bacon Act was enacted. While it distinguished the term ''laborer'' as ''one who performs manual laborer or labors at a toilsome occupation requiring physical strength'' from the term ''mechanic,'' a ''skilled worker with tools, who has learned a trade,'' it failed to articulate why the latter would not apply to a wider range of survey crew members who use tools or even to address other types of physical work performed by survey crew members, such as walking and carrying equipment.[187]

[187] The statutory term ''laborer or mechanic'' incorporates the meanings of the terms ''laborer'' and ''mechanic'' as these were commonly understood in 1931. *See* SMART and cases cited therein. Thus, any interpretation of ''laborer or mechanic'' that focuses solely on the meaning of ''laborer'' is inconsistent with the statute. For this reason, the Department finds unpersuasive the point raised by several commenters, *e.g.,* IRTBA, NSPS, that, because the BLS separately defines the terms ''surveyor'' and ''laborer,'' members of survey crews cannot be laborers or mechanics. In response

Several commenters asserted that surveyors, or survey crew members more generally, should be treated as ''learned professionals'' under 29 CFR part 541, and therefore excluded from the definition of ''laborer or mechanic,'' 29 CFR 5.2(m) (''Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics.''), because surveying is recognized as a ''professional service'' akin to architecture or engineering under the Brooks Act, 40 U.S.C. 1101 *et seq.* American Council of Engineering Companies; IAPA; IRTBA; NSPS; OCA; SIBA. Commenters also highlighted the training and licensure requirements for surveyors and expressed the view that survey crew members ''are either professional land surveyors or overseen by professional land supervisors'' and should therefore not be considered ''laborers or mechanics.'' IAPA; IPLSA; IRTBA; OCA; SIBA. Specifically, NSPS noted that all 50 states license individuals to engage in the professional practice of surveying, and an individual commenter stated that most states require a 4-year college degree. CLSA explained that while ''[e]very state recognizes a bachelor's degree in land surveying as a qualification to becoming a licensed land surveyor,'' 12 states require a 4-year degree in land surveying or an associated field and 38 require at least some formal education as a minimum qualification to becoming a licensed land surveyor. It further noted that a surveyor working in the field has training in engineering and that a construction surveyor has ''a high level of technical training anchored in math, related professions, construction management, and electronic data management.'' IAPA, IPLSA, IRTBA, OCA, and SIBA explained that Professional Land Surveyors licensed in Illinois must have a baccalaureate degree in land surveying or a related science field with 24 credits of land surveying course from an accredited college, pass two licensing exams, and serve as a surveyor in training for 4 years, and then continue to take continuing education to remain licensed. Similarly, MSPS stated that survey crew members working on construction projects operate as ''highly knowledgeable, specially trained, technicians and paraprofessionals'' whose education and certificates of achievement ''provide advanced knowledge in the surveying profession necessary for taking or assisting in taking measurements and exceed the classification of 'laborers or mechanics.' '' An individual commenter noted that survey crews often employ individuals with associate's or bachelor's degrees, while another referred to such survey technicians as ''future professionals.''

III–FFC noted that licensure status is not determinative as ''[o]ther trades have licensing requirements . . . including plumbers, electricians, roofing contractors, water well contractors, and water pump installation contractors'' and contended that ''[e]ven if work under a particular classification must be performed by, or under supervision of, a licensed individual, this requirement does not exclude workers from coverage, including survey crew members.''

To the extent that licensed professional surveyors meet the definition of ''learned professionals'' in 29 CFR part 541, they are not ''laborers or mechanics'' subject to the Davis-Bacon labor standards. 29 CFR 5.2(m) (''Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics.''); AAM 16. To qualify as a ''learned professional,'' for the purposes of part 541 and § 5.2(m), one's primary duty ''must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.'' 29 CFR 541.301(a). Work requiring ''advanced knowledge'' means work which is ''predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine, manual, mechanical or physical work.'' 29 CFR 541.301(b). Thus, an employee who performs work requiring advanced knowledge ''generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.'' *Id.* A ''field of science or learning'' includes ''occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.'' 29 CFR 541.301(c). Specialized academic training must be a standard prerequisite for entrance into the profession (though this does not exclude the occasional professional who has ''substantially the same knowledge level and perform[s] substantially the same work as the degreed employees, but who obtained the advanced knowledge through a combination of work experience and intellectual instruction''). 29 CFR 541.301(d). However, practitioners of occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through apprenticeship or training, will generally not be deemed ''learned professionals.'' *Id.*

While state requirements vary, based on the information received from commenters, the Department believes licensed surveyors may in some cases be ''learned professionals'' and thus excluded from the definition of ''laborers or mechanics.'' However, this conclusion may vary, particularly where state licensing requirements do not customarily require a prolonged course of specialized intellectual instruction. *See Goebel* v. *Colorado,* No. 93–K–1227, 1999 WL 35141269, at *7 (D. Co. 1999) (concluding at summary judgment that, under state licensing requirements involving a combination of surveying courses and land surveying experience, but no college degree, that surveying did ''not require the 'advanced type of knowledge' gained through 'a prolonged course of specialized intellectual instruction and study''' necessary to fall into the category of ''learned professionals'').

However, other members of survey crews, even if working under the supervision of a licensed surveyor, cannot be excluded from the definition of ''laborer or mechanic'' on this basis. Unlicensed survey crew members have not completed specialized academic training or demonstrated ''substantially the same knowledge level'' to state licensing authorities to secure a professional license. *See* 29 CFR 541.301(d). Because they must work under the supervision of a licensed surveyor, rather than independently, on any work requiring a license, they are generally not ''perform[ing] substantially the same work'' as licensed surveyors. *See id.* Unlicensed paraprofessionals are generally not considered ''learned professionals.'' *See* 29 CFR 541.301(e)(7) (paralegals are not

to such narrow interpretations, including the Department's interpretation in AAM 39, SMART opined that the Department should modify the definition of ''laborer or mechanic'' to *inter alia* give effect to each of its component terms. The Department notes that it did not propose any substantive changes to the definition of ''laborer or mechanic.'' Moreover, it believes that the current definition adequately reflects the separate characteristics of ''laborers'' and ''mechanics.'' The Department also notes that to the extent SMART referred to the Department's position about flaggers being laborers or mechanics, as reflected in AAM 141 (Aug. 16, 1985) since 1985, the revisions in this rule regarding flaggers do not address their status as laborers or mechanics, but rather clarify coverage of flaggers in connection with the site of the work.

learned professionals) and (e)(2) (practical nurses and other similar heath care employees, *even if licensed,* are not learned professionals because ''possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations''). Nor does the inclusion of surveying as a professional service under the Brooks Act suggest that unlicensed survey crew members should be deemed ''learned professionals'' excluded from the protections of the Davis-Bacon labor standards. As discussed above, whether unlicensed survey crew members are deemed ''laborers or mechanics'' will depend, not on the application of the part 541 ''learned professional'' exclusion in § 5.2(m), but on whether the specific range of duties they perform are ''manual or physical in nature (including . . . [the] use [of] tools or . . . the work of a trade), as distinguished from mental or managerial.'' *See* 29 CFR 5.2(m).[188]

After considering the comments received, the Department adopts as guidance the clarifying language set forth in the NPRM with one modification: The Department has historically recognized that members of survey crews who perform primarily physical and/or manual work while employed by contractors or subcontractors on a DBA or Related Acts covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers or mechanics subject to the Davis-Bacon labor standards. Whether or not a specific survey crew member is covered by these standards is a question of fact, which takes into account the actual duties performed and whether these duties are ''manual or physical in nature'' including the ''use of tools or . . . work of a trade.'' When considering whether a survey crew member performs primarily physical and/or manual duties, it is appropriate to consider the relative importance of the worker's different duties, including (but not solely) the time spent performing these duties. Thus, survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics (provided that they do not meet the tests for exemption as professional, executive, or administrative employees under part 541). If their work meets other required criteria (*i.e.,* it is performed on the site of the work, where required, and immediately prior to or during construction in direct support of construction crews), it would be covered by the Davis-Bacon labor standards.

(G) Site of the Work and Related Provisions

In the proposed rule, the Department proposed the following revisions related to the DBRA's ''site of the work'' requirement: (1) revising the definition of ''site of the work'' to further encompass certain construction of significant portions of a building or work at secondary worksites, (2) clarifying the application of the ''site of the work'' principle to flaggers, (3) revising the regulations to better delineate and clarify the ''material supplier'' exemption, and (4) revising the regulations to set clear standards for DBA coverage of truck drivers.

As discussed further below, having reviewed and considered the comments received, the Department is making certain revisions to these proposals in the final rule. Specifically, the final rule limits coverage of secondary worksites to locations where specific portions of a building or work are constructed and were either established specifically for contract performance or are dedicated exclusively or nearly so to the contract or project; further clarifies the material supplier exemption; and clarifies coverage of truck drivers employed by contractors or subcontractors by codifying the Department's current *de minimis* standard rather than using an analogous standard from the FLSA.

(1) Statutory and Regulatory Background

a. Site of the Work

The DBA and Related Acts generally apply to ''mechanics and laborers employed directly on the site of the work'' by ''contractor[s]'' and ''subcontractor[s]'' on contracts for ''construction, alteration, or repair, including painting and decorating, of [covered] public buildings and public works.'' 40 U.S.C. 3142(a), (c)(1). The Department's current regulations define ''site of the work'' as encompassing three types of locations: (1) ''the physical place or places where the building or work called for in the contract will remain,'' (2) ''any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project,'' and (3) ''job headquarters, tool yards, batch plants, borrow pits, etc.'' that are both ''dedicated exclusively, or nearly so, to performance of the contract or project'' and ''adjacent or virtually adjacent to the site of the work'' itself. 29 CFR 5.2(*l*)(1), (2). The ''site of the work'' requirement does not apply to Related Acts that extend Davis-Bacon coverage to all laborers and mechanics employed in the ''development'' of a project; such statutes include the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996. *See id.* § 5.2(j)(1); 42 U.S.C. 1437j(a); 25 U.S.C. 4114(b)(1), 4225(b)(1)(B); 42 U.S.C. 12836(a). As the Department has previously noted, ''the language and/or clear legislative history'' of these statutes ''reflected clear congressional intent that a different coverage standard be applied.'' 65 FR 80267, 80275 (Dec. 20, 2000) (2000 final rule); *see Griffin* v. *Sec'y of Lab.,* ARB Nos. 00–032, 00–033, 2003 WL 21269140, at *13 n.5 (May 30, 2003) (noting that the United States Housing Act of 1937 ''provides that all construction activity funded or assisted under its auspices is subject to DBA requirements if that work is performed 'in the development' of a covered project'' and therefore ''has no 'site of the work' restriction''); *L.T.G. Constr. Co.,* WAB No. 93–15, 1994 WL 764105, at *4 (Dec. 30, 1994) (noting that ''the Housing Act [of 1937] contains no 'site of work' limitation similar to that found in the Davis-Bacon Act'').

b. Offsite Transportation

The ''site of the work'' requirement is also referenced in the current regulation's definition of ''construction, prosecution, completion, or repair,'' which provides that ''the transportation of materials or supplies to or from the site of the work'' is not covered by the DBRA, except for such transportation under the statutes to which the ''site of the work'' requirement does not apply, as described above in paragraph (a). 29 CFR 5.2(j)(2). However, the regulation explains that transportation to or from the site of the work is covered where a covered laborer or mechanic employed by a contractor or subcontractor transports materials between an ''adjacent or virtually adjacent'' dedicated support site that is part of the site of the work pursuant to 29 CFR 5.2(l)(2), or transports portions of the building or work between a site where a significant portion of the building or

[188] MnDOT would have the Department simplify its analysis under 29 CFR 5.2(m), by considering survey crew members '' 'laborers or mechanics' subject to prevailing wage rates when performing work under the contract unless they are licensed surveyors.'' Given the range of duties performed by survey crew members on Davis-Bacon covered contracts, the Department does not believe it could implement such an approach without modifying § 5.2(m), which it did not propose doing in the NPRM.

work is constructed and that is established specifically for contract or job performance, which is part of the site of the work pursuant to 29 CFR 5.2(l)(1), and the physical place or places where the building or work will remain.[189] 29 CFR 5.2(j)(1)(iv)–(l)(2).

c. Material Supplier Exception

While not explicitly set out in the statute, the DBA has long been understood to exclude from coverage employees of bona fide ''material suppliers'' or ''materialmen.'' *See* AAM 45 (Nov. 9, 1962) (enclosing WHD Opinion Letter DB–30 (Oct. 15, 1962)); AAM 36 (Mar. 16, 1962) (enclosing WHD Opinion Letter DB–22 (Mar. 12, 1962)); *H.B. Zachry Co.* v. *United States,* 344 F.2d 352, 359 (Ct. Cl. 1965); FOH 15e16. This principle has generally been understood to derive from the limitation of the DBA's statutory coverage to ''contractor[s]'' and ''subcontractor[s].'' *See* AAM 36, WHD Opinion Letter DB–22, at 2 (discussing ''the application of the term subcontractor, as distinguished from materialman or submaterialman''); *cf. MacEvoy* v. *United States,* 322 U.S. 102, 108–09 (1944) (distinguishing a ''subcontractor'' from ''ordinary laborers and materialmen'' under the Miller Act); FOH 15e16 (''[B]ona fide material suppliers are not considered contractors under DBRA.''). Typically, these are companies whose sole responsibility under the contract or project is to furnish materials, such as sand, gravel, and ready-mixed concrete, rather than to perform construction work.

Like the ''site of the work'' restriction, the material supplier exception does not apply to work under statutes that extend Davis-Bacon coverage to all laborers and mechanics employed in the ''development'' of a project, regardless of whether they are employed by ''contractors'' or ''subcontractors.'' *See* 29 CFR 5.2(j)(1) (defining ''construction, prosecution, completion, or repair'' as including ''[a]ll types of work done on a particular building or work at the site thereof . . . by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, all work done in the construction or development of the project)''); 29 CFR 5.2(i) (''The manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.'').

d. Relevant Regulatory History and Case Law

The regulatory provisions regarding the site of the work were revised in 1992 and 2000 in two distinct fashions.

First, in response to a series of appellate court decisions in the 1990s, the provisions were revised to narrow the geographic scope of the site of the work and to preclude coverage of offsite transportation in most circumstances. Specifically, the language in § 5.2(l) that deems dedicated sites such as batch plants and borrow pits part of the site of the work only if they are ''adjacent or virtually adjacent'' to the construction site was adopted in 2000 in response to *Ball, Ball & Brosamer, Inc.* v. *Reich,* 24 F. 3d 1447 (D.C. Cir. 1994) and *L.P. Cavett Company* v. *U.S. Department of Labor,* 101 F.3d 1111 (6th Cir. 1996), which concluded that batch plants located only a few miles from the construction site (2 miles in *Ball,* 3 miles in *L.P. Cavett*) were not part of the ''site of the work.'' *See* 65 FR 80269–71.[190] The ''adjacent or virtually adjacent'' requirement in the current regulatory text is one that the courts in *Ball* and *L.P. Cavett* suggested, and which the ARB later concluded, to be consistent with the statutory ''site of the work'' requirement. *See L.P. Cavett,* 101 F.3d at 1115; *Ball, Ball & Brosamer,* 24 F.3d at 1452; *Bechtel Constructors Corp.,* ARB No. 97–149, 1998 WL 168939, at *4 (Mar. 25, 1998). Similarly, the provision in § 5.2(j)(2) that excludes, with narrow exceptions, ''the transportation of materials or supplies to or from the site of the work'' from coverage stems from a 1992 interim final rule, *see* 57 FR 19204 (May 4, 1992) (1992 IFR), and was adopted in response to *Building & Construction Trades Dep't, AFL–CIO* v. *U.S. Dep't of Labor Wage Appeals Bd.* (*Midway*), in which the D.C. Circuit held that drivers of a prime contractor's subsidiary who picked up supplies and transported them to the job site were not covered by the DBA for their time spent going to and from the site because ''the Act applies only to employees working directly on the physical site of the public building or public work under construction.'' 932 F.2d 985, 990 (D.C. Cir. 1991).[191]

Second, as discussed in more detail below in the discussion of ''Coverage of construction work at secondary construction sites,'' in response to developments in construction that had enabled companies in some cases to construct entire portions of public buildings or works offsite, the Department broadened the ''site of the work'' in the 2000 final rule by adding the provision in § 5.2(l)(1) that encompasses offsite locations ''where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.'' 65 FR 80278.

(2) Regulatory Revisions

In the NPRM, the Department proposed the following regulatory changes related to the ''site of the work'' requirement: (1) revising the definition of ''site of the work'' to further encompass certain construction of significant portions of a building or work at secondary worksites, (2) clarifying the application of the ''site of the work'' principle to flaggers, (3) revising the regulations to better delineate and clarify the ''material supplier'' exemption, and (4) revising the regulations to set clear standards for DBA coverage of truck drivers. The following discussion explains, with regard to each issue, the proposal, the comments received, and the Department's decisions in the final rule.

a. Coverage of Construction Work at Secondary Construction Sites

The current regulatory definition of ''site of the work'' includes a site away from the location where the building or work will remain where a ''significant portion'' of a building or work is constructed at the site, provided that the site is established specifically for the performance of the contract or project. § 5.2(*l*)(1). In the 2000 final rule in which this language was added, the Department explained that it was intended to respond to technological

[189] For more detail on this topic, see the section titled ''Coverage of Construction Work at Secondary Construction Sites.''

[190] Prior to 2000, the Department had interpreted ''site of the work'' more broadly to include, in addition to the site where the work or building would remain, ''adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the 'site.' '' 29 CFR 5.2(l) (1990); *see* 65 FR 80269; AAM 86 (Feb. 11, 1970). This interpretation encompassed the offsite batch plants in *Ball* and *L.P. Cavett* that the courts in those cases concluded were too far from the primary worksite. Accordingly, the Department revised the regulation in the 2000 final rule to adopt the ''adjacent or virtually adjacent'' standard.

[191] Prior to 1992, the Department had interpreted the DBA as covering the transportation of materials and supplies to or from the site of the work by workers employed by a contractor or subcontractor. *See* 29 CFR 5.2(j) (1990).

developments that had enabled companies in some cases to construct entire portions of public buildings or works offsite, leaving only assembly or placement of the building or work remaining. *See* 65 FR 80273 (describing ''the innovative construction techniques developed and currently in use, which allow significant portions of public buildings and public works to be constructed at locations other than the final resting place of the building or work''). The Department cited examples, including a dam project where ''two massive floating structures, each about the length of a football field'' were constructed upriver and then floated downriver and submerged; the construction and assembly of military housing units in Portland for final placement in Alaska; and the construction of modular units to be assembled into a mobile service tower for Titan missiles. *See id.* (citing *ATCO Constr., Inc.,* WAB No. 86–1, 1986 WL 193113 (Aug. 22, 1986), and *Titan IV Mobile Serv. Tower,* WAB No. 89–14, 1991 WL 494710 (May 10, 1991)).

The Department stressed that this new provision was a narrow one, intended to apply only to the ''rare'' situations where ''such a large amount of construction is taking place that it is fair and reasonable to view such location as a site where the public building or work is being constructed.'' 65 FR 80274, 80276. It further stated that the limit of such coverage to facilities that are established specifically for the performance of a particular contract or project was necessary to exclude ''[o]rdinary commercial fabrication plants, such as plants that manufacture prefabricated housing components,'' which have long been understood to be outside the DBA. *Id.* at 80274. The Department explained that ''[i]t [was] the Department's intention in [that] rulemaking to require in the future that workers who construct significant portions of a federal or federally assisted project at a location other than where the project will finally remain, will receive prevailing wages as Congress intended when it enacted the Davis-Bacon and related Acts.'' *Id.* Consistent with this amendment, the Department also revised § 5.2(j) to cover transportation of portion(s) of the building or work between such a site and the location where the building or work would ultimately remain, explaining that ''under these circumstances[,] the site of the work is literally moving between the two work sites,'' 65 FR 57269, 57273 (Sept. 21, 2000), and as such, ''workers who are engaged in transporting a significant portion of the building or work between covered sites . . . are 'employed directly upon the site of the work.' '' 65 FR 80276.

In the NPRM, the Department proposed to expand this aspect of the definition of ''site of the work'' to include ''any . . . site(s) where a significant portion of the building or work is constructed, provided that such construction is for specific use in that building or work and does not simply reflect the manufacture or construction of a product made available to the general public.'' The NPRM explained that since 2000, technological developments have continued to facilitate offsite construction that replaces onsite construction to an even greater degree and that the Department expects such trends to continue in the future, including in Federal and federally assisted construction. 87 FR 15731 (citing Dodge Data and Analytics, ''Prefabrication and Modular Construction 2020'' (2020), at 4, and GSA, Sched. 56—''Building and Building Materials, Industrial Service and Supplies, Pre-Engineered/ Prefabricated Buildings Customer Ordering Guide'' (GSA Sched. 56), at 5–7).[192] The Department further stated that ''when 'significant portions' of a building or work that historically would have been built where the building or work will ultimately remain are instead constructed elsewhere, the exclusion from the DBA of laborers and mechanics engaged in such construction is inconsistent with the DBA.'' *Id.* at 15732. Therefore, the Department proposed to eliminate the current regulation's requirement that an offsite facility at which such ''significant portions'' are constructed must also be ''established specifically for the performance of a particular contract or project'' in order to be considered part of the ''site of the work.'' The Department explained that the goal of excluding ''[o]rdinary commercial fabrication plants'' and similar material supply facilities and factories could be better accomplished by elaborating on the definition of ''significant portion,'' which the Department proposed to define as ''one or more entire portion(s) or module(s) of the building or work, as opposed to smaller prefabricated components, with minimal construction work remaining other than the installation and/or assembly.''

The Department received numerous comments regarding the proposal concerning secondary construction sites.

Most labor unions and groups representing union-affiliated employers supported the proposal, agreeing that the extension of coverage was consistent with the intent of the DBA and would prevent businesses from paying non-prevailing rates for work that historically had been performed by DBA-covered workers at the primary worksite. Examples of such comments included those from NABTU, LIUNA, SMART, The Association of Union Contractors (TAUC), UA, and MCAA.[193]

Some commenters, such as NABTU, IBEW, LIUNA, and UA, urged the Department to expand coverage even further, contending that the NPRM's limitation of coverage to locations where ''entire portions or modules'' of a public work are constructed, ''as opposed to smaller prefabricated components,'' was unwarranted, and that the proposed definition of ''significant portion'' should be changed to mean ''one or more portion(s), module(s) and/or individualized fabricated component(s) that are integral to the building or public work,'' to include even smaller custom components like custom pipe bends. NABTU and several other commenters that incorporated NABTU's comments by reference further argued that *Midway, L.P. Cavett,* and *Ball* were wrongly decided and encouraged the Department to abandon the distinction between work performed at ''primary'' or ''secondary'' sites, suggesting the term ''work'' in the phrase ''site of the work'' does not refer to the public work or building being constructed, but to any work that is specific to, and customized for, a DBA project. The UA made similar arguments. SMART urged the Department to consider the impact of building information modelling (BIM), a software modeling process that enables ''virtual construction of a building's superstructure and mechanical, electrical, and plumbing systems before the off-site or on-site construction of the physical buildings, portions, modules, or components begins,'' and to integrate a reference to BIM and similar technologies into the definitions of ''secondary construction site(s).'' Some commenters supporting the proposal provided examples of the use of offsite construction in Federal or federally funded projects; LIUNA, for example, cited the FHWA's seeking to develop innovations in offsite bridge

[192] *See https://proddrupalcontent.construction.com/s3fs-public/SMR1219_Prefab_2020_small-compressed.pdf; https://www.gsa.gov/cdnstatic/SCHEDULE_56_-_ORDERING_GUIDE.pdf.*

[193] MCAA, a group of union-affiliated contractors, noted in its comment that while its support of the proposal reflected the view of most of its member employers, some of its members dissented from that view.

construction, modular construction in airport expansion projects, prefabricated chemical storage buildings at DOE's national laboratories, and the use of prefabricated structures in Army Corps of Engineers navigation projects.

A few commenters recommended clarifications to the proposed definition of ''significant portion.'' For example, the NECA and the New York State Metropolitan Transportation Authority (MTA) requested that the Department ensure the definition of ''significant portions'' not include smaller prefabricated components such as electrical racks, temporary power distribution centers, prefabricated tiled wall units, elevators and escalators, and bus and train wash units. NECA further stated that the Department should ''consider when determining 'significant portion' that the prefabrication materials are specific and/or unique to the project itself and are not readily available to the general public or commercial market.'' The MTA also recommended that the Department clarify that, where required, the prevailing wage for offsite work should reflect the area where the offsite work is performed, as opposed to the area of the primary work site, and that no prevailing wage requirements apply to offsite fabrication that takes place in a foreign country. American Clean Power (ACP), while opposing the expansion in general, asserting that it was inconsistent with congressional intent, suggested in the alternative that ''significant portion'' be changed to eliminate any reference to size or modularity and instead to tie coverage or the lack thereof to a secondary site's ''permanence, independence, and distance'' from the primary worksite.

Except for groups representing union-affiliated employers, commenters representing employers generally opposed the proposed expansion of coverage of offsite work. Many of these commenters, including ABC and its member campaign comments, MBI, AGC, NAHB, OCA, and IRTBA, argued that the Department's proposal impermissibly exceeded the statutory restriction of coverage to ''site of the work'' as the term has been interpreted in *Midway, Ball,* and *L.P. Cavett.* Several commenters focused specifically on the proposal's potential impact on modular construction, arguing that proposed expansion would increase the cost of modular construction projects and imperil the modular industry and its workers. These commenters, including, for example, SG Echo, Parkline, Inc., Clark Pacific, Modular Solutions, Ltd., and IEC, described the modular industry as highly competitive and relatively low-margin, and argued that prevailing wage rates would cause modular companies to become less competitive in the marketplace, leading to increased costs to taxpayers on public buildings and works. Some commenters pointed to what they asserted are advantages of modular construction in arguing against the proposed expansion. For example, MBI, California Housing Consortium (CHC), and others argued that in addition to being more predictable and efficient, construction in a factory-controlled environment is safer for workers and more environmentally friendly than traditional construction, and that those priorities would be adversely affected if the industry were impacted by the proposed coverage expansion. Enterprise Electrical, LLC asserted that offsite operations provide an entry point for less experienced workers to be introduced to a trade that will enable them to graduate to onsite locations where they can earn higher wages.

Several of these commenters, including Conscious Communities, the CHC, Cloud Apartments, Optimum Modular Solutions, Southeast Modular, The Pacific Companies, and Manufactured Housing Institute, commented that the ''site of the work'' expansion would negatively impact the affordable housing sector, noting that the efficiencies and cost savings of modular construction can increase the availability of affordable housing. They argued that by effectively removing the cost advantages of modular construction, the proposal will deter modular housing firms from working on DBRA-covered projects. One such commenter, The Pacific Companies, stated that if the proposed changes are implemented, it would cease using Federal funding that triggers Davis-Bacon coverage for the construction of affordable housing, and would shift its business to producing market-based housing or commercial developments.

Some commenters opposing the proposal cited a lack of clarity with regard to coverage scope and impact. For example, MBI and ACP argued that the Department's proposed definition of ''significant portion'' was unclear and would cause tremendous uncertainty, and that employers would have to guess whether or not certain work is covered and could face significant liability if their interpretation is later determined to be incorrect. ACP specifically expressed concern that the new definition of ''significant portion'' would be a deviation from the current one on which stakeholders are relying to seek Federal funding under the IIJA. The SBA Office of Advocacy argued that the extent of the economic impact of the proposed expansion, including the number of small businesses that will be newly DBA-covered under the proposal, was unclear and that the Department should undertake further analysis of these issues.

Some commenters also raised concerns regarding whether it would be feasible or appropriate to apply Davis-Bacon rates for onsite construction to an offsite environment. For example, Quartz Properties and Phoenix Modular Elevator argued that the tasks and skills of offsite factory workers differ substantially from those of onsite workers, and Blazer Industries contended that paying factory workers different rates for government contract or federally funded work that is otherwise identical to non-covered work would be administratively difficult, since such workers typically work on multiple projects in a given day, and could hurt employee morale if some workers earn more than others doing the same kind of work. FTBA similarly argued that construction activity will be difficult to segregate from commercial, non-DBA work, including work manufacturing materials covered by the Walsh-Healey Public Contracts Act, and that this will lead to confusion and inadvertent violations of law. ACP, GCA, and ARTBA noted that offsite work often occurs at locations far away from the public work's intended location and contended the Department's proposal could impose liability on parties who have no control over the manufacturing process. Two union-affiliated commenters, UBC and Signatory Wall and Ceiling Contractors Alliance, while not expressly opposing the proposal, raised concerns that it could interfere with existing collective-bargaining agreements that cover workers at offsite factories, and proposed that the site of the work not include facilities where in the normal course of business products are manufactured or fabricated for non-Federal or non-federally assisted projects.

After consideration of the comments received, the Department is modifying its proposal to narrow the scope of coverage at secondary construction sites. Specifically, the final rule provides that for a secondary construction site to be considered part of the site of the work, in addition to being a location where a significant portion of a building or work is constructed for specific use in the designated building or work, the site must be either established specifically for the performance of the covered contract or project or dedicated

exclusively, or nearly so, to the covered contract or project.

While the Department remains concerned that the trend toward offsite construction of portions of buildings or works that are otherwise covered by the DBA and its Related Acts may result in fewer workers earning Davis-Bacon wages, in derogation of Congress's intent in enacting these statutes, the Department believes that commenters have raised valid concerns regarding the specific proposal in the NPRM. Specifically, the Department agrees that further analysis of the potential economic impact of such a proposal is warranted, particularly given the concerns raised about potential adverse effects on CBAs and affordable housing.[194] Additionally, while the Department maintains that the interpretation of the term ''site of the work'' advanced in the proposed rule would be a permissible construction of the language of the Davis-Bacon Act, the Department is cognizant that a reviewing court could reach a contrary conclusion based on existing circuit court precedent and the Department does not wish to create unnecessary legal uncertainty surrounding this issue at this time without further analysis or information about potential impacts. Finally, the Department recognizes that it could be challenging and resource-intensive for companies operating what are essentially factory environments creating products potentially for multiple clients and projects to pay workers different rates depending on the particular project for which they are creating products at any given point in a day.

Instead, the Department is revising this component of the regulation to reflect a more incremental expansion of coverage of secondary construction sites where significant portions of public works are constructed for specific use in a particular building or work. Specifically, whereas the current regulation includes such sites only if they are established specifically for a DBRA-covered project or contract, the revised regulation also includes any sites that are dedicated exclusively or nearly so to the performance of a single DBRA-covered project or contract—*i.e.,* sites that for a specific period of time are dedicated entirely, or nearly entirely, to the construction of one or more ''significant portions'' of a particular public building or work. The final rule further explains that a ''specific period of time'' in this context means a period of weeks, months, or more, and does not include circumstances where a site at which multiple projects are in progress is shifted exclusively or nearly so to a single project for a few hours or days in order to meet a deadline.

The Department believes that this more limited approach will address the most significant concerns voiced by commenters. Specifically, as noted above, many commenters contended that tracking time and wage rates at facilities engaged in work on multiple projects at once would be infeasible and that the potential administrative costs would especially deter small businesses, which work on multiple projects at a time, from working on Federal or federally funded projects. MBI, for example, asserted that ''the administrative costs of tracking multiple rates of pay and fringe benefits based on the type of project'' would be ''prohibitive.'' One small business owner stated that ''[w]e always have multiple projects being constructed in our facility at any given time with man power bouncing back and forth between projects as needed.'' Another voiced concerns about the potentially ''astronomical'' ''administrative costs of tracking multiple rates of pay based on the type of project.'' Another noted that ''[i]n the plant our staff are multi-tasking all day long,'' that ''small manufacturers everywhere . . . have cross trained employees that do multiple functions during the day on multiple projects,'' and that ''documentation of which project they worked on and which project is federal would be a huge undertaking that may cause our small minority firm to take a second look at doing any federal work.'' Along similar lines, UBC and Signatory Wall and Ceiling Contractors Alliance predicted difficulties with implementing the proposed rule at facilities at which workers are employed on both DBRA-covered and non-DBRA-covered projects. These issues will no longer be significant under the final rule, which will only cover secondary sites established specifically for a particular project or that are dedicated exclusively, or nearly so, to a single DBRA-covered project. Thus, sites at which work is being performed on more than one project at a time—whether DBRA-covered or not—will not be considered secondary construction sites (except for circumstances where work on a second project is merely token work, in which case the site would be deemed ''nearly'' exclusively dedicated to the main project and therefore covered).

Additionally, with a narrower scope of coverage, the Department expects that the impact of the final rule will be in line with the more limited impact of the 2000 final rule that provided for coverage of offsite locations where ''significant portions'' of public works were constructed only if those locations were established specifically for contract performance. In that rule, the Department stated that it anticipated that the number of instances in which the expansion would be implicated would be ''rare'' and that ''the prevailing wage implications would not be substantial.'' 65 FR 80277. While this final rule expands coverage beyond the 2000 rule to include dedicated secondary construction sites even if they were not established for contract performance, the Department believes that the impact will be of a similarly limited order of magnitude and not of the type that will cause significant disruption, particularly given the numerous comments stating that modular construction facilities typically work on multiple projects at a time and would therefore be beyond the scope of this provision. Similarly, the Department believes that narrowing the scope of the rule's change largely addresses concerns noted above regarding stakeholders' reliance on the current definition in seeking Federal funding, and that any remaining such interests are outweighed by the benefits of ensuring that construction workers on DBRA projects are paid Davis-Bacon wages for time spent on the site of the work.

The Department believes that the more limited scope of the final rule also addresses concerns about the potential ambiguity of the term ''significant portion.'' While the Department recognizes that there will be borderline cases, the Department anticipates, as it did in the 2000 final rule, that the distinction between a significant portion or module and a prefabricated component will be clear in the vast majority of cases. *See* 65 FR 80275 (stating that ''where projects are constructed in this manner, application of this provision should normally be obvious''). The Department similarly

[194] Although the Department noted above that it anticipates that this rule's revisions to the definition of prevailing wage will at most result in a limited potential increase in construction costs for a small percentage of the market and will not significantly affect overall housing prices or rents, the Department is cognizant that the definition of ''site of the work'' impacts the scope of covered employers and workers, rather than the amount of the prevailing wage for those already covered. The Department agrees that it is advisable to more closely examine the potential effects of a regulatory revision that could expand coverage to a category of employers that have generally not previously been covered by the Davis-Bacon labor standards. The Department also believes that such closer examination will inform the extent to which Davis-Bacon classifications can easily be applied to an offsite environment in a broader fashion.

agrees with its assessment in the 2000 final rule that ''a precise definition would be unwise because the size and nature of the project will dictate what constitutes a 'significant portion.''' *Id.* However, the final rule adds some additional clarifying language, and now states that a ''significant portion'' ''means one or more entire portion(s) or module(s) of the building or work, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly of the portions or modules at the place where the building or work will remain.'' Given the final rule's more limited scope, the Department anticipates that contractors and subcontractors can refer close questions to the Administrator and will be able to do so at an early stage in the contracting process. To the extent that questions arise frequently, the Department will consider elaborating on the definition of ''significant portion'' in subregulatory guidance.[195] The Department will also continue to solicit and review information regarding offsite construction and other developing trends in construction with Davis-Bacon implications.

The final rule further states explicitly that ''[a] 'significant portion' does not include materials or prefabricated component parts such as prefabricated housing components.'' The Department reiterates that the manufacture of such items has long been understood to be outside the scope of the DBA since the law's inception, and the final rule does not alter this well-established principle. *See Midway,* 932 F.2d at 991 n.12 (citing 1932 House debate on the DBA as evidence that its drafters understood that offsite prefabrication sites would generally not be considered part of the site of the work). Such prefabrication, however, is distinguishable from ''pre-engineering'' or ''modular'' construction, in which significant, often-self-contained portions of a building or work are constructed and then simply assembled onsite ''similar to a child's building block kit.'' GSA Sched. 56 at 5.

Under the latter circumstances, as the Department noted in 2000, ''such a large amount of construction is taking place [at an offsite location] that it is fair and reasonable to view such location as a site where the public building or work is being constructed.'' 65 FR 80274; *see also id.* at 80272 (stating that ''the Department views such [secondary construction] locations as the actual physical site of the public building or work being constructed''). The Department reached this conclusion in 2000 with respect to offsite locations established specifically for contract performance, and the Department concludes that it is equally consistent with the DBA, and with *Midway, Ball,* and *L.P. Cavett,* to apply this principle to locations dedicated exclusively or nearly so to contract performance. While the Department agrees that these appellate decisions generally place the primary focus of the ''site of the work'' inquiry on the physical proximity of a location to the intended location of the building or work, throughout the DBA's long history the Department has recognized that under certain circumstances, the term can also encompass other locations with a sufficient nexus to a particular project based on the nature of the work performed there. *See* AAM 7 (July 18, 1958) (concluding that DBRA applied to sheet metal workers who alternated between the installation site and an off-site shop); *Titan IV Mobile Serv. Tower,* 1991 WL 494710, at *7 (Rothman, J., writing separately) (opining that the removal of construction work from the final location ''does not by the fact of removal alone lose . . . Davis-Bacon Act coverage'').

The final rule is consistent with the overarching principle, reflected in both the site of the work principle and the material supplier exemption, that Davis-Bacon coverage does not apply to activities that are independent of the particular contract or project. *See United Constr. Co., Inc.,* WAB No. 82–10, 1983 WL 144675, at *3 (Jan. 14, 1983) (examining, as part of an inquiry into whether support activities are on the ''site of the work,'' ''whether the activities are sufficiently independent of the primary project to determine that the function of the support activities may be viewed as similar to that of materialman''). As noted above, the Department continues to maintain that as a legal matter, it would be permissible for the Department to interpret the term ''site of the work'' to include any location where custom-made ''significant portions'' of a public building or work are constructed. However, the final rule's restriction of coverage of such facilities to those that are either established for, or dedicated exclusively or nearly exclusively to, a particular project reflects a reasonable balance that the Department believes is supportable as a matter of law and policy in light of the countervailing concerns raised by commenters. In particular, when an offsite location becomes dedicated exclusively, or nearly so, to actual construction of either the entirety or significant portions (as defined in the rule) of a single public building or public work, the character of the offsite location is such that it is ''fair and reasonable'' to view it as a construction site (and not simply a factory) and as a ''site of the work'' for purposes of the project to which it is exclusively (or nearly so) dedicated.

While some commenters voiced concerns that it will be challenging to apply Davis-Bacon classifications in an offsite environment, the Department notes that if the classification of a worker based on the set of the worker's job duties is not straightforward, contractors, agencies, and other interested parties can bring questions to WHD and, if necessary, can submit conformance requests. The Department believes that the consultation and conformance processes, together with the final rule's new procedures for publishing supplemental wage rates under certain circumstances, will adequately address these concerns. The Department fully intends to work with contractors, contracting agencies, and other interested parties to resolve those questions as early in the contracting process as possible. Additionally, to the extent that some of these concerns are grounded in the fact that workers at secondary sites may work in different capacities at different times, this situation is not unique to offsite facilities. To the contrary, the Department's regulations and longstanding interpretation recognize that workers may perform work in more than one classification, and that employers may pay them at the rate for each classification based on the time worked therein, provided that the employer accurately tracks such time. *See* 29 CFR 5.5(a)(1)(i); *Pythagoras Gen. Contracting Corp.,* ARB Nos. 08–107, 09–007, 2011 WL 1247207, at *7 (Mar. 1, 2011), *aff'd sub nom. Pythagoras Gen. Contracting Corp.* v. *U.S. Dep't of Lab.,* 926 F. Supp. 2d 490 (S.D.N.Y. 2013).

For the reasons discussed above regarding the narrowing of the proposed rule, the Department declines commenters' suggestions to expand coverage of offsite construction even further to include smaller custom-made components, or to reject the holdings in *Midway, Ball,* and *L.P. Cavett.* The principles announced by the courts in those decisions are now well-established, including in the Department's own case law. Moreover, an even broader expansion of coverage than proposed in the NPRM would raise

[195] The Department notes that commenters raised similar concerns in the 2000 rulemaking regarding the ambiguity of the term ''significant portions,'' and that those concerns have not, to the Department's knowledge, resulted in significant compliance issues in the 2 decades since.

the concerns regarding costs and impact discussed above, but to an even greater degree. The Department also believes that it is reasonable to distinguish between exclusively-dedicated support sites like batch plants, borrow pits, and prefabrication sites—which under case law and the Department's regulations are part of the site of the work only if adjacent or nearly adjacent to a primary or secondary worksite—and exclusively-dedicated sites at which significant portions are constructed, which under the final rule are covered regardless of proximity to the primary worksite. Under the latter circumstances, the magnitude of construction activity taking place at the secondary location, and the near-completeness of the modules or portions, weigh much more heavily in favor of a conclusion that the secondary location is a ''site of the work'' and distinguish such circumstances from those in *Midway, Ball,* and *L.P. Cavett.*

Finally, in response to MTA's questions, the Department agrees that the appropriate geographic area for the application of prevailing wages to secondary construction sites is the location of the secondary construction site, not the location of the primary worksite. The purpose of the Davis-Bacon labor standards is to ensure that laborers and mechanics are paid wages that prevail where they work; thus, it would not be appropriate to apply wage rates from a different area when there is sufficient wage data in the area in which they work. A contract involving both a primary and secondary construction site should include wage determinations for both areas. Regarding whether work performed outside the United States is covered, the language of the specific statute providing for application of the Davis-Bacon labor standards controls. For example, the DBA applies only within the geographical limits of the 50 states and the District of Columbia, as well as in the Commonwealth of the Northern Mariana Islands. Conversely, some Related Acts apply to construction in U.S. territories such as Guam, Puerto Rico, and the U.S. Virgin Islands.

b. Clarification of Application of ''Site of the Work'' Principle to Flaggers

The Department proposed to clarify that workers engaged in traffic control and related activities adjacent or virtually adjacent to the primary construction site are working on the site of the work. Often, particularly for heavy and highway projects, it is necessary to direct pedestrian or vehicular traffic around or away from the primary construction site. Certain workers of contractors or subcontractors, typically called ''flaggers'' or ''traffic directors,'' may therefore engage in activities such as setting up barriers and traffic cones, using a flag and/or stop sign to control and direct traffic, and related activities such as helping heavy equipment move in and out of construction zones. Although some flaggers work within the confines of the primary construction site, others work outside of that area and do not enter the construction zone itself.

The Department has previously explained that flaggers are laborers or mechanics within the meaning of the DBA. *See* AAM 141 (Aug. 16, 1985); FOH 15e10(a); *Superior Paving Materials, Inc.,* ARB No. 99–065, 1999 WL 708177 (June 12, 2002). The Department proposed to clarify, in the definition of ''nearby dedicated support sites,'' that such workers, even if they are not working precisely on the site where the building or work would remain, are working on the site of the work if they work at a location adjacent or virtually adjacent to the primary construction site, such as a few blocks away or a short distance down a highway. Although the Department believes that any adjacent or virtually adjacent locations at which such work is performed are included within the current regulatory ''site of the work'' definition, given that questions have arisen regarding this coverage issue, the Department proposed to make this principle explicit.

As the Department has previously noted, such work by flaggers and traffic operators is integrally related to other construction work at the worksite and construction at the site would not be possible otherwise. *See* AAM 141; FOH 15e10(a). Additionally, as noted above in section III.B.3.ii.(G).(1).(d) and as the ARB has previously explained, the principle of adjacency or virtual adjacency in this context is consistent with the statutory ''site of the work'' limitation on DBA-covered work as interpreted by courts. *See Bechtel Constructors Corp.,* ARB No. 97–149, 1998 WL 168939, at *5 (explaining that ''it is not uncommon or atypical for construction work related to a project to be performed outside the boundaries defined by the structure that remains upon completion of the work,'' such as where a crane in an urban environment is positioned adjacent to the future building site). This proposed change therefore is consistent with the DBA and would eliminate any ambiguity regarding these workers' coverage.

The Department received a number of comments about the coverage of flaggers under the proposed revision of the definition of site of work. Some of the commenters supported the proposal in its entirety, others opposed the proposal (including through comments submitted as part of an organized ABC member campaign), and a few commenters sought clarification on the proposal.

Supporting commenters agreed with the proposal's intent to codify the Department's interpretation of adjacency to the site of the work and ensure that flaggers receive Davis-Bacon protections. For example, LIUNA stated this clarification reflects existing practice and therefore will ensure that laborers employed as flaggers receive the benefits and protections of the DBRA. LIUNA emphasized that this clarification is not only consistent with the original purpose of the DBA, but it also furthers the Secretary's 1985 coverage decision reflected in AAM 141.

Both LIUNA and the NCDCL stated the work of flaggers is integrally related to the other construction work at the worksite, with NCDCL emphasizing that this is especially true on heavy and highway projects. LIUNA noted that construction at the site would not be possible without such integrally related flaggers' work and pointed to LIUNA apprenticeship program curricula that demonstrate the integral nature of traffic control to construction work. Such apprenticeship training encompasses safety on construction sites related to protection of flaggers themselves, as well as of other workers and the driving and pedestrian public near the site. A number of commenters including LIUNA noted that a flagger may need to perform work outside the precise confines of the work site in order for them to effectively perform their duties, which are integrally related to the other work at the construction site.

LIUNA and NJHHCL noted that the dangerous nature of flagger work underscores the importance of clarifying, and thus ensuring, Davis-Bacon coverage for flaggers. Flagger work includes keeping laborers and mechanics working on or near the worksite safe, as well as keeping the public safe and out of the work site. LIUNA cited FHWA and State department of transportation best practices and flagging instruction materials that noted that flagger stations must be located in places where the traveling public has sufficient distance to stop at an intended stopping point before entering the work space. They also noted that flagger stations should be preceded by advance warning signs and be at points of maximum visibility, such as on the shoulder of a highway and opposite active work areas. Another commenter echoed the importance of flagger work performed adjacent or

nearly adjacent to the construction site because flaggers are keeping those in and around the jobsite safe.

NJHHCL expressed approval of the Department's recognition that ''workers handling the traffic control near the primary construction site are essential personnel to these projects.'' LIUNA similarly emphasized that over 60 percent of all fatal injuries at road construction sites are a result of vehicles striking workers who are on foot.

Commenters such as ABC and ARTBA opposed the proposal, characterizing it as an expansion of DBA coverage to flaggers whom they contend are not on the site of the work. In its comment, ABC argued that the proposed revision's ''expansion of coverage to include . . . flaggers who do not perform work at the site of construction'' violates the plain language of the DBA. ABC member campaign comments similarly claimed that the proposed rule would expand DBA regulations to work such as flaggers. These commenters also asserted that the Department's flagger and other proposals would increase the regulatory burden and costs on new industries and types of construction projects typically not subject to DBA regulations.

Likewise, ARTBA claimed the Department's flagger proposal extended DBA coverage to ''off-site'' flaggers. ARTBA opposed the proposal, claiming that it failed to recognize that flaggers working onsite directing personnel and equipment have special training. In contrast, according to ARTBA, ''off-site'' flaggers do not have special training and their primary responsibility is pedestrian management and directing people away from the worksite and they ''are not physically present on the worksite.'' ARTBA argued that onsite flaggers are properly covered by the DBA while offsite flaggers should not be covered by the DBA because of their duties, location, and lack of specialized training.

Various individual commenters also claimed that the proposal was an ''expansion of DBA regulations to . . . flaggers'' who do not perform work on the construction sites,[196] and voiced concerns that it would increase the regulatory burden and costs for industries and types of construction projects that these commenters claimed were not typically subject to DBA regulations.

The Department reiterates that the rule does not change the meaning of adjacent or nearly adjacent dedicated support sites or expand coverage to previously non-covered workers, but rather codifies the Department's interpretation that the site of the work encompasses flagger activities performed adjacent or virtually adjacent to the construction site. Codifying this policy is intended to assist contractors and other stakeholders with accurately assessing when flaggers are working on the site of the work and, therefore, covered by the DBA.

The Department thus disagrees with commenters who claimed the rule expands DBA coverage and would increase administrative burdens and costs on the regulated community. As explained in the NPRM, workers performing flagger activities adjacent or nearly adjacent to worksites are working on the site of the work under the DBA. Such work ensures that construction work in and around the active worksite proceeds in a safe and efficient manner, in part by protecting the laborers and mechanics doing the work, the flaggers themselves, and the public around the worksite. The Department notes that a worker's title is not determinative of whether the person performing flagger activities is on the site of the work, especially since, as LIUNA pointed out, there are numerous titles for people performing activities associated with directing vehicular or pedestrian traffic both on and around or away from the primary construction site.

Furthermore, the Department disagrees with ARTBA that only flaggers working ''on-site directing personnel and equipment'' and who have received specialized training should be covered by the DBA. Such a position is contrary to the Department's recognition that flaggers are laborers, *see, e.g.,* AAM 141, whose work, like the work of crane operators on building projects or of laborers setting up cones or cleaning up around heavy or highway projects, is ''performed outside the boundaries defined by the structure that remains upon completion of the work.'' *Bechtel,* ARB No. 97–149, 1998 WL 168939, at *5. These laborers work adjacent or virtually adjacent to the site of the work and are covered by the DBA. Additionally, ARTBA's emphasis on specialized training about directing personnel around work vehicles and operations that ''on-site'' flaggers receive is not relevant to whether a worker is performing flagger activities adjacent or virtually adjacent to the worksite.

AGC did not disagree with the proposal but emphasized that the Department should maintain the distinction between flaggers and employees of traffic service companies that rent equipment to the prime contractor and perform only incidental functions at the site in connection with delivery of equipment. AGC noted that the Department's current guidance in FOH 15e10 and 15e16 draws this distinction, with 15e16 further providing that traffic service company workers are not covered by the DBA unless they spend a substantial amount of time (20 percent or more) in a workweek on the site.

The Department acknowledges the distinction between flaggers and workers of traffic service companies. As described in section c (''Clarification of 'material supplier' distinction''), the final rule codifies the distinction between contractors and subcontractors and material suppliers. Under the final rule, if a traffic service company's only contractual responsibility is to deliver equipment and to perform activities incidental to such delivery, such as loading and unloading, then assuming it meets the other enumerated criteria, it is considered a material supplier and its workers therefore are not subject to the Davis-Bacon labor standards unless the work is performed under a statute that applies to all work performed by laborers and mechanics in the development of a project. On the other hand, if the company's workers are engaged in construction work on the site that is not incidental to delivery, such as acting as flaggers, the company would be considered a subcontractor, and therefore, as discussed below, *see infra* section d (''Coverage of time for truck drivers''), its workers would be covered for any time spent in non-delivery-related construction work, as well as any onsite time essential or incidental to delivery that is not *de minimis.*

Finally, the SBA commented that the proposed rule may result in more small businesses covered by the DBRA. The SBA recommended that the Department quantify the number of small businesses potentially affected by this and other proposals in the NPRM. The number of potentially affected small businesses is estimated in section VI (''Final Regulatory Flexibility (FRFA) Analysis'').

For the foregoing reasons, the final rule adopts the language regarding flaggers as proposed.

c. Clarification of ''Material Supplier'' Distinction

The Department also proposed to clarify the distinction between subcontractors and ''material suppliers'' and to make explicit that employees of material suppliers are not covered by

[196] The Department understands that the ABC member campaign comments, which were ambiguous, opposed the flagger proposal on this basis, as did ABC.

the DBA and most of the Related Acts. Although this distinction has existed since the DBA's inception, the precise line between ''material supplier'' and ''subcontractor'' is not always clear and is sometimes the subject of dispute.

While the Davis-Bacon regulations have not previously included definitions of ''contractor'' or ''subcontractor,'' this rule, as discussed, adds such definitions into § 5.2. The Department proposed to incorporate the material supplier exception into the proposed new definition of ''contractor,'' which was incorporated into the proposed definition of ''subcontractor.'' Specifically, the Department proposed to exclude material suppliers from the regulatory definition of ''contractor,'' with the exception of entities performing work under ''development statutes''—certain Related Acts that apply the Davis-Bacon labor standards to all laborers and mechanics employed in a project's development and thus are not limited to ''contractors'' or ''subcontractors.''

The Department proposed three criteria for the material supplier exception to apply to an employer. First, that the employer's only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup in addition to, but not exclusive of, delivery. Second, that the employer also supplies materials to the general public. Third, that the employer's facility manufacturing the materials, articles, supplies, or equipment is neither established specifically for the contract or project nor located at the site of the work. The proposed language further clarified that if an employer, in addition to being engaged in material supply and pickup, also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier but a subcontractor. The Department explained that these criteria were intended to reflect case law and the Department's guidance. *See* 87 FR 15732 (citing *H.B. Zachry,* 344 F.2d at 359, AAM 5 (Dec. 26, 1957), AAM 31 (Dec. 11, 1961), AAM 36, AAM 45, and AAM 53 (July 22, 1963)); PWRB, DBA/DBRA Compliance Principles, at 7–8; FOH 15e16(c)).

The Department received comments both supporting and opposing this proposed change. Supportive comments generally agreed with the Department that a codification of the definition of material supplier would be helpful. III–FFC, for example, characterized the Department's clarification as ''commonsense,'' and SMART stated that the revisions would ''ensure that workers who perform construction activities on a primary or secondary site are not deprived of coverage simply because one of their employer's functions is delivery.''

In contrast, many of the comments in opposition contended that the Department was proposing to significantly expand coverage to material suppliers. IRTBA, for example, argued that the proposed rule would ''essentially determin[e] that material suppliers are covered by the Act unless'' they meet certain criteria. Several comments, including the Illinois Association of Aggregate Producers (IAAP), Virginia Asphalt Association, ABC, and a joint comment from NAPA, NRMPCA, and NSSGA, voiced concern that the proposed rule would cover workers at temporary material supply facilities that are established and located on the site of the work and that recycle materials onsite to produce materials that can then be used onsite, asserting that such locations are not currently covered. The SBA Office of Advocacy commented that small businesses at its roundtable expressed similar concerns. Other comments also appeared to presume that the proposal regarding material suppliers represented a significant expansion. *See, e.g.,* the group of U.S. Senators. These commenters generally asserted that the proposed changes would significantly increase costs and would make it more difficult for small companies to compete on DBA projects.

Some commenters' objections were more limited or specific. For example, FTBA and AGC requested that any regulatory clarification more closely align with the Department's existing guidance, including the 20-percent threshold and the *de minimis* rule. IEC specifically opposed the proposed rule's requirement that to be a material supplier, an employer must supply products to ''the general public,'' contending that the term was ambiguous and that a supplier's ability to service only a few clients should not transform it into a subcontractor.

After considering the comments received, the final rule adopts a regulatory definition of material supplier with certain modifications from the proposed rule. As an initial matter, the comments reinforced the Department's belief that it is necessary to codify and clarify the definition of ''material supplier'' in the Davis-Bacon regulations. Many of the comments received appeared to be premised on an overbroad understanding of the existing material supplier exemption, and therefore perceived the proposed revisions as making significant substantive changes when they were largely intended to clarify and reflect existing coverage principles. As such, explicitly delineating the differences between subcontractors and material suppliers in the regulation will ensure that workers who are employed by contractors or subcontractors and work on the site of the work receive Davis-Bacon wages as appropriate.

Most notably, several comments contended that the proposed definitions would newly cover mobile or temporary materials manufacturing facilities located on the site of the work. These comments reflect a misconception that manufacturing or recycling of materials on the site of the work is outside the scope of the DBRA. To the contrary, the regulations have long covered such activities because the definition of ''construction, prosecution, completion, or repair'' explicitly includes ''[m]anufacturing or furnishing of materials, articles, supplies or equipment *on the site of the building or work.*'' 29 CFR 5.2(j)(1)(iii) (emphasis added); *see also* § 5.2(i) (stating that ''[t]he manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work within the meaning of the regulations in this part *unless conducted in connection with and at the site of such a building or work*'') (emphasis added). The Department's case law is consistent with this principle. *See, e.g., Forrest M. Sanders,* ARB No. 05–107, 2007 WL 4248530, at *4 (Nov. 30, 2007) (''[C]ontractors who furnish materials do engage in construction, and thus must pay DBA wages, when their activities occur on the site of the building or work.''). Thus, while the commenters are correct that under the proposed rule, such facilities will be covered, this does not reflect a change from the existing framework. The Department believes it is important to clarify that companies supplying materials under such circumstances are subcontractors, not material suppliers.

In recognition of commenters' concerns, however, the Department is making certain revisions to the proposed criteria for material suppliers.

First, the Department is clarifying that to qualify as a material supplier, an employer's obligations for work on a contract must be limited to the supply of materials, articles, supplies, or equipment, which may include pickup in addition to, but not exclusive of, delivery,[197] and which may also include

[197] As noted in the NPRM, an employer that contracts *only* for pickup of materials from the site of the work is not a material supplier but a subcontractor, and that this would be consistent

activities incidental to such delivery and/or pickup, such as delivery, drop off, and waiting time.[198] This is intended to clarify that activities that are incidental to material supply, such as loading, unloading, and pickup, would not constitute construction activity that would render the material supply exemption inapplicable.

Second, the Department is eliminating the criterion that the employer must supply materials to the ''general public'' in order to be a material supplier. The Department agrees with the IEC that this term lends itself to ambiguity. In place of this criterion, the final rule clarifies that for the material supplier exception to apply, the employer's facility or facilities being used for material supply of the contract either must have been established before opening of bids or, if it was established after bid opening, may not be dedicated exclusively, or nearly so, to the performance of a covered contract. The Department's existing regulations, guidance, and case law show that either of these two options is indicative of a sufficient degree of independence from the contract for the facility to be deemed an operation of a material supplier. *See United Constr. Co., Inc.,* 1983 WL 144675, at *3; 29 CFR 5.2(*l*) (describing material supplier facilities that were established before opening of bids, even where such operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract); FOH 15e16(d) (same); FOH 15e16(b) (explaining that even if a facility is set up for the purpose of fulfilling a contract and therefore was not established before bid opening, it ''may undergo a change in its character to such an extent that it becomes the operation of a supplier,'' such as ''if it makes a sufficient quantity of sales from its producing facility to the general public'').

Finally, to harmonize the definition with other regulatory provisions, the final rule states that a material supplier's facility manufacturing the materials, articles, supplies, or equipment may not be located on the primary or secondary construction site, rather than, as the proposed rule stated, on the site of the work, a term that also encompasses adjacent or virtually adjacent dedicated support sites. The current regulation states that the site of the work does not include a material supplier's facilities that are not on the primary or secondary worksite, even if the operations for a period of time may be dedicated exclusively or nearly so to the performance of a contract. § 5.2(*l*). This implies two additional principles: first, that a material supplier may have a facility on an adjacent or virtually adjacent support site without losing its status as a material supplier provided that the other conditions of independence from the project are met, and second, that on the other hand, when an employer operates a manufacturing or supply facility on the primary or secondary worksite itself, it is considered a subcontractor rather than a material supplier. Put differently, the existence of such a facility on the primary or secondary worksite itself demonstrates that it is not sufficiently independent of the project or contract to be deemed a material supply facility whose workers are outside the DBRA's scope.

The Department emphasizes that contrary to commenters' concerns, the only aspect of the ''material supplier'' definition in the final rule that arguably reflects a change from current practice is that the definition in the final rule strictly limits applicability of the exemption to companies whose only contractual responsibilities are material supply or activities incidental to material supply. It therefore excludes from the exemption companies that also perform any other onsite construction, alteration, or repair; such companies are instead deemed contractors or subcontractors even if they also engage in material supply. This principle is consistent with numerous statements in the Department's current guidance. *See* PWRB, DBA/DBRA Compliance Principles, at 7 (material suppliers are companies ''whose *only* contractual obligations for on-site work are to deliver materials and/or pick up materials'') (emphasis added); *id.* at 7–8 (''[I]f a material supplier, manufacturer, or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work would be subject to Davis-Bacon labor standards in the same manner as those employed by any other contractor or subcontractor.''); FOH 15e16(c) (same). However, in tension with this principle, the current guidance also provides that a company may be considered a material supplier even if its workers engage in some amount of non-delivery construction work onsite, such as a precast concrete item supplier that also repairs and cleans such items at the worksite or an equipment rental dealer that also repairs its leased equipment onsite. *See* FOH 15e16(c). The guidance provides that in such cases, the supplier's workers are covered by the Davis-Bacon labor standards for all onsite time engaged in such non-delivery construction work, and that if they spend at least 20 percent of their workweek engaged in such work, then all of their onsite time during the workweek is covered. *See id.;* PWRB, DBA/DBRA Compliance Principles at 7–8.

While the Department recognizes that many stakeholders are familiar with the 20-percent threshold, it believes that eliminating the 20-percent threshold for purposes of the material supplier/subcontractor distinction is appropriate for a number of reasons. First, the Department believes that by creating a bright-line rule that ties this determination to a company's obligations under a contract, rather than the amount of time its workers spend onsite engaged in particular activities in a given workweek, this change will reduce uncertainty about coverage and assist both bidders and agencies in predicting labor costs before bidding. Second, as noted in the proposed rule, the Department has observed that under its current guidance, there is considerable confusion regarding the 20-percent threshold and its application. Some employers, for example, believe that 20 percent is the *de minimis* threshold for coverage of onsite delivery work by truck drivers employed by contractors or subcontractors; however, the 20-percent threshold in the Department's current guidance actually applies to material suppliers. Similarly, others incorrectly read the existing guidance as only requiring compensation for onsite non-delivery construction time if such time exceeds 20 percent of a workweek; however, the existing guidance actually requires compensation for all such time regardless of the amount, and additionally requires that if such time exceeds 20 percent of a workweek, all of a worker's onsite time is covered. Such confusion can deprive workers of Davis-Bacon wages to which they are entitled. In contrast, the clarity in the final rule will facilitate compliance and is more consistent with both the language and purpose of the Davis-

with the plain meaning of the term ''material supplier'' and with the Department's case law. *See Kiewit-Shea,* ALJ Case No. 84–DBA–34, 1985 WL 167240, at *2 (Sept. 6, 1985), (concluding that companies whose contractual duties ''called for hauling away material and not for its supply'' were subcontractors, not material suppliers''), *aff'd, Md. Equip., Inc.,* WAB No. 85–24, 1986 WL 193110 (June 13, 1986).

[198] The Department notes that unloading of materials is considered incidental to delivery even if the materials are unloaded directly into a contractor's mixing facilities at the work site. *See* FOH 15e16(a). Employers and contracting agencies are encouraged to submit any questions regarding whether onsite construction work qualifies as incidental to delivery to the Administrator.

Bacon labor standards, as it ensures that all laborers and mechanics performing any non-delivery construction work on the site of the work will receive prevailing wages for such work. The Department therefore concludes that the need for clarity and predictability outweighs any reliance interests implicated by the final rule's change from the subregulatory 20-percent threshold, particularly given that in many cases, such reliance appears to be premised on contractors' incorrect application of the threshold.

Accordingly, the Department declines to retain the 20-percent threshold. Rather, under the final rule, an entity is a material supplier if: (a) its only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup of the same in addition to, but not exclusive of, delivery, and which may also include activities incidental to such delivery and pickup; and (b) its facility or facilities that manufactures the materials, articles, supplies, or equipment used for the contract or project (1) is not located on, or does not itself constitute, the project or contract's primary or secondary construction site, and (2) either was established before opening of bids on the contract or project, or is not dedicated exclusively, or nearly so, to the performance of the contract or project. All other entities engaged in work on the site of the work are contractors or subcontractors.

The Department also notes that the material supplier exemption operates in tandem with the ''site of the work'' requirement, except for ''development statutes'' to which neither limitation applies. Thus, under the final rule, a worker employed by an employer meeting the criteria for the material supplier exemption is not employed by a contractor or subcontractor, and therefore is not entitled to prevailing wages and fringe benefits under the Davis-Bacon labor standards at all even for time spent on the site of the work. In contrast, workers employed by contractors or subcontractors are entitled to Davis-Bacon wages, but only for time spent on the site of the work. Thus, for example, if a company establishes a facility near, but not on, the site of the work for the exclusive or nearly-exclusive purpose of furnishing materials to a particular project, even though the company is considered a subcontractor rather than a material supplier, its workers are only subject to the Davis-Bacon labor standards for time they spend on the site of the work as defined in this final rule.

Finally, in addition to the changes described above, the Department is making a conforming edit to ensure that the regulation as written reflects the principle that employers meeting the material supplier exemption are not covered, with the exception of employers performing work under development statutes to which the exemption does not apply. Specifically, the Department is amending the definition of ''contract'' in § 5.2 by adding language stating explicitly that with the exception of work performed under a development statute, the terms contract and subcontract do not include agreements with employers that meet the definition of a material supplier under § 5.2.

d. Coverage of Time for Truck Drivers

The Department also proposed to revise the regulations to clarify coverage of truck drivers under the DBRA. As explained in the proposed rule, the Department's current guidance differs depending on whether truck drivers are employed by material suppliers or contractors or subcontractors. As noted above, employees of material suppliers are only covered for onsite time engaged in non-delivery construction work, or for all of their time onsite if such construction work constitutes 20 percent or more of their workweek. FOH 15e16. In contrast, truck drivers employed by contractors or subcontractors are covered under a broader range of circumstances, including: (1) performing work on the site of the work that is not related to offsite hauling, including hauling materials or supplies from one location on the site of the work to another location on the site of the work, *see* 65 FR 80275; FOH 15e22(a)(1) (stating that drivers are covered ''for time spent working on the site of the work''); (2) hauling materials or supplies from a dedicated facility that is ''adjacent or virtually adjacent to the site of the work,'' 65 FR 80275–76; *see also* 29 CFR 5.2(j)(1)(iv)(A); FOH 15e22(a)(3); (3) transporting ''significant portion(s)'' of the building or work between a secondary worksite established for contract performance and the primary worksite, 65 FR 80276; *see also* 29 CFR 5.2(j)(1)(iv)(B); FOH 15e22(a)(4); and, finally, (4) time spent on the site of the work that is related to hauling materials to or from the site, such as loading or unloading materials, provided that such time is more than *de minimis*—a standard that as currently applied excludes drivers ''who come onto the site of the work for only a few minutes at a time merely to drop off construction materials.'' 65 FR 80276; *see also* FOH 15e22(a)(2); PWRB, DBA/DBRA Compliance Principles, at 6–7.

As noted in the NPRM, there is significant uncertainty regarding this topic, including, for example: the distinction between drivers for material supply companies versus drivers for construction contractors or subcontractors; what constitutes *de minimis;* and whether the 20-percent threshold for construction work performed onsite by material supply drivers is also applicable to delivery time spent on site by drivers employed by a contractor or subcontractor. Moreover, the Department's Administrative Law Judges (ALJs) have come to different conclusions on similar facts. *Compare Rogers Group,* ALJ No. 2012–DBA–00005 (May 28, 2013) (concluding that a subcontractor was not required to pay its drivers prevailing wages for sometimes-substantial amounts of onsite time, as much as 7 hours 30 minutes in a day, making deliveries of gravel, sand, and asphalt from offsite), *with E.T. Simonds Constr. Co.,* ALJ No. 2021–DBA–00001, 2022 WL 1997485 (May 25, 2021), *aff'd,* ARB No. 21–054, 2022 WL 1997485 (May 13, 2022) (concluding that drivers employed by a subcontractor who hauled materials from the site of the work and spent at least 15 minutes per hour—25 percent of the workday—on site were covered for their onsite time).

Taking this into account, the Department proposed to clarify coverage of truck drivers. First, as discussed above, the Department proposed to codify a definition of ''material supplier'' in a manner that would reduce ambiguity regarding the subcontractor/material supplier distinction by restricting the material supplier exemption to employers whose sole contractual responsibility is material supply and, in so doing, eliminate the subregulatory 20-percent threshold pertaining to material suppliers' drivers who engage in onsite construction work. Second, the Department proposed to amend its regulations concerning the coverage of transportation by truck drivers who are included within the DBA's scope generally (*i.e.,* truck drivers employed by contractors and subcontractors, as well as any truck drivers employed in project construction or development under development statutes) by amending the definition of ''construction, prosecution, completion, or repair'' in § 5.2 to include ''transportation'' under five specific circumstances: (1) transportation that takes place entirely within a location meeting the definition of site of the work (for example, hauling materials

from one side of a construction site to the other side of the same site); (2) transportation of portion(s) of the building or work between a ''secondary construction site'' and a ''primary construction site''; (3) transportation between a ''nearby dedicated support site'' and either a primary or secondary construction site; (4) a driver or driver's assistant's ''onsite activities essential or incidental to offsite transportation'' where the driver or driver's assistant's time spent on the site of the work is not so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded; and (5) any transportation and related activities, whether on or off the site of the work, by laborers and mechanics under a development statute. The Department explained that proposals (1), (2), (3), and (5) set forth principles reflected in the current regulations, but in a clearer and more transparent fashion, whereas proposal (4) sought to resolve the ambiguities discussed above regarding the coverage of onsite time related to offsite transportation.

The Department received comments expressing support for these proposals and the ''site of the work'' proposals in general, including from III–FFC, REBOUND, and an individual commenter. III–FFC specifically emphasized that most of the proposed revisions regarding truck drivers reflect principles that are in the current regulations, interpreted in case law, and explained in WHD regulatory guidance, but that clarity would nonetheless be helpful given stakeholder uncertainty. It cited onsite loading and unloading of equipment, which is a several-step, time-consuming process, as one fact pattern that can prompt coverage disputes, and indicated that it was hopeful that regulatory revisions would reduce such disputes and increase compliance.

The Department also received several comments opposing these proposals. Some appeared to argue that any coverage of material delivery truck drivers for onsite time is inconsistent with the D.C. Circuit's decision in *Midway.* OCA, IRTBA, SIBA, and IAPA also argued that case law under the NLRA supports the exclusion of delivery drivers from coverage even if they spend time on the site of the work. Some commenters similarly contended that the proposed rule's mere specification of ''transportation'' as a type of ''construction, prosecution, completion, or repair'' was itself outside the Department's statutory authority, whereas others suggested that while the DBRA covers wholly onsite transportation, such as hauling materials from one location on the site of the work to another, it does not cover any time spent onsite that is associated with delivery from offsite.

Other commenters specifically took issue with the proposal to cover truck drivers employed by contractors or subcontractors for any onsite delivery-related time that is ''practically ascertainable,'' arguing that it would effectively eliminate the current *de minimis* principle and impose burdensome recordkeeping requirements. IAAP argued that the Department's proposed standard could compromise safety by creating pressure on truck drivers to perform any onsite activities as quickly as possible. AGC argued that the Department should instead codify its current guidance, including the *de minimis* and 20 percent principles. AGC also argued that the Department should expand application of the *de minimis* principles to include all covered workers and activities, not only truck drivers. And FTBA suggested that the proposal would in some cases impose burdens without benefits since many truck drivers are owner-operators to whom the Department, as a matter of administrative policy, has not applied the DBRA. *See supra* n. 180.[199]

As an initial matter, the Department maintains that it is important to clarify the application of the DBRA to truck drivers, and to do so in the regulatory text. As noted above and in the discussion regarding the material supplier exemption, there remains considerable confusion about these principles, including conflation of the *de minimis* standard with the current 20-percent threshold related to material suppliers. Additionally, for the reasons discussed above in section III.B.3.ii.(G).(2).(b), the Department is retaining, with some clarification, its proposal to codify a definition of material supplier that is restricted to employers whose sole contractual responsibility is material supply. As such, any employer whose truck drivers engage in other construction activities will be considered contractors or subcontractors who are subject to the regulations' new provisions concerning transportation. This renders moot the subregulatory 20-percent threshold pertaining to onsite time for material suppliers' drivers who also engage in onsite construction work.

The Department disagrees that *Midway, Ball,* or *L.P. Cavett* preclude coverage of onsite time for delivery drivers employed by contractors or subcontractors. None of those cases speak to this precise issue; rather, these cases concerned the geographic scope of the ''site of the work'' and the coverage for time driving on locations *outside* the site of the work. As noted in the NPRM, *Midway* expressly declined to decide whether the DBA covers work that a driver performs onsite if the amount of such work is more than *de minimis*—because no party had raised it. *Midway,* 932 F.2d at 989 n.5 (''No one has argued in this appeal that the truckdrivers were covered because they were on the construction site for this brief period of the workday.''). If anything, *Midway* is best read to show that the DBA does cover non-''determinative of the [DBA's] coverage.'' 932 F.2d at 991.[200] Accordingly, the Department has consistently maintained since *Midway* that truck drivers, and their assistants, employed by contractors or subcontractors, are covered for onsite work associated with offsite delivery, provided that such onsite time exceeds a certain threshold. *See* 65 FR 80276; 57 FR 19205–06; FOH 15e22(a)(2); PWRB, DBA/DBRA Compliance Principles, at 6–7; *ET Simonds,* ALJ No. 2021–DBA–00001, 2022 WL 1997485, at *3–4.

The Department similarly disagrees that cases construing the NLRA preclude such coverage. Section 8(e) of the NLRA prohibits certain ''contract[s] or agreement[s]'' between employers and unions but does not prohibit ''an agreement . . . relating to . . . work to be done at the site of the . . . work''). 29 U.S.C. 158(e). Some commenters contended that judicial and National Labor Relations Board decisions construing this language support a conclusion that truck drivers transporting materials to or from construction sites are not considered to be performing work on the site of construction, even if they spend time onsite, and that the DBA should be construed similarly. These cases,

[199] AGC also suggested that the final rule codify the Department's policy in FOH 15e17 regarding truck driver owner-operators. Because the Department did not make any proposals along these lines in the NPRM, it declines to do so in the final rule.

[200] To the extent that some language in *Midway* could be read to support the notion that even onsite time of delivery drivers employed by contractors and subcontractors is not covered, *see, e.g., Midway,* 932 F.2d at 992 (''Material delivery truck drivers who come onto the site of the work merely to drop off construction materials are not covered by the Act.''), such language is dicta given the D.C. Circuit's express statement that it was *not* deciding whether the DBA covers a more than *de minimis* amount of work that a driver performs onsite, *id.* at 989 n.5. *See Cooper Indus., Inc.* v. *Aviall Servs., Inc.,* 543 U.S. 157, 170 (2004) (''Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'').

however, hold only that a rule similar to the DBA's *de minimis* principle applies under section 8(e) of the NLRA, which excludes ''small'' amounts of onsite work that are ''necessarily'' performed in delivering materials and merely ''incidental'' to a driver's primarily offsite work. *See In re Techno Constr. Corp.,* 333 NLRB 75, 82 (2001) (''[T]hese incidental tasks do not bring the Respondent within the building and construction industry as contemplated by [the NLRA].''); *Teamsters Loc. 957,* 298 N.L.R.B. 395, 399 (1990) (ALJ Op.) (''[E]mployees involved in such work have only 'incidental contact with the site.' . . . With rare exception, the haulage of [material] by the [drivers] in the instant case involves such 'incidental contact' with job sites.''), *aff'd, Gen. Truck Drivers, Chauffeurs, Warehousemen & Helpers of Am., Loc. No. 957* v. *NLRB,* 934 F.2d 732, 737 (6th Cir. 1991) (quoting ALJ with approval); *Joint Council of Teamsters No. 42,* 248 NLRB 808, 816 (1980) (''[T]he Board has repeatedly held that the proviso does not apply to jobsite deliveries (or, by logical inference, pickups) which are only a small part of basically offsite transportation activity.''); *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Emp. & Helpers Loc. Union No. 695* v. *NLRB,* 361 F.2d 547, 552 (D.C. Cir. 1966) (Section 8(e) does not cover work a delivery driver ''necessarily'' performs onsite). Thus, these cases stand only for the idea that section 8(e) of the NLRA apparently does not cover *de minimis* onsite work, the same principle that the Department has applied under the DBRA.[201] None of these cases held that the NLRA excludes work that a driver performs onsite that is more than *de minimis.*[202]

The Department also rejects the notion that it is improper to include ''transportation'' as a covered activity under the specific circumstances listed in the regulation. It has never been in serious dispute that the transportation of materials, equipment, and the like is within the scope of the types of activities covered by the DBRA. Rather, in cases where workers performing these activities have been determined not to be covered, the basis for such determinations has been either because they were deemed employees of bona fide material suppliers or because they were not working on the site of the work. The current regulations expressly recognize that transportation and the furnishing of materials are covered construction activities, either if they take place on the site of the work or if they are performed as part of work under a development statute. *See* § 5.2(j)(1)(iii), (iv), 5.2(j)(2). The proposed rule did not reflect any expansion of coverage in this regard.

However, after considering the comments received, the Department is not adopting the NPRM's proposal to require compensation for onsite time related to offsite delivery as long as it is not ''so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded.'' While the Department maintains that such a standard would be consistent with the DBA's ''site of the work'' principle, *see* 65 FR 80275–76 (explaining that the Department does not understand *Midway* as precluding coverage of any time that drivers spend on the site of the work, ''no matter how brief''), the Department also recognizes that it could impose unnecessary burdens on contractors for comparatively marginal benefits.

Instead, the final rule codifies the Department's current guidance by requiring contractors and subcontractors to pay Davis-Bacon wages to delivery drivers for onsite time related to offsite delivery if such time is not *de minimis.* The Department believes it is important to codify this principle, as commenters agreed that depending on the circumstances, including what is being delivered, traffic, and other factors, such drivers can spend significant portions of their day on the site of the work. Consistent with its pronouncements since *Midway,* the Department believes that such time is compensable under the DBRA.

However, whereas the proposed rule sought to borrow language from the Department's regulatory definition of *de minimis* under the FLSA, *see* 29 CFR 785.47, the final rule is not defining *de minimis* in the regulation for several reasons. First, the Department did not propose a definition for the term in the NPRM. Second, the Department's historical practice has been to evaluate *de minimis* under the DBRA on a case-by-case basis, and a recent decision by the ARB suggests that such an approach is reasonable. *See ET Simonds,* ARB No. 2021–0054, 2022 WL 1997485, at *8 (concluding that ''the analysis of whether a material transportation driver is covered is contextual in nature and should include a discussion of the totality of the circumstances''). To the extent warranted, the Department will consider whether to further elaborate on the definition of *de minimis* in subregulatory guidance. However, the Department notes two general principles here.

First, the *de minimis* standard under the DBRA is independent of the *de minimis* standard under the FLSA. As noted in the NPRM, the FLSA *de minimis* rule ''applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities.'' 29 CFR 785.47. Moreover, under the FLSA, ''an employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.'' *Id.* This strict standard is suitable for the FLSA, a statute that requires payment of a minimum wage for every hour worked. The DBRA's *de minimis* principle, on the other hand, informs the different inquiry of whether a worker is ''employed directly on the site of the work.'' Thus, the Department has generally held that it excludes periods of ''a few minutes'' onsite just to drop off materials, even though such time generally is considered hours worked under the FLSA.

Second, the Department intends that under circumstances where workers spend a significant portion of their day or week onsite, short periods of time that in isolation might be considered *de minimis* may be aggregated. For example, in its recent decision in *ET Simonds,* the ARB concluded that it was reasonable for the Administrator to aggregate such periods throughout a workday where the record showed that workers spent a total of 15 minutes per hour on the website. Thus, the Department's position is that the total amount of time a driver spends on the site of the work during a typical day or workweek—not just the amount of time that each delivery takes—is relevant to a determination of whether the onsite time is *de minimis.*

The Department declines AGC's suggestion to expand the *de minimis* principle beyond the context of truck

[201] In *Local No. 957,* the Sixth Circuit emphasized that the drivers performed only 10 percent of their work onsite—the same amount as in *Midway. Loc. No. 957,* 934 F.2d at 737; *see also Midway,* 932 F.2d at 989 n.5.

[202] The Department also notes that even if section 8(e) of the NLRA were construed to have a narrower scope, the DBA's ''site of the work'' language would nonetheless be consistent with the Department's interpretation here. Section 8(e) concerns an ''agreement'' for work done onsite, a term the DBA does not use. 29 U.S.C. 158(e). Even if an ''agreement'' which is primarily for offsite delivery work, which necessarily entails some incidental onsite work, does not necessarily ''relat[e] to'' onsite work under the NLRA, *id.,* any onsite work performed is still done at the ''site of the work'' under the DBA. *Accord Smith* v. *Berryhill,* 139 S. Ct. 1765, 1776 (2019) (''[they] are different statutes, and courts must remain sensitive to their differences'').

drivers. First, such a change would be beyond the scope of the proposed rule. Second, the Department developed the *de minimis* principle for truck drivers given that such workers frequently alternate between time spent on and off the worksite. The Department does not believe it is necessary to extend the principle to other types of workers. Additionally, while FTBA expressed concern that truck drivers that are owner-operators might have to be added to certified payrolls even though DOL policy does not require that they be compensated at DBRA rates, this is not a consequence of the final rule; as discussed above, even under the guidance in place prior to this rule, truck drivers employed by contractors or subcontractors have been subject to the DBRA for time spent on the site of the work that is not *de minimis.*

e. Non-Substantive Changes for Conformance and Clarity

The Department proposed to amend § 5.2 to use the term ''secondary construction sites'' to describe the covered locations at which ''significant portions'' of public buildings and works are covered provided all of the conditions discussed above are met and to use the term ''primary construction sites'' to describe the place where the building or work will remain. Although, as discussed above in ''Coverage of Construction Work at Secondary Construction Sites,'' the Department received numerous comments on the substance of these proposals, the Department did not receive comments on this conforming change, and the final rule retains these descriptive terms.

The Department additionally proposed to use the term ''nearby dedicated support site'' to describe locations such as flagger sites and batch plants that are part of the site of the work because they are dedicated exclusively, or nearly so, to the project, and are adjacent or nearly adjacent to a primary or secondary construction site. AGC voiced concern that the term ''nearby'' was confusing and could be read to indicate a broader geographic scope of coverage than the ''adjacent or nearly adjacent'' standard permits. As such, the final rule instead adopts the term ''adjacent or nearly adjacent dedicated support site.''

The Department also proposed to define the term ''development statute'' to mean a statute that requires payment of prevailing wages under the Davis-Bacon labor standards to all laborers and mechanics employed in the development of a project, and to make conforming changes to § 5.5 to incorporate this new term. The Department noted that the current regulations reference three specific statutes—the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996—that fit this description, but do not consistently reference all three, and that replacing those references with the defined term ''development statute'' would improve regulatory clarity and ensure that the regulations would not become obsolete if existing statutes meeting this description are revised or if new statutes meeting this description are added.

Regarding this proposal, AGC commented that the Sixth Circuit in *L.P. Cavett* concluded that coverage principles such as site of the work applicable to the Davis-Bacon Act apply to the Related Acts even if the Related Acts may contain different wording. *See* 101 F.3d at 1116. It stated that if the Department nonetheless wishes to apply a different coverage standard to Related Acts, it should engage in separate rulemaking. However, while the Department has previously voiced agreement with the general conclusion in *L.P. Cavett* regarding coverage principles under the vast majority of the Related Acts, it has explained that the three housing statutes noted above are distinguishable because their ''language and/or clear legislative history'' ''reflected clear congressional intent that a different coverage standard be applied.'' 65 FR 80275. The current regulations reflect this conclusion, as its references to both the site of the work and the material supplier exemption specifically exempt these statutes (though, as noted above, the regulations do not do so consistently in every instance). *See* §§ 5.2(i), (j)(1), (j)(1)(iii), (j)(2); 5.5(a)(1)(i), (a)(2), (a)(3)(i). Thus, the proposed rule's use of the defined term ''development statute'' does not make any substantive change from the current regulations with respect to these three statutes. However, to ensure that the revision is faithful to the Department's previous statements agreeing that identical coverage principles apply to all of the Related Acts except the above three, the final rule specifically names the three housing statutes in the definition of ''development statute,'' and requires that for any other statute to be deemed a development statute, the Administrator must make an affirmative determination that the statute's language and/or legislative history reflected clear congressional intent to apply a coverage standard different from the Davis-Bacon Act itself.

In addition to the above changes, the Department proposed a number of revisions to the regulatory definitions related to the ''site of the work'' and ''material supplier'' principle to conform to the above substantive revisions and for general clarity. The Department proposed to delete from the definition of ''building or work'' the language explaining that, in general, ''[t]he manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work,'' and proposed instead to clarify in the definition of the term ''construction (or prosecution, completion, or repair)'' that ''construction, prosecution, completion, or repair'' only includes ''manufacturing or furnishing of materials, articles, supplies or equipment'' under certain limited circumstances, namely, either on the site of the work or under development statutes. Along the lines of its comments noted above, FTBA expressed concern that this change could expand coverage to include material suppliers. While no substantive change was intended, in recognition of this concern, the Department is clarifying the definition of ''construction, prosecution, completion, or repair'' to read that such activities are only covered if done by laborers or mechanics who are employed by a contractor or subcontractor (*i.e.,* not a material supplier) on the site of the work, or who are working in the construction or development of a project under a development statute.

Additionally, the Department proposed to remove the citation to *Midway* from the definition of the term ''construction (or prosecution, completion, or repair).'' Finally, the Department proposed several linguistic changes to defined terms in § 5.2 to improve clarity and readability. Apart from the numerous substantive comments regarding these terms discussed at length above, the Department did not receive comments on these proposed conforming and clarifying changes and the final rule therefore adopts them as proposed.

(H) Paragraph Designations

The Department also proposed to amend § 5.2 to remove paragraph designations of defined terms and instead to list defined terms in alphabetical order. The Department proposed to make conforming edits throughout parts 1, 3, and 5 in any provisions that currently reference lettered paragraphs of § 5.2.

The Department received no comments on this proposal. The final

rule therefore adopts this change as proposed.

iii. Section 5.5 Contract Provisions and Related Matters

The Department proposed to remove the table at the end of § 5.5 related to the display of OMB control numbers. The Department maintains an inventory of OMB control numbers on *https://www.reginfo.gov* under ''Information Collection Review,'' and this table is no longer necessary to fulfill the requirements of the Paperwork Reduction Act. This website is updated regularly and interested persons are encouraged to consult this website for the most up-to-date information.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

The final rule includes a number of technical changes and other minor revisions to § 5.5, including to the proposed regulatory text of the DBRA and CWHSSA contract clauses, that were not in the proposed rule. The final rule adds a parenthetical to § 5.5(a) that clarifies that the requirement in the FAR is to incorporate contract clauses by reference, as distinguished from the non-FAR-covered contracts into which the contract clauses must be inserted ''in full.''

The final rule also updates the § 5.5(b) contract clauses by adding a reference to the new anti-retaliation provision at § 5.5(b)(5) and using gender neutral terminology (''watchpersons''). The term ''watchpersons'' has been substituted for ''watchmen'' in this and various other regulations. This change in terminology is not a substantive change.

Additional minor changes to § 5.5 include that § 5.5(b)(2) has been updated to reflect the Department's Civil Penalties Inflation Adjustment Act Annual Adjustment for 2023, which was published in the January 13, 2023 **Federal Register**. This adjustment is required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. Section 5.5(c) has also been revised so that the CWHSSA-required records are referred to in terms that conform with the new terminology for different types of records in § 5.5(a)(3). That section refers to basic records (including regular payroll) and certified payroll. *See also* § 3.3. Finally, ''CWHSSA'' has been added to the heading in § 5.5(b) to identify the acronym for the Contract Work Hours and Safety Standards Act.

(A) 29 CFR 5.5(a)(1)

The Department's proposed changes to this section are discussed above in section III.B.1.xii (''Frequently conformed rates'').

(B) 29 CFR 5.5(a)(3)

The Department proposed a number of revisions to § 5.5(a)(3) to enhance Davis-Bacon compliance and enforcement by clarifying and supplementing existing recordkeeping requirements. Conforming changes to § 5.5(c) are also discussed here.[203]

The Department received many comments supporting the proposed changes to § 5.5(a)(3) and the corresponding changes to § 5.5(c). These comments generally expressed the view that the proposed changes would enhance transparency and improve enforcement of Davis-Bacon labor standards requirements. Conversely, the Department received comments from the group of U.S. Senators and a few contractor associations expressing the view that the proposed changes were unduly burdensome to contractors. Specifics of these comments are addressed in the discussion below.

(1) 29 CFR 5.5(a)(3)(i)

The Department proposed to amend § 5.5(a)(3)(i) to clarify this recordkeeping regulation, consistent with its longstanding interpretation and enforcement, as requiring contractors to maintain and preserve basic records and information, as well as certified payrolls. The Department explained that required basic records include, but are not limited to, regular payroll (sometimes referred to as ''in-house'' payroll) and additional records relating to fringe benefits and apprenticeship. The Department similarly explained that the term ''regular payroll'' refers to any written or electronic records that the contractor uses to document workers' days and hours worked, rate and method of payment, compensation, contact information, and other similar information that provides the basis for the contractor's subsequent submission of certified payroll.

The Department also proposed changes to § 5.5(a)(3)(i) to clarify that regular payrolls and other basic records required by this section must be preserved for a period of at least 3 years after all the work on the prime contract is completed. The proposed change was intended to make it clear that even if a project takes more than 3 years to complete, contractors and subcontractors must keep payroll and basic records for work on the project for at least 3 years after all the work on the prime contract has been completed. For example, a subcontractor that performed work during the second year of a 5-year project would need to keep their payroll and basic records for at least 3 years after all work on the project had been completed, even though that may be 6 years after the subcontractor completed their own work on the project. This revision expressly stated the Department's longstanding interpretation and practice concerning the period of time that contractors and subcontractors must keep payroll and basic records required by § 5.5(a)(3).

The Department also proposed a new requirement that records required by § 5.5(a)(3) and (c) must include last known worker telephone numbers and email addresses, reflecting more modern and efficient methods of communication between workers and contractors, subcontractors, contracting agencies, and the Department's authorized representatives.

Another proposed revision in this section, as well as in § 5.5(c), clarified the Department's longstanding interpretation that these recordkeeping provisions require contractors and subcontractors to maintain records of each worker's correct classification or classifications of work actually performed and the hours worked in each classification. *See, e.g., Pythagoras Gen. Contracting Corp.,* ARB Nos. 08–107, 09–007, 2011 WL 1247207, at *7 (''If workers perform labor in more than one job classification, they are entitled to compensation at the appropriate wage rate for each classification according to the time spent in that classification, which time the employer's payroll records must accurately reflect.''). Current regulations permit contractors and subcontractors to pay ''[l]aborers or mechanics performing work in more than one classification . . . at the rate specified for each classification for the time actually worked therein,'' but only if ''the employer's payroll records accurately set forth the time spent in each classification in which work is performed.'' 29 CFR 5.5(a)(1)(i). The proposed revisions similarly recognized that laborers or mechanics may perform work in more than one classification and more expressly provided that, in such cases, it is the obligation of contractors and subcontractors to accurately record information required by this section for each separate classification of work performed.

By proposing these revisions to the language in § 5.5(a)(3)(i) and (c) to

[203] As an initial matter, the Department proposed to replace all references to employment (*e.g.,* employee, employed, employing, etc.) in § 5.5(a)(3) and (c), as well as in § 5.6 and various other sections, with references to ''workers'' or ''laborers and mechanics.'' These proposed changes are discussed in greater detail in section III.B.3.xxii (''Employment Relationship Not Required'').

explicitly require records of the ''correct classification(s) of work actually performed,'' the Department intended to clarify the requirements consistent with its longstanding interpretation of the current recordkeeping regulations that contractors and subcontractors must keep records of (and include on certified payrolls) hours worked segregated by each separate classification of work performed. The Department noted that it would continue to be the case that if a contractor or subcontractor fails to maintain such records of actual daily and weekly hours worked and correct classifications, then it must pay workers the rates of the classification of work performed with the highest prevailing wage and fringe benefits due.

Current § 5.5 expressly states that records that contractors and subcontractors are required to maintain must be accurate and complete. *See also* 40 U.S.C. 3145(b). The Department proposed to put contractors and subcontractors on further notice of their statutory, regulatory, and contractual obligations to keep accurate, correct, and complete records by adding the term ''actually'' in § 5.5(a)(3)(i) and (c) to modify ''hours worked'' and ''work performed.'' The current regulations require maintenance of records containing ''correct classifications'' and ''actual wages paid,'' and this proposed revision did not make any substantive change to the longstanding requirement that contractors and subcontractors keep accurate, correct, and complete records of all the information required in these sections.

Several commenters specifically noted that the clarification that contractors are required to maintain the required records for at least 3 years after work on the prime contract has been completed will reduce wage underpayment and enable more efficient enforcement of Davis-Bacon labor standards. *See* LIUNA, Electrical Training Alliance (Alliance), NCDCL, TAUC. LIUNA further noted that requiring all contractors to maintain required records for 3 years past the completion of work on the prime contract is particularly important in enforcing compliance standards when some or all of the workers may no longer be onsite, while NCDCL expressed the view that the proposed requirement would reduce the likelihood that records would be created or even falsified after the work has been performed. NECA similarly generally supported the proposed changes, though they also requested that the Department establish a cutoff time period for subcontractors to maintain the required records, as some projects may continue for several years after a subcontractor has performed any work on the project, thereby making it potentially burdensome for subcontractors to maintain the required records for such an extended period.

III–FFC and Alliance also specifically expressed support for the clarification that contractors must maintain accurate records of workers' classifications and the number of hours worked in each classification, indicating that misclassification of workers is a serious problem that would be reduced by the proposed clarification. III–FFC also commented favorably on the proposal to require contractors to maintain a record of workers' last known telephone numbers and email addresses, noting that this information is particularly important when the Department must interview workers as part of the enforcement process. Another commenter suggested that the Department should add to § 5.5(a)(3) a requirement that contractors maintain contact information for workers. The Department notes that such a requirement was part of its proposal and that the current regulations require that contractor records contain worker addresses. UBC also noted that contractors do not always maintain the required records for workers who have been classified, correctly or not, as independent contractors, and requested that language be added to the regulations requiring contractors to maintain time records for workers, jobsite orientation information, contact information for workers, names, contact information of subcontractors, and records of payments to independent contractors and/or subcontractors.

The Department also received two comments from contractor associations opposing the proposed requirement that contractors maintain a record of workers' last known telephone numbers and email addresses. ABC expressed the view that such a requirement would be an invasion of privacy and would increase the risk of identity theft and that the regulations should at least require that the phone numbers and email addresses be redacted, a position that appears to reflect the misimpression that the proposed change would require the worker phone numbers and email addresses to be included on the certified payrolls submitted to contracting agencies. IEC stated that ''it is one thing to maintain this contact information so that a contractor can contact its employees, and yet quite another to make this a regulatory requirement.'' IEC also noted that workers may not want to provide telephone numbers or email addresses or even might not have them. IEC further stated that the proposed requirement conflicts with the Privacy Act of 1974, as the information would not be relevant or necessary to accomplish the DBA's statutory purposes.

After consideration of the comments on this topic, the Department is adopting the changes to § 5.5(a)(3)(i) as proposed. As the various comments in support indicate, the proposed changes will clarify the recordkeeping requirements for contractors, discourage misclassification of workers, and increase the efficiency of the Department's enforcement. While the Department appreciates ABC's concerns for workers' privacy and the need to protect workers from the risk of identity theft, the change will not require contractors to provide workers' telephone numbers or emails on certified payrolls or post them on a publicly available database. The contractor will merely have to maintain records of the workers' last known telephone numbers and email addresses in the contractor's own internal records in the workers' personnel files or other suitable location, and to make that information available to the Department or the contracting agency upon request. Contractors will typically already have contact information, including phone numbers and email addresses, stored in their records in whatever manner the contractor has deemed appropriate in light of privacy concerns. The proposed requirement to maintain such a record for those workers who perform work on Davis-Bacon contracts for at least 3 years after work has concluded on the project and allow authorized representatives of the Department or the contracting agency access to that information on request, should not pose a material increased risk of identity theft for workers.

The Department acknowledges IEC's point that on occasion there may be workers who do not have telephone numbers or email addresses or who would prefer not to provide them to the contractor. However, workers also may prefer not to provide their home address, or may not have a permanent home address, but contractors have nevertheless been required to maintain a record of workers' last known home address and have generally done so without issue. Moreover, on the rare occasions when the contractor is unable to obtain a worker's telephone number or email address despite diligent efforts to do so, and has noted that fact in their records, the contractor will have satisfied this requirement by, in effect, documenting the worker's ''last known''

telephone number and email address. As discussed below, having a record of workers' telephone numbers and email addresses is extremely useful for enforcement purposes. The Department believes that these benefits outweigh any slight additional administrative or privacy burden that this requirement may impose.

The Department does not agree with IEC's claim that this information is not necessary or relevant to the DBA's statutory purposes. The Department, as well as the contracting agencies, is responsible for enforcing the Davis-Bacon prevailing wage requirements on covered contracts. Enforcement of prevailing wage requirements for a Davis-Bacon project requires the Department to obtain accurate and detailed information as to workers' classifications, hours of work, and wages paid at all stages of a project. Interviews are necessary to, among other reasons, confirm that the information provided on certified payrolls and basic records is correct and to fill in any gaps in a contractor's records. However, worksite interviews may not be possible (or suitable) for a variety of reasons: some workers may not be onsite at the time an investigation is conducted; some subcontractors may have already completed their portion of the work; certain work crews may not be necessary at that stage of construction; some contractors may attempt to interfere with WHD's investigation by, for example, telling workers to leave the worksite or lie to investigators; or some workers may have voluntarily separated from employment or been terminated. Information that can be obtained from such workers may be valuable or even necessary to determine whether contractors are in compliance with the Davis-Bacon labor standards. The requirement to maintain a record of workers' telephone numbers and email addresses should make it considerably easier and more efficient for the Department—and contracting agencies—to reach workers who are not on the worksite at the time of the Department's investigation and will therefore increase the effectiveness of the Department's enforcement efforts.

The Department also understands NECA's concern that the requirement to maintain the required records for at least 3 years after all the work on the prime contract is completed may be more burdensome for subcontractors that may complete work on their subcontract well before all work on the prime contract has been completed. However, allowing subcontractors to maintain the required records for a shorter period of time would be inconsistent with the Department's longstanding interpretation and practice concerning the period of time that contractors and subcontractors must keep payroll and basic records required by § 5.5(a)(3), and could impede enforcement of the Davis-Bacon labor standards. The obligation to ensure that the Davis-Bacon labor standards have been met and workers have received the applicable prevailing wage rates does not end when a subcontractor completes their portion of work on the project, and the Department may investigate compliance with the Davis-Bacon labor standards after a subcontractor is no longer working onsite. The required records are a key component in the Department's enforcement efforts. Such records are particularly helpful when workers are no longer working on the project, as other commenters noted. Accordingly, the Department does not believe it is appropriate to only require subcontractors to maintain records for a more limited period of time. The Department notes that nothing in the regulations prohibits a prime contractor from requesting, or requiring, its subcontractors provide a copy of the required records to the prime contractor, so that the prime contractor can ensure that these records are available for the required timeframe, as the prime contractor is responsible for ensuring subcontractor compliance under § 5.5(a)(6). Such an approach does not relieve subcontractors of their obligations to maintain the required records. If they also provide those records to the prime contractor, however, required records may be more readily available when needed by the Department or the contracting agency.

The Department also appreciates UBC's concerns that contractors may not maintain adequate records for workers when the contractor considers the workers to be independent contractors or subcontractors, making it more difficult to determine whether such workers were paid the applicable prevailing wage rates for their hours worked. Contractors are required to pay applicable prevailing wage rates for hours worked by laborers and mechanics on the site of work, regardless of any contractual relationship which may be alleged to exist between the contractor and those workers. A worker's classification as an independent contractor, even where such a classification is correct, does not relieve a contractor of the obligation to pay prevailing wages to that worker. Therefore, the regulatory language as proposed already requires that contractors keep all of the required records described in § 5.5(a)(3) for such workers, unless such workers meet the requirements for the executive, administrative, or professional exemption as defined in 29 CFR 541. These required records therefore already include time records for all workers (including workers' attendance at jobsite orientation, as this would be considered hours worked), contact information for all workers, and a record of payments made to all workers, including individuals classified as independent contractors.

(2) 29 CFR 5.5(a)(3)(ii)

The Department proposed to revise the language in § 5.5(a)(3)(ii) to expressly apply to all entities that might be responsible for maintaining the payrolls a contractor is required to submit weekly when a Federal agency is not a party to the contract. Currently, the specified records must be submitted to the ''applicant, sponsor, or owner'' if a Federal agency is not a party to the contract. The proposed revision added the language ''or other entity, as the case may be, that maintains such records'' to clarify that this requirement applies regardless of the role or title of the recipient of Federal assistance (through grants, loans, loan guarantees or insurance, or otherwise) under any of the statutes referenced by § 5.1.

The Department also proposed to revise § 5.5(a)(3)(ii) by replacing the phrase ''or audit of compliance with prevailing wage requirements'' with ''or other compliance action.'' This proposed revision clarified that compliance actions may be accomplished by various means, not solely by an investigation or audit of compliance. A similar change was proposed in § 5.6. Compliance actions include, without limitation, full investigations, limited investigations, office audits, self-audits, and conciliations. The proposed revision expressly set forth the Department's longstanding practice and interpretation of this current regulatory language to encompass all types of Davis-Bacon compliance actions currently used by the Department, as well as additional compliance tools the Department may use in the future. The proposed revision did not impose any new or additional requirements upon Federal agencies, applicants, sponsors, owners, or other entities, or on the Department, contractors, or subcontractors.

The Department also proposed to add language to § 5.5(a)(3)(ii)(A) to codify the Department's longstanding policy that contracting agencies and prime contractors can permit or require contractors to submit their certified

payrolls through an electronic system, provided that the electronic submission system requires a legally valid electronic signature, as discussed below, and the contracting agency or prime contractor permits other methods of payroll submission in situations where the contractor is unable or limited in its ability to use or access the electronic system. *See generally* PWRB, DBA/DBRA Compliance Principles, at 26. As noted in the proposal, the Department encourages all contracting agencies to permit submission of certified payrolls electronically, so long as all of the required information and certification requirements are met. Nevertheless, contracting agencies determine which, if any, electronic submissions systems they will use, as certified payrolls are submitted directly to the contracting agencies. The Department explained that electronic submission systems can reduce the recordkeeping burden and costs of record maintenance, and many such systems include compliance monitoring tools that may streamline the review of such payrolls.[204]

However, under the proposed revisions, agencies that require the use of an electronic submission system would be required to allow contractors to submit certified payrolls by alternative methods when contractors are not able to use the agency's electronic submission system due to limitations on the contractor's ability to access or use the system. For example, if a contractor does not have internet access or is unable to access or use the electronic submission system due to a disability, the contracting agency would be required to allow such a contractor to submit certified payrolls in a manner that accommodates these circumstances.

The Department also proposed a new paragraph, § 5.5(a)(3)(ii)(E), to reiterate the Department's longstanding policy that, to be valid, the contractor's signature on the certified payroll must either be an original handwritten signature or a legally valid electronic signature. Both of these methods are sufficient for compliance with the Copeland Act. *See* WHD Ruling Letter (Nov. 12, 2004) (''Current law establishes that the proper use of electronic signatures on certified payrolls . . . satisfies the requirements of the Copeland Act and its implementing regulations.'').[205] The proposal specified that valid electronic signatures include any electronic process that indicates acceptance of the certified payroll record and includes an electronic method of verifying the signer's identity. Valid electronic signatures do not include a scan or photocopy of a written signature. The Department recognized that electronic submission of certified payroll expands the ability of contractors and contracting agencies to comply with the requirements of the Davis-Bacon and Copeland Acts. The proposal noted that as a matter of longstanding policy, the Department has considered an original signature to be legally binding evidence of the intention of a person with regard to a document, record, or transaction. In its proposal, the Department acknowledged that modern technologies and evolving business practices are rendering the distinction between original paper and electronic signatures nearly obsolete.

Several commenters expressed support for the proposed language clarifying that agencies may permit or require electronic submission of certified payrolls, indicating that this method would result in more streamlined and efficient submission and maintenance of certified payrolls. *See, e.g.,* COSCDA, MnDOT, UBC, REBOUND. MnDOT also requested that the Department provide a process by which wage determination data could be incorporated into an electronic payroll system to more effectively ensure compliance with prevailing wage requirements. Although MnDOT's request is outside the scope of this rulemaking, as the NPRM did not refer to or otherwise address the possibility of incorporating wage determination data into electronic payroll systems, the Department appreciates MnDOT's request and will consider as a separate, subregulatory matter whether wage determination data can be provided in a format that would enable it to be readily incorporated into electronic payroll systems.

Although comments on the proposed revisions were generally supportive, several commenters suggested further additions or revisions. Smith, Summerset & Associates pointed out that contractors rarely print out or electronically save copies of certified payrolls that they have entered into an electronic submission system, generally assuming that they will always be able to obtain their certified payrolls from the system itself, but that certified payrolls are often archived when a project is complete and may therefore not be readily accessible to the contractor after that point. They therefore suggested adding language to the regulation to require any electronic certified payroll software provider to provide access to archived certified payrolls to the contractor, the contracting agency, and the Department upon request for at least 3 years after the work on the prime contract has been completed. The Department agrees that where a contracting agency encourages or requires contractors to submit their certified payroll through a particular electronic submission system, it is important that the contracting agency, the Department, and the contractors are easily able to access the certified payrolls in that system for the entire time period that such records must be maintained. The Department has therefore added language to § 5.5(a)(3)(ii)(A) of the final rule clarifying that where a contracting agency encourages or requires contractors to submit their certified payroll through a particular electronic submission system, the contracting agency must also ensure that the system allows the contractor, the contracting agency, and the Department to access the certified payrolls upon request for at least 3 years after the work on the prime contract has been completed.

Smith, Summerset & Associates also recommended that the Department add language to the regulations specifically authorizing contracting agencies to provide copies of certified payrolls to other labor or tax enforcement agencies, noting that in their review of certified payrolls, contracting agencies may frequently find issues, such as violations of state or local wage and hour laws or misclassification of employees as independent contractors, that should be reported to the relevant enforcement agency. They indicated that including such language would encourage contracting agencies to provide certified payrolls to other enforcement agencies while putting contractors on notice that the agencies might choose to do so. The Department recognizes that contracting agencies may frequently be in a position to identify potential violations of laws enforced by other agencies as the result of their certified payroll reviews and agrees that reporting such potential violations to the appropriate enforcement agencies can positively impact enforcement in these other areas and enhance workers' welfare. As the

[204] The Department explained that it does not endorse or approve the use of any electronic submission system or monitoring tool(s). Although electronic monitoring tools can be a useful aid to compliance, successful submission of certified payrolls to an electronic submission system with such tools does not guarantee that a contractor is in compliance, particularly since not all violations can be detected through electronic monitoring tools. Contractors that use electronic submission systems remain responsible for ensuring compliance with Davis-Bacon labor standards provisions.

[205] *https://www.fhwa.dot.gov/construction/cqit/111204dol.cfm.*

certified payrolls are records submitted to and maintained by the contracting agencies, contracting agencies are free to provide certified payrolls to other enforcement agencies without the Department's authorization or permission, where the contracting agency has determined that such a submission is appropriate and is in accordance with all relevant legal obligations. Therefore, the Department does not believe that regulatory language expressly directing such submissions or providing a blanket authorization for such submissions is currently necessary. However, the Department strongly encourages contracting agencies to provide certified payrolls and other related information to other law enforcement agencies when they determine they can and should appropriately do so.

MnDOT stated that contractors should be required to include addresses and Social Security numbers on electronically submitted certified payrolls, as the electronic submissions would be very secure, protecting workers' personally identifiable information while still allowing workers to be more easily identified and traced. Two other commenters requested adding a requirement to include an identifying number or similar identifier on certified payrolls that would not need to be redacted when certified payrolls are requested and obtained by third parties, apparently unaware that the current regulations already contain a requirement (which this rulemaking does not alter) that the contractor include an individual identifying number for each worker on the certified payrolls. As the proposed language maintains the current requirement that contractors include an individually identifying number for each worker, the Department believes that this is sufficient to allow workers to be identified and tracked across multiple certified payrolls. Although the Department acknowledges that electronic certified payroll submission systems will generally use secure online portals, the Department's experience has shown that the potential risk of unauthorized disclosure of workers' personally identifiable information outweighs any additional benefit that might be incurred by requiring the addition of an address and full Social Security number, instead of the current requirement for an individual identifying number, on certified payrolls.

One commenter objected to the proposed language explicitly permitting contracting agencies to permit or require the submission of certified payrolls through an electronic system, so long as the electronic system requires a legally valid signature, on the grounds that the Department prohibits submission of certified payrolls by email, even though having to use an electronic submission system is just as burdensome to small contractors as submitting certified payrolls by email. However, the Department does not in fact prohibit submission of certified payrolls by email. Contracting agencies may permit submission of certified payrolls by email so long as the certified payrolls submitted in such a manner have a legally valid electronic signature, as required for all forms of electronic submission. Certified payrolls that do not have an original or a legally valid electronic signature, but rather are unsigned or merely have a scan or copy of a signature, do not meet the requirements of the Copeland Act regardless of the method of submission. Many payroll software options provide a method of adding a valid electronic signature to payroll documents; even a widely used Portable Document Format (PDF) platform has a digital signature option that can meet this requirement. Accordingly, the Department declines to adopt this suggestion because the Department does not believe that the requirement to append a legally valid electronic signature to any certified payrolls submitted electronically will be burdensome to contractors, even where such signatures must be added to certified payrolls that are submitted by email.

COSCDA and NCSHA also indicated that the requirement to submit weekly certified payrolls imposes significant administrative costs on contractors, particularly as many contractors have to adjust their usual biweekly or bimonthly payroll to meet the weekly submission requirement. These commenters requested that the Department revise the regulations to permit greater flexibility in the frequency of certified payroll submissions. While the Department appreciates these commenters' concerns regarding the weekly payment of prevailing wages and weekly submission of certified payroll, both requirements are statutory, not regulatory. The DBA itself states that contracts must include stipulations requiring contractors and subcontractors to pay applicable prevailing wages ''unconditionally *and at least once per week*.'' 40 U.S.C. 3142(c)(1) (emphasis added). The Copeland Act similarly states that the Department's implementing regulations ''shall include a provision that each contractor and subcontractor *each week* must furnish a statement on the wages paid to each employee during the prior week.'' 40 U.S.C. 3145(a) (emphasis added). Therefore, the Department cannot promulgate regulations allowing contractors to pay required prevailing wages or submit certified payrolls on any basis less frequent than weekly.

Smith, Summerset & Associates noted that the language at 29 CFR 5.5(a)(3)(ii)(A) stating that ''[t]he prime contractor is responsible for the submission of copies of certified payrolls by all subcontractors'' is unnecessarily confusing, as prime contractors are responsible for ensuring that subcontractors submit all required certified payrolls, and recommended that the words ''copies of'' be replaced with ''all'' to eliminate this confusion. They also noted a citation error in the proposed regulatory text. The Department agrees with these suggestions and has made these non-substantive changes in the final rule.

After consideration of these comments and for the reasons discussed above, the Department is adopting the changes to this paragraph as proposed, except that the Department is also adding language regarding access to electronic certified payroll submission systems and the minor non-substantive edits described above. In addition, the Department has added a new paragraph (a)(3)(ii)(G) to § 5.5 that expressly states that contractors and subcontractors must preserve all certified payrolls during the course of the work and for a period of 3 years after all the work on the prime contract is completed. This length-of-record-retention requirement, which is the same as for other required records in § 5.5(a)(3), was implicit in the proposed regulatory text and is explicit in the existing regulatory text, but the express inclusion in the regulation will provide clarity for the regulated community.

(3) 29 CFR 5.5(a)(3)(iii)–(iv)

The Department proposed to add paragraph (a)(3)(iii) to § 5.5 to require all contractors, subcontractors, and recipients of Federal assistance to maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed. The Department explained that these related documents include, without limitation, contractors' and subcontractors' bids and proposals, as well as amendments, modifications, and extensions to contracts, subcontracts, or agreements.

The proposal explained that WHD routinely requests these contract documents in its DBRA investigations.

In the Department's experience, contractors and subcontractors that comply with the Davis-Bacon labor standards requirements usually, as a good business practice, maintain these contracts and related documents. The Department noted that adding an express regulatory requirement that contractors and subcontractors maintain and provide these records to WHD would bolster enforcement of the labor standards provisions of the statutes referenced by § 5.1. This requirement would not relieve contractors or subcontractors from complying with any more stringent record retention requirements (*e.g.,* longer record retention periods) imposed by contracting agencies or other Federal, State, or local law or regulation.

The Department also indicated that this proposed revision could help ensure uniform compliance with Davis-Bacon labor standards and prevent non-compliant contractors from underbidding law-abiding contractors. Like the current recordkeeping requirements, non-compliance with this new proposed requirement may result in the suspension of any further payment, advance, or guarantee of funds and may also be grounds for debarment action pursuant to 29 CFR 5.12.

The Department proposed to renumber current § 5.5(a)(3)(iii) as § 5.5(a)(3)(iv). In addition, the Department proposed to revise this re-numbered paragraph to clarify the records contractors and subcontractors are required to make available to the Federal agency (or applicant, sponsor, owner, or other entity, as the case may be) or the Department upon request. Specifically, the proposed revisions to § 5.5(a)(3)(ii) and (iv), and the proposed new § 5.5(a)(3)(iii), expanded and clarified the records contractors and subcontractors are required to make available for inspection, copying, or transcription by authorized representatives specified in this section. The Department also proposed an additional requirement that contractors and subcontractors must make available any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1.

Current § 5.5(a)(3)(iii) requires contractors and subcontractors to make available the records set forth in § 5.5(a)(3)(i) (Payrolls and basic records). The proposed revisions to re-numbered § 5.5(a)(3)(iv) would ensure that contractors and subcontractors are aware that they are required to make available not only payrolls and basic records, but also the payrolls actually submitted to the contracting agency (or applicant, sponsor, owner, or other entity, as the case may be) pursuant to § 5.5(a)(3)(ii), including the Statement of Compliance, as well as any contracts and related documents required by proposed § 5.5(a)(3)(iii). The Department explained that these records help WHD determine whether contractors are in compliance with the labor standards provisions of the statutes referenced by § 5.1, and what the appropriate back wages and other remedies, if any, should be. The Department believed that these clarifications would remove doubt or uncertainty as to whether contractors are required to make such records available to the Federal agency (or applicant, sponsor, owner, or other entity, as the case may be) or the Department upon request. The proposed revisions made explicit the Department's longstanding practice and did not impose any new or additional requirements upon a Federal agency (or applicant, sponsor, owner, or other entity, as the case may be).

The proposal stated that the new or additional recordkeeping requirements in the proposed revisions to § 5.5(a)(3) should not impose an undue burden on contractors or subcontractors, as they likely already maintain worker telephone numbers and email addresses and may already be required by contracting agencies to keep contracts and related documents. These proposed revisions also enhance the Department's ability to provide education, outreach, and compliance assistance to contractors and subcontractors awarded contracts subject to the Davis-Bacon labor standards provisions.

Finally, the Department proposed to add a sanction in re-numbered § 5.5(a)(3)(iv)(B) for contractors and other persons that fail to submit the required records in § 5.5(a)(3) or make those records available to WHD within the timeframe requested. Specifically, the Department proposed that contractors that fail to comply with WHD record requests would be precluded from introducing as evidence in an administrative proceeding under 29 CFR part 6 any of the required records that were not provided or made available to WHD despite WHD's request for such records. The Department proposed this sanction to enhance enforcement of recordkeeping requirements and encourage cooperation with its investigations and other compliance actions. The proposal provided that WHD would take into consideration a reasonable request from the contractor or person for an extension of the time for submission of records. WHD would determine the reasonableness of the request and may consider, among other things, the location of the records and the volume of production.

In addition to the general support for the proposed recordkeeping changes mentioned above, III–FFC, LIUNA, and TAUC specifically mentioned the proposal to require the maintenance of Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed, noting that it would help ensure that contractors are acting responsibly and would improve and strengthen enforcement, particularly when workers or contractors have already completed their work on a project. In contrast, FTBA, ABC, and the group of U.S. Senators objected to those proposed changes. FTBA also argued that the proposed requirement that contractors and subcontractors must make available ''any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1'' was overly broad and would require contractors to comply with potentially burdensome, varied, and unreasonable requests. FTBA also stated that the Department did not provide justification or state a need for adding this requirement, and that the Department should instead have proposed specific additional records, which would have provided an opportunity to comment on each specific additional record. ABC and the group of U.S. Senators stated that the proposed requirement that all contractors, subcontractors, and recipients of Federal assistance maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed is unduly burdensome, further stating that the Department did not provide sufficient justification for the requirement. ABC also objected to the proposed language prohibiting contractors that fail to comply with record requests from later introducing the specified records during administrative proceedings as arbitrary, coercive, and likely to violate contractors' due process rights, particularly since contractors may have many legitimate reasons for being unable or unwilling to comply immediately with the Department's record requests.

The Department agrees with commenters' statements that requiring contractors, subcontractors, and funding recipients to maintain Davis-Bacon contracts, subcontracts, and related documents will help ensure that

contractors are aware of their obligations and will strengthen enforcement. While the Department appreciates some commenters' concerns that maintaining copies of Davis-Bacon contracts, subcontracts, and related documents might be burdensome, particularly to small or mid-sized contractors, this requirement is not likely to result in any significant administrative burden or costs to contractors that contractors are not already incurring. Contractors would only be required to maintain contracts that they have been awarded or that they in turn have awarded to others. As the Department indicated in the NPRM, contractors will already have many sound business reasons for maintaining these contracts. The contracts awarded to the contractor (and subcontracts awarded to subcontractors) typically set forth the work that the contractor is obligated to perform, the terms and procedures of payment, and information as to what would be considered a breach of any of their contract obligations, including the specific Davis-Bacon obligations contained in their contract clauses. The subcontracts similarly typically state the subcontractor's scope of work, the financial terms under which the work will be performed, and what remedies exist if a subcontractor fails to perform as contracted. With these and many other sensible business reasons for maintaining a record of Davis-Bacon contracts and subcontracts, it is not surprising that, in the Department's experience, most contractors already maintain records of these contracts and subcontracts. The proposed regulatory language merely requires such records to be maintained for the same period of time as other required records, and that such records must similarly be provided to the Department upon request, as there are also several reasons why such records are particularly useful for enforcement purposes. Not only does the Department's experience indicate that contractors who fail to maintain these records are more likely to disregard their obligations to workers and subcontractors, as noted in the NPRM, but these records are critical for enforcement of the prevailing wage requirements. The information provided by these records assists the Department to make accurate coverage determinations, establish the extent of the site(s) of work, determine whether the contract included the required clauses and all applicable wage determinations (particularly where there is a dispute between the contracting agency and the contractor as to what was provided to the contractor), and verify whether the prime contractor and upper-tier contractors have met their obligations to lower-tier subcontractors and their workers. The advantages of ensuring that contractors maintain a record of the contracts that set out their Davis-Bacon obligations for a reasonable period of time and enabling the Department to more easily enforce those obligations clearly outweigh the minor additional recordkeeping burden, if any, that contractors may incur.

Similarly, the Department does not agree that the proposed requirement that contractors and subcontractors must make available ''any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1'' is overly broad, or that the Department instead should list all possible types of records that may be created during the course of a construction project and may be necessary to determine compliance. Davis-Bacon labor standards apply to a wide variety of projects, contractors, and worker classifications, resulting in a correspondingly wide variety of relevant records, such that it would not be possible to list every conceivable type of record that may be needed to verify hours worked, wages rates paid, and fringe benefits provided. Particularly where a contractor has not maintained an accurate or complete record of daily and weekly hours worked and wages paid as required, the Department may need to look at records ranging from daily construction reports or security sign-in sheets to drivers' trip tickets or petty cash logs to determine whether laborers and mechanics received the applicable prevailing wage rates for all hours worked. It would significantly hamper enforcement if the Department could not require contractors to provide existing—not create new—relevant records that would help determine compliance merely because it is not possible to list every conceivable form of relevant record. Moreover, to the extent that such records, or the failure to provide them, results in a determination that a contractor is not in compliance with the Davis-Bacon labor standards, the contractor will have the opportunity to raise the issue of the reasonableness of the Department's request for such records during the enforcement process, including any administrative proceedings, if the contractor wishes to do so.

For similar reasons, the Department does not believe that prohibiting contractors that fail to comply with record requests from later introducing the specified records during administrative proceedings is arbitrary, coercive, or likely to violate contractors' due process rights. While contractors may have valid reasons for being unable or unwilling to comply immediately with the Department's request, it is difficult to discern why contractors would be unable to provide those reasons to the Department in a request for an extension of time to provide such records, as provided for in the proposed provision. In addition, if the contractor believes that the requested records are relevant evidence in administrative proceedings relating to violations, the records would presumably also be relevant to the Department's investigation of those potential violations. Moreover, if a contractor believes that the Department's request for the records was arbitrary or unreasonable despite the contractor's belief that the records should be admitted as evidence during administrative proceedings, the contractor will have the opportunity to raise that issue during the administrative proceedings themselves.

For these reasons, the Department adopts § 5.5(a)(3)(iii) and (a)(3)(iv) as proposed.

(C) 29 CFR 5.5(a)(4) Apprentices

The Department proposed to reorganize § 5.5(a)(4)(i) so that each of the four apprentice-related topics it addresses—rate of pay, fringe benefits, apprenticeship ratios, and reciprocity—are more clearly and distinctly addressed. These proposed revisions are not substantive. In addition, the Department proposed to revise the paragraph of § 5.5(a)(4)(i) regarding reciprocity to better align with the purpose of the DBA and the Department's ETA regulation at 29 CFR 29.13(b)(7) regarding the applicable apprenticeship ratios and wage rates when work is performed by apprentices in a different State than the State in which the apprenticeship program was originally registered.

Section 5.5(a)(4)(i) provides that apprentices may be paid less than the prevailing rate for the work they perform if they are employed pursuant to, and individually registered in, a bona fide apprenticeship program registered with ETA's Office of Apprenticeship (OA) or with a State Apprenticeship Agency (SAA) recognized by the OA. In other words, in order to employ apprentices on a Davis-Bacon project at lower rates than the prevailing wage rates applicable to journeyworkers, contractors must ensure that the apprentices are participants in a federally registered

apprenticeship program or a State apprenticeship program registered by a recognized SAA. Any worker listed on a payroll at an apprentice wage rate who is not employed pursuant to and individually registered in such a bona fide apprenticeship program must be paid the full prevailing wage listed on the applicable wage determination for the classification of work performed. Additionally, any apprentice performing work on the site of the work in excess of the ratio permitted under the registered program must be paid not less than the full wage rate listed on the applicable wage determination for the classification of work performed.

In its current form, § 5.5(a)(4)(i) further provides that when a contractor performs construction on a project in a locality other than the one in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) specified in the contractor's or subcontractor's registered program will be observed. Under this provision, the ratios and wage rates specified in a contractor's or subcontractor's registered program are ''portable,'' such that they apply not only when the contractor performs work in the locality in which the program was originally registered (sometimes referred to as the contractor's ''home State'') but also when a contractor performs work on a project located in a different State (sometimes referred to as the ''host State''). In contrast, as part of a 1979 NPRM, the Department proposed essentially the opposite approach, *i.e.,* that apprentice ratios and wage rates would not be portable and that, instead, when a contractor performs construction on a project in a locality other than the one in which its program was originally registered, ''the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in plan(s) registered for that locality shall be observed.'' [206]

In a final rule revising 29 CFR part 5, issued in 1981, the Department noted that several commenters had objected to the 1979 NPRM's proposal to apply the apprentice ratios and wage rates in the location where construction is performed, rather than the ratios and wage rates applicable in the location in which the program is registered.[207] The Department explained that, in light of these comments, ''[u]pon reconsideration, we decided that to impose different plans on contractors, many of which work in several locations where there could be differing apprenticeship standards, would be adding needless burdens to their business activities.'' [208]

In 2008, ETA amended its apprenticeship regulations in a manner that is seemingly in tension with the approach to Davis-Bacon apprenticeship ''portability'' reflected in the 1981 final rule revising 29 CFR part 5. Specifically, in December 2007, ETA issued an NPRM to revise the agency's regulations governing labor standards for the registration of apprenticeship programs.[209] One of the NPRM proposals was to expand the provisions of then-existing 29 CFR 29.13(b)(8), which at that time provided that in order to be recognized by ETA, an SAA must grant reciprocal recognition to apprenticeship programs and standards registered in other States—except for apprenticeship programs in the building and construction trades.[210] ETA proposed to move the provision to 29 CFR 29.13(b)(7) and to remove the exception for the building and construction trades.[211] In the preamble to the final rule issued on October 29, 2008, ETA noted that several commenters had expressed concern that it was ''unfair and economically disruptive to allow trades from one State to use the pay scale from their own State to bid on work in other States, particularly for apprentices employed on projects subject to the Davis-Bacon Act.''[212] The preamble explained that ETA ''agree[d] that the application of a home State's wage and hour and apprentice ratios in a host State could confer an unfair advantage to an out-of-state contractor bidding on a Federal public works project.'' [213] Further, the preamble noted that, for this reason, ETA's negotiations of memoranda of understanding with States to arrange for reciprocal approval of apprenticeship programs in the building and construction trades have consistently required application of the host State's wage and hour and apprenticeship ratio requirements. Accordingly, the final rule added a sentence to 29 CFR 29.13(b)(7) to clarify that the program sponsor seeking reciprocal approval must comply with the host State's apprentice wage rate and ratio standards.[214]

In order to better harmonize the Davis-Bacon regulations and ETA's apprenticeship regulations, the Department proposed in its NPRM to revise 29 CFR 5.5(a)(4)(i) to reflect that contractors employing apprentices to work on a DBRA project in a locality other than the one in which the apprenticeship program was originally registered must adhere to the apprentice wage rate and ratio standards of the project locality. As noted above, the general rule in § 5.5(a)(4)(i) is that contractors may pay less than the prevailing wage rate for the work performed by an apprentice employed pursuant to, and individually registered in, a bona fide apprenticeship program registered with ETA or an OA-recognized SAA. Under ETA's regulation at 29 CFR 29.13(b)(7), if a contractor has an apprenticeship program registered in one State but wishes to employ apprentices to work on a project in a different State with an SAA, the contractor must seek and obtain reciprocal approval from the project State SAA and adhere to the wage rate and ratio standards approved by the project State SAA. Accordingly, upon receiving reciprocal approval, the apprentices in such a scenario would be considered to be employed pursuant to and individually registered in the program in the project State, and the terms of that reciprocal approval would apply for purposes of the DBRA. The Department's proposed revision requiring contractors to apply the ratio and wage rate requirements from the relevant apprenticeship program for the locality where the laborers and mechanics are working therefore better aligns with ETA's regulations on recognition of SAAs and is meant to eliminate potential confusion for Davis-Bacon contractors subject to both ETA and WHD rules regarding apprentices. The proposed revision also better comports with the DBA's statutory purpose to eliminate the unfair competitive advantage conferred on contractors from outside of a geographic area bidding on a Federal construction contract based on lower wage rates (and, in the case of apprentices, differing ratios of apprentices paid a percentage of the journeyworker rate for the work performed) than those that prevail in the location of the project.

The Department noted that multiple apprenticeship programs may be

[206] 44 FR 77085.

[207] 46 FR 4383.

[208] *Id.* The 1981 final rule revising 29 CFR part 5 was withdrawn, but the apprenticeship portability provision in § 5.5 was ultimately proposed and issued unchanged by a final rule issued in 1982. *See* Final Rule, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, 47 FR 23658, 23669 (May 28, 1982).

[209] *See* NPRM, Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations Notice of Proposed Rulemaking, 72 FR 71019 (Dec. 13, 2007).

[210] *Id.* at 71026.

[211] *Id.* at 71029.

[212] Final Rule, Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, 73 FR 64402, 64419 (Oct. 29, 2008).

[213] *Id.*

[214] *Id.* at 64420. *See* 29 CFR 29.13(b)(7).

registered in the same State, and that such programs may cover different localities of that State and require different apprenticeship wage rates and ratios within those separate localities. If apprentices registered in a program covering one State locality will be doing apprentice work in a different locality of the same State, and different apprentice wage and ratio standards apply to the two different localities, the proposed rule would require compliance with the apprentice wage and ratio standards applicable to the locality where the work will be performed. The Department encouraged comments as to whether adoption of a consistent rule, applicable regardless of whether the project work is performed in the same State as the registered apprenticeship program, best aligns with the statutory purpose of the DBA and would be less confusing to apply.

Lastly, the Department proposed to remove the regulatory provisions regarding trainees currently set out in §§ 5.2(n)(2) and 5.5(a)(4)(ii), and to remove the references to trainees and training programs throughout parts 1 and 5. Current § 5.5(a)(4)(ii) permits ''trainees'' to work at less than the predetermined rate for the work performed, and § 5.2(n)(2) defines a trainee as a person registered and receiving on-the-job training in a construction occupation under a program approved and certified in advance by ETA as meeting its standards for on-the-job training programs. Sections 5.2(n)(2) and 5.5(a)(4)(ii) were originally added to the regulations over 50 years ago.[215] However, ETA no longer reviews or approves on-the-job training programs and, relatedly, WHD has found that § 5.5(a)(4)(ii) is seldom if ever applicable to DBRA contracts. The Department therefore proposed to remove the language currently in §§ 5.2(n)(2) and 5.5(a)(4)(ii), and to retitle § 5.5(a)(4) ''Apprentices.'' The Department also proposed a minor revision to § 5.5(a)(4)(ii) to align with the gender-neutral term of ''journeyworker'' used by ETA in its apprenticeship regulations. The Department also proposed to rescind and reserve §§ 5.16 and 5.17, as well as delete references to such trainees and training programs in §§ 1.7, 5.2, 5.5, 5.6, and 5.15. The Department encouraged comments on this proposal, including any relevant information about the use of training programs in the construction industry.

The Department received no comments on its technical, non-substantive proposal to reorganize § 5.5(a)(4)(i) so that each of the four apprentice-related topics it addresses are more clearly and distinctly addressed. The final rule therefore adopts this change as proposed.

The Department received several comments on its proposal regarding reciprocity of ratios and wage rates where a contractor performs construction in a locality other than that in which its apprenticeship program is registered. The majority of the comments expressed support for the proposal. Several commenters, such as CEA, NECA, and SMACNA, supported the proposal, saying that requiring contractors to apply the apprenticeship ratio and wage rate standards of the locality where the project is being performed better aligns with ETA's apprenticeship regulations and eliminates potential confusion. The UA and NCDCL also stated that the proposal would help prevent non-local contractors from gaining an unfair economic advantage over local contractors and that it comports with the purpose of the DBA.

MCAA commended the proposal as constructive and sought clarification on ''where the apprentice must . . . be registered.'' In response to the question raised, the Department notes that nothing in the existing regulation or proposal purports to define where apprentices should be registered. Section 5.5(a)(4)(i) only provides that in order for contractors to employ apprentices on a Davis-Bacon project at lower rates than the prevailing wage rates applicable to journeyworkers, the apprentices must be participants in a federally registered apprenticeship program, or a State apprenticeship program registered by a recognized SAA. The ETA regulation at 29 CFR 29.3 governs the ''[e]ligibility and procedure for registration of an apprenticeship program'' and § 29.3(c) addresses individual registration.

CC&M, while supporting the proposal, recommended an additional change to the regulation to clarify that contractors employing apprentices outside of the locality in which the apprenticeship program is registered should apply the wage rate and ratio of the locality of the project ''or apply the wage rates and ratio of the actual program in which the apprentice is enrolled, whichever is higher and more restrictive.'' The Department's intent for the proposed revision, in part, was to harmonize the Davis-Bacon regulations with ETA's apprenticeship regulations requiring contractors to adhere to the host State's apprentice wage and ratio standards when employing apprentices in a State different from where the apprenticeship program is registered. In its existing form, § 5.5(a)(4)(i) is in tension with ETA regulations because it explicitly allows contractors to apply the apprentice ratio and wage rates under their registered program even where a different apprentice ratio and/or wage rate may apply pursuant to ETA's reciprocity rule. CC&M's recommended approach of applying the more restrictive apprenticeship ratio and wage rate would not sufficiently alleviate this tension and could cause further confusion for contractors subject to both ETA and WHD rules regarding apprentices. Therefore, the Department declines to adopt CC&M's recommendation.

On the other hand, IEC asserted that the proposed revision would impose an undue burden on apprenticeship programs by causing them ''to register in additional localities in order for apprenticeship to journeyman ratios to be reliable'' and by imposing ''locality-specific rules.'' While IEC did not elaborate on how the proposal would cause apprenticeship programs to register in additional localities, the Department does not agree that it would have that effect. Neither the proposal nor the existing regulations address where an apprenticeship program needs to be registered. Rather, the rules establish a framework for determining the applicable apprentice ratio and wage rate when a contractor seeks to employ apprentices in a locality different from that in which the program is registered. The Department also disagrees with the comment that the proposal would impose an undue burden on apprenticeship programs by imposing locality specific rules. Rather, the Department believes the proposal avoids confusion and creates a consistent framework for ETA registered apprenticeship programs by requiring, at a minimum, the application of local wage rates and ratios consistent with ETA's apprenticeship regulations.

IEC further stated that the Department provided no guidance for situations where localities have no apprenticeship program and asked what should be done in those circumstances. In response, the Department recognized the need for clarification and made revisions to the final rule accordingly. Specifically, the Department revised § 5.5(a)(4)(i)(D) to clarify that the apprenticeship ratio and wage rates under the contractor's registered program would apply in the

[215] *See* Final Rule, Labor Standards Applicable to Contracts Covering Federally Financed and Assisted Construction, 36 FR 19304 (Oct. 2, 1971) (defining trainees as individuals working under a training program certified by ETA's predecessor agency, the Manpower Administration's Bureau of Apprenticeship and Training).

event there is no program in the project locality establishing the applicable ratio and rates.

Finally, the Department received a few comments in response to its proposal to remove the reference to the regulatory provisions regarding trainees set out in existing §§ 5.2(n)(2) and 5.5(a)(4)(ii). See section III.B.3.ii (''29 CFR 5.2 Definitions''). Two commenters, CEA and SMACNA, supported the proposal, recognizing that ETA no longer reviews or approves on-the-job training programs. On the other hand, IAPA opposed the proposal and stated that ''eliminating trainees from the Davis[-]Bacon Act may have unintended consequences.'' IAPA contended that student trainees such as those receiving training under the Illinois Department of Transportation's program with the USDOT's FHWA may not be able to work on Davis-Bacon projects if the trainee language is removed.

IAPA's comment perhaps reflects a misunderstanding of the proposal. The existing regulation under § 5.5(a)(4)(ii) stated that trainees must not be paid at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval from the ETA. Given that the ETA no longer reviews or approves on-the-job training programs, the allowance to pay trainees less than the predetermined rate under the existing § 5.5(a)(4)(ii) also no longer applied. The proposal to remove the regulatory provisions pertaining to trainees would not prohibit trainees from working on Davis-Bacon projects. Rather, the proposal makes it clear that the trainees should be paid the full prevailing wage listed on the applicable wage determination for the work performed.

Moreover, as discussed in section III.B.3.ii (''29 CFR 5.2 Definitions''), the proposed regulatory definition in § 5.2 retains the text currently found in § 5.2(n)(3), which provides an exception for trainees employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c). Trainees under 23 U.S.C. 113(c) are subject to wage rates and conditions set by the USDOT pursuant to 23 CFR 230.111, and thus, may be paid less than the full prevailing wage for the work performed.

The Department received no specific comments on its proposal to rescind and reserve §§ 5.16 and 5.17, as well as delete references to such trainees and training programs in §§ 1.7, 5.2, 5.5, 5.6, and 5.15. The Department also received no comments regarding its proposal to revise current § 5.5(a)(4)(ii) to align with the gender-neutral term of ''journeyworker'' used by ETA in its apprenticeship regulations.

For the foregoing reasons, the final rule adopts the proposal to remove the regulatory provisions regarding trainees set out in existing §§ 5.2(n)(2) and 5.5(a)(4)(ii), and to remove the references to trainees and training programs throughout parts 1 and 5 as proposed. The final rule also adopts the changes proposed regarding reciprocity under § 5.5(a)(4)(i)(D) with minor clarifications as discussed in this section.

(D) Flow-Down Requirements in § 5.5(a)(6) and (b)(4)

The Department proposed to add clarifying language to the DBRA- and CWHSSA-specific contract clause provisions at § 5.5(a)(6) and (b)(4), respectively. Currently, these contract clauses contain explicit contractual requirements for prime contractors and upper-tier subcontractors to flow down the required contract clauses into their contracts with lower-tier subcontractors. The clauses also explicitly state that prime contractors are ''responsible for [the] compliance by any subcontractor or lower tier subcontractor.'' 29 CFR 5.5(a)(6) and (b)(4). The Department proposed changes that would affect these contract clauses in several ways.

(1) Flow-Down of Wage Determinations

The Department proposed adding language to § 5.5(a)(6) to clarify that the flow-down requirement also requires the inclusion in such subcontracts of the appropriate wage determination(s).

(2) Application of the Definition of ''Prime Contractor''

As noted in the discussion of § 5.2, the Department is codifying a definition of ''prime contractor'' in § 5.2 to include controlling shareholders or members, joint venturers or partners, and any contractor (*e.g.,* a general contractor) that has been delegated all or substantially all of the construction anticipated by the prime contract. These entities, having notice of the definitions, these regulations, and the contract clauses, would therefore also be ''responsible'' under § 5.5(a)(6) and (b)(4) for the same violations as the legal entity that signed the prime contract. As the Department explained, the change is intended to ensure that contractors do not interpose single-purpose corporate entities as the nominal ''prime contractor'' to escape liability or responsibility for the contractors' Davis-Bacon labor standards compliance duties.

(3) Responsibility for the Payment of Unpaid Wages

The proposal included new language underscoring that being ''responsible for . . . compliance'' means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of the contract clauses. This is consistent with the Department's longstanding interpretation of this provision. *See M.A. Bongiovanni, Inc.,* WAB No. 91–08, 1991 WL 494751, at *1 (Apr. 19, 1991); *see also All Phase Elec. Co.,* WAB No. 85–18, 1986 WL 193105, at *1–2 (June 18, 1986) (withholding contract payments from the prime contractor for subcontractor employees even though the labor standards had not been flowed down into the subcontract).[216] Because such liability for prime contractors is contractual, it represents strict liability and does not require that the prime contractor knew of or should have known of the subcontractors' violations. *Bongiovanni,* 1991 WL 494751, at *1. As the WAB explained in *Bongiovanni,* this rule ''serves two vital functions.'' *Id.* First, ''it requires the general contractor to monitor the performance of the subcontractor and thereby effectuates the Congressional intent embodied in the Davis-Bacon and Related Acts to an extent unattainable by Department of Labor compliance efforts.'' *Id.* Second, ''it requires the general contractor to exercise a high level of care in the initial selection of its business associates.'' *Id.*

(4) Potential for Debarment for Disregard of Responsibility

The Department proposed new language to clarify that in certain circumstances, underpayments of a subcontractor's workers may subject the prime contractor to debarment for violating the responsibility provision. Under the existing regulations, there is no reference in the § 5.5(a)(6) or (b)(4) responsibility clauses to a potential for debarment. However, the existing § 5.5(a)(7) currently explains that ''[a] breach of the contract clauses in 29 CFR 5.5''—which thus includes the responsibility clause at § 5.5(a)(6)—''may be grounds . . . for debarment[.]'' 29 CFR 5.5(a)(7). The new language provides more explicit notice (in § 5.5(a)(6) and (b)(4) themselves) that a prime contractor may be debarred where

[216] The new language also clarifies that, consistent with the language in § 5.10, such responsibility also extends to any interest assessed on back wages or other monetary relief.

there are violations on the contract (including violations perpetrated by a subcontractor) and the prime contractor has failed to take responsibility for compliance.

(5) Responsibility and Liability of Upper-Tier Subcontractors

The Department also proposed language in § 5.5(a)(6) and (b)(4) to eliminate confusion regarding the responsibility and liability of upper-tier subcontractors. The existing language in § 5.5(a)(6) and (b)(4) creates express contractual responsibility of upper-tier subcontractors to flow down the required contract clauses to bind their lower-tier subcontractors. *See* § 5.5(a)(6) (stating that the prime contractor ''or subcontractor'' must insert the required clauses in ''any subcontracts''); § 5.5(b)(4) (stating that the flow-down clause must ''requir[e] the subcontractors to include these clauses in any lower tier subcontracts''). The Department has long recognized that with this responsibility comes the potential for sanctions against upper-tier subcontractors that fail to properly flow down the contract clauses. *See* AAM 69 (DB–51), at 2 (July 29, 1966).[217]

The current contract clauses in § 5.5(a)(6) and (b)(4) do not expressly identify further contractual responsibility or liability of upper-tier subcontractors for violations their lower-tier subcontractors commit. However, although the Department has not had written guidance to this effect, it has in many circumstances held upper-tier subcontractors responsible for the failure of their lower-tier subcontractors to pay required prevailing wages. *See, e.g., Ray Wilson Co.,* ARB No. 02–086, 2004 WL 384729, at *6 (Feb. 27, 2004); *see also Norsaire Sys., Inc.,* WAB No. 94–06, 1995 WL 90009, at *1 (Feb. 28, 1995).

In *Ray Wilson Co.,* for example, the ARB upheld the debarment of an upper-tier subcontractor because its lower-tier subcontractor misclassified its workers. As the ARB held, the upper-tier subcontractor had an ''obligation[ ] to be aware of DBA requirements and to ensure that its lower-tier subcontractor . . . properly complied with the wage payment and record keeping requirements on the project.'' 2004 WL 384729, at *10. The Department sought debarment because the upper-tier subcontractor discussed the misclassification scheme with the lower-tier subcontractor and thus ''knowingly countenanced'' the violations. *Id.* at *8.

In the NPRM, the Department proposed to clarify that upper-tier subcontractors (in addition to prime contractors) may be responsible for the violations committed against the employees of lower-tier subcontractors. The Department's proposal also clarified that this responsibility requires upper-tier subcontractors to pay back wages on behalf of their lower-tier subcontractors and subjects upper-tier subcontractors to debarment in appropriate circumstances (*i.e.,* where the lower-tier subcontractor's violation reflects a disregard of obligations by the upper-tier subcontractor to workers of their subcontractors). In the contract clauses at § 5.5(a)(6) and (b)(4), the Department proposed to include language adding that ''any subcontractor[ ] responsible'' for the violations is also liable for back wages and potentially subject to debarment. This language is intended to place liability not only on the lower-tier subcontractor that is directly employing the worker who did not receive required wages, but also on the upper-tier subcontractors that may have disregarded their obligations to be responsible for compliance.

A key principle in enacting regulatory requirements is that liability should, to the extent possible, be placed on the entity that can best control whether a violation occurs. *See Bongiovanni,* 1991 WL 494751, at *1.[218] For this reason, the Department proposed language assigning liability to upper-tier subcontractors that can choose the lower-tier subcontractors they hire, notify lower-tier subcontractors of the prevailing wage requirements of the contract, and take action if they have any reason to believe there may be compliance issues. By clarifying that upper-tier subcontractors may be liable under appropriate circumstances—but are not strictly liable as are prime contractors—the Department believes that it has struck an appropriate balance that is consistent with historical interpretation, the statutory language of the DBA, and the feasibility and efficiency of future enforcement.

The Department received many comments from unions, contractor associations, and worker advocacy groups supporting the proposed changes to § 5.5(a)(6) and (b)(4). These comments stated generally that greater clarity and stronger enforcement mechanisms are necessary to increase compliance by contractors and protect vulnerable workers who may otherwise have no recourse against unscrupulous practices such as wage theft. Several contractor associations, including SMACNA, NECA, and CEA, supported the changes as reasonable clarifications of existing interpretations.

Several commenters in support of the proposal stated that the new language would help to ensure workers have a recourse regardless of which entity is their direct employer. The LCCHR letter, for example, stated that ''up-the-chain liability'' for DBRA violations is particularly important in the construction industry because large-scale construction is an inherently fissured operation, with multiple specialized subcontractors retained to complete discrete aspects of a project. Under these circumstances, strengthening and clarifying the longstanding principles of contractors' liability throughout the contracting chain reinforces accountability in taxpayer-funded construction and helps ensure workers will receive the wages they have earned, consistent with the purpose of the DBRA.[219]

Several commenters, including UBC and III–FFC, stated that appropriate liability is important to promote self-policing by contractors. These commenters stated that the clarification of responsibility and potential accountability will further incentivize prime contractors and upper-tier subcontractors to choose lower-tier subcontractors wisely and encourage them to police compliance. Several commenters supporting the proposal, including UA, III–FFC, MCAA, NECA, and CEA, noted that enhanced oversight, enforcement, and vulnerability to penalties would close

[217] In AAM 69, the Department noted that ''the failure of the prime contractor or a subcontractor to incorporate the labor standards provisions in its subcontracts may, under certain circumstances, be a serious violation of the contract requirements which would warrant the imposition of sanctions under either the Davis-Bacon Act or our Regulations.''

[218] *Cf. Am. Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.,* 456 U.S. 556, 572–73 (1982) (''[A] rule that imposes liability on the standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations.''). The same principle supports the Department's codification of the definition of ''prime contractor.'' Where the nominal prime contractor is a single-purpose entity with few actual workers, and it contracts with a general contractor for all relevant aspects of construction and monitoring of subcontractors, the most reasonable enforcement structure would place liability on both the nominal prime contractor and the general contractor that actually has the staffing, experience, and mandate to assure compliance on the job site.

[219] A number of commenters supporting the proposal cited to a publication summarizing the evidence of widespread unlawful labor practices in the residential construction industry in particular. *See* Ormiston et al., *supra* note 70, at 75–113. The authors of this meta-analysis noted that one of the most effective methods of ensuring compliance in such circumstances is the appropriate allocation of liability on upper-tier subcontractors. *Id.* at 100.

loopholes, deter bad actors, and ensure that contractors do not shirk their responsibilities through subcontracting arrangements. This would also remove competitive disadvantages for high-road contractors bidding on covered projects. Several dozen contractors and state-level contractor associations that are members of SMACNA wrote letters, as part of a campaign, that expressed general support of the revisions to § 5.5(a)(6) and (b)(4).

NECA and CEA, while supporting the proposal, urged that the contract clauses should include compliance language, including timetables, directing the prime contractor to expedite any new wage changes and contract modifications so they quickly and appropriately reach the lower-tier subcontractors and the workforce entitled to them.

The Department also received a few comments opposing the proposed changes. The SBA Office of Advocacy conveyed comments from small businesses that it would be especially difficult for subcontractors to keep track of their lower-tiered subcontractors and material suppliers because of the lack of clarity and vague definitions in the rulemaking. Three contractor associations, the OCA, SIBA, and IRTBA, commented that the current Davis-Bacon enforcement mechanisms are working and should not be changed. IEC stated that the Department's proposed language was ''overly harsh'' and would greatly increase the compliance costs of upper-tier contractors that would have to expend significant costs to audit subcontractors.

NAHB stated that subcontracting is ubiquitous in the residential construction industry, and in particular for multifamily residential building. NAHB likened the proposed language in this section and elsewhere in this rulemaking to a proposed expansion of joint employer liability. NAHB stated that construction sites are unique examples of multiemployer worksites and that many of the usual factors for establishing a joint employer relationship are not applicable in this setting. But NAHB also urged that WHD should clarify in the final rule that ''joint employer'' status will be governed by case law under the FLSA.

IEC stated that the cases the Department cited in support of its proposal ''do not support a blanket liability provision.'' IEC specifically pointed to the ARB decision in *Ray Wilson Co.,* in which, according to IEC, the vice-president of ''a prime [contractor], Aztec'' had prepared the subcontract with a lower-tier subcontractor that had violated the DBA, and the subcontract did not include DBA provisions.[220] IEC stated that in that instance it ''may have been appropriate'' to hold Aztec responsible, but that these ''specific issues govern the case'' and should be used to interpret the Board's finding that Aztec violated the requirement to ensure that its lower-tier subcontractor properly complied with the Act's requirements. ARB No. 02–086, 2004 WL 384729, at *6. IEC also emphasized that the ARB in *Ray Wilson Co.* and WAB in *Norsaire Systems,* 1995 WL 90009, at *1, did not cite any provision of the DBA or regulations to support the Department's actions.

IEC recommended that the Department follow the approach of other regulations applicable to government contractors by explicitly allowing upper-tier contractors to rely on the certifications of lower-tier subcontractors with respect to certain compliance obligations. IEC gave the example of the SBA, which allows upper-tier contractors to rely on the size certifications of small business with no duty to inquire unless there was a reason to believe the certification was inaccurate. Similarly, the ARTBA recommended that the DBA rule should include a ''good faith'' standard for prime contractors that would relieve the prime contractor of liability for a subcontractor's violation if the prime contractor has established a compliance program, the transgression was beyond their reasonable scope of knowledge, and they did not willfully participate in the violation.

The Department has considered the comments received on this proposal. Both the comments for and against the proposal emphasize that subcontracting is a critical aspect of the construction industry and that the allocation of liability between upper-tiered and lower-tiered subcontractors is an issue of particular interest to contractors, subcontractors, and workers. The Department generally agrees with the commenters that supported the proposal that the failure to appropriately allocate responsibility has consequences for the construction workers for whom the Act was enacted. *See Binghamton Constr. Co.,* 347 U.S. at 178. The LCCHR letter emphasized that one of the letter's signatory organizations represents a construction workforce in Texas and pointed to the crucial role ''up-the-chain liability'' plays in enabling these workers to secure redress from prime and general contractors for wage theft committed by subcontractors. The Department agrees with the LCCHR letter that clarity in the allocation of ''up-the-chain'' responsibility is consistent with the purpose of the Act to protect prevailing wages for these and other local construction workers.

The Department agrees with NECA and CEA that the contract clause language in § 5.5(a)(6) would be strengthened through the inclusion of a requirement that any DBRA-related contract modifications must also be flowed down. The Department therefore has amended the § 5.5(a)(6) contract clause language in the final rule to cover, along with the enumerated contract clauses and applicable wage determination(s), such other clauses ''or contract modifications'' as the Federal agency may by appropriate instructions require. The Department does not believe it is necessary to impose a specific timetable for such incorporation in § 5.5(a)(6), as the Department or relevant Federal agency can specify the timetable in the modification with the prime contractor, and the prime contractor will already be liable for the effect of any modification on the prevailing wages of the employees of lower-tier subcontractors during any delay in the flowing down of the required modification.

The Department has considered, but declines to adopt, the suggestions from IEC and ARTBA regarding certifications and ''good faith'' defenses. As the NPRM explained, the Department has long interpreted the DBRA to place strict liability on prime contractors to account for all unpaid back wages. This is because prime contractors are entering into a contract with the government agency that requires that all workers on the project be paid the prevailing wage in compliance with the Act. As explained in the Restatement (Second) of Contracts, ''[c]ontract liability is strict liability'' and ''[t]he obligor is therefore liable in damages for breach of contract even if he is without fault[.]'' Restatement, ch. 11, intro. note (Am. Law Inst. 1981). Allocating liability in this manner is appropriate given the prime contractor's ability to choose which subcontractors to hire, provide adequate notice and instruction to subcontractors of their responsibilities, and inquire into their compliance or audit them as appropriate. Creating a good faith defense to basic back wage or other contractual liability in this context is not consistent with common law of

[220] This description misstates the role of the company Aztec in *Ray Wilson Co.* Aztec was an upper-tier subcontractor, not the prime contractor. A lower-tier subcontractor of Aztec misclassified its workers as ''partners'' allegedly exempt from the Act's wage requirements. ARB No. 02–086, 2004 WL 384729, at *3, *5.

contract or with the purpose of the statute.

For the same reason, the Department does not believe that NAHB's comparison to joint employer liability under the FLSA is helpful. The DBA and Related Acts, like other statutes and executive orders governing Federal contracting, are not general regulatory statutes. Rather, they seek to impose conditions solely on entities involved in contracts for construction with a Federal agency or construction contracts receiving Federal assistance. The relevant question is not whether the common law would consider one entity to be liable for the other under a vicarious liability theory, or whether other statutes like the FLSA might impose liability depending on the wording of those statutes. Rather, the question the Department seeks to address is how best to ensure that the congressional purpose of the DBRA—the protection of the prevailing wages of workers on covered contracts—is satisfied.

Notwithstanding the above, the Department emphasized in the proposal that it does not intend to place the same strict liability on upper-tier subcontractors for back wages recoverable by the Department as it does on prime contractors. The Department also emphasized that it did not intend for the proposed new language in § 5.5(a)(6) to impose a new strict liability standard for debarment for either prime contractors or upper-tier subcontractors for violations involving the workers of lower-tier contractors. Some of the critical comments that the Department received overlooked these points in the NPRM. For example, OCA, SIBA, and IRTBA characterized the proposal as ''[e]ssentially . . . impos[ing] strict, vicarious liability on contractors, to the point of debarment.'' They opposed this, saying that it would place an undue burden and risk on contractors and would discourage contractors from bidding on work covered by the DBA.

OCA, SIBA, and IRTBA's recitation of the proposed changes blurs the Department's distinction between prime contractors and upper-tier subcontractors and also suggests confusion regarding the applicable debarment standard. The strict liability for covering unpaid back wages only applies to prime contractors, for the reasons articulated above. The new contract language in § 5.5(a)(6) will only impose back wage liability on upper-tier subcontractors to the extent they are ''responsible'' for the violations of their lower-tier subcontractors. As the Department stated in the NPRM, this language should not be read to place the same strict liability responsibility on all upper-tier subcontractors that the existing language already places on prime contractors. Rather, the new language clarifies that, in appropriate circumstances, such as in *Ray Wilson Co.,* upper-tier subcontractors may be held responsible for paying back wages jointly and severally with the prime contractor and the lower-tier subcontractor that directly failed to pay the prevailing wages. This standard is intended to provide the potential for back wage liability for an upper-tier subcontractor that, for example, repeatedly or in a grossly negligent manner fails to flow down the required contract clause, or has knowledge of violations by lower-tier subcontractors and does not seek to remedy them, or is otherwise purposefully inattentive to Davis-Bacon labor standards obligations of lower-tier subcontractors.

Regarding debarment, OCA, SIBA, and IRTBA's implication that there could be a strict liability standard requiring the Department to debar a prime contractor or any upper-tier subcontractor for the violations of a lower-tier subcontractor is misplaced. In proposing this additional notice of the potential for debarment, the Department stated that it did not intend to change the core standard for when a prime contractor or upper-tier subcontractor may be debarred for the violations of a lower-tier subcontractor. The potential for debarment for a violation of the responsibility requirement, unlike the responsibility for back wages, is not subject to a strict liability standard—even for prime contractors. Rather, in the cases in which prime contractors have been debarred for the underpayments of subcontractors' workers, they were found to have some level of intent that reflected a disregard of their own obligations. *See, e.g., H.P. Connor & Co.,* WAB No. 88–12, 1991 WL 494691, at *2 (Feb. 26, 1991) (affirming ALJ's recommendation to debar prime contractor for ''run[ning] afoul'' of 29 CFR 5.5(a)(6) because of its ''knowing or grossly negligent participation in the underpayment'' of the workers of its subcontractors).[221] The Department does not intend to change this debarment standard.

The Department believes it has appropriately relied on the precedent reflected in *Ray Wilson Co.* and *Norsaire Systems* to explain these liability principles. The lesson of *Ray Wilson Co.*—as IEC points out—is not that an upper-tier subcontractor will be debarred in any case in which a lower-tier subcontractor violates the DBRA. Rather, it is an example of a set of factual circumstances in which debarment of an upper-tier subcontractor was appropriate because it disregarded its obligations to employees of its own lower-tier subcontractor.

Although the Department declines to adopt IEC's suggestion that contractors should be allowed to escape liability if they rely on certifications of compliance by lower-tier subcontractors, this decision is not intended to limit the ways in which prime contractors, upper-tier subcontractors, and lower-tier subcontractors may agree among themselves to allocate liability. For example, a small business prime contractor or upper-tier subcontractor may wish to limit its exposure to back wage liability by requiring lower-tier subcontractors to enter into indemnification agreements with them for any back wage liability for the workers of lower-tier subcontractors. The Department believes that these types of agreements can address some of the concerns conveyed by SBA's Office of Advocacy about the potential burdens on small business subcontractors.

In general, however, the Department believes that the proposed changes to § 5.5(a)(6) and (b)(4) are consistent with the governing case law and represent a balanced compromise by allocating strict contractual liability only on the prime contractor and not on upper-tier subcontractors. The Department adopts the changes as proposed, with the limited addition of the language requiring the flow down of DBRA-related contract modifications.

(E) 29 CFR 5.5(d)—Incorporation of Contract Clauses and Wage Determinations by Reference

New paragraph at § 5.5(d) clarifies that, notwithstanding the continued requirement at § 5.5(a) that agencies incorporate contract clauses and wage determinations ''in full'' into contracts not awarded under the FAR, the clauses and wage determinations are equally effective if they are incorporated by reference. This new paragraph is discussed further below in section III.B.3.xx (''Post-award determinations and operation-of-law''), together with

[221] *See also Martell Constr. Co.,* ALJ No. 86–DBA–32, 1986 WL 193129, at *9 (Aug. 7, 1986), *aff'd,* WAB No. 86–26, 1987 WL 247045 (July 10, 1987). In *Martell,* the prime contractor had failed to flow down the required contract clauses and investigate or question irregular payroll records submitted by subcontractors. The ALJ explained that the responsibility clause in § 5.5(a)(6) places a burden on the prime contractor ''to act on or investigate irregular or suspicious situations as necessary to assure that its subcontractors are in compliance with the applicable sections of the regulations.'' 1986 WL 193129, at *9.

proposed changes to §§ 1.6(f), 3.11, 5.5(e), and 5.6.

(F) 29 CFR 5.5(e)—Operation of Law

In a new paragraph at § 5.5(e), the Department proposed language making effective by operation of law a contract clause or wage determination that was wrongly omitted from the contract. This paragraph is discussed below in section III.B.3.xx (''Post-award determinations and operation-of-law''), together with changes to §§ 1.6(f), 3.11, 5.5(d), and 5.6(a).

iv. Section 5.6 Enforcement

(A) 29 CFR 5.6(a)(1)

The Department proposed to revise § 5.6(a)(1) by renumbering the existing regulatory text § 5.6(a)(1)(i), and adding an additional paragraph, § 5.6(a)(1)(ii), to include a provision clarifying that where a contract is awarded without the incorporation of the required Davis-Bacon labor standards clauses required by § 5.5, the Federal agency must incorporate the clauses or require their incorporation. This paragraph is discussed further below in section III.B.3.xx (''Post-award determinations and operation-of-law''), together with changes to §§ 1.6(f), 3.11, 5.5(d), and 5.5(e).

(B) 29 CFR 5.6(a)(2)

The Department proposed to amend § 5.6(a)(2) to reflect the Department's longstanding practice and interpretation that certified payrolls submitted by the contractor as required in § 5.5(a)(3)(ii) may be requested—and Federal agencies must produce such certified payrolls—regardless of whether the Department has initiated an investigation or other compliance action. The term ''compliance action'' includes, without limitation, full investigations, limited investigations, office audits, self-audits, and conciliations.[222] The Department further proposed revising this paragraph to clarify that, in those instances in which a Federal agency does not itself maintain such certified payrolls, it is the responsibility of the Federal agency to ensure that those records are provided to the Department upon request, either by obtaining and providing the certified payrolls to the Department, or by requiring the entity maintaining those certified payrolls to provide the records directly to the Department.

The Department also proposed to replace the phrase ''payrolls and statements of compliance'' with ''certified payrolls'' to continue to more clearly distinguish between certified payrolls and regular payroll and other basic records and information that the contractor is also required to maintain under § 5.5(a)(3), as discussed above.

The proposed revisions were intended to clarify that an investigation or other compliance action is not a prerequisite to the Department's ability to obtain from a Federal agency certified payrolls submitted pursuant to § 5.5(a)(3)(ii). The proposed revisions also were intended to remove any doubt or uncertainty that each Federal agency has an obligation to produce or ensure the production of such certified payrolls, including in those circumstances in which it may not be the entity maintaining the requested certified payrolls. As the Department noted in the NPRM, these proposed revisions will make explicit the Department's longstanding practice and interpretation of this provision, and do not place any new or additional requirements or recordkeeping burdens on contracting agencies, as they are already required to maintain these certified payrolls and provide them to the Department upon request.

The Department believes that these revisions will enhance the Department's ability to provide compliance assistance to various stakeholders, including Federal agencies, contractors, subcontractors, sponsors, applicants, owners, or other entities awarded contracts subject to the provisions of the DBRA. Specifically, these revisions are expected to facilitate the Department's review of certified payrolls on covered contracts where the Department has not initiated any specific compliance action. Conducting such reviews promotes the proper administration of the DBRA because, in the Department's experience, such reviews often enable the Department to identify compliance issues and circumstances in which additional outreach and education would be beneficial.

The Department received no specific comments on these proposed revisions. III–FFC generally supported clarifying and strengthening the recordkeeping requirements as a means of ensuring that contractors remain responsible and that workers are paid the correct prevailing wage, without specifically discussing § 5.6(a)(2). The final rule therefore adopts these changes as proposed.

(C) 29 CFR 5.6(a)(3)–(5), 5.6(b)

The Department proposed revisions to § 5.6(a) and (b), similar to the proposed changes to § 5.6(a)(2), to clarify that an investigation is only one method of assuring compliance with the labor standards clauses required by § 5.5 and the applicable statutes referenced in § 5.1. The Department proposed to supplement the term ''investigation,'' where appropriate, with the phrase ''or other compliance actions.'' The proposed revisions align with all the types of compliance actions currently used by the Department, as well as any additional types that the Department may use in the future. These proposed revisions made explicit the Department's longstanding practice and interpretation of these provisions and did not impose any new or additional requirements upon a Federal agency.

Proposed revisions to § 5.6(a)(3) clarified the records and information that contracting agencies should include in their DBRA investigations. These proposed changes conformed to proposed changes in § 5.5(a)(3).

The Department also proposed renumbering current § 5.6(a)(5) as a stand-alone new § 5.6(c) and updating that paragraph to reflect its practice of redacting portions of confidential statements of workers or other informants that would tend to reveal those informants' identities. This proposed change was made to emphasize—without making substantive changes—that this regulatory provision mandating protection of information that identifies or would tend to identity confidential sources, applies to both the Department's and other agencies' confidential statements and other related documents. The proposed revisions codify the Department's longstanding position that this provision protects workers and other informants who provide information or documents to the Department or other agencies from having their identities disclosed.

The Department received few comments about these proposals. Two comments supported the proposed revisions. III–FFC generally supported clarifying and strengthening the recordkeeping requirements. The UA also supported the safeguards the Department proposed to make it possible for underpaid or misclassified workers to report violations, starting with the Department's clear commitment in § 5.6(c) to expressly protect the identity of workers or other informants who provide information in connection with a complaint or investigation.

In addition, the Department received a comment from NFIB recommending two limiting changes to § 5.6(b)(2) and (c). First, NFIB requested that the Department revise § 5.6(b)(2) by inserting ''consistent with applicable law,'' after ''cooperate.'' NFIB requested this regulatory change based on its concern that the existing regulatory

[222] *See* 2020 GAO Report, note 14, *supra,* at 6 tbl.1, for descriptions of WHD compliance actions.

requirement that private entities or citizens cooperate with Department investigations creates a legal duty that potentially conflicts with the legal rights of private entities or citizens to invoke evidentiary privileges against document production and the privilege against self-incrimination, and a right to refrain from answering questions absent service of compulsory process.

Second, NFIB recommended that the Department revise § 5.6(c) by inserting ''unless otherwise directed by a final and unappealable order of a federal court'' after ''without the prior consent of the informant'' and by inserting ''or by the terms of such final and unappealable order of the court'' at the end of the paragraph. NFIB asserted that the Department's privilege to withhold the identity of confidential sources in investigations or other compliance actions is a qualified, not absolute, privilege, and that the Department should not ''make[] a promise of confidentiality to confidential sources that, in certain circumstances, the Department cannot keep.'' In support of this recommendation, NFIB cited a seminal U.S. Supreme Court decision, *Roviaro* v. *United States,* 353 U.S. 53, 60 − 61 (1957), that addresses the common law government informer's privilege standard that applies to the FLSA, among other statutes.

After consideration, the Department declines to adopt NFIB's proposed limiting changes. First, the Department did not propose any substantive changes to the language in § 5.6(b)(2) that NFIB recommended qualifying. Second, the Davis-Bacon regulations have required cooperation since 29 CFR part 5 was added in 1951. *See* 16 FR 4432. Specifically, the paragraph then numbered § 5.10(a) provided that ''the Federal agencies, contractors, subcontractors, sponsors, applicants or owners, *shall cooperate* with any authorized representative of the Department of Labor in the inspection of records, interviews with workers, and in all other aspects of the investigation.'' *Id.* (emphasis added). This duty to cooperate, which has been reflected in the DBRA's implementing regulations for more than 70 years with only minor, technical changes to the operative language, has coexisted and will continue to coexist with other legal rights, such as the Fifth Amendment right against self-incrimination, and other privileges. The Department is not aware of any instances (and NFIB points to none) in which the regulatory language of § 5.6(b)(2) and its predecessor provisions have caused confusion or been interpreted as compelling contractors or other entities to, in NFIB's words, ''forfeit their legal rights in case of an investigation as a condition of working on federal construction projects.'' Particularly in the absence of any such evidence, and given that the Department did not propose any substantive changes to § 5.6(b)(2), the Department declines to adopt NFIB's suggested regulatory change.

Similarly, the Department declines to add NFIB's proposed qualification to the confidentiality protections codified in current § 5.6(a)(5) (renumbered as § 5.6(c)) in the case of ''final and unappealable order[s] of the court'' overriding these protections because that qualification is implicit and therefore unnecessary. The Department will continue to defend existing regulatory informant's privilege provisions which are currently codified in 29 CFR 5.6(a)(5) and 6.5 [223] and discussed further in the following paragraphs. The Department would, however, also abide by a higher court's final and unappealable order to the contrary.

The Department has long taken the position that protecting the identities of confidential informants is essential for enforcement. As explained in sections II.A (''Statutory and regulatory history'') and III.B.3.xix (''Anti-Retaliation''), the Department has broad authority to enact regulations like this one, which enhance enforcement and administration of the Act's worker protections. Decades ago, the Department exercised this authority by, among other measures, extending protections to confidential informants. The first iteration of current § 5.6(a)(5) was added in 1951 in the then new 29 CFR part 5. *See* 16 FR 4432 (''Complaints of alleged violations shall be given priority and statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to his employer without the consent of the employee.''). The current regulations, 29 CFR 5.6(a)(5) and 6.5, prohibit disclosing, without the informer's consent, the identities of such people who have provided information to the Department in confidence. Specifically, §§ 5.6(c) and 6.5 direct that when an informant provides statements or information in confidence, in no event will the identity of such an informant, or any portions of their statements, or other information provided that would tend to reveal their identity, be ordered to be produced before the date of that person's testimony. In the case of non-testifying informants, such information may not be disclosed at all, unless the person has consented to such disclosure. These DBRA regulatory informant's provisions, currently codified in §§ 5.6(a)(5) and 6.5—unlike the common law government informer's privilege discussed in *Roviaro,* which is derived from judicial decisions, not regulations—prohibit disclosure (absent consent) of information that would tend to identify non-testifying informants and, for testifying informants, does not permit such disclosure until the date of the informant's testimony at trial.

Absent these controlling regulations, application of the common law government informant's privilege alone, which, as NFIB asserts, is a qualified privilege, would be appropriate. But even if that common law government informant's privilege alone were applicable, it would be unnecessary to codify. WHD's current and longstanding practice is to let workers know that their identities will be kept confidential to the maximum extent possible under the law.

v. Section 5.10 Restitution, Criminal Action

To correspond with proposed new language in the contract clauses, the Department proposed to add references to monetary relief and interest to the description of restitution in § 5.10, as well as an explanation of the method of computation of interest applicable generally to any circumstance in which there has been an underpayment of wages under a covered contract.

The Department also proposed new anti-retaliation contract clauses at § 5.5(a)(11) and (b)(5), along with a new related section of the regulations at § 5.18. Those clauses and section provide for monetary relief that would include, but not be limited to, back wages. Reference to this relief in § 5.10 was proposed to correspond to those proposed new clauses and section. For further discussion of those proposals, see section III.B.3.xix (''Anti-Retaliation'').

The reference to interest in § 5.10 was similarly intended to correspond to proposed new language requiring the payment of interest on any underpayment of wages in the contract clauses at § 5.5(a)(1)(vi), (a)(2) and (6), and (b)(2) through (4), and on any other

[223] In 1984, the Department added the following sentence to § 6.5 (previously numbered § 6.33): ''In no event shall a statement taken in confidence by the Department of Labor or other Federal agency be ordered to be produced prior to the date of testimony at trial of the person whose statement is at issue unless the consent of such person has been obtained.'' 49 FR 10626, 10628 (Mar. 21, 1984) (final rule). The companion regulations in 29 CFR part 6, subparts A (general) and C (DBRA enforcement proceedings), are authorized by various sources, including the DBA and Reorganization Plan No. 14 of 1950.

monetary relief for violations of the proposed anti-retaliation clauses. The current Davis-Bacon regulations and contract clauses do not specifically provide for the payment of interest on back wages. The ARB and the Department's ALJs, however, have held that interest calculated to the date of the underpayment or loss is generally appropriate where back wages are due under other similar remedial worker protection statutes enforced by the Department. *See, e.g., Lawn Restoration Serv. Corp.,* ALJ No. 2002–SCA–00006, slip op. at 74 (Dec. 2, 2003) (awarding prejudgment interest under the SCA).[224] Under the DBRA, as under the INA and SCA and other similar statutes, an assessment of interest on back wages and other monetary relief will ensure that the workers Congress intended to protect from substandard wages will receive the full compensation that they were owed under the contract.

The proposed language established that interest would be calculated from the date of the underpayment or loss, using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621, and would be compounded daily. Various Occupational Safety and Health Administration (OSHA) whistleblower regulations use the tax underpayment rate and daily compounding because that accounting best achieves the make-whole purpose of a back-pay award. *See* Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, Final Rule, 80 FR 11865, 11872 (Mar. 5, 2015).

The Department received one comment in opposition to its proposal. ABC noted that contractors may be unaware of any wage underpayments until they are notified by the Department at or near the end of a construction project, and that—absent knowledge and/or willful underpayment—interest compounding should not begin to be accrue until after the Department notifies a contractor of an unremedied liability.

However, the majority of commenters on this topic supported the Department's proposal. The UA stated that the chances of underpaid or misclassified workers coming forward to report violations—and in turn, employers paying employees swiftly—are improved by requiring employers to pay interest if they fail to pay required wages. PAAG and PADLI also supported the proposal to calculate interest from the date of the underpayment or loss, and to be compounded daily, which it noted would ensure that the workers whom Congress intended to protect from substandard wages would receive the full compensation that they were owed. UBC stated that such language will improve deterrence and compliance. CC&M also supported the Department's proposal, noting that misclassification of workers as independent contractors amounts to wage theft and that protocols for workers to receive restitution are needed in the regulations.

Although in some cases the requirement to pay interest may act as an additional deterrent, the reason why the Department believes the requirement is necessary is its function in providing make-whole relief to workers who have not timely received the full prevailing wages that they were due under the statute and the regulations. The requirement to pay interest is not intended as a penalty on contractors or subcontractors that are responsible for violations. Accordingly, the requirement to provide interest outweighs the expressed concern about whether contractors and subcontractors have acted knowingly or willfully. The final rule adopts this change as proposed.

vi. Section 5.11 Disputes Concerning Payment of Wages

The Department proposed minor revisions to § 5.11(b)(1) and (c)(1), to clarify that where there is a dispute of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification, the Administrator may notify the affected contractors and subcontractors, if any, of the investigation findings by means other than registered or certified mail, so long as those other means would normally assure delivery. Examples of such other means include, but are not limited to, email to the last known email address, delivery to the last known address by commercial courier and express delivery services, or by personal service to the last known address. The Department explained that while registered or certified mail may generally be a reliable means of delivery, other delivery methods may be just as reliable or even more successful at assuring delivery, as has been demonstrated during the COVID–19 pandemic. The proposed revisions would therefore allow the Department to choose methods to ensure that the necessary notifications are delivered to the affected contractors and subcontractors.

In addition, the Department proposed similar changes to allow contractors and subcontractors to provide their response, if any, to the Administrator's notification of the investigative findings by any means that would normally assure delivery. The Department also proposed replacing the term ''letter'' with the term ''notification'' in this section, as the proposed changes would allow the notification of investigation findings to be delivered by letter or other means, such as email. Similarly, the Department proposed to replace the term ''postmarked'' with ''sent'' to reflect that various means may be used to confirm delivery depending upon the method of delivery, such as by the date stamp on an email or the delivery confirmation provided by a commercial delivery service.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

For additional discussion related to § 5.11, see section III.B.3.xxi (''Debarment'').

vii. Section 5.12 Debarment Proceedings

The Department proposed minor revisions to § 5.12(b)(1) and (d)(2)(iv) (renumbered as § 5.12(c)(2)(iv)(A)) to clarify that the Administrator may notify the affected contractors and subcontractors, if any, of the investigation findings by means other than registered or certified mail, so long as those other means would normally assure delivery. As discussed above in reference to identical changes proposed to § 5.11, these revisions would allow the Department to choose the most appropriate method to confirm that the necessary notifications reach their recipients. The Department proposed similar changes to allow the affected contractors or subcontractors to use any means that would normally assure delivery when making their response, if any, to the Administrator's notification.

The Department also proposed a slight change to § 5.12(b)(2), which stated that the Administrator's findings would be final if no hearing were requested within 30 days of the date the Administrator's notification is sent, as opposed to the current language, which states that the Administrator's findings shall be final if no hearing is requested within 30 days of receipt of the Administrator's notification. This proposed change would align the time period available for requesting a hearing in § 5.12(b)(2) with similar requirements

[224] *See also Greater Mo. Med. Pro-care Providers, Inc.,* ARB No. 12–015, 2014 WL 469269, at *18 (Jan. 29, 2014) (approving of pre-judgment and post-judgment interest on back pay award for H–1B visa cases under the Immigration and Nationality Act (INA)), *aff'd sub nom. Greater Mo. Med. Pro-care Providers, Inc.* v. *Perez,* No. 3:14–CV–05028, 2014 WL 5438293 (W.D. Mo. Oct. 24, 2014), *rev'd on other grounds,* 812 F.3d 1132 (8th Cir. 2015).

in § 5.11 and other paragraphs in § 5.12, which state that such requests must be made within 30 days of the date of the Administrator's notification.

For additional discussion related to § 5.12, see section III.B.3.xxi (''Debarment'').

The Department received no comments on this proposal. The final rule therefore adopts these changes as proposed.

viii. Section 5.16 Training Plans Approved or recognized by the Department of Labor Prior to August 20, 1975

As noted (*see* III.B.3.ii.(E) ''29 CFR 5.5(a)(4) Apprentices.''), the Department proposed to rescind and reserve § 5.16. Originally published along with § 5.5(a)(4)(ii) in a 1975 final rule, § 5.16 is essentially a grandfather clause permitting contractors, in connection with certain training programs established prior to August 20, 1975, to continue using trainees on Federal and federally assisted construction projects without seeking additional approval from the Department pursuant to § 5.5(a)(4)(ii). *See* 40 FR 30480. Since § 5.16 appears to be obsolete more than four decades after its issuance, the Department proposed to rescind and reserve the section. The Department also proposed several technical edits to § 5.5(a)(4)(ii) to remove references to § 5.16.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

ix. Section 5.17 Withdrawal of Approval of a Training Program

As already discussed, the Department proposed to remove references to trainees and training programs throughout parts 1 and 5 (*see* III.B.3.ii.(E) ''29 CFR 5.5(a)(4) Apprentices.'') as well as rescind and reserve § 5.16 (*see* III.B.3.viii ''Section 5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.''). Accordingly, the Department also proposed to rescind and reserve § 5.17.

The Department received no comments on the proposal to rescind and reserve § 5.17. The final rule therefore adopts this change as proposed.

x. Section 5.20 Scope and Significance of This Subpart

The Department proposed two technical corrections to § 5.20. First, the Department proposed to correct a typographical error in the citation to the Portal-to-Portal Act of 1947 to reflect that the relevant section of the Portal-to-Portal Act is codified at 29 U.S.C. 259, not 29 U.S.C. 359. Second, the last sentence of § 5.20 currently states, ''Questions on matters not fully covered by this subpart may be referred to the Secretary for interpretation as provided in § 5.12.'' However, the regulatory provision titled ''Rulings and Interpretations,'' which this section is meant to reference, is currently located at § 5.13. The Department therefore proposed to replace the incorrect reference to § 5.12 with the correct reference to § 5.13.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed, with minor technical edits to improve readability, none of which are intended to reflect a change in the substance of this section.

xi. Section 5.23 The Statutory Provisions

The Department proposed to make technical, non-substantive changes to § 5.23. The existing text of § 5.23 primarily consists of a lengthy quotation of a particular fringe benefit provision of the 1964 amendments to the DBA. The Department proposed to replace this text with a summary of the statutory provision at issue for two reasons. First, due to a statutory amendment, the quotation set forth in existing § 5.23 no longer accurately reflects the statutory language. Specifically, on August 21, 2002, Congress enacted legislation which made several non-substantive revisions to the relevant 1964 DBA amendment provisions and recodified those provisions from 40 U.S.C. 276a(b) to 40 U.S.C. 3141.[225] The Department proposed to update § 5.23 to include a citation to 40 U.S.C. 3141(2). Second, the Office of the Federal Register disfavors lengthy block quotations of statutory text.[226] In light of this drafting convention, and because the existing quotation in § 5.23 no longer accurately reflects the statutory language, the Department proposed to revise § 5.23 so that it paraphrases the statutory language set forth at 40 U.S.C. 3141(2).

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

xii. Section 5.25 Rate of Contribution or Cost for Fringe Benefits

The Department proposed to add new paragraph (c) to existing § 5.25 to codify the principle of annualization used to calculate the amount of Davis-Bacon credit that a contractor may receive for contributions to a fringe benefit plan when the contractor's workers perform work on both DBRA-covered projects (referred to as ''DBRA-covered'' work or projects) and projects that are not subject to DBRA requirements (referred to as ''private'' work or projects) in a particular year or other shorter time period. While existing guidance generally requires the use of annualization to compute the hourly equivalent of fringe benefits, annualization is not currently addressed in the regulations. The Department's proposal provided for annualization of fringe benefits unless a contractor obtained an exception with respect to a particular fringe benefit plan and also addressed how to properly annualize fringe benefits. The proposal also set forth an administrative process for obtaining approval by the Administrator for an exception from the annualization requirement.

Consistent with the Secretary's authority to set the prevailing wage, WHD has long concluded that a contractor generally may not take Davis-Bacon credit for all its contributions to a fringe benefit plan based solely upon the workers' hours on a DBRA-covered project when the workers also work on private projects for the contractor in that same time period. *See, e.g., Miree Constr. Corp.* v. *Dole,* 930 F.2d 1536, 1545–46 (11th Cir. 1991) (adopting the Administrator's contention that ''[i]f an employer chooses to provide a year-long fringe benefit, rather than cash or some other fringe benefit, the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work''); *see also, e.g., Indep. Roofing Contractors* v. *Chao,* 300 Fed. Appx. 518, 521 (9th Cir. 2008) (noting the Department's ''long history of applying annualization,'' including when an ''employer provides a year-long benefit'' so as to ''ensure 'that a disproportionate amount of that fringe benefit is not paid out of wages earned on . . . Davis-Bacon work' '') (citation omitted); *In re Cody-Zeigler,* ARB Nos. 01–014, 01–015, 2003 WL 23114278, at *13 (Dec. 19, 2003); WHD Opinion Letter DBRA–72 (June 5, 1978); WHD Opinion Letter DBRA–134 (June 6, 1985); WHD Opinion Letter DBRA–68 (May 22, 1984); FOH 15f11(b). Contributions made to a fringe benefit

[225] *See* Revision of Title 40, U.S.C., ''Public Buildings, Property, and Works,'' Public Law 107–217, sec. 3141, 116 Stat. 1062, 1150 (Aug. 21, 2002).

[226] *See* Off. of the FR, ''Document Drafting Handbook'' section 3.6 (Aug. 2018 ed., rev. Mar. 24, 2021), *https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf.*

plan for DBRA-covered work generally may not be used to fund the plan for periods of private work. A contractor therefore typically must convert its total annual contributions to the fringe benefit plan to an hourly cash equivalent by dividing the cost of the fringe benefit by the total number of hours worked (DBRA-covered and private work) to determine the amount creditable towards meeting its obligation to pay the prevailing wage under the DBRA. *See* FOH 15f11(b) (''Normally, contributions made to a fringe benefit plan for government work generally may not be used to fund the plan for periods of non-government work.''); *see also* FOH 15f12(b).

This principle, which is referred to as ''annualization,'' effectively prohibits contractors from using fringe benefit plan contributions attributable to work on private projects to meet their prevailing wage obligation for DBRA-covered work. *See, e.g., Miree Constr.,* 930 F.2d at 1545 (annualization ensures receipt of the prevailing wage by ''prevent[ing] employers from receiving Davis-Bacon credit for fringe benefits actually paid to employees during non-Davis-Bacon work''). Annualization is intended to prevent the use of DBRA-covered work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and that constitute compensation for all the worker's work, both DBRA-covered and private.

For many years, WHD has required contractors to annualize contributions for most types of fringe benefit plans, including health insurance plans, apprenticeship training plans, vacation plans, and sick leave plans. *See, e.g., Rembrant, Inc.,* WAB No. 89–16, 1991 WL 494712, at *1 (Apr. 30, 1991) (noting WHD Deputy Administrator's position that ''fringe benefit contributions creditable for Davis-Bacon purposes may not be used to fund a fringe benefit plan for periods of non-government work''); PWRB, sec. 9, p. 21 (noting that the Administrator originally applied annualization to health insurance plans in the 1970s). WHD's rationale for requiring annualization is that such contributions finance benefits that are continuous in nature and reflect compensation for all of the work performed by a laborer or mechanic, including work on both DBRA-covered and private projects. One exception to this general rule compelling the annualization of fringe benefit plan contributions has been that annualization is not required for defined contribution pension plans (DCPPs) that provide for immediate participation and essentially immediate vesting (*e.g.,* 100 percent vesting after a worker works 500 or fewer hours). *See* WHD Opinion Letter DBRA–134 (June 6, 1985); *see also* FOH 15f14(f)(1). However, WHD does not currently have public guidance explaining the extent to which other plans may also warrant an exception from the annualization principle.

To clarify when an exception to the general annualization principle may be appropriate, the Department proposed language stating that contributions to a fringe benefit plan may only qualify for such an exception when three requirements are satisfied: (1) the benefit provided is not continuous in nature; (2) the benefit does not provide compensation for both public and private work; and (3) the plan provides for immediate participation and essentially immediate vesting. In accordance with the Department's longstanding guidance, under the proposal, a plan would generally be considered to have essentially immediate vesting if the benefits vest after a worker works 500 or fewer hours. These proposed criteria were not necessarily limited to DCPPs. However, to ensure that the criteria were applied correctly and that workers' Davis-Bacon wages were not disproportionately used to fund benefits during periods of private work, the Department proposed that such an exception could only apply when the plan in question had been submitted to the Department for review and approval. As proposed, such requests could be submitted by plan administrators, contractors, or their representatives. However, to avoid any disruption to the provision of worker benefits, the Department also proposed that any plan that is not subject to annualization under the Department's existing guidance could continue to use such an exception until the plan had either requested and received a review of its exception status under the proposed process, or until 18 months had passed from the effective date of this rule, whichever came first.

The Department noted that by requiring annualization, the proposal furthered the policy goal of protecting the fringe benefit component of workers' Davis-Bacon prevailing wage compensation from dilution by preventing contractors from taking credit for fringe benefits attributable to work on private projects against their fringe obligations on DBRA-covered work. The proposed exception also provided the flexibility for certain fringe benefit plan contributions to be excepted from the annualization requirement if they met the proposed criteria.

The Department received a wide variety of comments on the Department's proposal to codify the annualization principle. All of the commenters appeared to recognize that the Department has long required most fringe benefits to be annualized. They also appeared to accept that annualization of fringe benefits is at least typically warranted and that codification of the annualization principle in regulations would be appropriate. However, some commenters that were generally supportive of annualization advocated that the Department modify the proposal to more broadly require annualization, whereas others (including through comments submitted as part of an organized ABC member campaign) opposed the proposed exception approval process, questioned or opposed the criterion that annualization apply to any fringe benefit that is continuous in nature, and/or proposed that contributions to specific types of fringe benefit plans such as DCPPs and supplemental unemployment benefit (SUB) [227] plans be excepted from annualization.

Many commenters, including III–FFC, Alaska District Council of Laborers, LIUNA Laborers' Local 341, PAAG and PADLI, NABTU, and an individual commenter, expressed general support for the Department's proposal to codify the Davis-Bacon annualization principle. These commenters agreed that annualization prevents the use of DBRA work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and that constitute compensation for all the worker's work, both DBRA-covered and private. Commenters such as PAAG and PADLI also supported the Department's explanation of the method for annualizing fringe benefit contributions, commenting that codifying and explaining annualization would assist

[227] Under SUB plans, contractors typically make payments to worker-specific supplemental unemployment insurance accounts. The terms and conditions of SUB plans vary, but contractors often contribute an amount equal to the difference between the fringe benefit amount listed on an applicable Davis-Bacon wage determination and the fringe benefit amount that the contractor would have provided in the absence of DBRA requirements. Participating contractors generally are not required to make contributions to SUB plans for hours worked on private projects, but plan benefits may be available to workers when they experience ''involuntary work interruptions'' on both DBRA-covered and private projects. Under some SUB plans, for example, work interruptions such as layoffs, inclement weather, illness, or equipment down time can all render a participant eligible to receive benefits. Under other SUB plans, a participant may be eligible to receive payouts if the worker qualifies to receive state unemployment benefits.

contractors in complying with the Davis-Bacon annualization and fringe benefit requirements.

Although NABTU, the III–FFC, and the IUOE expressed strong support for the annualization principle, they commented that the Department should revise the proposed regulation to strengthen the annualization requirement. In particular, NABTU and the III–FFC recommended adopting an express presumption in favor of annualization, claiming that without such an express presumption and the other revisions they proposed, contractors would be free to front-load benefit costs on DBRA projects instead of spreading them out across DBRA-covered and private work, thereby effectively paying for fringe benefits used by workers during periods of private work with Davis-Bacon contributions. NABTU, the III–FFC, and the IUOE also recommended that the phrase ''essentially immediate vesting'' in the Department's third proposed criterion for an exception from annualization be changed to ''immediate vesting.'' In longstanding subregulatory guidance, as well as in its proposed rule, the Department has interpreted ''essentially immediate vesting'' to refer to 100 percent vesting after a worker works 500 or fewer hours. *See, e.g.,* FOH 15f14(f)(1). An exception from annualization therefore is available when a worker becomes 100 percent vested in their DCPP benefit after working 500 or fewer hours, if all other criteria [228] for the exception are satisfied. Under these commenters' recommended approach, by contrast, the exception from annualization would not be available unless a worker's fringe benefit vested beginning with their first hour of work.[229]

NABTU, the III–FFC, and the IUOE, along with an individual commenter, further contended that an exception from annualization should not be available for plan types other than DCPPs, and that the final rule should expressly state that the narrow exception to annualization only applies to DCPPs. The III–FFC and the IUOE explained that no type of fringe benefit plan besides DCPPs satisfies each of the exception criteria that the Department set forth in proposed § 5.25, since, for example, health and welfare fringe benefit plans are continuous in nature and cover individuals when working on DBRA-covered and private projects. Similarly, NABTU urged the Department to emphasize in the final rule that the criterion that a fringe benefit not be continuous in nature is a stringent requirement that very few benefit plans would satisfy. Specifically, NABTU asserted that a year-round SUB plan that is available to protect against loss of both private work and DBRA-covered work should be considered continuous in nature, as the plan is available throughout the year to meet a contingent event, such as the involuntary loss of employment due to seasonal or similar conditions prevalent in the construction industry. NABTU similarly stated that, unlike DCPPs, SUB plans are made available during an employee's active career, not at retirement, and therefore are ''continuous in nature'' for this reason as well. By limiting the annualization exception to certain DCPPs, NABTU contended (as did the III–FFC and the IUOE) that prevailing wage standards will be preserved, as contractors will be unable to use DBRA-covered work to pay for fringe benefits used by employees during periods of private work.

Other commenters, including Fringe Benefit Group, Inc. (FBG), CC&M, IEC, the Law Office of Martha Hutzelman (Hutzelman), and ABC, objected to the treatment of particular types of fringe benefits under the proposed rule and, more generally, the administrative exception process set forth in the proposed rule. FBG expressed support for the principles underlying proposed § 5.25(c) ''on a macro level'' but recommended that, with respect to DCPPs, the Department reconsider requiring all fringe benefit plans seeking an exception from the annualization requirement to submit a written request for approval to WHD. FBG explained that, with respect to DCPPs, such a requirement would place a significant burden on contractors, plan administrators, and WHD in connection with plans that ''on their face'' qualify for the exception. FBG added that this additional administrative complexity could discourage small businesses or new entrants from pursuing work on DBRA-covered projects without any offsetting benefits given that ''the vast number of contractors adopt DCPPs that are already consistent with the long-held annualization exception.'' Other commenters, including ABC, expressed similar concerns and opposition to the proposed administrative exception process.[230] In light of these stated concerns, and particularly given their view that the Department has long successfully applied the exception from annualization to DCPPs that provide for immediate participation and essentially immediate vesting, FBG, along with CC&M, proposed amending the proposal to create a safe-harbor provision that would automatically apply the annualization exception to DCPPs that meet the proposed requirements without requiring them to apply for approval.

Hutzelman similarly objected to the creation of a new administration exception process applicable to all types of fringe benefit plans and instead called for the Department to clearly define and describe the criteria for exception from the annualization requirement in the final rule. Specifically, Hutzelman recommended that the Department not adopt its administrative exception process or that, in the alternative, the proposal be revised to provide for an exception from the annualization process for all DCPPs and SUB plans that provide for immediate participation and essentially immediate vesting (as historically defined by the Department) where the benefit provided is not continuous in nature.[231] Hutzelman then proposed that the term ''continuous in nature'' be defined in the regulations as ''a benefit that requires minimum periodic deposits or payments or that has a stated annual cost associated with the benefit,'' such that a benefit that is ''continuous in nature'' ''is not a benefit that is continuously available, but rather is a benefit that is continuously funded.'' Hutzelman contended that ''essentially cash equivalent benefits'' such as DCPPs and SUB plans are not ''continuous in nature'' under this proposed definition and should be excepted from the annualization requirement.[232] REBOUND and an individual

[228] In this final rule the Department has made a non-substantive change by referring to the requirements for the annualization exception as ''criteria'' instead of ''factors.'' The NPRM sometimes referred to these requirements as factors, but criteria is a more appropriate term.

[229] IEC appeared to interpret the Department's proposal as already contemplating the type of ''immediate vesting'' that NABTU, the III–FFC, and the IUOE proposed, thereby prompting IEC to comment, incorrectly, that the Department's proposal of ''immediate participation and immediate vesting'' would ''eliminate[ ] fringe 401k plans from DBA creditability.''

[230] IEC opposed the administrative exception process for similar reasons, and III–FFC similarly commented that a general ''preclearance process'' would be unnecessary, particularly if exceptions to annualization are limited to certain DCPPs, and that the proposed process also raised practical concerns about staff and resources.

[231] Hutzelman's proposed formulation did not include the long-established criterion that, in order to be excepted from annualization, contributions to a fringe benefit plan must not provide compensation for both DBRA-covered and private work.

[232] ABC also address the ''continuous in nature'' criterion, contending that the criterion does not appear in the FOH or other guidance materials and therefore appeared to reflect ''a significant, but unacknowledged, policy change.''

commenter expressed support for the annualization of fringe benefits and for the specific exception criteria proposed by the Department.'' However, they further commented that there has been an increase in the number of companies that offer contractors the ability to purchase medical and other types of insurance for their employees during the hours that they are employed on public works projects in order to comply with prevailing wage requirements, but that the contractors do not have to participate in the plans when they work on private projects. The commenters opposed annualization of such contributions, as long as the policies provided immediate vesting and coverage of each individual employee, and further stated that these policies allow contractors to meet the requirements of prevailing wage laws while still maintaining their regular operations. These comments thus appear similar to Hutzelman's to the extent they suggest that whether an exception to the annualization requirement is warranted should be determined based on when the contribution is made (*i.e.,* whether contributions are made solely in connection with DBRA-covered work) rather than when benefits are available.

In considering the comments received, the Department notes at the threshold that annualization is not a new principle; rather, as reflected in the directly applicable Federal court and administrative precedent cited in this section, DBRA contractors have been required to annualize fringe benefit contributions for decades. As various commenters stated, including annualization in the regulations will help ensure that contractors are aware of how to comply with fringe benefit requirements and are informed about how to properly credit plan contributions against their fringe benefit obligations.

The Department believes that addressing annualization in the final rule will increase compliance with Davis-Bacon prevailing wage obligations by codifying subregulatory guidance and case law about the requirement to annualize contributions to fringe benefit plans. Codifying the annualization principle in regulations rather than continuing to address annualization at the subregulatory level does not increase costs or make compliance more difficult for experienced contractors, small contractors, or contractors that are new to DBRA-covered projects. Rather, codifying the annualization principle will aid contractors in understanding and fulfilling their obligations when working on Davis-Bacon projects. By doing so, the regulations will help contractors that may otherwise have overlooked or misunderstood the requirements of annualization to correctly satisfy their fringe benefit obligations under the DBRA and to account for the annualization of fringe benefits when formulating bids for DBRA-covered projects.

While annualization is not a new requirement, the addition of a regulatory administrative process requiring approval of all plans for the exception to annualization would have been new. The Department appreciates the comments and recommendations regarding this proposed administrative process to approve plans for exception from annualization.

Upon review and consideration of the comments, in this final rule the Department adopts § 5.25(c) as proposed, with two substantive exceptions and related revisions. First, the formal administrative process for requesting exceptions from the annualization requirement will not apply to contributions to DCPPs as long as the DCPP meets each of the exception criteria. This approach aligns with various commenters' objections to applying the proposed administrative exception process to DCPPs and the related requests for a safe harbor for DCPPs that satisfy the exception criteria. The final rule, therefore, consistent with existing subregulatory requirements, generally only requires that administrative approval of an exception to the annualization requirement be obtained in connection with contributions to fringe benefit plans other than DCPPs. In accordance with this change from the proposed provision, a sentence has been added to § 5.25(c)(2) excepting contributions to DCPPs provided that each of the requirements of new § 5.25(c)(3) is satisfied, and that the DCPP provides for immediate participation and essentially immediate vesting (*i.e.,* the benefit vests within the first 500 hours worked). In the final rule, proposed § 5.25(c)(3) was replaced with a portion of proposed § 5.25(c)(2) that was revised as explained in this section.

The Department made this change to the proposed rule because it agrees with commenters, including ABC and FBG, that contributions to DCPPs have a long history of being excepted from the annualization requirement. The Department believes that excepting contributions to DCPPs that meet the criteria for exception from the annualization requirement in the final rule addresses the concern of commenters that the administrative process could be burdensome on plan administrators, contractors, and the Department. Not applying the formal administrative exception process to DCPPs will likely dramatically reduce the number of requests for an exception from the annualization requirement. The Department also agrees with commenters that DCPPs will typically if not invariably satisfy the enumerated exception criteria. To the extent questions arise regarding whether the exception to annualization may apply to contributions to a particular DCPP, an exception request should be submitted in accordance with § 5.25(c)(2).

In further response to the comments about the proposal's perceived administrative burdens, the Department reiterates that, as revised, § 5.25 provides that only contributions to non-DCPP fringe benefit plans that wish to be excepted from the annualization requirement need to be approved through the administrative process. Thus, as revised, § 5.25 mirrors existing subregulatory practice, under which contributions to DCPPs do not need to be annualized if the applicable criteria are satisfied, and fringe benefit contributions to all other types of plans must be annualized absent requesting and receiving an exception from the annualization requirement from WHD. Thus, the administrative burden for plan administrators, contractors, and the Department is limited to non-DCPP plans that want to be approved for the exception to annualization and DCPPs for which there is uncertainty as to whether they meet all the requirements of the exception. Based on its extensive experience, the Department believes the number of fringe benefit plans that fall in this category will be manageable for all affected parties. The final rule does not impose an unduly burdensome administrative requirement for the remaining plans that choose to apply for the exception because exception requests will predominantly be based on readily available documents such as plan descriptions. Requiring approval for the exception for non-DCPP fringe benefit plans will help ensure workers receive their required Davis-Bacon fringe benefits.

The Department declines to adopt suggestions that the exception from annualization perhaps should be eliminated altogether, or that it should apply exclusively to DCPPs. While the Department acknowledges these commenters' concerns that workers receive all the fringe benefits they are due under the DBRA, it also recognizes the long-standing practice of allowing DCPPs to forego annualization if they meet the enumerated criteria. Moreover, by allowing contributions to bona fide

fringe benefit plans other than DCPPs to be excepted from the annualization requirement, the final rule codifies existing practice and implements a process that allows a broader range of plans to potentially be excepted from the annualization requirement to the extent appropriate, but only if they too meet the enumerated criteria for the exception.

The Department believes that the test for obtaining an exception from annualization is sufficient to address NABTU's and III–FFC's concerns about DBRA benefit contributions—particularly SUB plan benefits—subsidizing benefits that are available throughout the year on DBRA-covered and private projects. If WHD has not approved an exception from annualization with respect to a specific non-DCPP plan, such as a particular SUB plan, then contributions to the plan must be annualized. Moreover, with respect to such plans, exceptions to annualization will be approved only when each of the criteria have been satisfied. This framework reflects an implicit presumption in favor of annualization. Therefore, the Department declines to add an express presumption in favor of annualization.

The second change in the final rule from the proposed rule is a more fulsome recitation in § 5.25(c)(3) of the criteria for an exception to the annualization requirement. Some commenters, including NABTU and III–FFC, recommended the regulations include a definition of ''continuous in nature'' and eliminate the use of the word ''essentially'' when discussing immediate vesting, specifically recommending elimination of the use of the 500-hour criterion and opting for immediate vesting. The Department agrees that the regulations should include an explanation of when a fringe benefit is not ''continuous in nature'' to provide further guidance to the regulated community and other interested parties. As a result, § 5.25(c)(3)(i) of the final rule includes a new explanation of benefits that are ''not continuous in nature'' as benefits that are not available to a participant without penalty throughout the year or other relevant time period to which the cost of the benefit is attributable.

The Department declines to accept Hutzelman's proposed definition of ''continuous in nature'' as a benefit that requires minimum periodic deposits or payments or that has a stated annual cost associated with the benefit. This proposed definition would appear to undermine the purpose of annualization, which is to prevent contractors from paying for benefits that cover hours worked on private projects with compensation due for hours worked on DBRA-covered projects. Moreover, the continuous in nature criterion focuses on the circumstances under which the fringe benefit is available, not the timing of the contractor's contributions toward the benefit. Under a contrary approach that focused on the timing of the contractor's contributions to the benefit, a contractor could annualize contributions to a fringe benefit plan that were made only in connection with DBRA-covered work, even though benefits were available to the worker during periods of private work. Such an approach would contravene the basic premise of the annualization requirement. *See, e.g., Indep. Roofing Contractors,* 300 Fed. Appx. at 521 (noting the Department's ''long history of applying annualization'' so as to ''ensure 'that a disproportionate amount of that fringe benefit is not paid out of wages earned on . . . Davis-Bacon work''') (citation omitted). For this reason, to the extent that REBOUND and an individual commenter suggested that whether an exception to the annualization requirement is warranted should be determined based on when the contribution is made (*i.e.,* whether contributions are made solely in connection with DBRA-covered work) rather than when benefits are available, such a suggestion reflects a misunderstanding of the annualization principle, as in such a scenario, contributions during periods of DBRA-covered work would be used to subsidize benefits provided during periods of private work, thereby presenting a classic case in which annualization is required.

The Department also disagrees with ABC's contention that the ''continuous in nature'' criterion appears to reflect ''a significant, but unacknowledged, policy change'' because it does not appear in the FOH or other guidance materials. This criterion simply expressly reflects the bedrock principle that where benefits are available on a continuing basis, and are not, for example, restricted to Davis-Bacon work, annualization will be warranted. As such, this criterion reflects the Department's longstanding position, as reflected in *Miree Construction* and *Independent Roofing Contractors,* that it is proper to annualize benefits that are continuous in nature and constitute compensation for all of an employee's work. *See Miree Constr.,* 930 F.2d at 1546 (''If an employer chooses to provide a year-long fringe benefit, rather than cash or some other fringe benefit, the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work''); *Indep. Roofing Contractors,* 300 Fed. Appx. at 521 (concluding that the ARB had a reasonable basis for requiring annualization of apprentice training program benefits where ''apprentice training continued year-round but [the contractor] contributed to the [apprenticeship training fund] only for DBA projects'').

The Department did not receive comments specifically on the second criterion that requires a benefit plan to not compensate both DBRA-covered and private work. However, considering the comments requesting clarification or recommending changes to the other two criteria, the Department has clarified in § 5.25(c)(3)(ii) of the final rule that the second criterion means that a benefit does not compensate both private and DBRA-covered work if any benefits provided during periods of private work are wholly paid for by compensation for private work. Benefits provided during periods of private work that are paid for, in whole or in part, by compensation earned during hours worked on DBRA-covered work do not meet this criterion.

While the Department appreciates some commenters' request to require immediate vesting, the Department declines to adopt this recommendation. The Department has used the 500-hour criteria for ''essentially immediate vesting'' for decades, and it is the current standard for DCPPs that are excepted from the annualization requirement. Moreover, any request to change vesting requirements (as opposed to identifying a vesting threshold that satisfies the annualization principle) is beyond the scope of this rule. The Department has, however, revised the regulatory text to reflect that, as a matter of historical practice, the requirement of immediate participation and essentially immediate vesting has been a criterion generally applied to DCPPs. To the extent that benefit plans or contractors have concerns regarding the application of this criterion or wish to seek exception approval whether or not they satisfy the criterion, they may direct questions or requests for specific exception to the Department pursuant to § 5.25(c)(3). The Department also notes that to the extent that IEC interpreted the Department's proposal as requiring ''immediate vesting'' in a manner that would ''eliminate[ ] fringe 401k plans from DBA creditability,'' the commenter misunderstood the nature of the proposal, which, through its requirement of ''essentially immediate

vesting,'' reflected that annualization of contributions to DCPPs will be permissible (assuming other criteria are satisfied) where the pension benefit vests within the first 500 hours worked, which is a criterion that has not interfered with the availability of an exception from annualization for DCPPs.

In addition to the two substantive changes discussed in this section, the final rule includes several clarifying changes. In § 5.25(c), the Department has added a one-sentence summary of the annualization principle as well as language to further clarify that annualization requirements apply to unfunded as well as funded plans. The Department also has clarified that, except as provided in § 5.25(c), contractors must annualize all contributions to fringe benefit plans, not all fringe benefit contributions. As proposed, this paragraph could have been construed to incorrectly imply that cash payments in lieu of fringe benefits must be annualized. Similarly, the beginning of § 5.25(c)(3) in the final rule has been revised to clarify that the annualization principle, and exceptions to that principle, apply to contributions to fringe benefit plans, not to the plans themselves. This concept was clear in the NPRM and was understood by the regulated community and other stakeholders that submitted comments on this proposal. The Department has made these changes in the final rule to be more precise.

xiii. Section 5.26 ''* * * Contribution Irrevocably Made * * * to a Trustee or to a Third Person''

The Department proposed several non-substantive technical corrections to § 5.26 to improve clarity and readability. The Department received no comments on most of the proposed changes to § 5.26 and therefore adopts those changes as proposed. The Department, however, received two comments contending that one of the proposed changes would be substantive and opposing the change. Specifically, FBG and ABC asserted that the proposed change from current language stating, ''The trustee [of fringe benefits contributions] must assume the usual fiduciary responsibilities imposed upon trustees by applicable law'' to revised language stating, ''the trustee or third person must adhere to any fiduciary responsibilities applicable under law'' appeared to impose, for the first time, fiduciary responsibilities on non-trustee third parties that administer fringe benefits, and that the scope of such fiduciary responsibilities was unclear.

As an initial matter, as noted in the proposed rule, this change was not intended to be substantive. Neither the existing language nor the proposed language imposes any fiduciary responsibilities; rather, both simply state that the recipient of fringe benefits contributions must adhere to whatever fiduciary responsibilities already apply by virtue of any ''applicable law.'' Thus, whether a non-trustee third party is considered a fiduciary and subject to fiduciary responsibilities is determined not by the Davis-Bacon regulations but by other laws. The proposed rule would not have effected any change in this regard.

The Department nonetheless recognizes that, as these commenters noted, the current regulation only includes trustees, not non-trustee ''third persons,'' when referring to applicable fiduciary responsibilities, whereas the proposed rule included both. Given the commenters' concerns that this could be construed as a substantive change, the Department modifies the language in the final rule to state instead that ''a trustee must adhere to any fiduciary responsibilities applicable under law.'' The Department notes, however, that whether the recipient of fringe benefit contributions is a trustee or a third person, to the extent that the party is deemed a fiduciary under applicable law, if the party is found to have materially violated its fiduciary responsibilities with respect to the fringe benefit contributions, it is likely that such contributions will not be creditable under the DBRA. The final rule makes this change and otherwise adopts the language as proposed.

xiv. Section 5.28 Unfunded Plans

Section 5.28 discusses ''unfunded plans,'' *i.e.,* plans in which the contractor does not make irrevocable contributions to a trustee or third person pursuant to a fund, plan, or program, but instead provides fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, and receives fringe benefit credit for the rate of costs which may be reasonably anticipated in providing benefits under such a commitment. In the NPRM, the Department proposed a technical correction to the citation to the DBA to reflect the codification of the relevant provision at 40 U.S.C. 3141(2)(B)(ii), as well as a number of other non-substantive revisions. The Department received no comments on these proposals. The final rule therefore adopts these changes as proposed.

Additionally, the Department proposed adding a new paragraph (b)(5) to § 5.28, explicitly stating that unfunded benefit plans or programs must be approved by the Secretary in order to qualify as bona fide fringe benefits, and to replace the text in current paragraph (c) with language explaining the process contractors and subcontractors must use to request such approval. To accommodate these changes, the Department proposed to add a new paragraph (d) that contains the text currently located in paragraph (c) with non-substantive edits for clarity and readability.

As the Department noted in the proposed rule, other regulatory sections—including the Davis-Bacon contract clause itself in § 5.5—make clear that if a contractor provides its workers with fringe benefits through an unfunded plan, the contractor may only take credit for any costs reasonably anticipated in providing such fringe benefits if it has submitted a request in writing to the Department and the Secretary has determined that the applicable standards of the DBA have been met. *See* 29 CFR 5.5(a)(1)(iv), 5.29(e). However, § 5.28 does not mention this approval requirement or the process for requesting approval, even though § 5.28 is the section that most specifically discusses requirements for unfunded plans. Accordingly, to improve regulatory clarity and consistency, the Department proposed to revise § 5.28 to clarify that, for payments under an unfunded plan or program to be credited as fringe benefits, contractors and subcontractors must submit a written request for the Secretary to consider in determining whether the plan or program, and the benefits proposed to be provided thereunder, are ''bona fide,'' meet the factors set forth in § 5.28(b)(1)–(4), and are otherwise consistent with the Act. The Department also proposed to add language to explain that such requests must be submitted by mail to WHD's Division of Government Contracts Enforcement, via email to *unfunded@dol.gov* or any successor address, or via any other means directed by the Administrator.

The Department received one comment in support of the proposed revisions to § 5.28. PAAG and PADLI commented that while ''unfunded plans may provide workers with meaningful benefits, prevailing wage violators often . . . claim fringe benefit credits for unfunded plans that do not meet the standards currently outlined in 29 CFR 5.28.'' As an example, PAAG and PADLI cited a case in which a contractor claimed credit for an unfunded paid time off plan under which all but 3 of the workers' unused vacation days were

forfeited every year and the workers were not compensated for the forfeited vacation time. PAAG and PADLI explained that contracting agencies—especially small, local agencies—often lack the information and expertise to determine whether or not an unfunded plan is creditable under the DBRA and therefore need to refer questionable cases for investigation, whereas the proposed language would ensure that unfunded plans would be evaluated and preapproved up front. PAAG and PADLI therefore supported the proposed revisions to § 5.28 explicitly requiring preapproval of unfunded plans as a means of ensuring that workers actually receive the money they earn and increasing regulatory clarity.

The Department also received comments in opposition to these revisions. CC&M commented that requiring the Department's approval of unfunded plans, especially vacation and holiday plans, is unduly burdensome to contractors and would disadvantage nonunion contractors by discounting legitimate holiday and vacation benefits. Similarly, IUOE commented that over 60 percent of construction workers receive health care from self-funded plans. They expressed concern that contractors might not possess the documentation necessary to substantiate more ''informal'' self-funded benefits such as vacation, holiday, and sick leave. IUOE also expressed concern that a preapproval process would be unnecessarily burdensome on WHD and that WHD's authority to approve benefit plans could conflict with the authority of the Department's Employee Benefits Security Administration (EBSA) under the Employment Retirement Income Security Act (ERISA). The IUOE instead recommended that the final rule establish clear rules for determining the hourly fringe benefit credit in lieu of cash wages for unfunded plans, recommending four specific additions to the rule.[233] III–FFC expressed concerns and made recommendations similar to those of IUOE. ABC suggested that the Department address any inconsistency in the regulations by eliminating the advance approval requirement from both §§ 5.28 and 5.29, stating that such advance approvals should be voluntary on the part of contractors. Finally, IAPA expressed concern that under the proposed revisions, underfunded multiemployer pension plans may be considered unfunded, and contractors would be prohibited from paying cash in lieu of fringe benefits or using other fringe benefit plans that are regulated by the Internal Revenue Service (IRS).

Many of the comments in opposition appear to be premised on a misconception that the revisions impose new substantive requirements with respect to unfunded plans. Nothing in these revisions alters the four substantive conditions for unfunded plans set out in § 5.28(b)(1)–(4) or the overall requirements that an unfunded plan must be ''bona fide'' and able to ''withstand a test . . . of actuarial soundness.'' For example, the existing regulations already provide the Secretary with discretion to require sufficient funds be set aside to meet the obligations of an unfunded plan, and nothing in the existing or revised regulations prohibits a contractor from making contributions to bona fide fringe benefit plans or from paying cash in lieu of fringe benefits, as appropriate. Nor do the revisions have any effect on whether a multiemployer pension plan would be considered ''underfunded.'' Consistent with §§ 5.5(a)(1)(iv) and 5.29(e), the Department has long required written approval if a contractor seeks credit for the reasonably anticipated costs of an unfunded benefit plan towards its Davis-Bacon prevailing wage obligations, including with respect to vacation and holiday plans. The revisions to § 5.28 merely clarify this preexisting requirement and detail the process through which contractors may request such approval from the Department. Moreover, this existing process is consistent with ERISA; while EBSA is charged with evaluating a plan's compliance with ERISA, WHD is responsible for determining whether an employer has complied with the fringe benefit requirements of the DBRA.

The Department disagrees that the revised regulations will disadvantage non-union contractors. To the extent any contractor—union or non-union—wishes to take credit towards its prevailing wage obligations for the reasonably anticipated costs of unfunded benefit plans, the contractor must ensure that such plan has been approved by the Department. The approval process benefits contractors by helping them avoid potential violations by correcting any issues noted during the approval process. The approval process also benefits workers by ensuring that they will receive the full prevailing wage to which they are entitled when working on Davis-Bacon covered contracts. Only contractors who wish to claim credit for the reasonably anticipated costs of an unfunded plan will incur the minimal burden of submitting a request for approval.

While the Department appreciates the suggestions by IUOE and III–FFC for specific standards for unfunded plans, the Department believes that the current regulatory requirements provide greater flexibility to contractors in fulfilling their prevailing wage obligations on Davis-Bacon covered contracts. Section 5.28 outlines the process and requirements for obtaining approval regarding an unfunded benefit plan; it does not purport to describe the methodology by which contractors may calculate the appropriate credit for the reasonably anticipated cost of such plans. Adding the language that IUOE and III–FFC proposed would significantly alter the purpose and scope of this section and would be beyond the scope of the proposed rule.

Finally, the proposal provided that a request for approval of an unfunded plan must include sufficient documentation for the Department to evaluate whether the plan satisfies the regulatory criteria. To provide flexibility for contractors, the final rule, like the proposed rule, does not specify the documentation that must be submitted with the request. Rather, new paragraph (d) of this section (which, as noted above, contains the language of former paragraph (c) with non-substantive edits for clarity and readability) explains that the words ''reasonably anticipated'' contemplate a plan that can ''withstand a test'' of ''actuarial soundness.'' While WHD's determination whether an unfunded plan meets the statutory and regulatory requirements will be based on the totality of the circumstances, the type of information WHD will require from contractors or subcontractors in order to make such a determination will typically include identification of the benefit(s) to be provided; an explanation of the funding/contribution formula; an explanation of the financial analysis methodology used to estimate the costs of the plan or program benefits and how the contractor has budgeted for those costs; a specification of how frequently the contractor either sets aside funds in accordance with the cost calculations to meet claims as they arise, or otherwise budgets, allocates, or tracks such funds to ensure that they will be available to meet claims; an explanation of whether employer contribution amounts are different for Davis-Bacon and non-prevailing wage work; identification of

[233] Specifically, IUOE suggested that (1) all ''rate of cost'' plans must use a yearly period for their fringe benefit credit calculations; (2) ''rate of cost'' health care plans must use the IRS COBRA rules for determining the premium costs used for any fringe benefit credit calculations; (3) all ''rate of contribution'' plans must use the existing annual or monthly time period for annualizing fringe credit calculation; shorter periods are not allowed; and (4) the regulations should state that annualization rule should apply to all types of plans, including Health Savings Accounts and Health Reimbursement Accounts; except for Defined Contribution Pension Plans.

the administrator of the plan or program and the source of the funds the administrator uses to pay the benefits provided by the plan or program; specification of the ERISA status of the plan or program; and an explanation of how the plan or program is communicated to laborers or mechanics.

The final rule accordingly adopts these revisions as proposed.

xv. Section 5.29 Specific Fringe Benefits

In the NPRM, the Department proposed to revise § 5.29 to add a new paragraph (g) that addresses the circumstances under which a contractor may take a fringe benefit credit for the costs of an apprenticeship program. While § 5.29(a) provides that the defrayment of the costs of apprenticeship programs is a recognized fringe benefit that Congress considered common in the construction industry, the regulations do not presently address when a contractor may take credit for such contributions or how to properly credit such contributions against a contractor's fringe benefit obligations.

In the NPRM, the Department proposed that for a contractor or subcontractor to take credit for the costs of an apprenticeship program, the program, in addition to meeting all other requirements for fringe benefits, must be registered with OA, or an SAA recognized by the OA). Additionally, the Department proposed to permit contractors to take credit for the actual costs of the apprenticeship program, such as tuition, books, and materials, but not for additional contributions that are beyond the costs actually incurred for the apprenticeship program. The proposed rule also reiterated the Department's position that the contractor may only claim credit towards its prevailing wage obligations for the workers employed in the classification of laborer or mechanic that is the subject of the apprenticeship program. For example, if a contractor has apprentices registered in a bona fide apprenticeship program for carpenters, the contractor could claim a credit for the costs of the apprenticeship program towards the prevailing wages due to the carpenters on a Davis-Bacon project, but could not apply that credit towards the prevailing wages due to other classifications, such as electricians or laborers, on the project. Furthermore, the proposed paragraph explained that, when applying the annualization principle pursuant to the proposed revisions to § 5.25, the workers whose total working hours are used to calculate the hourly contribution amount are limited to those workers in the same classification as the apprentice, and that this hourly amount may only be applied toward the wage obligations for such workers. The Department explained that the proposed changes were consistent with its historical practice and interpretation and relevant case law. *See* WHD Opinion Letters DBRA–116 (May 17, 1978), DBRA–18 (Sept. 7, 1983), DBRA–16 (July 28, 1987), DBRA–160 (Mar. 10, 1990); FOH 15f17; *Miree Constr. Corp.,* 930 F.2d at 1544–45; *Miree Constr. Corp.* v. *Dole,* 730 F. Supp. 385 (N.D. Ala. 1990); *Miree Constr. Corp.,* WAB No. 87–13, 1989 WL 407466 (Feb. 17, 1989). The Department also proposed a minor technical revision to paragraph (e) to include a citation to § 5.28, which provides additional guidance on unfunded plans.

The comments the Department received regarding these proposals were generally supportive. The Alliance agreed that limiting creditable contributions to registered apprenticeship programs will help ensure that apprentices receive quality instruction and may help prevent unscrupulous employers from paying a lower wage while providing sub-standard apprenticeship programs. SMACNA stated that the guidance will assist contractors to properly compute fringe benefit credit against their fringe benefit obligation. CEA also expressed support for these proposals. LIUNA, while generally supportive, suggested that § 5.29(g)(2) be revised so that permissible contributions include, in addition to actual costs incurred by an apprenticeship program, contributions negotiated as part of a collectively bargained agreement. LIUNA expressed concern that the proposed language might not necessarily encompass such programs.

After reviewing the comments received, the Department has largely retained the language as proposed but has modified § 5.29(g)(2) to allow for greater flexibility in determining whether contributions to apprenticeship plans are creditable. Specifically, the final rule requires that a contractor's apprenticeship contributions must bear a ''reasonable relationship'' to the cost of apprenticeship benefits provided to the contractor's employees. This standard more accurately reflects the Department's position noted and upheld in *Miree* and subsequent decisions. *See Indep. Roofing Contractors,* 300 F. App'x at 521; *Tom Mistick & Sons, Inc.* v. *Reich,* 54 F.3d 900, 903 (D.C. Cir. 1995); *Miree Constr. Corp.,* 930 F.2d at 1543. The final rule further explains that in the absence of evidence to the contrary, the Department will presume that amounts the employer is required to contribute by a CBA or by a bona fide apprenticeship plan (whether or not the plan is collectively bargained) satisfy this standard, but reaffirms that voluntary contributions beyond that which is reasonably related to apprenticeship benefits are not creditable.

While the Department declines to adopt LIUNA's suggestion to categorically deem collectively bargained contributions creditable, under this presumption, required contributions to apprenticeship plans under CBAs will typically be creditable. *See Miree Constr. Corp.,* 930 F.2d at 1543–45 (noting that the Department ''gives full credit for the amounts required to be contributed under a [collectively bargained] plan, based on the assumption that there exists a reasonable relationship between the amount of contributions on the one hand and the cost of providing training and administering the plan on the other hand,'' and agreeing that such an assumption is reasonable) (quoting Letter of Administrator of Feb. 20, 1987).

xvi. Section 5.30 Types of Wage Determinations

The Department proposed several non-substantive revisions to § 5.30. In particular, the Department proposed to update the examples in § 5.30(c) to more closely resemble the current format of wage determinations issued under the DBA. The current illustrations in § 5.30(c) list separate rates for various categories of fringe benefits, including ''Health and welfare,'' ''Pensions,'' ''Vacations,'' ''Apprenticeship program,'' and ''Others.'' However, current Davis-Bacon wage determinations typically contain a single combined fringe benefit rate per classification, rather than separately listing rates for different categories of fringe benefits. To avoid confusion, the Department proposed to update the illustrations to reflect the way in which fringe benefits are typically listed on wage determinations. The Department also proposed several non-substantive revisions to § 5.30(a) and (b), including revisions pertaining to the updated illustrations in § 5.30(c).

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

xvii. Section 5.31 Meeting Wage Determination Obligations

The Department proposed to update the examples in § 5.30(c) to more closely resemble the current format of wage determinations under the DBRA. The

Department therefore proposed to make technical, non-substantive changes to § 5.31 to reflect the updated illustration in § 5.30(c).

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

xviii. Section 5.33 Administrative Expenses of a Contractor or Subcontractor

The Department proposed to add a new § 5.33 to codify existing WHD policy under which a contractor or subcontractor may not take Davis-Bacon credit for its own administrative expenses incurred in connection with fringe benefit plans. 87 FR 15745 (citing WHD Opinion Letter DBRA–72 (June 5, 1978); FOH 15f18). This policy is consistent with Department case law under the DBA, under which such costs are viewed as ''part of [an employer's] general overhead expenses of doing business and should not serve to decrease the direct benefit going to the employee.'' *Collinson Constr. Co.,* WAB No. 76–09, 1977 WL 24826, at *2 (also noting that the DBA's inclusion of ''costs'' in the provision currently codified at 40 U.S.C. 3141(2)(B)(ii) refers to ''the costs of benefits under an unfunded plan''); *see also Cody-Zeigler, Inc.,* ARB Nos. 01–014, 01–015, 2003 WL 23114278, at *20 (applying *Collinson* and concluding that a contractor improperly claimed its administrative costs for ''bank fees, payments to clerical workers for preparing paperwork and dealing with insurance companies'' as a fringe benefit). This policy is also consistent with the Department's regulations and guidance under the SCA. *See* 29 CFR 4.172; FOH 14j00(a)(1).

The Department also sought public comment regarding whether it should clarify this principle further with respect to administrative functions performed by third parties. 87 FR 15745. Under both the DBA and SCA, fringe benefits include items like health insurance, which necessarily involves both the payment of medical benefits and administration of those benefits through activities such as evaluating benefit claims, deciding whether they should be paid, and approving referrals to specialists. 40 U.S.C. 3141(2)(B); 41 U.S.C. 6703(2). Accordingly, reasonable costs incurred by a third-party fiduciary in its administration and delivery of fringe benefits to employees are creditable under the SCA. *See* WHD Opinion Letter SCA–93 (Jan. 27, 1994) (noting that an SCA contractor could take credit for its contribution to a pension plan on behalf of its employees, including the portion of its contribution that was used by the pension plan for ''administrative costs'' ''incurred'' by ''the plan itself''); FOH 14j00(a)(2). WHD applies a similar standard under the DBA.

However, as explained in the NPRM, WHD has received a number of inquiries in recent years regarding the extent to which contractors may take credit for fees charged by third parties for performing such administrative tasks as tracking the amount of the contractor's fringe benefit contributions; making sure those contributions cover the fringe benefit credit claimed by the contractor; tracking and paying invoices from third-party plan administrators; and sending lists of new hires to the plan administrators. Since a contractor's own administrative costs incurred in connection with the provision of fringe benefits are non-creditable business expenses, *see Collinson,* 1977 WL 24826, at *2; *cf.* 29 CFR 4.172, WHD has advised that if a third party is merely performing these types of administrative functions on the contractor's behalf, the contractor's payments to the third party are not creditable.

While not proposing specific regulatory text, the Department sought comment on whether and how to address this issue in a final rule. The Department sought comment on whether it should incorporate the above-described policies, or other policies regarding third-party entities, into its regulations. In addition, the Department sought comment on examples of the administrative duties performed by third parties that do not themselves pay benefits or administer benefit claims. The Department also sought comment on the extent to which third-party entities both (1) perform administrative functions associated with providing fringe benefits to employees, such as tracking a contractor's fringe benefit contributions, and (2) actually administer and deliver benefits, such as evaluating and paying out medical claims, and on how the Department should treat payments to any such entities. The Department asked for comments on whether, for instance, it should consider the cost of the administrative functions in the first category to be non-creditable business expenses, and the cost of actual benefits administration and payment in the second category to be creditable as fringe benefit contributions. It also asked whether the creditability of payments to such an entity depends on the third-party entity's primary function or whether the third-party entity is an employee welfare plan within the meaning of ERISA, 29 U.S.C. 1002(1).

The Department received several comments in response to proposed § 5.33 and its request for comments regarding administrative functions performed by third parties.

Commenters either generally agreed with or did not specifically address the Department's proposal to codify the longstanding principle that a contractor or subcontractor may not take credit for its own administrative expenses which it incurs directly, like the cost of an office employee who fills out medical insurance claim forms for submission to an insurance carrier.[234] For example, Duane Morris noted that the statement that ''a contractor may not take DBRA credit for its own administrative expenses incurred in connection with the administration of a fringe benefit plan'' expresses a longstanding principle, reflected in *Collinson,* WAB No. 76–09, 1977 WL 24826, and *Cody-Zeigler,* ARB Nos. 01–014, 015, 2003 WL 23114278, that, in Duane Morris's words, ''a contractor may not take fringe credit for expenses it pays directly for delivering DBRA-required fringe benefits.'' FBG similarly stated that the language of FOH 15f18 regarding a contractor's own administrative expenses, which the Department proposed to codify in § 5.33, ''directly aligns'' with its preferred approach to the issue of administrative costs generally.

However, a number of commenters expressed concerns in response to the Department's request for comments regarding the potential creditability of administrative expenses paid by third parties. While they generally agreed, as noted above, that contractors should not receive credit against DBRA fringe benefits for their own direct costs, they expressed concern that the Department appeared to be considering classifying as non-creditable any expenses incurred by a third party other than those associated with claims payment or benefits administration. These commenters, including ABC, Duane Morris, and FBG, advocated that the Department instead permit any reasonable fees paid by a contractor to a third party that are directly related to the provision of fringe benefits to be creditable, and suggested that the standard for such an inquiry be that a third-party expense should be creditable as long as it would not have been incurred ''but for'' the provision of the fringe benefit. Duane Morris and FBG argued that such a standard would be

[234] East Coast Wall Systems stated they would find it beneficial to use fringe benefit contributions to pay for the cost of providing fringe benefits but did not specifically explain this statement or how it related to the proposed revisions.

consistent with their own interpretation of ERISA's standard for the permissible use of plan assets, with Duane Morris contending that a separate DBRA creditability standard would make the distinction between creditable and noncreditable expenses ambiguous and would unnecessarily complicate compliance.[235] These commenters argued that necessary expenses associated with plan administration go beyond mere claims administration, that administrative functions and the delivery of benefits are inherently interrelated, and therefore that the costs of both should be creditable toward DBRA obligations.[236]

Some of these commenters also argued that the Department's proposal would also unfairly advantage contractors that make direct payments to insurers as opposed to contractors who either self-insure, participate in multiemployer plans, or pay third parties to administer their Davis-Bacon fringe benefit obligations. Duane Morris, for example, stated that the Department had ''conflate[d]'' ''employers and their plans when the plans are funded in trust'' and inappropriately contemplated ''regulat[ing] the internal operations of the plan.'' [237] Similarly, FBG said that the distinction between creditable expenses incurred by a third party for administration of a plan versus noncreditable expenses that substitute for a contractor's own administrative costs is impracticable because third parties usually bundle their services and fees together. It also commented that making certain third-party administrative costs noncreditable would make it more expensive for contractors to use ''third-party benefit administrators,'' thereby incentivizing contractors to, for instance, ''spend[ ] less on administrative services'' or ''bring[ ] administration 'in-house' to be performed by individuals who lack . . . specialized knowledge[.]'' ABC likewise argued that contractors should be permitted to take credit for any reasonable fees paid to third parties, whether related to the administration and delivery of benefits or to the administrative costs relating to the provision of fringe benefits to employees, as contractors ''use qualified third parties to assist with the administration of benefits'' because they ''ensure that the highest quality benefits are provided in an efficient manner to covered employees.'' Clark Pacific commented that the rule would prohibit taking credit for administrative costs entirely and, as a result, reduce the number of contractors willing to provide fringe benefits.

III–FFC and IUOE recommended that the Department continue to analyze when contributions are creditable against fringe benefits on a case-by-case basis, particularly relating to fees charged by plan administrators and other plan service providers. IUOE stated that it would be difficult to determine whether a plan administrative expense is ''reasonable'' because there are too many factors to be considered, such as ''the size of the plan, the nature of the benefits provided by the plan, the nature of the administrative services provided to the plan, the availability of the administrative services in the marketplace, the precise scope of the administrative services provided, the qualifications, expertise and reputation of the service provider, differences in regional costs, and so forth.'' After reviewing the comments received, the Department has adopted § 5.33 with several revisions to clarify the Department's intent and address commenter concerns.

As an initial matter, the Department did not propose to make all third-party expenses, or even all expenses except for the direct expense of evaluating and paying out benefit claims, noncreditable; nor did the Department propose to incentivize any particular method by which contractors provide bona fide fringe benefits. As multiple commenters noted, third-party administrators may fulfill a vital role in the provision of fringe benefits. As WHD has expressly noted in guidance under the analogous fringe benefit requirements under the SCA, contractors may take credit for third-party expenses which are directly related to the administration and delivery of fringe benefits to their workers under a bona fide plan. *See* FOH 14j00(a)(2). The Department agrees that credit for such expenses is appropriate whether the entity performing such activities is an insurance carrier, a third-party trust fund, or a third-party administrator under a contractor's bona fide unfunded plan.

To clarify this, the Department has added paragraph (a) to § 5.33, which explicitly states that a contractor may take credit for costs incurred by a contractor's insurance carrier, third-party trust fund, or other third-party administrator that are directly related to the administration and delivery of bona fide fringe benefits to the contractor's laborers and mechanics. Section 5.33(a) includes illustrative examples of creditable expenses directly related to the administration and delivery of benefits, stating that a contractor may take credit for payments to an insurance carrier or trust fund that are used to pay for both benefits and the administration and delivery of benefits, such as evaluating benefit claims, deciding whether they should be paid, approving referrals to specialists, and other reasonable costs of administering the plan. Additional examples of such creditable expenses include the reasonable costs of administering the plan, such as the cost of recordkeeping related to benefit processing and payment in the case of a healthcare plan, or expenses associated with managing plan investments in the case of a 401(k) plan. Additionally, to clarify that these expenses are also creditable

[235] Under ERISA, plan fiduciaries must act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. While ERISA section 406(a) prohibits the provision of services between plans and service providers and plan payments to service providers, ERISA section 408(b)(2) sets forth an exemption from section 406(a) which permits a plan fiduciary to contract or make reasonable arrangements for services necessary for the establishment or operation of the plan if no more than reasonable compensation is paid therefore, among other requirements. *See* 29 U.S.C. secs. 1106(a), 1108(b)(2); *see also* 29 CFR 2550.408b–2. However, the exemption under section 408(b)(2) does not provide relief for transactions described in section 406(b) of ERISA, including fiduciary self-dealing, conflicts of interest, and kickbacks in connection with transactions involving plan assets.

[236] Duane Morris also submitted a set of proposals ''to improve the scheme for benefiting contractor employees'' subject to a fixed-cost contract, under which, among other elements, a contractor apparently would be required to request competitive bids for fringe benefits at least every 3 years in order to satisfy a requirement, for purposes of receiving fringe benefit credit, to evaluate whether the value of the benefit ''is market competitive with comparable alternatives available to the contractor.'' Under these proposals, contributions to a trust that ''can be expected to provide'' ''market competitive'' benefits would be presumptively creditable, ''without regard to the specific application of plan assets to the trust.'' Although the Department has reviewed and appreciates the proposals, it considers them to be outside the scope of this rulemaking. To the extent Duane Morris is proposing that, under certain conditions, a contractor should be permitted to take credit for payments to a third party to perform the contractor's own administrative tasks, the Department disagrees, for the reasons discussed below.

[237] Duane Morris claimed that multiemployer plans maintained through CBAs often use plan assets to hire third-party administrators to perform tasks which the Department ''propose[d] to make non-creditable,'' such as ''reconcil[ing] covered hours [and] employer contributions[.]'' The Department did not receive any comments from unions indicating that its proposal would make noncreditable the cost of tasks regularly performed by plans maintained under CBAs between unions and contractors. In WHD's enforcement experience, such plans do not perform administrative tasks on behalf on the contractor such as keeping track of whether a particular contractor's contributions were sufficient to cover its fringe benefit credit on its various projects.

in the case of an unfunded plan, § 5.33(a) states that a contractor may take credit for the fees paid to a third-party administrator to perform similar tasks directly related to the administration and delivery of benefits, including under an unfunded plan.

As noted above, commenters did not oppose the Department's proposal to codify its policy that a contractor may not take credit for its own administrative costs where it incurs them directly, and accordingly, in new § 5.33(b), the final rule adopts that proposal. In addition, section 5.33(b) of the final rule states that a contractor may not take credit for its own administrative expenses even when the contractor pays a third party to perform its administrative tasks rather than incurring the expenses internally. The final rule includes illustrative examples of such noncreditable administrative expenses, including the cost of filling out medical insurance claim forms for submission to an insurance carrier, paying and tracking invoices from insurance carriers or plan administrators, updating the contractor's personnel records when laborers or mechanics are hired or separate from employment, sending lists of new hires to insurance carriers or plan administrators, or sending out tax documents to the contractor's laborers or mechanics. The Department is hopeful that these examples will be helpful in identifying expenses that would be considered employer expenses not directly related to the administration and delivery of bona fide fringe benefits. The Department agrees with the commenters who contended that its regulations should not incentivize any particular benefit model, and as such, the final rule clarifies that these types of costs are non-creditable regardless of whether the employer performs them itself or pays a third party a fee to perform them. Section 5.33(b) also clarifies that recordkeeping costs associated with ensuring the contractor's compliance with the Davis-Bacon fringe benefit requirements, such as the cost associated with tracking the amount of its fringe benefit contributions or making sure contributions cover the fringe benefit credit claimed, are considered a contractor's own administrative expenses and therefore are not creditable whether the contractor performs those tasks itself or whether it pays a third party a fee to perform those tasks.

Section 5.33(b) is in accordance with the analogous SCA regulations, which preclude SCA contractors from taking credit for any costs that are ''primarily for the benefit or convenience of the contractor.'' 29 CFR 4.171(e); *see also* 29 CFR 4.172. Under the FLSA—upon which the SCA prohibition against taking credit for contractor business expenses is based, *see* 48 FR 49757—an expense is primarily for the benefit of the employer if, among other reasons, it is ''imposed on the employer by law.'' *See* Br. of the Sec'y of Labor, 2010 WL 5622173, at *10–11, *Ramos-Barrientos* v. *Bland Farms,* No. 10–13412–C (11th Cir. 2011), ECF No. 47 (citing 29 CFR 531.3(d)(2), 531.32(c), 531.38). Given that contractors may satisfy their DBRA prevailing wage obligations by making contributions to or incurring reasonably anticipated costs in providing bona fide fringe benefits under a plan or program, *see* 29 CFR 5.5(a)(1)(i), and given that contractors are required to keep records of the hours worked by their laborers and mechanics and any contributions made or costs reasonably incurred under a bona fide fringe benefit plan, *id.* at (3)(i), it would be anomalous to permit a contractor to take credit towards its prevailing wage obligation for the cost of, for instance, tracking the hours worked by its laborers and mechanics on DBRA-covered projects costs, tracking the contractor's fringe benefit contributions on behalf of these workers, and reconciling workers' hours worked with the contractor's contributions.

This rationale applies equally to a contractor that uses its own employees to perform such tasks as to a contractor that pays a third party to perform such tasks. If a contractor were permitted to claim a credit for these expenses, it could effectively outsource its own administrative and compliance costs to third parties and have the cost paid for from the prevailing wages due to its workers. Similarly, if it is not permissible for a contractor to take credit for the cost of an office employee who submits claim forms to an insurance carrier—which none of the commenters specifically disputed—then it should not be permissible for a contractor to take credit for payments it makes to a third party to perform similar tasks on its behalf.

The Department declines the recommendation from some commenters to adopt a standard under which third-party expenses are considered directly related to the administration and delivery of fringe benefits, and therefore creditable, as long as they would not have been incurred but for the provision of the fringe benefit. The Department acknowledges those comments that claimed that such a ''but for'' standard would be consistent with what they assert are ERISA standards governing the permissible use of plan assets. Regardless of the accuracy of those claims, the DBRA requires a different analysis for whether a contractor may take credit against the payment of prevailing wages for such expenses. Under the DBRA, the question is not whether a plan's assets may be used for a particular expense, but whether a contribution or cost may be considered a part of a worker's wage. A contractor's own administrative costs, even if related in some fashion to the fringe benefits provided to workers, are not part of its workers' wages since, as explained above, such costs primarily benefit the contractor. It is therefore not sufficient, for purposes of DBRA credit, that an administrative cost would not have been incurred ''but for'' the fringe benefit plan(s).

The Department has observed an increase in the number of third-party businesses that promise to reduce contractors' costs if contractors hire them to perform the contractors' own administrative tasks and then claim a fringe benefit credit for the costs of those outsourced tasks. Existing regulations have not been sufficient to curtail this practice, and for the reasons discussed above, the payments of fees to third parties to perform such tasks is inconsistent with the requirements of the DBRA. Thus, the final rule adopts an approach, consistent with the guidance the Department has previously provided, that distinguishes more precisely between creditable and noncreditable expenses based on whether the expenses are properly viewed as business expenses of the contractor. The Department believes that codifying this standard in the regulations will help the contracting community and third-party administrators understand which types of expenses are creditable and which types are not.

By making creditability depend on the type and purpose of the expense, rather than on whether it is paid by the contractor directly or through a third party, the Department believes that the final rule addresses commenters' concerns that the proposed rule might have discouraged the use of bona fide third-party plan administrators or provided an advantage to contractors that make payments directly to insurers and other benefit providers. The final rule does not preclude contractors from taking credit for reasonable costs incurred or charged by these entities to administer bona fide fringe benefit plans. Rather, § 5.33(b) merely precludes contractors from taking credit for their own administrative costs

associated with providing fringe benefit plans and which are properly considered business expenses of the contractor, whether the contractor incurs such costs directly or in the form of payments to a third party.

While the Department appreciates some commenters' recommendation to continue to analyze administrative expenses on a case-by-case basis, given that, as discussed above, the Department has observed an increase in business models under which contractors may be taking credit for noncreditable expenses, the Department believes that it is necessarily to codify these basic principles to help contractors and plan administrators recognize and comply with the requirements and their obligations under the DBRA. The Department recognizes that there will, of course, be close cases, and will continue to conduct fact-specific analyses in individual cases when questions of creditability arise. To that end, the Department has added § 5.33(c) to clarify that if contractors, plan administrators, or others have questions as to whether certain expenses are creditable, such questions should be submitted to the Department for review.

Finally, the Department disagrees with FBG's comment that third parties' practice of bundling creditable and noncreditable expenses together will makes it difficult to comply with the proposed rule. In its investigations under the DBRA and SCA, WHD has found that when third parties both perform plan administration and help contractors fulfill their own administrative obligations, they frequently impose separate charges for the different types of services. Even in instances where such services are so intertwined that it is not possible to determine whether payments to a third party are for creditable plan administration or noncreditable administrative activities, WHD will consider the facts to determine whether the third party is primarily performing creditable services. Finally, if questions arise, § 5.33(c) will allow contractors to receive input from the Department as to the creditability of any questionable expenses, whether bundled or not.

xix. Anti-Retaliation

The Department proposed to add anti-retaliation provisions to enhance enforcement of the DBRA and their implementing regulations in 29 CFR parts 1, 3, and 5. The proposed anti-retaliation provisions were intended to discourage contractors, responsible officers, and any other persons from engaging in—or causing others to engage in—unscrupulous business practices that may chill worker participation in WHD investigations or other compliance actions and enable prevailing wage violations to go undetected. The proposed anti-retaliation provisions were also intended to provide make-whole relief for any worker who has been discriminated against in any manner for taking, or being perceived to have taken, certain actions concerning the labor standards provisions of the DBA, CWHSSA, and other Related Acts, and the regulations in parts 1, 3, and 5.

In most WHD DBRA investigations or other compliance actions, effective enforcement requires worker cooperation. Information from workers about their actual hours worked, wages paid, and work performed is often essential to uncover violations such as falsification of certified payrolls or wage underpayments, including underpayments due to craft misclassification, by contractors or subcontractors that fail to keep pay or time records or have inaccurate or incomplete records. Workers are often reluctant to come forward with information about potential violations of the laws WHD enforces because they fear losing their jobs or suffering other adverse consequences. Workers are similarly reluctant to raise these issues with their supervisors. Such reluctance to inquire or complain internally may result in lost opportunities for early correction of violations by contractors.

The current Davis-Bacon regulations protect the identity of confidential worker-informants in large part to prevent retribution by the contractors for whom they work. *See* 29 CFR 5.6(a)(5); *see also* 29 CFR 6.5. This protection helps combat the ''possibility of reprisals'' by ''vindictive employers'' against workers who speak out about wage and hour violations, but does not eliminate it. *Cosmic Constr. Co.,* WAB No. 79–19, 1980 WL 95656, at *5 (Sept. 2, 1980).

When contractors retaliate against workers who cooperate or are suspected of cooperating with WHD or who make internal complaints or otherwise assert rights under the DBRA, neither worker confidentiality nor the DBRA remedial measures of back wages or debarment can make workers whole. The Department's proposed anti-retaliation provisions aimed to remedy such situations by providing make-whole relief to workers who are retaliated against, as well as by deterring or correcting interference with DBRA worker protections.

The Department's authority to promulgate the anti-retaliation provisions stems from 40 U.S.C. 3145 and Reorganization Plan No. 14 of 1950. In transmitting the Reorganization Plan to Congress, President Truman noted that ''the principal objective of the plan is more effective enforcement of labor standards,'' and that the plan ''will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.'' *Special Message to the Congress Transmitting Reorganization Plan No. 14 of 1950,* reprinted in 5 U.S.C. app. 1 (Mar. 13, 1950) (1950 Special Message to Congress).

It is well settled that the Department has regulatory authority to debar Related Act contractors even though Related Acts do not expressly provide for debarment. *See Janik Paving & Constr., Inc.* v. *Brock,* 828 F.2d 84, 90, 91 (2d Cir. 1987) (upholding debarment for CWHSSA violations even though that statute ''specifically provided civil and criminal sanctions for violations of overtime work requirements but failed to mention debarment''). In 1951, the Department added a new part 5 to the DBRA regulations, including the Related Act debarment regulation. *See* 16 FR 4430. The Department explained that it was doing so in compliance with the directive of Reorganization Plan No. 14 of 1950 to ''assure coordination of administration and consistency of enforcement of the labor standards provisions'' of the DBRA. *Id.* Just as regulatory debarment is a permissible exercise of the Department's ''implied powers of administrative enforcement,'' *Janik Paving & Constr.,* 828 F.2d at 91, so, too, are the proposed anti-retaliation provisions and the revised Related Act debarment provisions discussed in section III.B.3.xxi (''Debarment''). The Department stated its position that it would be both efficient and consistent with the remedial purpose of the DBRA to investigate and adjudicate complaints of retaliation as part of WHD's enforcement of the DBRA. These measures will help achieve more effective enforcement of the Davis-Bacon labor standards.

Currently, debarment is the primary mechanism under the DBRA civil enforcement scheme for remedying retribution against workers who assert their right to prevailing wages. Debarment is also the main tool for addressing less tangible discrimination such as interfering with investigations by intimidating or threatening workers. Such unscrupulous behavior may be both a disregard of obligations to workers under the DBA and ''aggravated or willful'' violations under the current Related Act regulations that warrant debarment. *See* 40 U.S.C. 3144(b)(1); 29 CFR 5.12(a)(1), (a)(2), (b)(1).

Both the ARB and ALJs have debarred contractors in part because of their retaliatory conduct or interference with WHD investigations. *See, e.g., Pythagoras Gen. Contracting Corp.,* ARB Nos. 08–107, 09–007, 2011 WL 1247207, at *13 (affirming debarment of contractor and its principal in a DBRA case in part because of the ''attempt [by principal and other officials of the contractor] at witness coercion or intimidation'' when they visited former employees to talk about their upcoming hearing testimony); *R.J. Sanders, Inc.,* WAB No. 90–25, 1991 WL 494734, at *1–2 (Jan. 31, 1991) (affirming ALJ's finding that employer's retaliatory firing of an employee who reported to a Navy inspector being paid less than the prevailing wage was ''persuasive evidence of a willful violation of the [DBA]''); *Early & Sons, Inc.,* ALJ No. 85–DBA–140, 1986 WL 193128, at *8 (Aug. 5, 1986) (willful and aggravated DBRA violations evidenced in part where worker who ''insisted on [receiving the mandated wage] . . . was told, in effect, to be quiet or risk losing his job''), *rev'd on other grounds,* WAB No. 86–25, 1987 WL 247044, at *2 (Jan. 29, 1987); *Enviro & Demo Masters, Inc.,* ALJ No. 2011–DBA–00002, Decision and Order, slip op. at 9–10, 15, 59, 62–64 (Apr. 23, 2014) (*Enviro D&O*) (debarring subcontractor, its owner, and a supervisor because of ''aggravated and willful avoidance of paying the required prevailing wages,'' which included firing an employee who refused to sign a declaration repudiating his DBRA rights, and instructing workers to lie about their pay and underreport their hours if questioned by investigators).

There are also criminal sanctions for certain coercive conduct by DBRA contractors. The Copeland Anti-Kickback Act makes it a crime to induce DBRA-covered construction workers to give up any part of compensation due ''by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever.'' 18 U.S.C. 874; *cf.* 29 CFR 5.10(b) (discussing criminal referrals for DBRA violations). Such prevailing wage kickback schemes are also willful or aggravated violations of the civil Copeland Act (a Related Act) that warrant debarment. *See* 40 U.S.C. 3145; *see, e.g., Killeen Elec. Co.,* WAB No. 87–49, 1991 WL 494685, at *5 (Mar. 21, 1991).

Interference with WHD investigations or other compliance actions may also warrant criminal prosecution. For example, in addition to owing 37 workers $656,646 in back wages in the DBRA civil administrative proceeding, *see Enviro D&O* at 66, both the owner of Enviro & Demo Masters and his father, the supervisor, were convicted of Federal crimes including witness tampering and conspiracy to commit witness tampering. These company officials instructed workers at the jobsite to hide from and ''lie to investigators about their working hours and wages,'' and they fired workers who spoke to investigators or refused to sign false documents. *Naranjo* v. *United States,* No. 17–CV–9573, 2021 WL 1063442, at *1–2 (S.D.N.Y. Feb. 26, 2021), *report and recommendation adopted by* 2021 WL 1317232 (S.D.N.Y. Apr. 8, 2021); *see also Naranjo, Sr.* v. *United States,* No. 16 Civ. 7386, 2019 WL 7568186, at *1 (S.D.N.Y. Dec. 16, 2019), *report and recommendation adopted by* 2020 WL 174072, at *1 (S.D.N.Y. Jan. 13, 2020).

Contractors, subcontractors, and their responsible officers may be debarred and even criminally prosecuted for retaliatory conduct. Laborers and mechanics who have been discriminated against for speaking up, or for having been perceived as speaking up, however, currently have no redress under the Department's regulations implementing the DBA or Related Acts to the extent that back wages do not make them whole or that such discriminatory conduct is not prohibited under a separate anti-retaliation provision such as the FLSA, 29 U.S.C. 215(a)(3).[238] For example, the Department currently may not order reinstatement of workers fired for their cooperation with investigators or as a result of an internal complaint to their supervisor. Nor may the Department award compensation for the period after a worker is fired. Similarly, the Department cannot require contractors to compensate workers for the difference in pay resulting from retaliatory demotions or reductions in hours. The addition of anti-retaliation provisions is a logical extension of the DBA and Related Acts debarment remedial measure. It would supplement debarment as an enforcement tool to more effectively prevent retaliation, interference, or any other such discriminatory behavior. An anti-retaliation mechanism would also build on existing back-wage remedies by extending compensation to a fuller range of harms.

The Department therefore proposed to add two new regulatory provisions concerning anti-retaliation, as well as to update several other regulations, to reflect the new anti-retaliation provisions.

(A) Proposed New § 5.5(a)(11) and (b)(5)

The Department proposed to implement anti-retaliation in part by adding a new anti-retaliation provision to all contracts subject to the DBA or Related Acts. The proposed contract clauses provided for in § 5.5(a)(11) and (b)(5) stated that it is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate, or to cause any person to do the same, against any worker for engaging in a number of protected activities. The proposed protected activities included notifying any contractor of any conduct which the worker reasonably believes constitutes a violation; filing any complaints, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert any right or protection; cooperating in an investigation or other compliance action, or testifying in any proceeding; or informing any other person about their rights under the DBA, Related Acts, or the regulations in 29 CFR parts 1, 3, or 5, for proposed § 5.5(a)(11), or the CWHSSA or its implementing regulations in 29 CFR part 5, for proposed § 5.5(b)(5).

The scope of these anti-retaliation provisions was intended to be broad to better effectuate the remedial purpose of the DBRA, to protect workers, and to ensure that they are not paid substandard wages. Workers must feel free to speak openly—with contractors for whom they work and contractors' responsible officers and agents, with the Department, with co-workers, and others—about conduct that they reasonably believe to be a violation of the prevailing wage requirements or other DBRA labor standards requirements. The proposed anti-retaliation provisions recognized that worker cooperation is critical to enforcement of the DBRA. They would also incentivize compliance and seek to eliminate any competitive disadvantage borne by government contractors and subcontractors that follow the rules.

In line with those remedial goals, the Department intended the proposed anti-retaliation provisions to protect workers who make internal complaints to supervisors or who otherwise assert or seek to assert Davis-Bacon or CWHSSA labor standards protections set forth in § 5.5(a)(11) and (b)(5), as well as to remedy interference with Davis-Bacon worker protections or WHD investigations that may not have a direct adverse monetary impact on the affected workers. Similarly, the Department

[238] One exception is ARRA, a Related Act, that included a whistleblower protection provision which provided that complaints were to be investigated by agency inspectors general, not WHD. *See* section 1553, Public Law 111–5, 123 Stat 115 (Feb. 17, 2009).

intended the anti-retaliation provisions to also apply in situations where there is no current work or employment relationship between the parties. For example, it would prohibit retaliation by a prospective or former employer or contractor (or both). Finally, the Department's proposed rule sought to protect workers who make oral as well as written complaints, notifications, or other assertions of their rights protected under § 5.5(a)(11) and (b)(5).

(B) Proposed New § 5.18

The Department proposed remedies to assist in enforcement of the DBRA labor standards provisions. Section 5.18 set forth the proposed remedies for violations of the new anti-retaliation provisions. This proposed section also included the process for notifying contractors and other persons found to have violated the anti-retaliation provisions of the Administrator's investigative findings, as well as for Administrator directives to remedy such violations and provide make-whole relief.

Make-whole relief and remedial actions under this proposed provision were intended to restore the worker subjected to the violation to the position, both economically and in terms of work or employment status (*e.g.,* seniority, leave balances, health insurance coverage, 401(k) contributions, etc.), that the worker would have occupied had the violation never taken place. Proposed available remedies included, but were not limited to, any back pay and benefits denied or lost by reason of the violation; other actual monetary losses or compensatory damages sustained as a result of the violation; interest on back pay or other monetary relief from the date of the loss; and appropriate equitable or other relief such as reinstatement or promotion; expungement of warnings, reprimands, or derogatory references; the provision of a neutral employment reference; and posting of notices that the contractor or subcontractor agrees to comply with the DBRA anti-retaliation requirements.

In addition, proposed § 5.18 specified that when contractors, subcontractors, responsible officers, or other persons dispute findings of violations of § 5.5(a)(11) or (b)(5), the procedures in 29 CFR 5.11 or 5.12 would apply.

Conforming revisions were proposed to the withholding provisions at §§ 5.5(a)(2) and (b)(3) and 5.9 to indicate that withholding includes monetary relief for violations of the anti-retaliation provisions at § 5.5(a)(11) and (b)(5), in addition to withholding of back wages for DBRA prevailing wage violations and CWHSSA overtime violations.

Similarly, conforming changes were proposed to §§ 5.6(a)(4) and 5.10(a). Computations of monetary relief for violations of the anti-retaliation provisions were added to the limited investigatory material that may be disclosed without the permission and views of the Department under § 5.6(a)(4). In proposed § 5.10(a), monetary compensation for violations of anti-retaliation provisions were added as a type of restitution.

As explained, contractors, subcontractors, and their responsible officers have long been subject to debarment for their retaliatory actions. The NPRM proposed to update DBRA enforcement mechanisms by attempting to ensure that workers can cooperate with WHD or complain internally about perceived prevailing wage violations without fear of reprisal. The proposal reflected a reasonable extension of the Department's broad regulatory authority to enforce and administer the DBRA. Further, the Department stated its belief that adding anti-retaliation provisions would amplify existing back wage and debarment remedies by making workers whole who suffer the effects of retaliatory firings, demotions, and other actions that reduce their earnings. The Department explained that this important new tool would help carry out the DBRA's remedial purposes by bolstering WHD's enforcement.

The Department received many comments about this proposal. All but a few of the comments expressed support for the anti-retaliation proposal. Most of the supporting comments were from individuals, including as part of an organized LIUNA member campaign. The remaining supporting comments were from many non-profit and workers' rights organizations, unions, labor-management groups, contractors (including an organized SMACNA member campaign), and various appointed and elected government officials. Most of the commenters expressed general support for this proposal in its entirety and a few commenters recommended measures to strengthen the proposal. The comments opposing the proposal were submitted by the group of U.S. Senators and several contractor organizations, all of whom opposed the proposal in its entirety.

Commenters that supported the proposed anti-retaliation provisions in their entirety overwhelmingly agreed that the proposed provisions would both strengthen enforcement of the Davis-Bacon and Related Acts and better protect workers who speak out about potential DBRA violations. *See, e.g.,* LCCHR, several members of the U.S. House of Representatives from Illinois, International Union of Operating Engineers Local 77 (IUOE Local 77), and individual commenters. UBC noted that the proposed anti-retaliation provisions—both the contract clauses and remedies—would also assist in deterring retaliatory conduct. NABTU emphasized that the anti-retaliation proposal is consistent with the Department's broad enforcement authority under Reorganization Plan No. 14 of 1950, which Congress has consistently affirmed throughout the years.

Various commenters provided empirical support for the need to strengthen worker protections, including through the proposed anti-retaliation provisions. WA BCTC and LIUNA, for example, pointed to the Department's recent data showing that the construction industry is consistently one of the top two low-wage, high violation industries.[239] LCCHR highlighted various reports and articles documenting the widespread problem of wage theft, workers' fear of retaliation which leads workers to not report serious workplace problems, and retaliation against workers who did so report. Similarly, EPI referred to reports that underscored the particular importance of strengthening anti-retaliation protections for low-wage and immigrant workers who are disproportionately affected by wage theft in the construction industry, where many wage payment violations go unreported due to workers' well-founded fears of retaliation.

A number of commenters provided anecdotal support for the proposed anti-retaliation provisions as an effective mechanism to enhance enforcement through worker cooperation. PAAG and PADLI stated that they have received feedback from many workers that fear of retaliation stopped them from coming forward and reporting prevailing wage violations. FFC noted their experience with ''how reluctant workers can be to report misconduct,'' explaining the disincentive to come forward to report violations when there is no possibility that the workers will be made whole if they are retaliated against. Affiliated Construction Trades Foundation of Ohio (ACT Ohio) and NCDCL commented that they have witnessed workers' reluctance to report misconduct for fear of losing their jobs, thereby compromising their ability to support themselves and their families

[239] *See https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.*

financially. LCCHR explained that the risk of retaliation tends to be greater for workers who are already in relatively vulnerable positions and who are least likely to be able to withstand the consequences of retaliation, which can quickly escalate as lost pay leads to serious financial, emotional, and legal issues.

A number of commenters, including several members of the U.S. House of Representatives from Illinois, lauded this proposal, as well as the timing of the Department's proposed rulemaking, which they asserted would help maximize the economic benefits of the bipartisan IIJA for workers, their families, and their communities. SMACNA members who supported the proposed anti-retaliation protections, among other proposals in the NPRM, also supported providing substantial resources to WHD. *See, e.g.,* Mechanical & Sheet Metal Contractors of Kansas.

A few commenters recommended additional provisions to strengthen the anti-retaliation proposal. PAAG and PADLI recommended adding a requirement to add the anti-retaliation contract provisions to existing DBRA mandatory postings. LCCHR described the Department's proposed make-whole relief as a ''good start,'' but recommended going further to account for financial losses that are more difficult to quantify, such as fees and penalties for missed payments due to loss of income, and non-financial harms such as harassment. An individual commenter asserted that the proposed uniform and less stringent debarment standard could also have a chilling effect on workers' willingness to report violations since their hours could be cut if the contractor for whom they work is less profitable as a result of being debarred. They noted that whether the threat of a reduction in wages and harm to career prospects comes from retaliation or from the employer's loss of Federal contracting opportunities, the fact that the economic consequence was a result of speaking up remains the same. This commenter, therefore, recommended adding ''predicted lost pay'' as an additional quasi-anti-retaliation remedy to compensate workers for reduced hours resulting from possible debarment. UBC suggested that the Department also require notice posting in the first step of the proposed administrative process in § 5.18(a), include interest on lost wages, and include information in WHD case-handling manuals about how investigators can assist immigrant workers in obtaining deferred action from the Department of Homeland Security (DHS), as well as applications for T and U visas.

None of the commenters that opposed the proposal rejected the proposed anti-retaliation provisions squarely on their merits. Rather, in opposing the proposal, IEC claimed that it was duplicative of another whistleblower protection law for Federal contractor employees, 41 U.S.C. 4712, as well as various anti-retaliation provisions issued under other statutes or regulatory schemes, Executive Orders, and a trade agreement. APCA claimed that the anti-retaliation provisions, combined with other proposals, would subject many—particularly small—firms to significant cost increases. And the group of U.S. Senators and ABC claimed that the proposed anti-retaliation provisions were overbroad remedial measures that exceeded the Department's statutory authority and should be withdrawn. The group of U.S. Senators argued that forcing private actors to reinstate workers or pay them back wages implicated unspecified constitutional rights and, therefore, the broad whistleblower enforcement scheme envisioned by the Department ''is reserved for Congress to impose as subject matter experts and elected representatives.''

After considering the comments, the Department adopts the anti-retaliation provisions as proposed, with one minor addition to the anti-retaliation contract clauses and one minor addition to the remedies in § 5.18. The vast majority of commenters expressed strong support for this proposal in its entirety. The Department echoes the support of the many commenters that emphasized the importance of worker cooperation to effective enforcement of the DBRA and reiterates the reasons for adding these provisions that the Department enumerated in the NPRM preamble—primarily that the Department anticipates that the anti-retaliation provisions will significantly enhance enforcement, compliance, and deterrence, while making workers whole who suffer reprisals in violation of these provisions. In § 5.5(a)(11)(ii) and (b)(5)(ii) the Department added protection for otherwise asserting ''or seeking to assert'' the enumerated DBRA or CWHSSA labor standards protections. This provision would prohibit a contractor's retaliation after, for example, learning that a worker has consulted with a third party about the possibility of asserting such rights or protections. In § 5.18, the Department added to the illustrative list of remedies front pay in lieu of reinstatement. This type of relief is appropriate in situations where either the contractor or worker does not want reinstatement and front pay is provided instead.

While the Department appreciates the recommendations of several commenters to strengthen the anti-retaliation provisions in particular respects, the Department believes that the anti-retaliation provisions as proposed contain appropriate and sufficient safeguards against retaliation. The Department agrees, however, that PAAG and PADLI's recommendation to require posting of the new anti-retaliation contract provisions would further enhance DBRA enforcement and compliance as well as worker protections. Therefore, the Department will add anti-retaliation information to the Davis-Bacon poster [240] (WH–1321) that is currently required by § 5.5(a)(1)(i).

Concerning anti-retaliation remedies, the Department agrees with LCCHR that it is important to account for financial losses that are difficult to quantify, like fees and penalties for missed payments due to loss of income, as well as non-financial harms such as harassment. Nevertheless, the Department believes that the regulatory remedies in the final rule adequately encompass such relief. If a worker or job applicant provides sufficient justification of financial and non-financial harms resulting from a violation of § 5.5(a)(11) or (b)(5), such as those that LCCHR identified, § 5.18(b) as adopted contemplates relief for those types of harms to remedy the violation. Moreover, the examples in § 5.18(c) are illustrative, not exclusive.

The Department also appreciates an individual commenter's concern that speaking up could lead to debarment with attendant adverse financial and/or career impacts similar to those that workers may experience as a result of retaliation. But the Department declines to adopt this commenter's accompanying recommendation for predicted lost pay resulting from debarment for several reasons. The final rule's anti-retaliation provisions are intended to encourage more workers to report potential DBRA violations and to provide make-whole relief for workers who have suffered specific incidents of reprisals or interference as a result of such reporting. In contrast, the individual commenter's proposal seeks highly speculative damages based on a possible future event—debarment—that may not occur and, even if it did, might not happen for years if the contractor disputes the underlying violations and/or debarment remedy through an

[240] *See https://www.dol.gov/agencies/whd/posters/dbra* and *https://www.dol.gov/agencies/whd/posters/dbra/espanol.*

administrative hearing and any subsequent administrative or Federal court appeals. This commenter's proposed predicted lost pay remedy is far-reaching: it goes beyond financial make-whole relief for the particular workers who spoke up and could extend to the whole workforce if they were adversely impacted by the debarment. The Department's anti-retaliation provisions are more narrowly tailored to address specific harms. For example, if a worker were given a bad reference by a debarred DBRA contractor for whom they had worked, or if a contractor refused to hire a worker who had spoken up about DBRA violations and was then ''blacklisted,'' that worker could seek relief under the final rule's anti-retaliation provisions.

While the Department also appreciates UBC's recommendation to require the posting of a notice to workers that the contractor or subcontractor agrees to comply with the DBRA anti-retaliation requirements in the first step of the proposed administrative process in § 5.18(a), the Department declines to adopt this recommendation because at that stage of proceedings, the contractor or subcontractor would still be able to dispute the findings in an administrative hearing. The Department notes that the examples of make-whole relief listed in § 5.18(c)—an illustrative, not exhaustive list—include notice posting as well as back pay and interest among other types of make-whole relief. Similarly, UBC's suggestion to include interest on lost wages is encompassed in the final rule's remedies under § 5.18. Finally, the Department appreciates UBC's recommendation to include information in WHD case-handling manuals about assisting immigrant workers in obtaining deferred action from DHS, as well as applications for T and U visas, and notes that WHD currently has publicly available guidance about these topics.[241]

The Department disagrees with IEC that the proposed anti-retaliation provisions are duplicative of other whistleblower protections for contractor employees and could unnecessarily expand the number of claims against contractors. There are Federal laws, including one that IEC identified, that provide protections from reprisal for employees of Federal contractors and grantees who disclose, among other things, ''information that [they] reasonably believe[ ] is a . . . violation of law, rule, or regulation related to a Federal contract.'' 41 U.S.C. 4712 (covering certain civilian contracts); *see* 10 U.S.C. 4701(a)(1) (covering certain defense contracts).[242] But these statutory whistleblower protections are not duplicative because they may not apply to the same subsets of workers, and they are not as specifically tailored to protected activities under the DBRA. Nor are they mutually exclusive.

In addition, enforcement under these existing statutory whistleblower protections appears to have been uncommon. Specifically, the Department is not aware of any Federal courts deciding cases on the merits in which DBRA or SCA workers have availed themselves of section 4712, and the Department is only aware of one such case under 10 U.S.C. 2409. *See Rogers* v. *U.S. Army,* 2007 WL 1217964, at *3, *6–8 (S.D. Tex. Apr. 23, 2007) (dismissing, among other claims, employee's claim under 10 U.S.C. 2409).[243]

The new DBRA anti-retaliation provisions will coexist with these other whistleblower statutory protections and supplement them with additional worker protections to further effectuate the DBRA statutory and regulatory scheme. For example, the final rule's anti-retaliation provisions cover disclosures to a wider range of people than in the above-mentioned two whistleblower-protection laws. The final rule protects worker disclosure of information not only to law enforcement entities, courts, and contractors, but also to any other person (*e.g.,* co-workers or advocates for workers' rights) about their Davis-Bacon rights and assertions of any right or protection under the DBRA.

The Department believes that it is both efficient and consistent with the remedial purpose of the DBRA as well as the directive in Reorganization Plan No. 14 of 1950 ''to assure coordination of administration and consistency of enforcement'' for WHD—not only contracting agency inspectors general—to investigate and adjudicate complaints of retaliation or interference as part of the Department's Davis-Bacon labor standards enforcement, particularly given WHD's expertise in interpreting and enforcing DBRA labor standards requirements. Potential retaliation and interference with DBRA worker protections are relevant to WHD's investigations of whether debarment is warranted. Under the final rule, WHD's investigations will encompass the new anti-retaliation remedies provisions as part of the Department's overarching enforcement authority.

Finally, the Department declines to withdraw its proposed anti-retaliation provisions because, contrary to assertions of ABC and the group of U.S. Senators that this proposal exceeds the Department's statutory authority,[244] the proposed provisions fit within the Department's broad enforcement authority under the DBA and Reorganization Plan No. 14 of 1950. *See* 5 U.S.C. app. 1. The comments submitted by the group of U.S. Senators and ABC overlook the fact that Reorganization Plan No. 14 of 1950 was a Congressional delegation of rulemaking authority to the Department. The Plan was prepared by President Truman and submitted to Congress in March 1950 pursuant to the Reorganization Act of 1949, Public Law 81–109, 63 Stat. 203 (1949). The Reorganization Act, as passed in 1949, provided that a plan submitted by the President would become effective after 60 days unless disapproved by Congress. *See* 63 Stat. at 205. Although not required, the Senate Committee on Expenditures in the Executive Department reviewed the Reorganization Plan and reported favorably before the Plan became

[241] *See, e.g.,* U and T Visa Certifications, Wage & Hour Div., Dep't of Lab., *https://www.dol.gov/agencies/whd/immigration/u-t-visa*; Dep't of Lab., ''FAQ: Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes'' (2022), *https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf*; Department of Labor U and T Visa Process & Protocols Question—Answer, Wage & Hour Div., Dep't of Lab., *https://www.dol.gov/agencies/whd/immigration/u-t-visa/faq.*

[242] Formerly cited as 10 U.S.C. 2409(a)(1).

[243] Similarly, the Department is aware of only one Federal court decision about ARRA's whistleblower protection provisions in which the underlying protected activity related to alleged prevailing wage violations. *See Business Commc'ns, Inc.* v. *U.S. Dept. of Educ.,* 739 F.3d 374, 376, 383 (8th Cir. 2013) (worker filed complaint with the Department of Education's OIG alleging that cable installation contractor had terminated his employment after he complained about not being paid prevailing wages as required by ARRA). In any event, most ARRA funding has been spent by now or is no longer available due to sunset provisions, so the protections that flowed from that funding no longer apply and ARRA's anti-retaliation provisions will soon be, if they are not already, inapplicable to any existing or future DBRA-covered projects.

[244] The group of U.S. Senators' apparent suggestion that DBRA remedial purpose and remedies are limited to those Congress expressly provided for in the 1935 amendment to the DBA (withholding, debarment, and affording laborers a private right of action against a contractor) is inconsistent with subsequent legislative, regulatory, and judicial actions discussed in this section. Furthermore, these commenters' suggestion that DBRA is not remedial as that term is defined overlooks another meaning of ''remedial statute,'' which is ''[one] that is designed to . . . introduce regulations conducive to the public good.'' *Remedial statute,* Black's Law Dictionary Deluxe 4th Ed. (1951) & 6th Ed. (1990).

effective on May 24, 1950. *See* 95 Cong. Rep. 6792 (daily ed. May 10, 1950).

Since that time, as NABTU noted, Congress has repeatedly recognized the Secretary's authority and functions under Reorganization Plan No. 14 of 1950 with respect to the DBA's prevailing wage provisions in subsequent legislation. *See, e.g.,* 42 U.S.C. 18851(b), 42 U.S.C. 1440(g), 42 U.S.C. 3212, 20 U.S.C. 954(n), 42 U.S.C. 300j–9(e), 42 U.S.C. 5046. Additionally, in 1984, Congress ratified and affirmed as law each reorganization plan that was implemented pursuant to the provision of a prior reorganization act. Public Law 98–532, 98 Stat. 2705 (1984). The 1984 ratification went on to declare that ''[a]ny actions taken *prior to the date of enactment* of this Act pursuant to a reorganization plan ratified [herein] shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress.'' *Id.* (emphasis added). Such prior actions include the Department's various rulemakings for 29 CFR parts 1, 3, and 5. For example, the 1964 final rule amending part 5 in turn had extended the Department's regulatory enforcement and administration authority to future Related Acts that the Department anticipated Congress would continue to enact from time to time. *See* 29 FR 95, 99 (Jan. 4, 1964) (adding the following italicized language to § 5.1(a), ''The regulations contained in this part are promulgated in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration *and such additional statutes as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those conferred upon him under Reorganization Plan No. 14 of 1950.*''). That regulation implemented by another Department final rule in 1983 added to the statutory sources of the Department's authority to promulgate such regulations to include the Copeland Act as well as Reorganization Plan No. 14 of 1950. *See* 48 FR 19540–41 (implementing provisions of final rule that had not been enjoined by a Federal district court and on appeal by the Department).

Federal courts, the ARB, and the ARB's predecessor tribunals have all explained that Reorganization Plan No. 14 of 1950 authorizes the Department ''to issue regulations designed to 'assure coordination of administration and consistency of enforcement' of the Davis-Bacon Act and *all* Davis-Bacon related statutes.'' *Vulcan Arbor Hill Corp.* v. *Reich,* No. 87–3540, 1995 WL 774603, at *2 (D.D.C. Mar. 31, 1995) (emphasis added), *aff'd,* 81 F.3d 1110, 1112 (D.C. Cir. 1996) (''[The Reorganization Plan No. 14 of 1950] confers on the Department of Labor the authority and responsibility to coordinate the enforcement not only of the Davis-Bacon Act itself, but also Davis-Bacon related statutes.''); *see also Coutu,* 450 U.S. at 759 (''Pursuant to Reorganization Plan No. 14 of 1950 the Secretary of Labor . . . issued regulations designed to 'assure coordination of administration and consistency of enforcement' of the Act and some 60 related statutes.'' (internal citations omitted)); *Quincy Hous. Auth. LaClair Corp.,* WAB No. 87–32, 1989 WL 407468, at *2 (Feb. 17, 1989) (''Pursuant to [the] mandate [of Reorganization Plan No. 14], the Secretary has promulgated regulations to enforce the labor standards provisions of the Davis-Bacon Act and the related acts.''); *cf. Coleman Constr. Co.,* ARB No. 15–002, 2016 WL 4238468, at *2, *9–11 (June 8, 2016) (stating that ''the National Housing Act and CWHSSA, the two Davis-Bacon Related Acts under which this case is being brought, do not include a debarment provision,'' but that ''it is the Department of Labor regulations, duly promulgated pursuant to Reorganization Plan No. 14 of 1950 that provide for debarment for violations of a Related Act'').

The Department reiterates that like regulatory debarment, the anti-retaliation provisions adopted in the final rule—as well as the revised Related Act debarment provisions discussed in section III.B.3.xxi (''Debarment'')—are all permissible exercises of the Department's ''implied powers of administrative enforcement.'' *Janik Paving & Constr.,* 828 F.2d at 91. Like the revised debarment provisions, the anti-retaliation provisions will also help achieve more effective enforcement of DBRA labor standards requirements.

The Department does not agree with ABC or the group of U.S. Senators that Congress's omission of express statutory anti-retaliation provisions or authority in the DBA and most Related Acts prohibits the Secretary from regulating such behavior. The new anti-retaliation regulations are consistent with and a permissible extension of current remedies for retaliatory conduct. Courts have recognized the Department's broad regulatory authority to enforce and administer the DBRA, including the appropriateness of measures such as debarment under the Related Acts, which was initially implemented without explicit statutory authority. *See Janik Paving & Constr.,* 828 F.2d at 92 (holding that Congressional silence on debarment when it enacted the CWHSSA did not preclude the Department from enforcing its regulatory debarment provision under that statute and noting ''[t]hat a later Congress seeks to grant expressly a power which an earlier Congress has granted by implication does not negate the existence of the power prior to the express grant'' (internal quotations omitted)); *Copper Plumbing & Heating Co.* v. *Campbell,* 290 F.2d 368, 372–73 (D.C. Cir. 1961) (holding that Reorganization Plan No. 14 of 1950 authorized debarment under a Related Act as ''a means for securing compliance with the wage and hour standards and . . . obtaining responsible bidding,'' notwithstanding that the Related Act was silent on debarment but provided for other sanctions and that Congress had expressly authorized debarment in similar statutes, like the DBA.).

The anti-retaliation provisions will further Reorganization Plan No. 14 of 1950's mandate by helping to ensure workers are paid the prevailing wages they are owed and to coordinate effective administration of Davis-Bacon labor standards on Federal and federally assisted construction projects. As with debarment, anti-retaliation is ''integral to the Secretary's effective enforcement of labor standards provisions.'' *Janik Paving & Constr.,* 828 F.2d at 93. Prohibiting retaliation against workers for asserting their rights under the DBRA and requiring contractors to remedy such retaliation gives DOL and contracting agencies a tool to help ensure effective administration and enforcement of the DBRA and to protect the prevailing wage statutory scheme ''from those who would abuse it.'' *Jacquet* v. *Westerfield,* 569 F.2d 1339, 1345 (5th Cir. 1978). The final rule's anti-retaliation provisions will further the DBA's purposes of protecting workers and preventing substandard wages on Federal construction projects. By further shielding workers who speak out about violations that might not be discovered otherwise, this final rule will enhance the incentive to comply with the law, foster construction worker cooperation with the Department's (and contracting agencies') enforcement efforts, and improve the ability of WHD investigators to respond to and discover violations.

The final rule's regulatory anti-retaliation provisions are not novel. The Department has promulgated anti-retaliation regulations with make-whole remedies to aid enforcement and worker protection in other program areas where the underlying statutes do not expressly

provide for anti-retaliation. For example, both the Department's H–2A and H–2B regulations include anti-retaliation provisions. *See* 29 CFR 501.4 (H–2A); 29 CFR 503.20(a) (H–2B); Temporary Non-Agricultural Employment of H–2B Aliens in the United States, 80 FR 24042, 24069 (Apr. 29, 2015) (Interim final rule; request for comments) (''Worker rights cannot be secured unless there is protection from all forms of intimidation or discrimination resulting from any person's attempt to report or correct perceived violations of the H–2B provisions.''). In addition, OSHA added an anti-retaliation regulation to provide an enforcement tool for the long-standing injury and illness recordkeeping regulations despite also having a statutory anti-retaliation provision, section 11(c), 29 U.S.C. 660(c)—both of which had been in place for over 40 years. *See* 29 CFR 1904.35(b)(1)(iv); Improve Tracking of Workplace Injuries and Illnesses, 81 FR 29624, 29627 (May 12, 2016) (Final rule) (''Where retaliation threatens to undermine a program that Congress required the Secretary to adopt, the Secretary may proscribe that retaliation through a regulatory provision unrelated to section 11(c).''); *cf.* 57 FR 7533, 7535 (Mar. 3, 1992) (Final Rule) (stating that the DOE's regulatory anti-retaliation DOE Contractor Employee Protection Program found at 10 CFR part 708 was ''issued pursuant to the broad authority granted [DOE]'' by various statutes ''to prescribe such rules and regulations as necessary or appropriate to protect health, life, and property and the otherwise administer and manage the responsibilities and functions of the agency''). The Department's adoption of anti-retaliation provisions in the final rule similarly implements this additional enforcement tool.

xx. Post-Award Determinations and Operation-of-Law

The Department proposed several revisions in parts 1, 3, and 5 to update and codify the administrative procedure for enforcing Davis-Bacon labor standards requirements when the contract clauses and/or appropriate wage determination(s) have been wrongly omitted from a covered contract.

(A) Current Regulations

The current regulations require the insertion of the relevant contract clauses and wage determination(s) in covered contracts. 29 CFR 5.5. Section 5.5(a) requires the appropriate contract clauses to be inserted ''in full'' into any covered contracts, though the FAR only requires the DBA contract clauses to be incorporated by reference in FAR-covered contracts. The contract clause language at § 5.5(a)(1) currently states that applicable wage determinations are ''attached'' to the contract.

The existing regulations at § 1.6(f) provide instruction for how the Department and contracting agencies must act when a wage determination has been wrongly omitted from a contract. Those regulations provide a procedure through which the Administrator makes a finding that a wage determination should have been included in the contract. After the finding by the Administrator, the contracting agency must either terminate and resolicit the contract with the valid wage determination or incorporate the wage determination retroactively by supplemental agreement or change order. The same procedure applies where the Administrator finds that the wrong wage determination was incorporated into the contract. The existing regulations at § 1.6(f) specify that the contractor must be compensated for any increases in wages resulting from any supplemental agreement or change order issued in accordance with the procedure.

As the Department explained in the NPRM, WHD has faced multiple longstanding enforcement challenges under the current regulations. First, the language of § 1.6(f) explicitly refers only to omitted wage determinations and does not expressly address the situation where a contracting agency has mistakenly omitted the contract clauses from the contract. Although WHD has historically relied on § 1.6(f) to address this situation, the ambiguity in the regulations has caused confusion in communications between WHD and contracting agencies and delay in resolving conflicts. *See, e.g.,* WHD Opinion Letters DBRA–167 (Aug. 29, 1990); DBRA–131 (Apr. 18, 1985).

Second, under the existing regulations, affected workers have suffered from significant delays while contracting agencies determine the appropriate course of action. At a minimum, such delays cause problems for workers who must endure long waits to receive their back wages. At worst, the delay can result in no back wages recovered at all where witnesses become unavailable or there are no longer any contract payments to withhold when a contract is finally modified or terminated. In all cases, the identification of the appropriate mechanism for contract termination or modification can be difficult and burdensome on Federal agencies—in particular during later stages of a contract or after a contract has ended.

The process provided in the current § 1.6(f) is particularly problematic where a contracting agency has questions about whether an existing contract can be modified without violating another non-DBRA statute or regulation. This problem has arisen in particular in the context of MAS contracts, BPAs, and other similar schedule contracts negotiated by GSA.[245] Contracting agencies that have issued task orders under GSA schedule contracts have been reluctant to modify those task orders to include labor standards provisions where the governing Federal schedule contract does not contain the provisions. Under those circumstances, contracting agencies have argued that such a modification could render that task order ''out of scope'' and therefore arguably unlawful.

Although the Department believes it is incorrect that a contract modification to incorporate required labor standards clauses or wage determinations could render a contract or task order out of scope,[246] concerns about this issue have interfered with the Department's enforcement of the labor standards. If a contracting agency believes it cannot modify a contract consistent with applicable procurement law, it may instead decide to terminate the contract without retroactively including the required clauses or wage determinations. In those circumstances, the regulations currently provide no express mechanism that explains how the Department or contracting agencies should seek to recover the back wages that the workers should have been paid on the terminated contract. While in many cases, the authority does exist, the

[245] Sales on the GSA MAS, for example, have increased dramatically in recent decades—from $4 billion in 1992 to $36.6 billion in 2020. Gov't Accountability Office, ''High Risk Series: An Update,'' GAO–05–207 (Jan. 2005), at 25 (Figure 1) (noting these types of contracting vehicles ''contribute to a much more complex environment in which accountability has not always been clearly established''), available at: *https://www.gao.gov/assets/gao-05-207.pdf*; Gen. Servs. Admin., ''GSA FY 2020 Annual Performance Report,'' at 11, available at: *https://www.gsa.gov/cdnstatic/GSA%20FY%202020%20Annual%20Performance%20Report%20v2.pdf*.

[246] This argument tends to conflate the change associated with incorporating a missing contract clause or wage determination with any unexpected changes by the contracting agency to the actual work to be performed under the task order or contract. As a general matter, a Competition in Contracting Act challenge based solely on the incorporation of missing labor standards clauses or appropriate wage determinations would be without merit. *See Booz Allen Hamilton Eng'g Servs., LLC,* B–411065 (May 1, 2015), available at: *https://www.gao.gov/products/b-411065*.

lack of an express mechanism can lead to unnecessary delay and confusion.

The Department also engages in various compliance assistance efforts to decrease the risk that contract clauses will be omitted from covered contracts in the first place. The Department routinely conducts trainings for contracting agencies and other stakeholders about Davis-Bacon coverage principles, issues and maintains guidance documents (such as the PWRB and FOH), and responds to requests for advice and rulings about coverage matters. In tandem with this rulemaking, the Department intends to continue these efforts to reduce the likelihood of erroneous omission of contract clauses and wage determinations. However, after decades of experience with this problem, the Department has determined that additional measures are necessary.

To address these longstanding enforcement challenges, the Department proposed to exercise its authority under Reorganization Plan No. 14 of 1950 and 40 U.S.C. 3145 to adopt several changes to §§ 1.6, 5.5, and 5.6.

(B) Proposed Regulatory Revisions

In the NPRM, the Department proposed to include language in a new paragraph at § 5.5(e) to provide that the labor standards contract clauses and appropriate wage determinations will be effective ''by operation of law'' in circumstances where they have been wrongly omitted from a covered contract. The Department explained that the purpose of the proposal was to ensure that, in all cases, a mechanism exists to enforce Congress's mandate that workers on covered contracts receive prevailing wages—notwithstanding any mistake by an executive branch official in an initial coverage decision or in an accidental omission of the labor standards contract clauses. The proposal would also ensure that workers receive the correct prevailing wages in circumstances where the correct wage determination has not been attached to the original contract or has not been incorporated during the exercise of an option.

Under the proposal, erroneously omitted contract clauses and appropriate wage determinations would be effective by operation of law and therefore enforceable retroactive to the beginning of the contract or construction. The proposed language provided that all of the contract clauses set forth in § 5.5—the contract clauses at § 5.5(a) and the CWHSSA contract clauses at § 5.5(b)—are considered to be a part of every covered contract, whether or not they are physically incorporated into the contract. This includes the contract clauses requiring the payment of prevailing wages and overtime at § 5.5(a)(1) and (b)(1), respectively; the withholding clauses at § 5.5(a)(2) and (b)(3); and the labor-standards disputes clause at § 5.5(a)(9).

In the NPRM, the Department explained that the operation-of-law provision is intended to complement the existing requirements in § 1.6(f) and would not entirely replace them. Thus, the contracting agency will still be required to take action as appropriate to terminate or modify the contract. Under the new proposed procedure, however, WHD would not need to await a contract modification to assess back wages and seek withholding, because the wage requirements and withholding clauses would be read into the contract as a matter of law.[247] The application of the clauses and the correct wage determination as a matter of law would also provide WHD with an important tool to enforce the labor standards on a contract that a contracting agency decides it must terminate instead of modify.

The proposal included two important provisions to protect both contractors and contracting agencies. First, the proposal included a provision requiring that contracting agencies compensate prime contractors for any increases in wages resulting from a post-award incorporation of a contract clause or wage determination by operation of law under § 5.5(e). This proposed language was modeled after similar language that has been included in § 1.6(f) since 1983.[248] Under the proposal, when the contract clause or wage determination is incorporated into the prime contract by operation of law, the prime contractor would be responsible for the payment of applicable prevailing wages to all workers under the contract—including the workers of its subcontractors—retroactive to the contract award or beginning of construction, whichever occurs first. This is consistent with the current Davis-Bacon regulations and case law. *See* 29 CFR 5.5(a)(6); *All Phase Elec. Co.,* WAB No. 85–18 (June 18, 1986) (withholding contract payments from the prime for subcontractor employees even though the labor standards had not been flowed down into the subcontract). This responsibility, however, would be offset by the compensation provision in § 5.5(e), which would require that the prime contractor be compensated for any increases in wages resulting from any post-award incorporation by operation of law.

The second important provision in the proposed operation-of-law paragraph was language that provides protection for contracting agencies by continuing to allow requests that the Administrator grant a variance, tolerance, or exemption from application of the regulations. As noted in the NPRM, this includes an exemption from retroactive enforcement of wage determinations and contract clauses (or, where permissible, an exemption from prospective application) under the same conditions currently applicable to post-award determinations. *See* 29 CFR 1.6(f); 29 CFR 5.14; *City of Ellsworth,* ARB No. 14–042, 2016 WL 4238460, at *6–8 (June 6, 2016).[249] In addition, as the Department noted in the NPRM, contracting agencies avoid difficulties associated with post-award incorporations by proactively incorporating the Davis-Bacon labor standards clauses and applicable wage determinations into contracts or using the existing process for requesting a coverage ruling or interpretation from the Administrator prior to contract award. *See* 29 CFR 5.13.[250]

The operation-of-law provision in proposed § 5.5(e) is similar to the Department's existing regulations enacting Executive Order 11246—Equal Employment Opportunity. *See* 41 CFR 60–1.4(e); *United States* v. *Miss. Power & Light Co.,* 638 F.2d 899, 905–06 (5th Cir. 1981) (finding 41 CFR 60–1.4(e) to be valid and have force of law). The operation-of-law provision at 41 CFR 60–1.4(e), like the proposed language in

[247] The Department proposed parallel language in 29 CFR 5.9 (Suspension of funds) to clarify that funds may be withheld under the contract clauses and appropriate wage determinations whether they have been incorporated into the contract physically, by reference, or by operation of law.

[248] *See* 46 FR 4306, 4313 (Jan. 16, 1981); 47 FR 23644, 23654 (May 28, 1982) (implemented by 48 FR 19532 (Apr. 29, 1983)).

[249] Factors that the Administrator considers in making a determination regarding retroactive application are discussed in the ARB's ruling in *City of Ellsworth,* ARB No. 14–042, 2016 WL 4238460, at *6–10. Among the non-exclusive list of potential factors are ''the reasonableness or good faith of the contracting agency's coverage decision'' and ''the status of the procurement (*i.e.,* to what extent the construction work has been completed).'' *Id.* at *10. In considering the status of the procurement, the Administrator will consider the status of construction at the time that the coverage or correction issue is first raised with the Administrator.

[250] Contracting agencies can also contest a determination by the Administrator that a contract is covered (either an initial determination or a post-award determination) or the Administrator's denial of a tolerance, variance, or exemption, by seeking review of the determination with the ARB. 29 CFR 7.1, 7.9. A decision of the ARB on a coverage question is a final agency action that in turn may be reviewable under the APA in Federal district court. *See* 5 U.S.C. 702, 704.

§ 5.5(e), operates in addition to and complements the other provisions in the Executive Order's regulations that require the equal opportunity contract clause to be included in the contract. *See* 41 CFR 60–1.4(a).

Unlike 41 CFR 60–1.4(e), the Department's proposed language in the new § 5.5(e) would apply the ''operation of law'' provision only to prime contracts and not to subcontracts. The reason for this difference is that, as noted above, the Davis-Bacon regulations and case law provide that the prime contractor is responsible for the payment of applicable wages on all subcontracts. If the prime contract contains the labor standards as a matter of law, then the prime contractor is required to ensure that all employees on the contract—including subcontractors' employees—receive all applicable prevailing wages. Accordingly, as the Department explained in the NPRM, extending the operation-of-law provision itself to subcontracts is not necessary to enforce the Congressional mandate that all covered workers under the contract are paid the applicable prevailing wages.

The proposed operation-of-law provision at § 5.5(e) is also similar in many, but not all, respects to the judicially-developed *Christian* doctrine, named for the 1963 Court of Claims decision *G.L. Christian & Assocs.* v. *United States,* 312 F.2d 418 (Ct. Cl.), *reh'g denied,* 320 F.2d 345 (Ct. Cl. 1963). Under the doctrine, courts and administrative tribunals have held that required contractual provisions may be effective by operation of law in Federal government contracts, even if they were not in fact included in the contract. The doctrine applies even when there is no specific ''operation of law'' regulation as proposed here.

The *Christian* doctrine flows from the basic concept in all contract law that ''the parties to a contract . . . are presumed or deemed to have contracted with reference to existing principles of law.'' 11 Williston on Contracts § 30:19 (4th ed. 2021); *see Ogden* v. *Saunders,* 25 U.S. 213, 231 (1827). Thus, those who contract with the government are charged with having ''knowledge of published regulations.'' *PCA Health Plans of Texas, Inc.* v. *LaChance,* 191 F.3d 1353, 1356 (Fed. Cir. 1999) (citation omitted).

Under the *Christian* doctrine, a court can find a contract clause effective by operation of law if that clause ''is required under applicable [F]ederal administrative regulations'' and ''it expresses a significant or deeply ingrained strand of public procurement policy.'' *K-Con, Inc.* v. *Sec'y of Army,* 908 F.3d 719, 724 (Fed. Cir. 2018). Where these prerequisites are satisfied, it does not matter if the contract clause at issue was wrongly omitted from a contract. A court will find that a Federal contractor had constructive knowledge of the regulation and that the required contract clause applies regardless of whether it was included in the contract.

The recent decision of the Federal Circuit in *K-Con* is helpful to understanding why it is appropriate to provide that the DBA labor standards clauses are effective by operation of law. In *K-Con,* the Federal Circuit held that the *Christian* doctrine applies to the 1935 Miller Act. 908 F.3d at 724–26. The Miller Act contains mandatory coverage provisions that are similar to those in the DBA, though with different threshold contract amounts. The Miller Act requires that contractors furnish payment and performance bonds before a contract is awarded for ''the construction, alteration, or repair of any public building or public work.'' 40 U.S.C. 3131(b). The DBA, as amended, requires that the prevailing wage stipulations be included in bid specifications ''for construction, alteration, or repair, including painting and decorating, of public buildings and public works.'' 40 U.S.C. 3142(a).

Like the Miller Act, the 90-year-old Davis-Bacon Act also expresses a significant and deeply ingrained strand of public procurement policy. The Miller Act and the Davis-Bacon Act are of similar vintage. The DBA was enacted in 1931. The DBA amendments were enacted in 1935, almost simultaneously with the Miller Act. Through both statutes, Congress aimed to protect participants on government contracts from nonpayment by prime contractors and subcontractors. Thus, the same factors that the Federal Circuit found sufficient to apply the *Christian* doctrine to the Miller Act also apply to the DBA and suggest that the proposed operation-of-law regulation would be appropriate.[251]

The Department's proposal, however, offers more consideration for contractor equities than the *Christian* doctrine in two critical respects. First, as noted above, the proposed language at § 5.5(e) would be paired with a contractor compensation provision similar to the existing provision in § 1.6(f). The *Christian* doctrine does not incorporate such protection for contractors, and as a result, can have the effect of shifting cost burdens from the government to the contractor. In *K-Con,* for example, the doctrine supported the government's defense against a claim for equitable adjustment by the contractor. 908 F.3d at 724–28.

Second, the *Christian* doctrine is effectively self-executing and renders contract clauses applicable by operation of law solely on the basis of the underlying requirement that they be inserted into covered contracts. The doctrine contains no specific mechanism through which the government can limit its application to avoid any unexpected or unjust results—other than simply deciding not to raise it as a defense or affirmative argument in litigation. The proposed provision here at § 5.5(e), on the other hand, would pair the enactment of the operation-of-law language with the traditional authority of the Administrator to waive retroactive enforcement or grant a variance, tolerance, or exemption from the regulatory requirement under 29 CFR 1.6(f) and 5.14, which the Department believes will foster a more orderly and predictable process and reduce the likelihood of any unintended consequences.

In the NPRM, the Department also discussed whether it was necessary or advisable to create a different procedure in which the operation-of-law rule would only become effective after a determination by the Administrator or a contracting agency that a contract was in fact covered. While the Department stated that it did not believe that such an approach was necessary, it nonetheless sought comment regarding this potential alternative.

(C) Discussion of Comments

(1) § 5.5(e) and Operation of Law

Many commenters expressed support for the operation-of-law proposal at § 5.5(e) on the basis that it would be protective of workers. The LCCHR and other civil rights and employee advocacy organizations supported the proposal, stating that under the status quo, workers on covered projects too often do not receive DBRA-required prevailing wages ''on time or at all.'' Several unions strongly supported the proposal because it would ensure that, as UBC commented, the burden of ''intentional or mistaken omissions'' would not be placed ''on the backs of construction workers.'' The FFC and the NCDCL wrote that technicalities or accidental omissions should not prevent

[251] The Federal Circuit has also noted that the *Christian* doctrine applies to in the context of the SCA, which has a similar purpose as the DBA and dates only to 1965. *See Call Henry, Inc.* v. *United States,* 855 F.3d 1348, 1351 & n.1 (Fed. Cir. 2017). Because the DBA and SCA are similar statutes with the same basic purpose, the Department has long noted that court decisions relating to one of these acts may have a direct bearing on the other. *See* WHD Opinion Letter SCA–3 (Dec. 7, 1973).

workers from ''receiving the protection of the DBRA and being paid the prevailing wage.''

Various commenters emphasized other positive aspects of the proposal. The III–FFC stated that the approach will streamline enforcement. SMACNA noted that the compensation provision allows a contractor to rely on an initial determination that the DBA does not apply or a wage determination with lower rates applies. Similarly, LCCHR noted that the provision is more favorable to contractors than traditional operation-of-law doctrine because it provides reimbursement to prime contractors for any increase of wages that results from its invocation. Furthermore, LCCHR added that the provision's application only to prime contracts, and not subcontracts, reflects a targeted approach. This is appropriate, they stated, because prime contractors ''are frequently repeat recipients of federal funds, engage directly with the contracting agency, and may reasonably be expected to be aware of generally applicable legal requirements, such as the DBRA.''

Several commenters, including AFP–I4AW, ABC, CC&M, IEC, the SBA Office of Advocacy, and the group of U.S. Senators, opposed the operation-of-law proposal, arguing that it does not give contractors sufficient notice of the applicability of DBA requirements. IEC and the group of U.S. Senators asserted that a lack of notice is not consistent with basic contract and procedural due process principles. AFP–I4AW claimed that ''without direct contractual notice to contractors, the risk of unknowing violations will abound,'' and stressed the ''risk of inadvertent and completely avoidable noncompliance.'' And CC&M asserted that sometimes a local agency does not inform a contractor that Federal funds are being used on a particular project.

Some commenters expressed concern that the operation-of-law provision would increase costs to contractors, and that those costs in turn could be passed on to the government. IEC, for example, asserted that the provision would lead to higher costs through two routes: first, uncertainty could result in contractors opting out of DBA-covered work, resulting in less competition and thus, higher prices; and second, through contractors ''hedging'' about DBA coverage by ''submitting bids that account for the DBA, when it is in fact not covered, but still placing these added costs onto the taxpayer.'' IEC also contended that ''contractors would have to track all the different regulatory changes (wage rates) from location,'' which would increase their cost of compliance. AFP–I4AW and two partners from the law firm Wiley Rein LLP expressed concern that the proposal could lead to increased litigation, with associated costs for contractors.[252] ABC and the SBA Office of Advocacy expressed concern about costs and burdens on subcontractors.

The Wiley Rein partners and the group of U.S. Senators expressed concern that the provision requiring compensation for contractors would not work as proposed. The Wiley Rein partners stated that contracting officers might simply refuse to provide an equitable adjustment, notwithstanding the express requirement in § 5.5(e). The result could be unreimbursed cost increases ''and related adverse effects.'' The Senators suggested that agencies might ''use the threat of refusing to award contract bids in the future'' in order to pressure contractors not to seek compensation. CC&M stated that it is unfair for a contracting agency to transfer liability to a contractor when it is the agency that failed to meet its obligations.

A few commenters expressed concern that the Department lacks the authority to implement the proposed rule. The FTBA noted that the text of the DBA explicitly requires contracting agencies to insert the contract clauses in covered contracts. Given this statutory language, the comment asserted, ''it is within the sole power and domain of the federal courts, not the DOL as a regulatory agency, to make any determination that the DBA requirements are applicable by operation of law.'' AFP–I4AW argued that the there is no ''legal justification'' for the proposal because the statute requires the government to include the proper clauses in the contract. The comment from the group of U.S. Senators stated that the statute meant to place the burden on procuring agencies, not contractors.

Commenters disagreed about the effect of the Supreme Court's decision in *University Research Ass'n* v. *Coutu,* 450 U.S. 754 (1981), and the state of the law on the *Christian* doctrine. The WileyRein partners noted the Court's statement in the *Coutu* decision that the DBA is ''not self-executing.'' *See also id.* at 784 n.38. Accordingly, the partners expressed doubt that the Department can ''give away'' its interpretive authority by allowing arbitrators, courts, or other administrative agencies to make determinations about whether the DBA should be found to be incorporated by operation of law in a given contract.

The FTBA and the Wiley Rein partners argued that the Department had read too much into Federal Circuit decisions discussing the *Christian* doctrine. The Wiley Rein partners suggested that *Coutu* and *Bellsouth Communications Systems,* ASBCA No. 45955, 94–3 BCA ¶ 27231, a subsequent decision issued by the Armed Services Board of Contract Appeals, undermine the significance of the Federal Circuit's decision about the Miller Act in *K-Con,* 908 F.3d at 724–26. In addition, both the FTBA and the Wiley Rein partners stated the Department had overread the Federal Circuit's decision in *Call Henry,* 855 F.3d at 1351 n.1, because, among other reasons, that decision involved a situation in which the core SCA clauses had in fact been incorporated into the contract.

On the other hand, the LCCHR and other civil rights and worker advocacy groups noted that multiple decisions after *Coutu* have stated that the DBA contract clauses may be effective by operation of law. *See, e.g., United States ex rel. D.L.I. Inc.* v. *Allegheny Jefferson Millwork, LLC,* 540 F. Supp. 2d 165, 176 (D.D.C. 2008) (''When such provisions are omitted from a *prime* contract, they do become part of the contract by operation of law, and the prime contractor is charged with constructive knowledge of Davis–Bacon's requirements.''); *BUI Constr. Co. & Bldg. Supply,* ASBCA No. 28707, 84–1 B.C.A. ¶ 17183 (citing *G.L. Christian,* 312 F.2d at 418). LCCHR noted that these decisions were issued after *Coutu,* which suggests that *Coutu* imposes no bar to the proposed rule.

The Wiley Rein partners made several recommendations in their comment. They recommended that instead of the Department's current proposal, the Department should adapt the SCA regulation codified at 29 CFR 4.5(c) for use in the DBRA rule. Section 4.5(c) instructs contracting agencies to add omitted SCA requirements to contracts after award by modification but does not make them effective by operation of law. The partners stated that this approach would reduce the risk that contractors would not be made whole for increased costs, while still addressing the Department's enforcement concerns. They suggested that the SCA post-award modification provision has been time-tested because it was implemented many years ago. *See* 48 FR 49736, 49766 (Oct. 27, 1983).

The Wiley Rein partners also made two suggestions in the alternative. First, if their recommendation to adapt the SCA regulation is declined, the

[252] The Wiley Rein partners also expressed concern about how the operation-of-law provision would function in contracts that may be jointly covered by both the DBA and the SCA.

Department should instead finalize the alternative option discussed in the NPRM to require that the operation-of-law provision at § 5.5(e) be effective only after a determination by the contracting agency or the Department that the DBRA applies to the contract at issue. The partners stated that this option is consistent with the *Christian* doctrine, ''comports with existing caselaw,'' and offers certain practical benefits as well.[253] The Wiley Rein partners also suggested that the Department should defer the effective date for the operation-of-law provision until the FAR is updated to expressly require equitable adjustments in these circumstances.

A few other commenters requested clarifications or made suggestions. AGC stated that the Department ''has always maintained that the DBA clauses required by the regulation are applicable by operation of law.'' They asserted, however, that this has never been ''official,'' and they noted that the Department's practice is to require retroactive incorporation of contract clauses and appropriate wage determinations into a contract before enforcement. AGC acknowledged the language in the proposal that would require compensation for contractors where the operation-of-law provision is invoked but asked for ''further clarifications'' because ''[i]t is absolutely necessary that prime contractors be compensated for any increased costs caused by a contracting agency failure.'' The COSCDA similarly agreed that the Department should take actions to secure adequate compensation for workers in a timely manner, but it stated that proposals to do so should not impose additional costs on contractors or program administrators. CC&M suggested that when compensation is provided under the proposal, agencies should be required to pay the contractor ''150% of the delta between what the contractor paid and the amount that should have been paid,'' to penalize the agency for its error, and that withholding or cross-withholding for violations based on operation of law should not be permitted unless such a rule is implemented.

Lastly, a number of union and contractor association commenters expressed general support for the provision ensuring that DBA provisions are incorporated by ''operation of law.'' Those commenters included the Alaska District Council of Laborers, Bricklayers & Allied Craftworkers Local #1, LIUNA, LIUNA Local 341, LIUNA Local 942, the Massachusetts Building Trades Unions, NABTU, the Southern Nevada Building Trades Unions (SNBTU), the WA BCTC, SMACNA, and CEA.

The Department considered the comments submitted regarding the operation-of-law provision at § 5.5(e) and agrees with those commenters that supported the implementation of the provision as proposed in the NPRM. Commenters noted that failures by contracting agencies to properly incorporate the DBRA contract clauses and wage determinations have significant consequences for the workers that the DBA and Related Acts were enacted to protect. For example, the comment from LCCHR and other civil rights and worker advocacy organizations cited a news article that discussed similar problems occurring during the implementation of the 2009 Recovery Act. *See* Ben Penn, ''Labor's Infrastructure Wins Depend on Avoiding Problems of 2009,'' Bloomberg L. (Nov. 9, 2021).[254] According to the article, during the implementation of the Recovery Act, the Department ''struggled to secure commitments on worker pay standards from government agencies that awarded contracts,'' problems ''fueled interagency breakdowns and debates over whether prevailing wage standards were applicable on particular projects,'' and ''[u]ltimately, workers paid the price when Davis-Bacon wasn't applied, lowering their pay.'' *Id.* As the Department noted in the NPRM, it is not appropriate for staff at an executive agency to effectively nullify Congress's intent that Davis-Bacon standards apply to certain categories of contracts.

While the operation-of-law provision addressed an important subset of enforcement problems, as a practical matter it should not represent a broad expansion of application of the DBRA. As COSCDA noted in their comment, the proposal is an ''extension of the retroactive modification procedures'' that have been in effect in § 1.6 of the regulations since the 1981–1982 rulemaking. While the § 1.6(f) procedure in the existing regulations references only wage determinations, the Department has long interpreted the procedure to also require the retroactive modification of contracts to include missing contract clauses themselves. The operation-of-law provision has the effect of extending the current status quo only to those situations in which a contract has not been timely modified through the retroactive modification procedures in § 1.6(f).

MBI, BCCI, PCCA, and several others asserted the proposal would function by ''essentially eliminating the requirement to publish specific Davis-Bacon wage determinations in project bid and contract documents.'' However, this characterization is not accurate. Under the current procedures, contracting agencies' responsibility to insert contract clauses and wage determinations has long co-existed with a post-award modification procedure that allows the government to remedy any circumstances when those clauses have been omitted. Since the 1981–1982 rulemaking, § 5.5(a) has required a contracting agency head to ''cause or require the contracting officer to insert'' the required contract clauses into any covered contracts. 29 CFR 5.5(a). Likewise, § 5.6(a)(1)(i) has stated that the Federal agency is responsible for ''ascertain[ing] whether the clauses required by § 5.5 and the appropriate wage determination(s) have been incorporated'' into covered contracts. *Id.* § 5.6.

The proposed operation-of-law proposal is not significantly different in this respect from the current incorporation and enforcement procedures. Contrary to the concerns of MBI and other commenters, § 5.5(a) in the final rule continues to require contracting agencies to insert the contract clauses in full into covered contracts, although the Department has also added language to § 5.5(a) and (b) to clarify that the FAR permits incorporation by reference. The contract clause at § 5.5(a)(1) continues to contemplate that, for non-FAR contracts, the applicable wage determinations ''will be attached hereto and made a part thereof.'' These requirements are reinforced by practical consequences. The new provision at § 5.5(e) requires that contracting agencies compensate contractors for any resulting increases in wages when the agency fails to incorporate the contract clauses and wage determinations and those clauses or wage determinations are subsequently incorporated into the contract through the operation-of-law provision. It is therefore not the case, as the commenters contended, that this rule eliminates contracting agencies' obligations to include wage determinations in covered contracts.

Given current enforcement procedures already require agencies to incorporate omitted contract clauses and require compensation from contracting agencies in those

[253] Conversely, two other commenters, UBC and the III–FFC, stated that the Department's proposed rule as written was superior to the alternative option in which the DBA provisions would only be added by operation of law after a determination by the Administrator.

[254] Available at: *https://news.bloomberglaw.com/daily-labor-report/labors-infrastructure-wins-depend-on-avoiding-problems-of-2009.*

circumstances, it is unlikely that the operation-of-law provision will materially increase overall costs to contractors or the government. In the individual cases in which the provision ultimately must be invoked, the costs will be borne by the government, and not the contractor, because the operation-of-law provision at § 5.5(e) requires agencies to compensate a prime contractor for any increases in wages. However, in such cases, the operation-of-law provision should increase efficiency and reduce administrative costs for both contracting agencies and the Department. It will reduce the need for extended negotiations about retroactive modification. It also may in some circumstances reduce litigation costs by reducing or eliminating disputes about the method and timing of modification. The existence of the compensation provision significantly reduces the potential that CC&M identified of contractors being required to pay the price for errors by contracting agencies.

The Department also is not persuaded by comments from IEC and others that the operation-of-law provision will increase contractors' general compliance costs because contractors will have to newly track coverage provisions or may prophylactically apply Davis-Bacon wages even where they do not apply. The Department already interprets the DBRA to require employers to take affirmative steps to ensure that they are in compliance. *See, e.g., Coleman Construction Co.,* ARB No. 15–002, 2016 WL 4238468, at *6 (holding that ''[t]he law is clear that, if a contract subject to Davis-Bacon lacks the wage determination, it is the employer's obligation . . . to get it''). And, the Department's current application of § 1.6(f) provides similar incentives and consequences as will the operation-of-law provision. As the comment from LCCHR and other civil rights and employee advocacy organizations noted, trade publications already advise contractors to be proactive in determining whether a project is covered.[255] Because prime contractors are already monitoring DBRA coverage, the Department believes any increased compliance burdens due to this change will be minimal and are outweighed by the Department's goal of streamlining coverage determinations, ensuring effective enforcement, and reducing economic hardship to workers caused by delays in receiving backpay.

The Department has also considered specific concerns raised by ABC and the SBA Office of Advocacy about the effects on subcontractors of the operation-of-law provision. ABC stated that the result of the operation-of-law provision would be to hold subcontractors (as well as prime contractors) responsible for DBRA violations without notice. The SBA Office of Advocacy stated that small subcontractors are less equipped to absorb withholding on a contract. As the Department explained in the NPRM, however, § 5.5(e) limits the reach of the operation-of-law provision to prime contractors only, rather than including subcontractors. Accordingly, if neither a prime contract nor a subcontract thereunder references the DBA, the Department would not hold a subcontractor liable for unpaid back wages under § 5.5(e). The Department recognizes that there may still be residual effects on a subcontractor where the operation-of-law provision is invoked and funds are withheld from a prime contractor to ensure that workers of a subcontractor are paid the required prevailing wages. In such a situation, it is possible the prime contractor might in turn delay in paying its subcontractor in full as a result. However, this circumstance is not materially different than any other enforcement action that involves withholding, except that there is a provision requiring compensation that should make the effects of any withholding temporary. Moreover, because the operation-of-law provision is likely to be invoked in only a small portion of overall enforcement actions, the Department believes that the additional impact of such actions on subcontractors will be minimal. The Department thus has concluded that the final rule's limited effects on subcontractors are outweighed by the Department's goal of streamlining and ensuring the effectiveness of enforcement.

The Department also disagrees with those commenters that argued that the proposal does not give contractors sufficient notice of the applicability of DBA requirements. As noted in the NPRM, those that contract with the government are charged with having ''knowledge of published regulations.'' *PCA Health Plans of Texas,* 191 F.3d at 1356 (citing *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384–85 (1947)). ''[T]he appearance of rules and regulations in the **Federal Register** gives legal notice of their contents.'' *Merrill,* 332 U.S. at 384–385. Under the Department's final rule, contractors will be put on notice, through the language of § 5.5(e), that the DBRA requirements are effective by operation of law, regardless of whether they have been wrongly omitted from a contract. Section 1.6(b)(2) also provides notice that a contractor has an ''affirmative obligation to ensure that its pay practices are in compliance with the Davis-Bacon Act labor standards.'' Further, any contractor can seek guidance from the Department prior to contract award regarding whether the DBA provisions should apply to a contract. *See* 29 CFR 5.13. These regulations provide notice to prime contractors of the potential that DBRA contract clauses may be effective by operation of law. For similar reasons, the Department disagrees with the comments from IEC and the group of U.S. Senators that the proposal does not comport with procedural due process.[256]

In the NPRM, the Department provided a review of legal considerations regarding the application of the operation-of-law provision. The commenters suggesting that the statute does not permit the provision, or, as the AFP–I4AW argued, that the Department lacked a ''legal justification,'' largely did not engage with that reasoning in the NPRM. The group of U.S. Senators, for example, stated that the statute meant to place the burden on procuring agencies, not contractors. This comment, however, did not acknowledge that the compensation provision in the operation-of-law proposal does in practice place the ultimate responsibility on the contracting agency rather than contractors.

The commenters raising legal questions about the operation-of-law proposal based their arguments largely on the DBA's express requirement that contracting agencies incorporate the contract clauses into covered contracts. The commenters suggested that this language prevents the Department from enforcing the Act where the clause is not included. The mandatory nature of this statutory requirement, however, is itself the basis for the operation-of-law provision. *See K-Con,* 908 F.3d at 724. Where Congress has expressly stated that a contract clause must be included in certain types of contracts, that is precisely where it is not appropriate to allow a contracting agency to effectively nullify the statutory command by failing

[255] *See* Kim Slowey, ''The Dotted Line: Beefing up Davis-Bacon compliance,'' Construction Dive (Mar. 30, 2021), *https://www.constructiondive.com/news/the-dotted-line-beefing-up-davis-bacon-compliance/597398.*

[256] In addition to the notice provided by the regulation itself, contractors are provided due process through the administrative procedures that allow contractors to challenge a ruling by the Department that a contract is covered by the DBRA or that back wages are owed. *See generally* 29 CFR 5.11.

to act. *See S.J. Amoroso Const. Co.* v. *United States,* 12 F.3d 1072, 1075 (Fed. Cir. 1993) (discussing *G.L. Christian & Assocs.,* 312 F.2d at 426).[257] As the Court of Federal Claims explained in denying rehearing on the original decision in *G.L. Christian & Assocs.,* the animating principle is that ''[o]bligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against ad hoc encroachment or dispensation by the executive.'' *G.L. Christian & Assocs.* v. *United States,* 320 F.2d 345, 350–51 (Ct. Cl. 1963) (denying reconsideration). Therefore, the Department does not interpret the Davis-Bacon Act's requirement that agencies include a mandatory contract clause in covered contracts to preclude the proposed operation-of-law provision as designed.[258]

The Department also disagrees with FTBA and the Wiley Rein partners that the NPRM read too much into *Call Henry, Inc.* v. *United States,* 855 F.3d 1348, 1351 n.1 (Fed. Cir. 2017). The FTBA stated that the *Call Henry* decision only discussed operation of law with regard to section 4(c) of the SCA, under which a predecessor contractor's CBA is recognized by operation of law as the contract wage determination. That observation is not accurate. While the opinion also discusses section 4(c), the Department's citation was to the opinion's separate discussion of the SCA price adjustment clauses. *See Call Henry,* 855 F.3d at 1351 n.1 (Fed. Cir. 2017). There, the Federal Circuit noted that the appropriate SCA price adjustment clause at 48 CFR 52.222–43 had not been included in the contract at issue in that case, but explained that ''[p]ursuant to the Christian doctrine, the mandatory SCA clauses applicable to this contract are incorporated by reference, as those clauses reflect congressionally enacted, deeply ingrained procurement policy.'' *Id.* (citing *G.L. Christian & Assocs.,* 312 F.2d at 426). That the Federal Circuit found the SCA price adjustment clauses satisfy those elements of the *Christian* doctrine is certainly relevant to whether it is justifiable to require the DBRA clauses to be effective by operation of law as well.

The Wiley Rein partners also questioned whether the Supreme Court's decision in *Coutu* casts doubt on the Department's reference to *K-Con* and the *Christian* doctrine. As noted in the NPRM, before proposing this new regulatory provision, the Department considered the implications of the Supreme Court's decision in *Coutu.* In that case, the Court held that there was no implied private right of action for workers to sue under the Davis-Bacon Act—at least when the contract clauses were not included in the contract. *Coutu,* 450 U.S. at 768–69 & nn.17, 19. Although not the focus of the decision, the Court also stated in dicta that the workers in that case could not rely on the *Christian* doctrine to read the missing DBA contract clause into the contract. *Id.* at 784 & n.38.[259] For the reasons discussed in the NPRM and below, however, the Department has concluded that the operation-of-law provision in the final rule is consistent with *Coutu* and that the distinctions between the final rule and the *Christian* doctrine address the concerns that animated the *Coutu* Court in that case.

One of the Court's fundamental concerns in *Coutu* was that an implied private right of action could allow parties to evade the Department's review of whether a contract should be covered by the Act. The Court noted that there was at the time ''no administrative procedure that expressly provides review of a coverage determination after the contract has been let.'' 450 U.S. at 761 n.9.[260] If an implied private right of action existed under those circumstances, private parties could effectively avoid raising any questions about coverage with the Department or with the contracting agency—and instead bring them directly to a Federal court to second-guess the administrative determinations. *Id.* at 783–84.

Another of the Court's concerns was that such an implied private right of action would undermine Federal contractors' reliance on the wage determinations that the Federal government had (or had not) incorporated into bid specifications. The Supreme Court noted that one of the purposes of the 1935 amendments to the DBA was to ensure that contractors could rely on the predetermination of wage rates that apply to each contract. 450 U.S. at 776. If, after a contract had already been awarded, a court could find that a higher prevailing wage applied to that contract than had been previously determined, the contractor could lose money because of its mistaken reliance on the prior rates—all of which would undermine Congress's intent. *Id.* at 776–77.

The operation-of-law procedure in this final rule alleviates both of these concerns. As noted, the procedure differs from the *Christian* doctrine because—like under the existing regulation at § 1.6(f)—contractors will be compensated for any increase in costs caused by the government's failure to properly incorporate the clauses or wage determinations. The proposed procedure therefore will not undermine contractors' reliance on an initial determination by the contracting agency that the DBRA did not apply or that a wage determination with lower rates applied.[261] In light of the clear rule

[257] Like the *K-Con* decision, the *S.J. Amoroso Construction Co.* matter also involved the application of statutory coverage language which mirrors the text of the DBA. *Compare* 41 U.S.C. 8303(a) (formerly cited as 41 U.S.C. 10b) (requiring, under the 1933 Buy America Act, that ''[e]very contract for the construction, alteration, or repair of any public building or public work in the United States . . . shall contain'' certain contract provisions) *with* 40 U.S.C. 3142(a) (requiring, under the DBA, that ''[e]very contract . . . for construction, alteration, or repair . . . of public building or public works . . . shall contain a provision'' setting prevailing wages).

[258] The Department disagrees with the FTBA that this statutory language gives Federal courts ''sole power and domain'' to determine whether any DBA requirements are applicable by operation of law. While the *Christian* doctrine is a judicially-made rule, the concept of ''operation of law'' is not limited to judge-made rules. *See Operation of Law,* Black's Law Dictionary (11th ed. 2019) (defining the concept as ''[t]he means by which a right or a liability is created for a party regardless of the party's actual intent''). Likewise, the potential for such a judicially imposed outcome does not bar administrative agencies from identifying specific circumstances where a rule will be effective by operation of law. *See, e.g.,* 19 CFR 111.45(b) (prescribing that if a customs broker fails to pay user fee, permit is revoked by operation of law); 29 CFR 38.25 (prescribing that a grant applicant's nondiscrimination assurance is considered incorporated by operation of law into grants and other instruments under the Workforce Innovation and Opportunity Act); 49 CFR 29.207 (prescribing that if a Tribe submits a final offer to the Department of Transportation to resolve a dispute and the Department takes no action with the 45-day review period, the offer is accepted by operation of law).

[259] *See* Steven Feldman, 1 Government Contract Awards: Negotiation and Sealed Bidding § 1:7 n.16 (rev. Oct. 2022) (describing the discussion in *Coutu* as ''infrequently recognized dictum'').

[260] Section 1.6(f) did not go into effect until Apr. 29, 1983, nearly 2 years after the *Coutu* decision. *See* 48 FR 19532. Moreover, although the Department has used § 1.6(f) to address post-award coverage determinations, as noted here, the language of that paragraph references wage determinations and does not explicitly address the omission of required contract clauses. The Department now seeks to remedy that ambiguity in § 1.6(f) by adding similar language to § 5.6, as discussed below, in addition to the proposed operation-of-law language at § 5.5(e).

[261] For the same reason, the *BellSouth* case cited by the Wiley Rein partners does not undermine the Department's logic. In that case, after the government unilaterally modified a contract pursuant to 29 CFR 1.6(f), the government denied part of a request for compensation, and attempted to use the *Christian* doctrine to circumvent the requirement for compensation in § 1.6(f) and the applicable FAR provisions. ASBCA No. 45955, Sept. 27, 1994, 94–3 BCA ¶ 27231. Under the proposed operation-of-law provision in § 5.5(e), to the contrary, the Department is specifying that when the contract clauses are effective by operation of law, contractors will be compensated ''for any resulting increase in wages in accordance with applicable law.''

requiring compensation, the Department is not persuaded by the concerns raised by commenters that contracting agencies might simply ignore the compensation requirement.[262]

Nor does the operation-of-law rule risk creating an end-run around the administrative procedures set up by contracting agencies and the Department pursuant to Reorganization Plan No. 14. Instead, the provision will function as part of an administrative structure implemented by the Administrator and subject to the Administrator's decision to grant a variance, tolerance, or exemption. Its enactment should not affect one way or another whether any implied private right of action exists under the statute. Executive Order 11246 provides a helpful comparator. In 1968, the Department promulgated the regulation clarifying that the Executive Order's equal opportunity contract clause would be effective by ''operation of the Order'' regardless of whether it is physically incorporated into the contract. 41 CFR 60–1.4(e). That regulation was upheld, and the *Christian* doctrine was also found to apply to the required equal opportunity contract clause. *See Miss. Power & Light,* 638 F.2d at 905–06. Nonetheless, courts have widely held that E.O. 11246 does not convey an implied private right of action. *See, e.g., Utley* v. *Varian Assocs., Inc.,* 811 F.2d 1279, 1288 (9th Cir. 1987).

The Department has also considered whether the operation-of-law provision will lead to an increase in bid protest litigation or expand the authority of the Court of Federal Claims or other contracting appeal tribunals to develop their own case law on the application of the DBRA without the input of the Department. In exploring this question, the Department considered proposing an alternative procedure in which the operation-of-law rule would only become effective after a determination by the Administrator or a contracting agency that a contract was in fact covered. The Department, however, does not believe that such an approach is necessary because both the GAO and the Federal Circuit maintain strict waiver rules that prohibit post-award bid protests based on errors or ambiguities in the solicitation. *See NCS/EML JV, LLC,* B–412277, 2016 WL 335854, at *8 n.10 (Comp. Gen. Jan. 14, 2016) (collecting GAO decisions); *Blue & Gold Fleet, L.P.* v. *United States,* 492 F.3d 1308, 1312–13 (Fed. Cir. 2007).[263]

The operation-of-law provision as enacted in this final rule also will not affect the well-settled case law in the Court of Federal Claims—developed after the *Coutu* decision—that only the Department of Labor has jurisdiction to resolve disputes arising out of the labor standards provisions of the contract. As part of the post-*Coutu* 1982 final rule, the Department enacted a provision at 29 CFR 5.5(a)(9) that requires a disputes clause with that jurisdictional limitation to be included in all DBRA-covered contracts. *See* 47 FR 23660–61 (final rule addressing comments received on the proposal). The labor standards disputes clause creates an exception to the Contract Disputes Act of 1974 and effectively bars the Court of Federal Claims from deciding substantive matters related to the Davis-Bacon Act and Related Acts. *See, e.g., Emerald Maint., Inc.* v. *United States,* 925 F.2d 1425, 1428–29 (Fed. Cir. 1991). Under the operation-of-law provision, the disputes clause at § 5.5(a)(9) will continue to be effective even when it has been omitted from a contract because the language of the operation-of-law provision applies the principle to all of the required contract clauses in § 5.5(a)—including § 5.5(a)(9). As a result, under the operation-of-law provision, disputes regarding DBRA coverage or other related matters arising under § 5.5(a)(9) should continue to be heard only through the Department's administrative process instead of or prior to any judicial review in the Court of Federal Claims, and there is no reason to believe that the implementation of the operation-of-law provision would lead to a parallel body of case law in that venue.

The Department has also considered the Wiley Rein partners' concern that the operation-of-law provision could result in litigation pursuant to the False Claims Act (FCA). *See* 31 U.S.C. 3729 *et seq.* The FCA, which applies to claims submitted by contractors for payment under the DBRA, provides an important avenue for private whistleblowers to assist the government in recovering funds that have been paid out as a result of false or fraudulent claims. *See, e.g., United States ex rel. Int'l Bhd. of Elec. Workers Loc. 98* v. *Farfield Co.,* 5 F.4th 315, 343 (3d Cir. 2021). To be actionable, the FCA requires false claims to be ''material'' to the Government's decision to make payments in response to the claims. *Id.* at 342 (citing 31 U.S.C. 3729(a)(1)(B)). Where a DBA contractor fails to comply with the DBRA contract clauses, the regulations require contracting agencies to suspend payments to the contractor. *See* 29 CFR 5.9 (stating in the event of a contractor's compliance failure, the government ''shall'' take action if necessary to suspend payments). And where a contractor knowingly misrepresents information on the certified payroll it must submit, it subjects itself to potential criminal penalties for false statements (which are referenced on the certified payroll forms themselves) and debarment.[264]

The circumstances may be different, however, where no certified payroll has been submitted because the contract clause has been omitted entirely from the contract by the contracting agency. As noted in the NPRM, debarment requires some degree of intent, so it would generally not be appropriate to debar a contractor for violations where the contracting agency omitted the contract clause and the clause was subsequently incorporated retroactively or found to be effective by operation of law. The FCA also has a scienter requirement that, like the DBRA debarment standard, requires a level of culpability beyond negligence. *See United States* v. *Comstor Corp.,* 308 F. Supp. 3d 56, 88 (D.D.C. 2018). Whether the FCA scienter requirement can be satisfied will depend on the facts and circumstances of any individual case. For example, where a contracting agency omits the contract clauses based on case law or guidance from the Department that is public or shared with the contractor, a relator would be unlikely to be able to satisfy the FCA's scienter requirement for the same reasons that debarment would generally not be appropriate. For these reasons, there is no certainty that the operation-of-law provision will lead to a

[262] The Department is not persuaded by the speculation from the group of U.S. Senators that contracting agencies might ''use the threat of refusing to award contracts in the future'' in order to pressure contractors not to seek compensation. The Department is not aware of any basis on which a contracting agency would be permitted to deny future awards because a contractor sought reimbursement under that regulation that expressly provides for such compensation.

[263] In *Blue & Gold,* the National Park Service failed to include the SCA contract clauses in a contract that the Department of Labor later concluded was covered by the Act. The Federal Circuit denied the bid protest from a losing bidder because ''a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.'' 492 F.3d at 1313.

[264] The Department pursues recovery (and suspension or withholding as necessary) regardless of the amount of unpaid wages. Davis-Bacon enforcement efforts at the Department in the last decade have resulted in the recovery of more than $229 million in back wages for over 76,000 workers. *see* 2020 GAO Report, at 39, *supra* note 14. This recovery occurred across 14,639 compliance determinations, meaning that the average recovery in a compliance investigation was under $16,000.

significant expansion of FCA disputes.[265]

Finally, the Wiley Rein partners' concern about arbitrators potentially deciding Davis-Bacon coverage issues does not warrant a different approach. The Department believes it is unlikely that arbitrators will be asked to consider Davis-Bacon questions with any frequency. When a dispute turns on Davis-Bacon determinations that implicate the Department's technical expertise, arbitration is not appropriate. *See IBEW Local 113* v. *T&H Services,* 8 F.4th 950, 962–63 (10th Cir. 2021). Moreover, mandatory pre-dispute arbitration agreements neither prevent workers from alerting agencies to potential violations of the law nor limit agencies' authority to pursue appropriate enforcement measures in response to worker complaints. *See EEOC* v. *Waffle House, Inc.,* 534 U.S. 279, 287 (2002). To the extent that any arbitrator considers a Davis-Bacon coverage question, however, it would not run the risk of creating a separate body of law because arbitration decisions are generally sealed and non-precedential.

Given all of these continued safeguards and considerations, the Department believes it is not necessary to expressly limit the proposed operation-of-law provision to be effective only after the Department or a contracting agency determines that contract clauses or wage determinations were erroneously omitted, as the Wiley Rein partners advocated.

The Department also considered the Wiley Rein partners' suggestion to replace the operation-of-law provision with post-award procedures similar to the SCA regulation at 29 CFR 4.5(c). The SCA regulation at § 4.5(c) is similar to the existing DBRA regulation at § 1.6(f). It covers situations where the Department discovers that a contracting agency made an erroneous determination that the SCA did not apply to a particular contract and/or failed to include an appropriate wage determination in the contract. *Id.* § 4.5(c). In those situations, the SCA regulation states that the contracting agency has 30 days from the notification by the Department to incorporate the missing clauses or wage determinations through the exercise of any all authority that may be needed, including through its authority to pay any additional costs. *Id.* It also states that the Department can require retroactive application. *Id.* The Wiley Rein partners wrote that a primary benefit of this proposal would be to avert FCA litigation or other disputes. For the reasons discussed above, the Department is not persuaded that the final rule will lead to a significant increase in FCA or other litigation.

This language from § 4.5(c), moreover, does not fully address the underlying problems that the Department is seeking to address with the operation-of-law provision. Section 4.5(c) still leaves the Department's enforcement efforts dependent on the willingness or ability of contracting agencies to pursue modification of a contract at the Department's direction, and the speed with which they accomplish the necessary modification. While many agencies timely act in response to the Department's requests under § 4.5(c), the Department has also experienced many of the same challenges enforcing the SCA under § 4.5(c) as it has experienced enforcing the DBRA under § 1.6(f). Thus, modeling the updated DBRA post-award modification regulations based on § 4.5(c) would be an improvement over the current status quo, but such a rule would not resolve the contract-modification issues that have motivated the operation-of-law proposal.

While the Department declines to replace the operation-of-law provision with a § 4.5(c)–type provision, some of the Wiley Rein partners' animating concerns are nonetheless addressed in the related aspects of the final rule. For example, for contracts covered by both the DBA and SCA, the partners stated that their proposal would simplify contract administration by allowing contracting agencies to be able to make both DBA and SCA contract modifications in the same contract modification. Using similar contract-modification procedures for each Act would allow this. However, the existence of an operation-of-law provision in the DBRA regulations is not an obstacle to this sort of coordination. As described in the NPRM, the operation-of-law provision is intended to work in tandem with the existing wage-determination modification procedure at § 1.6(f), as well as the new contract-modification procedure in § 5.6(a)(1)(ii). Thus, notwithstanding an operation-of-law provision, the Department could still issue a direction to a contracting agency to incorporate new terms for application of both the SCA and DBRA in the same contract.

Similarly, the final rule addresses the Wiley Rein partners' concern about the need for a clear date marking the dividing line between prospective and retroactive applicability. The language in § 5.5(e) specifically subjects such a determination to the Administrator's authority to grant a variance, tolerance, or exemption. As noted in the NPRM, this includes the authority to limit retroactive enforcement traditionally exercised under 29 CFR 1.6(f). Thus, when the Administrator issues a coverage determination pursuant to the operation-of-law provision, the Administrator will be authorized to make a decision about the date back to which the retroactive application will be enforced and the date from which prospective application is required. *Cf. FlightSafety Def. Corp.,* ARB No. 2022–0001, slip op. at 16–19 (Feb. 28, 2022) (affirming the Administrator's determination, in an SCA matter, that under the circumstances of that case the prospective application of a missing contract clause should begin at the start of the subsequent Contract Line Item Number period). This authority should sufficiently allay the Wiley Rein partners' concerns.

The Department has considered AGC's request for further clarification regarding the manner in which the compensation requirement would work. The language of § 5.5(e) requires that compensation should be made ''in accordance with applicable law.'' As a general matter, the FAR will provide the applicable law for direct Federal procurement contracts. The FAR currently includes price adjustment clauses applicable to different types of Davis-Bacon contracts. *See, e.g.,* 48 CFR 52.222–30, 52.222–31 and 52.222–32. Because the FAR and its price-adjustment contract clauses provide applicable law, the Department does not believe it is appropriate to adopt CC&M's suggestion to mandate that contractors be reimbursed 150 percent of the difference between current and required wage rates. The Department also does not believe that it is necessary to penalize contracting agencies when the compensation provision alone already provides sufficient incentive to agencies to ensure that contract clauses and applicable wage determinations are correctly incorporated into covered contracts.

Finally, the Wiley Rein partners suggested that the Department should defer the effective date for the operation-of-law provision until the FAR is updated to expressly require equitable adjustments in these circumstances. In the **DATES** section of this final rule, the Department discusses

[265] AFP–I4AW also expressed a generalized concern about increased litigation from the operation-of-law provision. As there is no certainty that the provision will increase bid protests, claims in the Court of Federal Claims, or FCA litigation, the Department does not agree that such generalized concern is a persuasive reason to decline to adopt the proposal.

the applicability date of the rule. *See also infra* section III.C (''Applicability Date''). The provisions of parts 3 and 5 of the final rule (including the operation-of-law provisions at §§ 3.11(e) and 5.5(e)) are generally applicable only to contracts entered into after the effective date of the final rule.

Once the operation-of-law provision at § 5.5(e) is effective and applicable to a contract, it will require the incorporation as a matter of law of any omitted contract clauses and wage determinations that would have been appropriate and necessary to include in the contract at the time the contract was entered into. Because § 5.5(e) will generally only apply to contracts newly entered into after the applicability date, the Department would not interpret § 5.5(e) to require the contract clause provisions as amended in this final rule to be incorporated by operation of law to replace the contract clauses that have already been physically incorporated into contracts entered into before the applicability date. Similarly, § 5.5(e) would not incorporate the contract clauses into any contract from which the clauses have been wrongly omitted, unless that contract has been entered into after the effective date of the final rule. For any contracts entered into prior to the effective date of the final rule that are missing required contract clauses or wage determinations, the Department will seek to address any omissions solely through the modification provisions in the existing regulation at § 1.6(f).

The Department declines to defer the effective date of the operation-of-law provision at § 5.5(e) for contracts governed by the FAR, but has amended § 5.5(e) to clarify how the provision interacts with the FAR. The final rule clarifies that for contracts governed by the FAR, the contract clauses that are made effective by operation of law are the Davis-Bacon contract clauses in the FAR itself. Accordingly, for any contracts that are entered into after the effective date of the final rule but before the effective date of any amendment to the FAR (including an amendment to the required FAR DBRA contract clauses), § 5.5(e) would incorporate by operation-of-law the FAR contract clauses that are mandatory under the FAR regulation in effect at the time the FAR contract was entered into. As a result, it is not necessary to defer the effective date of § 5.5(e).

The final rule thus adopts the regulatory text of § 5.5(e) as proposed, with the limited modification discussed above.

(2) § 3.11 Application of Copeland Act Regulations

The Department also proposed a revision to § 3.11 to conform to the ''operation of law'' provision in § 5.5(e). Section 3.11 currently requires all covered contracts to ''expressly bind the contractor or subcontractor to comply'' with the applicable regulations from part 3. 29 CFR 3.11. The existing regulations then reference § 5.5(a)'s longstanding requirement that agency heads require contracting officers to insert appropriate contract clauses into all covered contracts. See *id.* The contract clause at § 5.5(a)(3)(ii) contains the certified payroll requirements that are derived from and mirror the requirements in part 3. *See* section III.B.3.iii.(B).

The proposed new operation-of-law paragraph in § 5.5(e) makes all of the contract clauses required by § 5.5(a) effective by operation of law even when they have been wrongly omitted from a covered contract. Thus, in accordance with § 5.5(e), the recordkeeping requirements in the contract clause at § 5.5(a)(3)(ii) are made effective by operation of law where necessary. The Department proposed the amendment to § 3.11 as a conforming change to provide notice to contractors that the applicable part 3 regulations, required to be included in every contract by that provision, are effective by operation of law where necessary.

UBC expressed support for the proposed change to § 3.11, writing that it would improve application and enforcement of the DBRA standards. AFPF–I4AW opposed the operation-of-law addition to § 3.11, arguing that the change will lead to greater litigation and wasted resources. The Department has considered these comments, which parallel the comments received on § 5.5(e). The Department believes that the proposed language in § 3.11 provides appropriate additional notice that the regulations in part 3 govern DBRA-covered contracts whether or not their requirements have been physically included through a contract clause or otherwise. For the same reasons articulated above with regard to § 5.5(e), the Department does not believe that the operation-of-law provision will significantly increase litigation or otherwise waste resources. By making required contract clauses effective by operation of law, the Department will avoid the enforcement challenges that have arisen in the application of the current contract-modification provision at § 1.6(f). The final rule therefore adopts the language of § 3.11 as proposed.

(3) § 5.5(d) Incorporation of Contract Clauses and Wage Determinations by Reference

The Department proposed a new provision at § 5.5(d) to clarify that the clauses and wage determinations are equally effective if they are incorporated by reference, notwithstanding the requirement in § 5.5(a) that contracting agencies insert contract clauses ''in full'' into non-FAR contracts and the language of the contract clause at § 5.5(a)(1)(i) that specifies that the applicable wage determination ''is attached'' to such contracts. As the Department noted in the NPRM, this follows from the FAR and the common law of contract. Under the FAR, a contract that contains a provision expressly incorporating the clauses and the applicable wage determination by reference may be tantamount to insertion in full. *See* 48 CFR 52.107, 52.252–2. And, as a general matter, the terms of a document appropriately incorporated by reference into a contract effectively bind the parties to that contract. *See* 11 Williston on Contracts section 30:25 (4th ed.) (''Interpretation of several connected writings'').

Only one commenter, CC&M, referenced this proposed language. In the comment, CC&M stated general opposition to the idea that incorporation by reference can be just as effective as inserting the full Davis-Bacon contract section. The comment did not address the common use of incorporation by reference in the FAR or in the common law. The Department agrees with CC&M that it is preferable for contracting agencies to insert contract clauses and wage determinations in full into covered contracts. That is why the Department maintained instructions to contracting agencies in § 5.5(a) that they continue to be required to insert the contract clauses ''in full'' into non-FAR-covered contracts.[266] The Department does not agree, however, that the failure by a contracting agency to do so should result in a disregard of the statutory command that a contract should be covered and the workers on the contract paid a prevailing wage. This is particularly true where the contract includes express language making compliance with the DBRA a term of the agreement. In such a situation, it generally would be sufficient under the common law to find the missing contract clauses and wage determinations to be effective through incorporation by reference. The same

[266] The Department, however, has revised its instructions in § 5.5(a) to reflect that it is FAR convention to incorporate clauses by reference, as opposed to in full text.

should be true under a statute that has the recognized purpose of protecting workers and ensuring that they are paid prevailing wages. *See Binghamton Constr. Co.,* 347 U.S. at 178.

As the Department explained in the NPRM, these various proposed parallel regulatory provisions are consistent and work together. They require the best practice of physical insertion or modification of contract documents (or, where warranted, incorporation by reference), so as to provide effective notice to all interested parties, such as contract assignees, subcontractors, sureties, and employees and their representatives. At the same time, they create a safety net to ensure that where any mistakes are made in initial determinations, the prevailing wage required by statute will still be paid to the laborers and mechanics on covered projects.

Accordingly, the final rule adopts the language of § 5.5(d) as proposed.

(4) § 1.6(f) Post-Award Correction of Wage Determinations

In addition to the operation-of-law language at § 5.5(e), the Department proposed to make several changes to the regulation at § 1.6(f) that contains the current post-award procedure requiring contracting agencies to incorporate an omitted wage determination. First, as discussed above in section III.B.1.vi. (§ 1.6 Use and effectiveness of wage determinations), the Department proposed adding titles to § 1.6(a)–(g) in order to improve readability of the section as a whole. The proposed title for § 1.6(f) was ''Post-award determinations and procedures.'' The Department also proposed dividing § 1.6(f) into multiple paragraphs to improve the organization and readability of the important rules it articulates.

At the beginning of the section, the Department proposed a new § 1.6(f)(1), which explains generally that if a contract subject to the labor standards provisions of the Acts referenced by § 5.1 is entered into without the correct wage determination(s), the relevant agency must incorporate the correct wage determination into the contract or require its incorporation. The Department proposed to add language to § 1.6(f)(1) expressly providing for an agency to incorporate the correct wage determination post-award ''upon its own initiative'' as well as upon the request of the Administrator. The current version of § 1.6(f) explicitly provides only for a determination by the Administrator that a correction must be made. Some contracting agencies had interpreted the existing language as precluding an action by a contracting agency alone—without action by the Administrator—to modify an existing contract to incorporate a correct wage determination. The Department proposed the new language to clarify that the contracting agency can take such action alone. Where a contracting agency does intend to take such an action, proposed language at § 1.6(f)(3)(iii) would require it to notify the Administrator of the proposed action.

In the proposed reorganization of § 1.6(f), the Department located the discussion of the Administrator's determination that a correction is necessary in a new § 1.6(f)(2). The only proposed change to the language of that paragraph was not substantive. The current text of § 1.6(f) refers to the action that the Administrator may take as an action to ''issue a wage determination.'' However, in the majority of cases, where a wage determination is not included in the contract, the proper action by the Administrator will not be to issue a new or updated wage determination, as that term is used in § 1.6(c), but to identify the appropriate existing wage determination that applies to the contract. Thus, to eliminate any confusion, the Department proposed to amend the language in this paragraph to describe the Administrator's action as ''requir[ing] the agency to incorporate'' the appropriate wage determination. To the extent that, in an exceptional case, the Department would need to ''issue'' a new project wage determination to be incorporated into the contract, the proposed new language would require the contracting agency to incorporate or require the incorporation of that newly issued wage determination.

The Department also proposed to amend the language in § 1.6(f) that describes the potential corrective actions that an agency may take. In a non-substantive change, the Department proposed to refer to the wage determinations that must be newly incorporated as ''correct'' wage determinations instead of ''valid'' wage determinations. This is because the major problem addressed in § 1.6(f)—in addition to the failure to include any wage determination at all—is the use of the wrong wage determinations. Even while wrong for one contract, a wage determination may be valid if used on a different contract to which it properly applies. It is therefore more precise to describe a misused wage determination as incorrect rather than invalid. The proposed amendment would also add to the reference in the current regulation at § 1.6(f) to ''supplemental agreements'' or ''change orders'' as the methods for modifying contracts post-award to incorporate valid wage determinations. The Department proposed, in a new § 1.6(f)(3), to instruct that agencies make such modifications additionally through the exercise of ''any other authority that may be needed.'' This language parallels the Department's regulation at 29 CFR 4.5 for similar circumstances under the SCA.

The Department also proposed to make several changes to § 1.6(f) to clarify that the requirements apply equally to projects carried out with Federal financial assistance as they do to DBA projects. The proposed initial paragraph at § 1.6(f)(1) contains new language that states expressly that where an agency is providing Federal financial assistance, ''the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the correct wage determination(s) into its contracts.'' Similarly, the reference to agencies' responsibilities in proposed new § 1.6(f)(3) requires an agency to terminate and resolicit the contract or to ''ensure'' the incorporation (in the alternative to ''incorporating'' the correct wage determination itself)—in recognition that this language applies equally to direct procurement where the agency is a party to a DBA-covered contract and Related Acts where the agency must ensure that the relevant State or local agency incorporates the corrected wage determination into the covered contract. Finally, the Department also proposed to amend the requirement that the incorporation should be ''in accordance with applicable procurement law'' to instead reference ''applicable law.'' This change is intended to recognize that the requirements in § 1.6 apply also to projects executed with Federal financial assistance under the Related Acts, for which the Federal or State agency's authority may not be subject to Federal procurement law. None of these proposed changes represent substantive changes, as the Department has historically applied § 1.6(f) equally to both DBA and Related Act projects. *See, e.g., City of Ellsworth,* ARB No. 14–042, 2016 WL 4238460, at *6–8.

In the new § 1.6(f)(3)(iv), the Department proposed to include the requirements from the existing regulations that contractors must be compensated for any change and that the incorporation must be retroactive to the beginning of the construction. That retroactivity requirement, however, is amended to include the qualification that the Administrator may direct otherwise. As noted above, the

Administrator may make determinations of non-retroactivity on a case-by-case basis. In addition, consistent with the SCA regulation on post-award incorporation of wage determinations at 29 CFR 4.5(c), the Department proposed including language in a new § 1.6(f)(3)(ii) to require that incorporation of the correct wage determination be accomplished within 30 days of the Administrator's request, unless the agency has obtained an extension.

The Department also proposed to include new language at § 1.6(f)(3)(v), applying to Related Acts, instructing that the agency must suspend further payments or guarantees if the recipient refuses to incorporate the specified wage determination and that the agency must promptly refer the dispute to the Administrator for further proceedings under § 5.13. This language is a clarification and restatement of the existing enforcement regulation at § 5.6(a)(1), which provides that no such payment or guarantee shall be made ''unless [the agency] ensures that the clauses required by § 5.5 and the appropriate wage determination(s) are incorporated into such contracts.''

In proposed new language at § 1.6(f)(3)(vi), the Department included additional safeguards for the circumstances in which an agency does not retroactively incorporate the missing clauses or wage determinations and instead seeks to terminate the contract. The proposed language provided that before termination, the agency must withhold or cross-withhold sufficient funds to remedy any back wage liability or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism. This language is consistent with the existing FAR provision at 48 CFR 49.112–2(c) that requires contracting officers to ascertain whether there are any outstanding labor violations and withhold sufficient funds if possible before forwarding the final payment voucher. It is also consistent with the language of the template termination settlement agreements at 48 CFR 49.602–1 and 49.603–3 that seek to ensure that any termination settlement agreement does not undermine the government's ability to fully satisfy any outstanding contractor liabilities under the DBRA or other labor clauses.

Finally, the Department included a proposed provision at § 1.6(f)(4) to clarify that the specific requirements of § 1.6(f) to physically incorporate the correct wage determination operate in addition to the proposed requirement in § 5.5(e) that makes the correct wage determination applicable by operation of law. As discussed above, such amendment and physical incorporation (including incorporation by reference) is helpful in order to provide notice to all interested parties, such as contract assignees, subcontractors, sureties, and employees and their representatives.

Two contractor associations, CEA and SMACNA, generally expressed support for the Department's proposed amendments to § 1.6(f). They noted in particular that the proposed amendments would allow contracting agencies to incorporate correct wage determinations upon their own initiative as well as at the request of the Administrator. These two commenters, along with the UBC, supported the proposed language at § 1.6(f)(4) that states the operation-of-law provision at § 5.5(e) would operate in tandem with the requirement that contracting agencies insert wage determinations into contracts where they have been omitted.

In contrast, ABC opposed the proposed changes to § 1.6(f), stating that the proposal would allow contracting agencies to make a change ''without a determination from WHD of special circumstances justifying such incorporation'' as required by current rules. ABC argued that this ''threatens contractors with improper changes to their government contracts post-award.'' ABC also stated that the proposed new language at § 1.6(f)(3)(vi) that requires withholding before contract termination ''imposes new withholding and cross-withholding requirements that violate longstanding understandings of the contract-based scope of the DBA and FAR contract requirements.''

AGC stated that the proposed language needs additional clarification. As AGC noted, the proposed rule stated at § 1.6(f)(3)(i) that ''[u]nless the Administrator directs otherwise, the incorporation of the clauses required by § 5.5 must be retroactive.'' AGC requested clarification about whether the Administrator's authority to ''direct[ ] otherwise'' applies only to the retroactive incorporation or also to the requirement that contractors must be compensated for any increased costs as a result. AGC also asked two other questions regarding compensation: first, whether the proposal would allow the Administrator to deny compensation to contractors when a wage determination is retroactively included; and second, what would happen if a missing wage determination were not retroactively included in a contract. AGC stated that it is absolutely necessary that prime contractors be compensated for increased costs that result from a contracting agency failure.

The Department considered the comments received regarding the proposed revisions to § 1.6(f) and agrees with the commenters supporting the amendments to this section. Allowing contracting agencies to take action to correct missing or incorrect wage determinations will streamline compliance and enforcement. Earlier action to remedy such problems will be more protective of workers, who otherwise may need to wait a longer time to receive the prevailing wages they are due. In response to ABC's comment about ''improper changes,'' the Department notes that proposed § 1.6(f)(3)(iii) requires agencies to provide notice to the Administrator of their proposed action before they require incorporation on their own initiative. This requirement provides the Department with the opportunity to help ensure that the contracting agency's proposed action is appropriate. The Department also considered ABC's comments about withholding, but those comments appear to be directed toward the Department's cross-withholding proposals. The Department has addressed comments regarding these proposals in section III.B.3.xxiii (''Withholding'').

The proposed language at § 1.6(f)(3)(i) addressed the Administrator's authority to direct that a newly incorporated wage determination should not be enforced retroactively to the beginning of the contract. The Administrator does not have separate authority to ''direct[] otherwise'' with regard to contractor compensation. Rather, the proposed language of § 1.6(f)(3)(iv) states that the contractor must be compensated for any increases in wages resulting from incorporation of a missing wage determination, and the language at proposed § 1.6(f)(3) states that the method of adjustment in contract prices ''should be in accordance with applicable law.'' For direct Federal procurement contracts, the extent to which compensation is due, if any, is governed by the FAR and any price adjustment clauses applicable to different types of Davis-Bacon contracts. *See, e.g.,* 48 CFR 52.222–30, 52.222–31 and 52.222–32.

The provisions regarding compensation in § 1.6(f) apply where the contracting agency incorporates the correct wage determination into a contract post-award. They do not apply in the hypothetical AGC provides, in which the contractor believes that a wage determination is missing and the missing wage determination is not retroactively included in the contract. While it is important for enforcement purposes that the Department and

contracting agencies have the ability to modify an award to correct errors (with appropriate compensation), the Department has generally found it to be inappropriate for a contractor to seek to modify wage determinations post-award to attempt to receive compensation for wage rates it has been paying already. *See Joe E. Woods, Inc.,* ARB No. 96–127, 1996 WL 678774 (Nov. 19, 1996).

The Department proposed several of the changes to § 1.6(f) in order to borrow language from the similar SCA provision at 29 CFR 4.5(c). That provision, as noted in the comment by the Wiley Rein partners, has been time-tested in the many years it has been in effect to address post-award modifications under the SCA. The changes proposed to § 1.6(f) are common-sense changes that provide clarity and consistency to the process of addressing circumstances where no wage determination, or the wrong wage determination, was attached to a covered contract. The changes will benefit construction workers by ensuring that they receive back wages owed to them in a timely manner.

The final rule therefore adopts the revisions to § 1.6(f) as proposed.

(6) § 5.6(a)(1) Post-Award Incorporation of Contract Clauses

The Department proposed to revise § 5.6(a)(1) to include language expressly providing a procedure for determining that the required contract clauses were wrongly omitted from a contract. As noted above, the Department has historically sought the retroactive incorporation of missing contract clauses by reference to the language regarding wage determinations in § 1.6(f). In the NPRM, the Department proposed to eliminate any confusion by creating a separate procedure at § 5.6(a)(1)(ii) that will apply specifically to missing contract clauses in a similar manner as § 1.6(f) continues to apply to missing or incorrect wage determinations.

The Department proposed to revise § 5.6(a)(1) by renumbering the existing regulatory text as § 5.6(a)(1)(i), and adding an additional paragraph, (a)(1)(ii), to include the provision clarifying that where a contract is awarded without the incorporation of the Davis-Bacon labor standards clauses required by § 5.5, the agency must incorporate the clauses or require their incorporation. This includes circumstances where the agency does not award a contract directly but instead provides funding assistance for such a contract. In such instances, the Federal agency, or other agency where appropriate, must ensure that the recipient or subrecipient of the Federal assistance incorporates the required labor standards clauses retroactive to the date of contract award, or the start of construction if there is no award.

The proposed paragraph at § 5.6(a)(1)(ii) contained a similar set of provisions as § 1.6(f), as modified by the amendments to that paragraph proposed in the NPRM. These included that the incorporation must be retroactive unless the Administrator directs otherwise; that retroactive incorporation may be required by the request of the Administrator or upon the agency's own initiative; that incorporation must take place within 30 days of a request by the Administrator, unless an extension is granted; that the agency must withhold or otherwise obligate sufficient funds to satisfy back wages before any contract termination; and that the contractor should be compensated for any increase in costs resulting from any change required by the paragraph.

The Department also proposed to clarify the application of the current regulation at § 5.6(a)(1), which states that no payment, advance, grant, loan, or guarantee of funds will be approved unless the Federal agency ensures that the funding recipient or sub-recipient has incorporated the required clauses into any contract receiving the funding. Similar to the proposed provision in § 1.6(f)(3)(v), a new proposed provision at § 5.6(a)(1)(ii)(C) explains that such a required suspension also applies if the funding recipient refuses to retroactively incorporate the required clauses. In such circumstances, the issue must be referred promptly to the Administrator for resolution.

Similar to the proposed provision at § 1.6(f)(4), the Department also proposed a provision at § 5.6(a)(1)(ii)(E) that explains that the physical-incorporation requirements of § 5.6(a)(1)(ii) would operate in tandem with the proposed language at § 5.5(e), making the contract clauses and wage determinations effective by operation of law.

The proposed changes clarify that the requirement to incorporate the Davis-Bacon labor standards clauses is an ongoing responsibility that does not end upon contract award, and the changes expressly state the Department's longstanding practice of requiring the relevant agency to retroactively incorporate, or ensure retroactive incorporation of, the required clauses in such circumstances. As discussed above, such clarification is warranted because agencies occasionally have expressed confusion about—and even questioned whether they possess—the authority to incorporate, or ensure the incorporation of, the required contract clauses after a contract has been awarded or construction has started.

The proposed changes similarly make clear that while agencies must retroactively incorporate the required clauses upon the request of the Administrator, agencies also have the authority to make such changes on their own initiative when they discover that an error has been made. The proposed changes also eliminate any confusion of the recipients of Federal funding as to the extent of the Federal funding agency's authority to require such retroactive incorporation in federally funded contracts subject to the Davis-Bacon labor standards. Finally, the proposed changes do not alter the provisions of 29 CFR 1.6(g), including its provisos.

The Department received only one comment, from ABC, regarding the proposed revisions to § 5.6(a). ABC referenced its concerns about the § 5.5(e) operation-of-law provision and stated that the proposal at § 5.6(a) ''again holds contractors responsible without notice of DBA requirements.'' The comment added that ''[u]ntil now, contractors have not been held responsible for DBA compliance'' in these circumstances and continued that ''[c]hanging contract requirement after award is forbidden unless specific requirements of the FAR are satisfied.'' ABC also stated that the NPRM is ''unclear or else fails to justify the apparent expansion in the scope of the DBA's coverage.''

The Department disagrees with ABC. As explained above, these revisions merely codify the Department's practice of requiring contracting agencies to take the necessary steps to correct contracts which omit required clauses and does not represent an expansion in ''the scope of the DBA's coverage.'' Although § 1.6(f) expressly references only the authority of the Department to direct the incorporation of missing wage determinations, the Department has consistently interpreted that language as including by necessity the authority to request the incorporation of erroneously omitted contract clauses. *See, e.g.,* DBRA–131 (Apr. 18, 1985) (requesting the contracting agency take action ''in accordance with section 1.6(f) of Regulations, 29 CFR part 1, to include the Davis-Bacon provisions and an applicable wage decision'' in a contract from which the contract clauses were erroneously omitted). Accordingly, the rule neither imposes new DBA responsibilities on contractors nor provides agencies with new authority to amend contracts which they could not have amended previously.

Finally, this proposed revision to § 5.6(a)(ii) does not ''hold[ ] contractors responsible without notice of DBA requirements,'' as ABC states, for the same reason that the new operation-of-law provision at § 5.5(e) does not. Like the operation-of-law provision, and like the existing regulation at § 1.6(f), the revision to § 5.6(a)(ii) contains a compensation provision that states that the contractor must be compensated for any increases in wages resulting the incorporation of a missing contract clause. Contractors will also receive sufficient notice through publication of the final rule. *See Merrill,* 332 U.S. at 384–85.

Retroactive incorporation of the required contract clauses ensures that agencies take every available step to ensure that workers on covered contracts are paid the prevailing wages that Congress intended. The final rule therefore adopts the language in § 5.6(a)(ii) as proposed.

xxi. Debarment

In accordance with the Department's goal of updating and modernizing the DBA and Related Act regulations, as well as enhancing the implementation of Reorganization Plan No. 14 of 1950, the Department proposed a number of revisions to the debarment regulations that were intended both to promote consistent enforcement of the Davis-Bacon labor standards provisions and to clarify the debarment standards and procedures for the regulated community, adjudicators, investigators, and other stakeholders.

The regulations implementing the DBA and the Related Acts currently reflect different standards for debarment. Since 1935, the DBA has mandated 3-year debarment ''of persons . . . found to have *disregarded their obligations to employees and subcontractors.*'' 40 U.S.C. 3144(b) (emphasis added); *see also* 29 CFR 5.12(a)(2) (setting forth the DBA's ''disregard of obligations'' standard). Although the Related Acts themselves do not contain debarment provisions, since 1951, their implementing regulations have imposed a heightened standard for debarment for violations under the Related Acts, providing that ''any contractor or subcontractor . . . found . . . to be in *aggravated or willful violation of the labor standards provisions*'' of any Related Act will be debarred ''for a period not to exceed 3 years.'' 29 CFR 5.12(a)(1) (emphasis added). The Department proposed to harmonize the DBA and the Related Act debarment-related regulations by applying the longstanding DBA debarment standard and related provisions to the Related Acts as well. Specifically, in order to create a uniform set of substantive and procedural requirements for debarment under the DBA and the Related Acts, the Department proposed five changes to the Related Act debarment regulations so that they mirror the provisions governing DBA debarment.

First, the Department proposed to adopt the DBA statutory debarment standard—disregard of obligations to employees or subcontractors—for all debarment cases and to eliminate the Related Acts' regulatory ''aggravated or willful'' debarment standard. Second, the Department proposed to adopt the DBA's mandatory 3-year debarment period for Related Act cases and to eliminate the process under the Related Acts regulations for early removal from the ineligible list (also known as the debarment list).[267] Third, the Department proposed to expressly permit debarment of ''responsible officers'' under the Related Acts. Fourth, the Department proposed to clarify that under the Related Acts as under the DBA, entities in which debarred entities or individuals have an ''interest'' may be debarred. Related Acts regulations currently require a ''substantial interest.'' Finally, the Department proposed to make the regulatory scope of debarment language under the Related Acts consistent with the scope of debarment under the DBA by providing, in accordance with the current scope of debarment under the DBA, that Related Acts debarred persons and firms may not receive ''any contract or subcontract of the United States or the District of Columbia,'' as well as ''any contract or subcontract subject to the labor standards provisions'' of the DBRA. *See* 29 CFR 5.12(a)(2).

(A) Relevant Legal Authority

The 1935 amendments to the DBA gave the Secretary authority to enforce—not just set—prevailing wages, including through the remedy of debarment. *See Coutu,* 450 U.S. at 758 n.3, 759 n.5, 776–77; *see also* S. Rep. No. 74–332, pt. 3, at 11, 14–15 (1935). Since then, the DBA has required 3-year debarment of persons or firms that have been found to ''have disregarded their obligations to employees and subcontractors.'' 40 U.S.C. 3144(b) (formerly 40 U.S.C. 276a-2 and known as section 3(a) of the DBA). The DBA also mandates debarment of entities in which debarred persons or firms have an ''interest.'' 40 U.S.C. 3144(b)(2).

Approximately 15 years later, the Truman Administration developed, and Congress accepted, Reorganization Plan No. 14 of 1950, a comprehensive plan to improve Davis-Bacon enforcement and administration. The Reorganization Plan provided that ''[i]n order to assure coordination of administration and consistency of enforcement'' of the DBRA by the agencies who are responsible for administering them, the Secretary of Labor was empowered to ''prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies.'' Reorganization Plan No. 14 of 1950, 15 FR 3176. In transmitting the Reorganization Plan to Congress, President Truman observed that ''the principal objective of the plan is more effective enforcement of labor standards'' with ''more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.'' 1950 Special Message to Congress.

Shortly after Reorganization Plan No. 14 of 1950 was adopted, the Department promulgated regulations adding ''a new Part 5,'' effective July 1, 1951. 16 FR 4430. These regulations added the ''aggravated or willful'' debarment standard for the Related Acts. *Id.* at 4431. The preamble to that final rule explained that adding the new part 5 was to comply with Reorganization Plan No. 14 of 1950's directive to prescribe standards, regulations, and procedures ''to assure coordination of administration and consistency of enforcement.'' *Id.* at 4430. Since then, the two debarment standards—disregard of obligations in DBA cases and willful or aggravated violations in Related Acts cases—have co-existed, but with challenges along the way that the Department seeks to resolve through this rulemaking.

(B) Proposed Regulatory Revisions

(1) Debarment Standard

a. Proposed Change to Debarment Standard

As noted previously, the DBA generally requires the payment of prevailing wages to laborers and mechanics working on contracts with the Federal Government or the District of Columbia for the construction of public buildings and public works. 40 U.S.C. 3142(a). In addition, Congress has included DBA prevailing wage provisions in numerous Related Acts under which Federal agencies assist construction projects through grants, loans, guarantees, insurance, and other

[267] There are several terms referring to the same list (*e.g.,* ineligible list, debarment list, debarred bidders list) and the terms for this list may continue to change over time.

methods. The same contract clauses are incorporated into DBA- and Related Act- covered contracts, and the laws apply the same labor standards protections (including the obligation to pay prevailing wages) to laborers and mechanics without regard to whether they are performing work on a project subject to the DBA or one of the Related Acts. Not only are some projects subject to the requirements of both the DBA and one of the Related Acts due to the nature and source of Federal funding, but also the great majority of DBA-covered projects are also subject to CWHSSA, one of the Related Acts.

Against this backdrop, there is no apparent need for a different level of culpability for Related Acts debarment than for DBA debarment. The sanction for failing to compensate covered workers in accordance with applicable prevailing wage requirements should not turn on the source or form of Federal funding. Nor is there any principled reason that it should be easier for prime contractors, subcontractors, and their responsible officials to avoid debarment in Related Acts cases. Accordingly, the Department proposed to revise the governing regulations so that conduct that warrants debarment on DBA construction projects would also warrant debarment on Related Act projects. This proposal fits within the Department's well-established authority to adopt regulations governing debarment of Related Act contractors. *See, e.g., Janik Paving & Constr.,* 828 F.2d at 91; *Copper Plumbing & Heating Co.* v. *Campbell,* 290 F.2d 368, 372–73 (D.C. Cir. 1961).

The Department noted in the NPRM that the potential benefits of adopting a single, uniform debarment standard outweigh any benefits of retaining the existing dual-standard framework. Other than debarment, contractors who violate the DBA and Related Acts run the risk only of having to pay back wages, often long after violations occurred. Even if these violations are discovered or disclosed through an investigation or other compliance action, contractors that violate the DBA or Related Acts can benefit in the short-term from the use of workers' wages, an advantage that can enable such contractors to underbid their more law-abiding competitors. If the violations never come to light, such non-compliant contractors pocket wages that belong to workers. Strengthening the debarment remedy encourages unprincipled contractors to comply with Davis-Bacon prevailing wage requirements by expanding the reach of this remedy when they do not. *Facchiano Constr. Co.* v. *U.S. Dep't of Lab.,* 987 F.2d 206, 214 (3d Cir. 1993) (observing that debarment ''may in fact 'be the only realistic means of deterring contractors from engaging in willful [labor] violations based on a cold weighing of the costs and benefits of non-compliance' '' (quoting *Janik Paving & Constr.,* 828 F.2d at 91)).

In proposing a unitary debarment standard, the Department intended that well-established case law applying the DBA ''disregard of obligations'' debarment standard would now also apply to Related Act debarment determinations. Under this standard, as a 2016 ARB decision explained, ''DBA violations do not, by themselves, constitute a disregard of an employer's obligations,'' and, to support debarment, ''evidence must establish a level of culpability beyond negligence'' and involve some degree of intent. *Interstate Rock Prods., Inc.,* ARB No. 15–024, 2016 WL 5868562, at *4 (Sept. 27, 2016) (footnotes omitted). For example, the underpayment of prevailing wages, coupled with the falsification of certified payrolls, constitute a disregard of a contractor's obligations that establish the requisite level of ''intent'' under the DBA debarment provisions. *See id.* Bad faith and gross negligence regarding compliance have also been found to constitute a disregard of DBA obligations. *See id.* The Department's proposal to apply the DBA ''disregard of obligations'' standard as the sole debarment standard would maintain safeguards for law-abiding contractors and responsible officers by retaining the bedrock principle that DBA violations, by themselves, generally do not constitute a sufficient predicate for debarment. Moreover, the determination of whether debarment is warranted would continue to be based on a consideration of the particular facts found in each investigation and to include the same procedures and review process that are currently in place to determine whether debarment is to be pursued.

For these reasons and those discussed in more detail in this section below, the Department's proposal to harmonize debarment standards included a reorganization of § 5.12. Proposed paragraph (a)(1) set forth the ''disregard of obligations'' debarment standard, which would apply to both DBA and Related Acts violations. The proposed changes accordingly removed the ''willful or aggravated'' language from § 5.12, with proposed conforming changes in 29 CFR 5.6(b) (included in renumbered 5.6(b)(4)) and 5.7(a). Proposed paragraph (a)(2) combined the parts of current § 5.12(a)(1) and (a)(2) concerning the different procedures for effectuating debarment under the DBA and Related Acts.

b. Impacts of Proposed Debarment Standard Change

Because behavior that is willful or aggravated is also a disregard of obligations, in many instances the proposed harmonization of the debarment standards would apply to conduct that under the current regulations is already debarrable under both the DBA and Related Acts. For example, falsification of certified payrolls to simulate compliance with Davis-Bacon labor standards has long warranted debarment under both the DBA and Related Acts. *See, e.g., R.J. Sanders, Inc.,* WAB No. 90–25, 1991 WL 494734, at *1–2 (Jan. 31, 1991) (DBA); *Coleman Constr. Co.,* ARB No. 15–002, 2016 WL 4238468, at *11 (Related Acts). Kickbacks also warrant debarment under the DBA and Related Acts. *See, e.g., Killeen Elec. Co., Inc.,* WAB No. 87–49, 1991 WL 494685, at *5–6 (DBA and Related Act). In fact, any violation that meets the ''willful or aggravated'' standard would necessarily also be a disregard of obligations.

Under the proposed revisions, a subset of violations that would have been debarrable only under the DBA ''disregard of obligations'' standard now would be potentially subject to debarment under both the DBA and Related Acts. The ARB recently discussed one example of this type of violation, stating that intentional disregard of obligations ''may . . . include acts that are not willful attempts to avoid the requirements of the DBA'' since contractors may not avoid debarment ''by asserting that they did not intentionally violate the DBA because they were unaware of the Act's requirements.'' *Interstate Rock Prods.,* ARB No. 15–024, 2016 WL 5868562, at *4. Similarly, ''failures to set up adequate procedures to ensure that their employees' labor was properly classified,'' which might not have been found to be willful or aggravated Related Act violations, were debarrable under the DBA ''disregard of obligations'' standard. *Id.* at *8. Under the Department's proposed revisions to § 5.12, these types of violations could now result in debarment in Related Acts as well as DBA cases. Additionally, under the ''disregard of obligations'' standard, prime contractors and upper-tier subcontractors may be debarred if they fail to flow down the required contract clauses into their lower-tier subcontracts as required by § 5.5(a)(6), or if they otherwise fail to ensure that their subcontractors are in compliance with the Davis-Bacon labor standards

provisions. *See* 29 CFR 5.5(a)(6), (7); *Ray Wilson Co.,* ARB No. 02–086, 2004 WL 384729, at *10 (affirming debarment under DBA of upper-tier subcontractor and its principals because of subcontractor's ''abdication from—and, thus, its disregard of—its obligations to employees of . . . its own lower-tier subcontractor''). Such failures alone, which might not have been found to be a willful or aggravated violation depending on the totality of the circumstances, would under the proposed harmonized standard be more likely to satisfy the requirements for debarment whether the failure had occurred on a DBA or Related Act project.

c. Benefits of Proposed Debarment Standard Change

i. Improved Compliance and Enforcement

In the NPRM, the Department stated its position that applying the DBA's ''disregard of obligations'' debarment standard in a uniform, consistent manner would advance the purpose of the DBA, '''a minimum wage law designed for the benefit of construction workers.''' *Abhe & Svoboda, Inc.* v. *Chao,* 508 F.3d 1052, 1055 (D.C. Cir. 2007) (quoting *Binghamton Constr. Co.,* 347 U.S. at 178). Both the DBA statutory and the Related Acts regulatory debarment provisions are ''intended to foster compliance with labor standards.'' *Howell Constr., Inc.,* WAB No. 93–12, 1994 WL 269361, at *7 (May 31, 1994); *see also Interstate Rock Prods.,* ARB No. 15–024, 2016 WL 5868562, at *8 (''Debarment has consistently been found to be a remedial rather than punitive measure so as to encourage compliance and discourage employers from adopting business practices designed to maximize profits by underpaying employees in violation of the Act.'').

The Department explained that using the ''disregard of obligations'' debarment standard for all DBA and Related Act work would enhance enforcement of and compliance with Davis-Bacon labor standards in multiple ways. First, it would better enlist the regulated community in Davis-Bacon enforcement by increasing contractors' incentive to comply with the Davis-Bacon labor standards. *See, e.g., Facchiano Constr.,* 987 F.2d at 214 (''Both § 5.12(a)(1) and § 5.12(a)(2) are designed to ensure the cooperation of the employer, largely through self-enforcement.''); *Brite Maint. Corp.,* WAB No. 87–07, 1989 WL 407462, at *2 (May 12, 1989) (debarment is a ''preventive tool to discourage violation[s]'').

Second, applying the ''disregard of obligations'' standard to Related Act cases would serve the important public policy of holding contractors' responsible officials accountable for noncompliance in a more consistent manner, regardless of whether they are performing on a Federal or federally funded project. Responsible officials currently may be debarred under both the DBA and the Related Acts. *See, e.g., P.B.M.C., Inc.,* WAB No. 87–57, 1991 WL 494688, at *7 (Feb. 8, 1991) (stating that ''Board precedent does not permit a responsible official to avoid debarment by claiming that the labor standards violations were committed by agents or employees of the firm'' in Related Act case); *P.J. Stella Constr. Corp.,* WAB No. 80–13, 1984 WL 161738, at *3 (Mar. 1, 1984) (affirming DBA debarment recommendation because ''an employer cannot take cover behind actions of his inexperienced agents or representatives or the employer's own inexperience in fulfilling the requirements of government construction contracts''); *see also Howell Constr., Inc.,* WAB No. 93–12, 1994 WL 269361, at *7 (DBA case) (debarment could not foster compliance if ''corporate officials . . . are permitted to delegate . . . responsibilities . . . [and] to delegate away any and all accountability for any wrong doing''). Applying a unitary debarment standard would further incentivize compliance by all contractors and responsible officers.

ii. Greater Consistency and Clarity

The Department also stated its view that applying the DBA debarment and debarment-related standards to all Related Act prevailing wage cases would eliminate the confusion and attendant litigation that have resulted from erroneous and inconsistent application of the two different standards. The incorrect debarment standard has been applied in various cases over the years, continuing to the present, notwithstanding the ARB's repeated clarification. *See, e.g., J.D. Eckman, Inc.,* ARB No. 2017–0023, 2019 WL 3780904, at *3 (July 9, 2019) (remanding for consideration of debarment under the correct standard as a result of ALJ's legal error of using inapplicable ''disregard of obligations'' standard rather than applicable ''aggravated or willful'' standard); *Coleman Constr. Co.,* ARB No. 15–002, 2016 WL 4238468, at *9–11 (noting that the ALJ had applied the wrong debarment standard but concluding that the ALJ's ''conflat[ion of the] two different legal standards'' was harmless error under the circumstances). Most recently, the ARB vacated and remanded an ALJ's decision to debar a subcontractor and its principal under the DBA, noting that, even though the Administrator had not argued that the DBA applied, the ALJ had applied the incorrect standard because ''the contract was for a construction project of a non-[F]ederal building that was funded by the U.S. Government but did not include the United States as a party.'' *Jamek Eng'g Servs., Inc.,* ARB No. 2020–0043, 2021 WL 2935807, at *8 (June 23, 2021); *see also Jamek Eng'g Servs., Inc.* (*Jamek II*), ARB No. 2022–0039, 2022 WL 6732171, at *8–9 (Sept. 22, 2022) (affirming ALJ's decision on remand, including 3-year debarment for aggravated or willful Related Acts violations), *appeal docketed, Jamek Eng'g Servs., Inc.* v. *U.S. Dep't of Lab.,* No. 22–cv–2656 (D. Minn. Oct. 21, 2022).

Additionally, the ''aggravated or willful'' Related Acts standard has been interpreted inconsistently over the past decades. In some cases, the ARB has required actual knowledge or awareness of violations, while in others it has applied (or at least recited with approval) a less stringent standard that encompasses intentional disregard or plain indifference to the statutory requirements but does not require actual knowledge of violations. *Compare J.D. Eckman, Inc.,* ARB No. 2017–0023, 2019 WL 3780904, at *3 (requiring actual knowledge or awareness of the violation) *and A. Vento Constr.,* WAB No. 87–51, 1990 WL 484312, at *3 (Oct. 17, 1990) (aggravated or willful violations are ''intentional, deliberate, knowing violations of the [Related Acts'] labor standards provisions'') *with Fontaine Bros., Inc.,* ARB No. 96–162, 1997 WL 578333, at *3 (Sept. 16, 1997) (stating in Related Act case that ''mere inadvertent or negligent conduct would not warrant debarment, [but] conduct which evidences an intent to evade or a purposeful lack of attention to, a statutory responsibility does'' and that ''[b]lissful ignorance is no defense to debarment'' (quotation omitted)); *see also Pythagoras Gen. Contracting Corp.,* ARB Nos. 08–107, 09–007, 2011 WL 1247207, at *12 (''[A] 'willful' violation encompasses intentional disregard or plain indifference to the statutory requirements.'').

The Department stated its belief that a single debarment standard would provide consistency for the regulated community. Under the proposed single ''disregard of obligations'' debarment standard, purposeful inattention, and gross negligence with regard to Davis-Bacon labor standards obligations—as well as actual knowledge of or

participation in violations—could warrant debarment. The Department explained that it would continue to carefully consider all of the facts involved in determining whether a particular contractor's actions meet the proposed single standard.

(2) Length of Debarment Period

The Department also proposed to revise § 5.12(a)(1) and (2) to make 3-year debarment mandatory under both the DBA and Related Acts and to eliminate the regulatory provision permitting early removal from the debarment list under the Related Acts.

As noted above, since 1935, the DBA has mandated a 3-year debarment of contractors whose conduct has met the relevant standard. In 1964, the Department added two regulatory provisions that permit Related Acts debarment for less than 3 years as well as early removal from the debarment list. According to the 1964 final rule preamble, the Department added these provisions ''to improve the debarment provisions under Reorganization Plan No. 14 of 1950 by providing for a flexible period of debarment up to three years and by providing for removal from the debarred bidders list upon a demonstration of current responsibility.'' 29 FR 95.

The Department explained in the proposal that its experience over the nearly 60 years since then has shown that those Related Act regulatory provisions that differ from the DBA standard have not improved the debarment process (*i.e.,* have not assured consistency of enforcement) for any of its participants. Rather, they have added another element of confusion and inconsistency to the administration and enforcement of the DBA and Related Acts. For example, contractors and subcontractors have been confused about which provision applies. *See, e.g., Bob's Constr. Co., Inc.,* WAB No. 87–25, 1989 WL 407467, at *1 (May 11, 1989) (stating that ''[t]he [DBA] does not provide for less than a 3-year debarment'' in response to contractor's argument that ''if the Board cannot reverse the [ALJ's DBA] debarment order, it should consider reducing the 3-year debarment'').

Requiring a uniform 3-year debarment period would reduce confusion and increase consistency. Although the regulations currently provide for an exception to 3-year debarment, debarment in Related Acts cases is usually, but not always, for 3 years. In some cases, the WAB treated a 3-year debarment period as effectively presumptive and therefore has reversed ALJ decisions imposing debarment for fewer than 3 years. *See, e.g., Brite Maint. Corp.,* WAB No. 87–07, 1989 WL 407462, at *1, *3 (imposing a 3-year debarment instead of the 2-year debarment ordered by the ALJ); *Early & Sons, Inc.,* WAB No. 86–25, 1987 WL 247044, at *1–2 (Jan. 29, 1987) (same); *Warren E. Manter Co., Inc.,* WAB No. 84–20, 1985 WL 167228, at *2–3 (June 21, 1985) (same). Under current case law, ''aggravated or willful'' violations of the Related Acts labor standards provisions warrant a 3-year debarment period ''absent extraordinary circumstances.'' *A. Vento Constr.,* WAB No. 87–51, 1990 WL 484312, at *6. ALJs have grappled with determining the appropriate length of debarment in Related Acts cases. *Id.* In the NPRM, Department noted its belief that setting a uniform 3-year debarment period would provide clarity and promote consistency.

Further, the Department remarked that it had concluded that in instances—usually decades ago—when debarment for a period of less than 3 years had been found to be warranted, it had not improved the debarment process or compliance. *See, e.g., Rust Constr. Co., Inc.,* WAB No. 87–15, 1987 WL 247054, at *2 (Oct. 2, 1987) (1-year debarment), *aff'd sub nom. Rust Constr. Co., Inc.* v. *Martin,* 779 F. Supp. 1030, 1032 (E.D. Mo. 1992) (affirming WAB's imposition of 1-year debarment instead of no debarment, noting ''plaintiffs could have easily been debarred for three years''); *Progressive Design & Build Inc.,* WAB No. 87–31, 1990 WL 484308, at *3 (Feb. 21, 1990) (18-month debarment); *Morris Excavating Co., Inc.,* WAB No. 86–27, 1987 WL 247046, at *1 (Feb. 4, 1987) (6-month, instead of no, debarment).

For the above reasons, the Department proposed to modify the period of Related Acts debarment to mirror the DBA's mandatory 3-year debarment when contractors are found to have disregarded their obligations to workers or subcontractors.

The Department also proposed to eliminate the provision at 29 CFR 5.12(c) that allows for the possibility of early removal from the debarment list for Related Acts contractors and subcontractors. The Department stated that in its experience, the possibility of early removal from the debarment list has not improved the debarment process. Just as Related Acts debarment for fewer than 3 years has rarely been permitted, early removal from the debarment list has seldom been requested, and it has been granted even less often.

Similarly, the ARB and WAB do not appear to have addressed early removal for decades. When they have, the ARB and WAB affirmed denials of early removal requests. *See Atl. Elec. Servs., Inc.,* ARB No. 96–191, 1997 WL 303981, at *1–2 (May 28, 1997); *Fred A. Nemann,* WAB No. 94–08, 1994 WL 574114, at *1, *3 (June 27, 1994). Around the same time, early removal was affirmed on the merits in only one case. *See IBEW Loc. No. 103,* ARB No. 96–123, 1996 WL 663205, at *4–6 (Nov. 12, 1996). Additionally, the early-removal provision has caused confusion among judges and the regulated community concerning the proper debarment standard. For example, an ALJ erroneously relied on the regulation for early relief from Related Acts debarment in recommending that a contractor not be debarred under the DBA. *See Jen-Beck Assocs., Inc.,* WAB No. 87–02, 1987 WL 247051, at *1–2 (July 20, 1987) (remanding case to ALJ for a decision ''in accordance with the proper standard for debarment for violations of the [DBA]''). Accordingly, the Department proposed to amend § 5.12 by deleting paragraph (c) and renumbering the remaining paragraph to accommodate that revision.

(3) Debarment of Responsible Officers

The Department also proposed to revise 29 CFR 5.12 to expressly state that responsible officers of both DBA and Related Acts contractors and subcontractors may be debarred if they disregard obligations to workers or subcontractors. The purpose of debarring individuals along with the entities in which they are, for example, owners, officers, or managers is to close a loophole where such individuals could otherwise continue to receive Davis-Bacon contracts by forming or controlling another entity that was not debarred. The current regulations mention debarment of responsible officers only in the paragraph addressing the DBA debarment standard. *See* 29 CFR 5.12(a)(2). But it is well-settled that they can be debarred under both the DBA and Related Acts. *See Facchiano Constr.,* 987 F.2d at 213–14 (noting that debarment of responsible officers is ''reasonable in furthering the remedial goals of the Davis-Bacon Act and Related Acts'' and observing that there is ''no rational reason for including debarment of responsible officers in one regulation, but not the other''); *Hugo Reforestation, Inc.,* ARB No. 99–003, 2001 WL 487727, at *12 (Apr. 30, 2001) (CWHSSA; citing Related Acts cases); *see also Coleman Constr. Co.,* ARB No. 15–002, 2016 WL 4238468, at *12 (''Although the regulations do not explicitly grant authority to debar individual corporate

officers in Related Act cases, the regulations have been interpreted to grant such authority for decades.''). Thus, by expressly stating that responsible officers may be debarred under both the DBA and Related Acts, this proposed revision merely codifies current law. The Department explained that it intended that Related Acts debarment of individuals would continue to be interpreted in the same way as debarment of DBA responsible officers has been interpreted.

(4) Debarment of Other Entities

The Department proposed another revision so that the Related Acts regulations mirror the DBA regulations not only in practice, but also in letter. Specifically, the Department proposed to revise 29 CFR 5.12(a)(1) (with conforming changes in § 5.12 and elsewhere in part 5) to state that ''any firm, corporation, partnership, or association in which such contractor, subcontractor, or responsible officer has an interest'' must be debarred under the Related Acts, as well as the DBA. The DBA states that ''No contract shall be awarded to persons appearing on the list or to any firm, corporation, partnership, or association in which the persons have *an interest.*'' 40 U.S.C. 3144(b)(2) (emphasis added); *see* 29 CFR 5.12(a)(2). In contrast, the current regulations for Related Acts require debarment of ''any firm, corporation, partnership, or association in which such contractor or subcontractor has *a substantial interest.*'' 29 CFR 5.12(a)(1) (emphasis added); *see* 29 CFR 5.12(b)(1), (d).

The 1982 final rule preamble for these provisions indicated that the determination of ''interest'' (DBA) and ''substantial interest'' (Related Acts) was intended to be the same: ''In both cases, the intent is to prohibit debarred persons or firms from evading the ineligibility sanctions by using another legal entity to obtain Government contracts.'' 47 FR 23658, 23661 (May 28, 1982), *implemented by* 48 FR 19540 (Apr. 29, 1983). It is ''not intended to prohibit bidding by a potential contractor where a debarred person or firm holds only a nominal interest in the potential contractor's firm,'' and ''[d]ecisions as to whether 'an interest' exists will be made on a case-by-case basis considering all relevant factors.'' *Id.* In the NPRM, the Department proposed to eliminate any confusion by requiring the DBA ''interest'' standard to be the standard for both DBA and Related Acts debarment.

(5) Debarment Scope

The Department proposed to revise the regulatory language specifying the scope of Related Acts debarment so that it mirrors the language specifying the scope of DBA debarment set forth in current 29 CFR 5.12(a)(2). Currently, under the corresponding Related Acts regulation, § 5.12(a)(1), contractors are not generally debarred from being awarded all contracts or subcontracts of the United States or the District of Columbia, but rather are only barred from being awarded contracts or subcontracts subject to Davis-Bacon and/or CWHSSA labor standards provisions, *i.e.,* ''subject to any of the statutes listed in § 5.1.'' As proposed in revised § 5.12(a)(1), in Related Acts as well as DBA cases, any debarred contractor, subcontractor, or responsible officer would be barred for 3 years from ''[being] awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of any of the statutes referenced by § 5.1.''

The Department's belief is that there is no reasoned basis to prohibit debarred contractors or subcontractors whose violations have warranted debarment for Related Acts violations from receiving DBRA contracts or subcontracts, but to permit them to continue to be awarded other, non-DBRA-covered contracts or subcontracts with the United States or the District of Columbia that parties debarred under the DBA are statutorily prohibited from receiving during their debarment period. The proposed changes to § 5.12(a)(1) would eliminate this anomalous situation, and apply debarment consistently to contractors, subcontractors, and their responsible officers who have disregarded their obligations to workers or subcontractors, regardless of the nature of the of Federal contract or subcontract for the work.

(C) Discussion

The Department received many comments about its proposed debarment provisions. Most of the comments, including organized IUOE and SMACNA member campaign comments, expressed general support for the debarment proposals in their entirety. A few organizations, including a group of civil rights and workers' rights organizations, unions, and labor-management organizations, specified the detailed reasons for their support. Several commenters opposed the proposals entirely, giving reasons for their opposition.

As an overarching matter, commenters that supported the debarment proposals did so because the proposal would promote consistent enforcement of the DBRA labor standards provisions. Supporting commenters generally agreed that the proposed uniform debarment standards and procedures (*e.g.,* mandatory 3-year debarment, no option for early removal, responsible officer, and/or interest proposals) would provide clarity for, among others, the regulated community and, thus, enhance compliance with the DBRA labor standards provisions. *See, e.g.,* Balance America, Inc., CEA, LCCHR, Fair Contracting Foundation of Minnesota, UBC, LIUNA.

Commenters like FFC noted that having one debarment standard would be easier to understand for both workers and contractors. UBC supported the single debarment standard because it would eliminate confusion for adjudicators and the regulated community and improve efficiency for the Department. LCCHR also supported the uniform 3-year debarment period without early removal to promote clarity as to regulatory obligations and compliance.

Among supporters, many comments praised the proposal's impact on worker protection. For example, III–FFC and LCCHR supported the uniform ''disregard of obligation'' debarment standard because it would reach contractor behavior that is essential for compliance with Davis-Bacon and CWHSSA labor standards, but that may not have been deemed to rise to the level of aggravated or willful behavior under the existing Related Act debarment standard. LCCHR gave as examples of such behavior a contractor's failure to establish appropriate procedures to classify laborers or mechanics correctly and to ensure that lower-tier subcontractors are in compliance with DBRA labor standards requirements. These and other commenters applauded the proposed harmonized debarment standards because they would strengthen worker protections, in part by reducing disincentives to underpay workers—in some cases repeatedly—as well as by enhancing enforcement. *See, e.g.,* FFC, IUOE Local 77, LIUNA.

Several commenters emphasized the importance of uniform, clear debarment standards to further protect workers and DBRA-compliant contractors by deterring contractors that treat violations as part of their business model due in part to the unlikelihood of being debarred. The Fair Contracting Foundation of Minnesota explained that in their experience, contractors that show a disregard for labor standards obligations on one project without significant consequences often go on to demonstrate a similar disregard on future projects. They, therefore, supported the single debarment

standard as well as the mandatory 3-year debarment and interest provisions to further protect workers and DBRA-compliant contractors, incentivize compliance, and promote consistent enforcement of labor standards requirements. ACT Ohio asserted that violators of the DBRA rarely face debarment from Federal contracts, no matter how egregious the violation. And LCCHR highlighted watchdog group findings that the Federal government has awarded contracts to contractors that have repeatedly violated Federal laws like the DBA, such as a report asserting that in fiscal year 2017 Federal agencies spent over $425 million on contractors that had been found to have violated the DBA in 2016. UBC noted that applying the lower debarment threshold to Related Act violations would increase deterrence.

A number of commenters similarly supported the harmonized debarment standard as a way to hold repeat contractors accountable. *See, e.g.,* ACT Ohio, Foundation for Fair Contracting of Connecticut, Inc. (FFC–CT). They noted that the different debarment standards could allow violators to remain out of compliance without facing real consequences beyond just paying back wages. FFC–CT explained that debarment is a real consequence that sends a message to government contractors that ''we expect them to be responsible stewards of public monies.''

Those commenters that supported the proposed changes also affirmed the importance of the Department's proposal to codify existing law regarding debarment of responsible officers. The UA emphasized the need to debar individuals so that they cannot ''avoid accountability by setting up shop as another entity.'' LCCHR noted their support for the responsible officers proposal, which is consistent with existing law.

Some supporting commenters went further and claimed that the current two debarment standards are inconsistent, *see, e.g.,* FFC, or even arbitrary and capricious, *see, e.g.,* NABTU. NCDCL claimed that the heightened Related Act standard ''arbitrarily makes it more difficult to debar contractors for violations of the DBRA.'' LCCHR asserted that there is no principled reason for employing two different debarment standards for contractors that are otherwise subject to the same contractual requirements. NABTU cited *Transactive Corp.* v. *United States,* 91 F.3d 232, 237 (D.C. Cir. 1996) and *Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2127 (2016) in support of its claim that the different DBA and Related Act debarment standards ''are arbitrary and capricious because they treat identical situations differently without a reasonable basis.'' LCCHR also objected to the inconsistent consequences for similar behavior under the current DBRA debarment framework.

Among commenters who opposed the Department's debarment proposals in their entirety, several challenged the Department's authority to change the debarment standard for Related Acts. ABC and IEC questioned the Department's authority to implement a uniform standard for DBA and Related Act debarments. ABC argued that since Congress had not adopted the DBA standard for Related Act debarments, the Department could not ''unilaterally impose a unitary debarment test.'' ABC claimed that if in the 70 years since the Department established by regulation in 1951 Congress had wanted to impose the DBA's ''inflexible and easier to prove'' ''disregard of obligations'' debarment standard, it could easily have done so, and that the Department had provided no specific justification for this ''radical change.'' IEC objected to applying the DBA debarment standard to Related Acts, stating without further explanation that this broadening would likely exceed ''the statutory authority of several if not all of the 'Related Acts.' ''

Next, unlike commenters that noted that a uniform debarment standard would lead to more consistent enforcement, a few commenters contended that the Department's proposed changes would not achieve these results or were too burdensome. The group of U.S. Senators claimed that the fact-specific nature of the DBA ''disregard of obligations'' standard is ''ambiguous'' and would lead to ''the same supposed 'inconsistencies' '' the Department sought to address in the proposed rule. They also claimed that in the NPRM, the Department failed to explain the ''disregard of obligations'' standard, which would pose a greater obstacle to small firms bidding on ''federal contracts covered by the DBRA [that are] in essence nearly the entirety of federal procurement.'' In addition, the group of U.S. Senators questioned the Department's claim that the willful or aggravated standard has been interpreted inconsistently over the decades, alleging that this claim is ''dubious'' because of ''the volatile manner in which DOL calculates prevailing wage rates.''

Unlike commenters who lauded the proposal's enhanced enforcement and worker protection and clarity for the regulated community and other stakeholders, FTBA and the group of U.S. Senators asserted that the proposed harmonized debarment provisions would have a negative impact on contractors, especially small and mid-size contractors. FTBA asserted that compliance with certain aspects of DBA requirements like the classification of work and coverage issues such as the site-of-the-work limitation can be ''extraordinarily difficult even for contractors with robust compliance processes.'' FTBA and ABC faulted the Department for not proposing changes such as greater transparency about proper classification of workers on wage determinations, instead of relying on ''unpublished union scope of work claims'' or ''unpublished union work rules'' that make it challenging for non-union contractors to properly determine job classifications.[268] The group of U.S. Senators asserted that small and mid-size contractors are at greater vulnerability of ''unintentionally violating incomprehensible prevailing wage requirements.''

To support its claim that the Department's debarment and other proposals would be an ''impermissible burden on the private sector,'' the group of U.S. Senators alleged that the Department's proposal to eliminate the aggravated or willful debarment standard would ''lower[ ] the burden of persuasion to a 'disregard of obligations' [and] ensnare many small contractors into debarment proceedings.'' According to the group of U.S. Senators, given the ''non-transparent and wasteful manner in which prevailing wages are calculated'' and ''less than consistent'' survey methods, small and mid-size contractors who ''lack administrative resources to keep abreast of DOL's nightmarishly bureaucratic administration of DBRA'' would be vulnerable to ''an ocean of legal liability as a result of the new debarment standard.'' FTBA asserted that there was no compelling reason for the Department to choose the ''more rigid threshold and longer debarment period'' given that debarment is a remedial, not punitive measure.

ABC also objected to the Department's proposals to revise § 5.12(a)(2) to

[268] The Department did not include the publication of ''union work rules'' in the proposed rule, and therefore, such an initiative is outside the scope of this rulemaking. However, the Department recognizes that it is important that contractors be able to understand wage determinations and comply with their obligations to pay laborers and mechanics prevailing wages based on the appropriate labor classifications in the applicable wage determination. Therefore, the Department will continue to address the clarity of wage determinations at the subregulatory level. The Department believes that the modifications to the enforcement procedures in part 5 of this rulemaking should be implemented along with continued efforts to improve compliance.

expressly include responsible officers and entities in which they have a ''substantial [sic] interest'' for debarment purposes, claiming that the NPRM offered little guidance as to how responsible officers would be determined or what constitutes a substantial interest in a debarred company. ABC requested additional guidance about these provisions.

The Department considered all the comments it received about its proposals to harmonize the DBA and Related Act debarment standards by adopting the DBA's debarment provisions for all DBRA debarments. As explained below, the Department adopts the debarment provisions as proposed.

As many of the supporting commenters underscored, a primary benefit of the harmonized debarment provisions, most notably the change to a single ''disregard of obligations'' debarment standard, will be to improve consistency of—and, thus, effectiveness of—enforcement and coordination of administration of the DBRA, as Reorganization Plan No. 14 of 1950 directs the Department to do. The unitary debarment standard will also advance Reorganization Plan No. 14 of 1950's related objective of ''more uniform and adequate protection for workers.'' 1950 Special Message to Congress.

Although the Related Act debarment standard adopted in 1951 was also implemented to try to accomplish Reorganization Plan No. 14 of 1950's directive, it has become evident that more change is needed to achieve this objective. As explained in the NPRM, the dual debarment standard and related provisions have not achieved the goals the Department intended that they would, and, in some instances, have led to counterproductive results from inconsistent or erroneous application of the applicable standard(s), as well as from confusion about which standard applies. For example, in one case, a subcontractor and its principal claimed that they should not be debarred under the DBA because their violations were not ''willful or fraudulent,'' an apparent misunderstanding of the ''disregard of obligation'' standard. *NCC Elec. Servs., Inc.,* ARB No. 13–097, 2015 WL 5781073, at *6 n.25 (Sept. 30, 2015).[269]

As some commenters that supported this change asserted, the current dual debarment standard could be viewed as arbitrary or inconsistent to the extent that it treats contractors, subcontractors, and their responsible officers—who are subject to the same DBRA labor standards requirements and doing the same types of work—differently based solely on the source of Federal funding or assistance. The Department, however, does not agree with NABTU that the current dual debarment standards are impermissibly arbitrary or capricious. The Department also disagrees with FTBA that it did not explain why there were different debarment standards. As explained in the NPRM, the Department adopted a new part 5 in 1951 to comply with Reorganization Plan No. 14 of 1950's directive and made changes to Related Act debarment in 1964 in an effort to improve debarment provisions under that Reorganization Plan. The Department posits that the willful or aggravated Related Act standard may have been chosen in 1951 to lessen the effect on the regulated community of the expansion of debarment to Related Act violations by limiting debarment to more egregious violations, in an acknowledgement of the relative novelty of Related Act work at that time. This heightened standard may have been intended to accommodate the regulated community's relative inexperience with Related Act work, as well as the new part 5 provisions, most of which were new (other than Copeland Act requirements, which had existed since the mid-1930s).

The Department's 1964 changes to the Related Act 3-year debarment period may have corresponded with growing criticism in the early 1960s of Federal agency use of debarment and suspension without sufficient due process safeguards. *See, e.g.,* Robert F. Meunier & Trevor B. A. Nelson, ''Is It Time for a Single Federal Suspension and Debarment Rule?,'' 46 Pub. Cont. L.J. 553, 558–59, 559 n.29 (2017) (discussing judicial ''due process and fundamental fairness requirements'' developments in debarment and suspension beginning in the 1960s and extending through the 1990s); *see also Copper Plumbing & Heating Co.,* 290 F.2d at 371–73 (affirming the Department's regulatory authority to debar contractors for willful or aggravated violations of Related Acts such as the Eight Hour Laws, and in dicta mentioning that ''upon a proper showing [of responsibility] it appears'' the contractor's petition for removal from the Comptroller General's ineligible list ''would have been granted'').

There are now more than 70 Related Acts, and federally assisted construction work is prevalent. Since the same Davis-Bacon contractual obligations apply on Related Act projects as on DBA projects, with a few exceptions mandated by statute,[270] the regulated community's familiarity with their labor standards obligations on Related Acts has also increased over this time. Due process safeguards include that the DBRA regulations require notification of violation findings and an opportunity to request a hearing when WHD finds reasonable cause to believe that debarment is warranted.

Moreover, in the decades since the Related Act debarment provisions went into effect, as explained in the NPRM, it has become clear that having two debarment standards has not always improved consistency of enforcement and administration and, at times, has had the opposite effect. It has become evident that the flexibility of a possible shorter debarment period of under 3 years and the possibility of early removal from the debarment list, aside from rarely being used over the past 2 or 3 decades, have not improved the effectiveness of debarment, and at times, have impaired it. The Department agrees with commenters that the unitary debarment standard and concomitant related provisions (mandatory 3-year debarment period with no early removal, interest, responsible officers, and scope of debarment) will be easier to understand for the regulated community and adjudicators, and more consistent in application and result.

The final rule thus adopts a uniform debarment framework comprised of the longstanding DBA provisions. The DBA debarment provisions will enhance worker protection by eliminating the heightened Related Act standards, and the DBA standards are well-known to the regulated community. The

[269] While misunderstanding the applicable debarment standard has led to counterproductive results, contrary to the assertion of the group of U.S. Senators, for debarment purposes, it is irrelevant if contractors do not understand how WHD calculated or periodically adjusted applicable prevailing wages and fringe benefits. Although contractors are free to challenge the wage rates on a wage determination prior to contract award, if they do not challenge the rates prior to that date and instead agree to incorporation of the wage determination into their contract without modification, they have thereby accepted the wage rates as a part of their contract and have agreed to comply with those wage rates. In this context, given their commitment to pay no less than the wage rates listed in the wage determination that they have accepted as contractually binding, contractors do not need to understand how prevailing wage rates are determined to comply, but merely need to be able to look at the applicable wage determination and pay required rates listed on that wage determination, a task well within the capacity of even small firms.

[270] Such exceptions include the ''site of the work'' provision, which applies to DBA and most Related Act work, with the exception of CWHSSA and certain HUD projects under ''development statutes.'' Another difference is that under the DBA, the Department recommends debarment to the GAO for implementation, while under the Related Acts, the Department effectuates debarment.

Department emphasizes that the ''disregard of obligations'' standard is not ''new,'' as the group of U.S. Senators asserted. The Department also disagrees with ABC that this rule is a ''radical change.'' Rather, it takes the original, longstanding ''disregard of obligations'' debarment standard and applies it to all debarments, not only DBA debarments. Since 1935, the DBA has required debarment of ''persons or firms'' who have ''disregarded their obligations to employees and subcontractors'' as well as debarment of firms and other entities in which such debarred persons or firms have an ''interest.'' 40 U.S.C. 3144(b). Since willful or aggravated violations are, by definition, also a disregard of a contractor's obligations to workers or subcontractors, debarment for such violations will continue.

The Department disagrees with the allegation from the group of U.S. Senators that the fact-specific nature of the ''disregard of obligations'' standard is ''ambiguous'' and will lead to inconsistencies the Department is trying to address. First, aggravated or willful Related Act violations are also determined on a case-specific basis. Second, such totality of the circumstances analyses are common legal approaches, even in criminal law where a person's liberty is at stake. *See, e.g., Florida* v. *Harris,* 568 U.S. 237, 244 (2013) (describing the ''fluid concept'' of probable cause under the Fourth Amendment as a ''common-sensical standard'' that should evaluated by looking at the ''totality of the circumstances . . . a more flexible, all-things-considered approach'' and ''reject[ing] rigid rules, bright-line tests, and mechanistic inquiries'' for determining probable cause in case involving police search of a vehicle during a traffic stop); *see also Monasky* v. *Taglieri,* 140 S. Ct. 719, 723 (2020) (holding that a child's ''habitual residence'' for purposes of the Hague Convention ''depends on the totality of the circumstances specific to the case''); *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.,* 572 U.S. 545, 553–54 (2014) (holding that courts may consider the totality of the circumstances when determining whether a case is ''exceptional'' under Federal Patent Act provision concerning the award of attorney's fees to prevailing parties). The Department is confident that its case-by-case approach in the DBRA debarment context will continue to be fairly administered and readily understood by the regulated community.

Contractors on DBRA projects are charged with knowing the law, including the Davis-Bacon and CWHSSA labor standards requirements and the consequences, such as debarment, for violating them. *See, e.g., NCC Elec. Servs., Inc.,* ARB No. 13–097, 2015 WL 5781073, at *7 (''[T]here has to be a presumption that the employer who has the savvy to understand government bid documents and to bid on a Davis-Bacon Act job knows what wages the company is paying its employees and what the company and its competitors must pay when it contracts with the federal government'' (quotation marks omitted)); *cf. Abhe & Svoboda, Inc.,* 508 F.3d at 1059–60 (''Existing administrative and judicial decisions and the [DBA] itself put the Company on fair notice of what was required'' regarding classification of employees despite contractor's claim that ''general wage determinations did not indicate the proper method of classifying employees.'').

Being a government contractor carries with it attendant responsibilities, not least of which is complying with DBRA labor standards requirements. These obligations apply to all DBRA contractors, subcontractors, and responsible officers. Government contractors may be subject to debarment regardless of size and even if their disregard of obligations occurs on their first DBRA contract, or if WHD has not previously found violations. *See, e.g., Stop Fire, Inc.,* WAB No. 86–17, 1987 WL 247040, at *2 (June 18, 1987) (''The contention that this was a company's first Davis-Bacon Act job is not sufficient to relieve it from being placed on the ineligible list, absent other additional justification.''); *Morris Excavating Co., Inc.,* WAB No. 86–27, 1987 WL 247046, at *1 (rejecting ''principle that each contractor'' violating the DBRA ''gets one free shot at underpaying laborers and mechanics on a Davis-Bacon project until the time of enforcement'' and finding that 6-month debarment of a small contractor on relatively small contract doing ''localized specialty work'' was warranted despite workers' ''agree[ment] that [the firm] would pay them their regular wages now and the additional Davis-Bacon amount later'').

The Department believes that existing mechanisms are sufficient to address FTBA's concern about debarment in light of what they allege to be a lack of ''transparency'' about applicable classifications. If there is any uncertainty about which classifications apply to particular work, contractors may request clarification and information on local area practice, including from the contracting agency or WHD. If that further guidance indicates that the work in question is not performed by a classification listed on the wage determination, the issue may be resolved through the conformance process. Further, ''[c]ontractors who seek to perform work on a federal construction project subject to the Davis-Bacon Act have an obligation 'to familiarize themselves with the applicable wage standards contained in the wage determination incorporated into the contract solicitation documents.' '' *Am. Bldg. Automation, Inc.,* ARB No. 00–067, 2001 WL 328123, at *3–4 (Mar. 30, 2001) (citation omitted) (denying subcontractor's appeal of denial of conformance request in which subcontractor claimed it had no reason to believe that building automation and controls work fell within plumber classification). Firms of any size may also consult the extensive subregulatory materials that are available on WHD's website (including FOH chapters and the PWRB), request informal compliance assistance from WHD, or seek guidance in accordance with 29 CFR 5.13. More formally, contractors may request ruling letters from the Administrator.

The Department disagrees with the group of U.S. Senators that the NPRM did not adequately explain the ''disregard of obligations'' standard such that small firms could understand it. Not only did the NPRM contain an explanation of the standard, but also the Department has resources available on its website for those who desire more information about debarment criteria. Nevertheless, the Department takes this opportunity to expand upon the explanation in the NPRM about the types of actions and inactions that could constitute a debarrable disregard of obligations to workers or subcontractors under the rule. The additional examples of debarrable actions or omissions in this section are illustrative, not exhaustive.

As the Department highlighted in the NPRM, it is well settled that contractors, subcontractors, and responsible officers will be debarred for certain egregious or deliberate and knowing violations under both the disregard of obligations and aggravated or willful standards. For example, falsification of certified payroll combined with underpayment or misclassification—thus simulating compliance with Davis-Bacon or CWHSSA obligations—constitute aggravated and willful violations and, necessarily, a disregard of obligations to workers too. Falsification of certified payrolls can take various forms including, but not limited to, overreporting prevailing wages and/or fringe benefits paid; underreporting

hours worked; misclassifying workers who performed skilled trade work as laborers; omitting workers (often because they are paid less that required wages) from the payroll; and listing managers or principals who did not perform manual labor as laborers and mechanics.

Making workers ''kick back'' or return any portion of the prevailing wages is another DBRA violation that has warranted debarment under both the willful or aggravated and the ''disregard of obligations'' standards for decades. *See, e.g., Killeen Elec. Co.,* WAB No. 87–49, 1991 WL 494685, at *5. Such kickbacks have been illegal since 1934, when the Copeland ''Anti-Kickback'' Act was passed and can even result in criminal prosecution. *See* 48 Stat. 948 (June 13, 1934); *see also* section III.B.3.xix (''Anti-Retaliation''). When the DBA was amended in 1935, Congress not only added the debarment sanction, but also ''the provision that each contract shall contain a stipulation requiring unconditional weekly payments without subsequent deductions or rebates'' to try to eliminate the ''illegal practices of exacting rebates or kick-backs.'' H. Rep. No. 74–1756, at 3 (1935); S. Rep. No. 74–1155, at 3 (1935); 40 U.S.C. 3142(c)(1). Regulations implementing the Copeland Act's requirement that contractors and subcontractors submit weekly statements about wages paid each worker—with some variation and changes over the years—have been in place since 1935, except for a ''three-year hiatus from 1948 to 1951.'' *Donovan,* 712 F.2d at 630; *see also* 6 FR 1210, 1210–1211 (Mar. 1, 1941) (requiring contractors and subcontractors to provide weekly sworn affidavits regarding wages paid during preceding pay roll period); 7 FR 686, 687–88 (Feb. 4, 1942).

Other categories of willful or aggravated actions that necessarily warrant debarment under the lower ''disregard of obligations'' standard include, but are not limited to, contractor efforts to require or coerce workers to lie to the Department or contracting agencies about their wages paid and hours worked, or to refuse to cooperate with such enforcement efforts at all by instructing workers to leave the job site when investigators are conducting worker interviews. These actions are akin to falsification of payroll or destruction of records to the extent that such actions are intended to simulate compliance or, at least, hide noncompliance.

While disregard of obligations ''need not be the equivalent of intentional falsification,'' DBA violations alone do not constitute a disregard of obligations warranting debarment. *See NCC Elec. Servs., Inc.,* ARB No. 13–097, 2015 WL 5781073, at *6, *10; *Structural Concepts, Inc.,* WAB No. 95–02, 1995 WL 732671, at *3 (Nov. 30, 1995) (the strict liability standard for holding prime contractors liable for back wages owed to workers has not been extended to debarment under the DBA). For example, in *Structural Concepts,* the Board reversed an ALJ's debarment order because the Board could not conclude from the evidence presented that the prime contractor's principal knew or should have known of the subcontractor's falsified certified payrolls, and when the principal did find out about the subcontractor's DBA violations, they took reasonable action by cancelling the subcontract. *Id.*

The Department reiterates, as it explained in the NPRM, that contractors' bad faith or grossly negligent actions or inactions can be a disregard of their DBRA obligations warranting 3-year debarment. While merely inadvertent or negligent conduct or innocuous mistakes would not warrant debarment, conduct evidencing an intent to evade, or a purposeful lack of attention to, statutory or regulatory obligations warrant debarment. ''Blissful ignorance is no[t]'' and will continue not to be a ''defense to debarment.'' *Fontaine Bros., Inc.,* ARB No. 96–162, 1997 WL 578333, at *3.

Debarment under the ''disregard of obligations'' standard requires some element of intent or culpability beyond mere negligence. *P&N, Inc./Thermodyn Mech. Contractors, Inc.,* ARB No. 96–116, 1996 WL 697838, at *4, *7 (Oct. 25, 1996); *NCC Elec. Servs., Inc.,* ARB No. 13–097, 2015 WL 5781073, at *6. The Department, thus, disagrees with the claim from the group of U.S. Senators that small and mid-size contractors are at greater vulnerability of debarment for ''unintentionally violating'' prevailing wage requirements. Truly unintentional violations that are merely negligent would not merit debarment as a disregard of obligations.

The Board has explained the difference between violations that constitute a disregard of obligations to workers or subcontractors and those that are willful or aggravated violations. For example, an ''intentional failure to look at what the law requires'' may not rise to a deliberate, knowing, and intentional action that constitutes a willful or aggravated violation of the Related Acts. *Interstate Rock Prods., Inc.,* ARB No. 15–024, 2016 WL 5868562, at *4 (''Intentional disregard of obligations may therefore include acts that are not willful attempts to avoid the requirements of the DBA.''). The Board went on to explain that ''contractors and subcontractors [may not] ignore the rules and regulations applicable to DBA contracts, pay their employees less than prevailing wages, and avoid debarment by asserting that they did not intentionally violate the DBA because they were unaware of the Act's requirements.'' *Id.* Similarly, gross negligence and bad faith can constitute a disregard of obligations. *NCC Elec. Servs., Inc.,* ARB No. 13–097, 2015 WL 5781073, at *6 & n.22.

For example, a contractor or subcontractor's failure to ''look to [their] obligations under DBA,'' a failure to read DBA provisions on a contract, a failure ''to keep proper records tracking the actual work performed,'' and failing to flow down Davis-Bacon labor standards provisions to lower-tier subcontractors would be a disregard of obligations because government contractors are expected to know the law. *Id.* at *7. A subcontractor's failure to read DBRA provisions the prime contractor included in its subcontract and its failure to include the DBA provision in its own subcontract with a lower-tier contractor also has been held to constitute a disregard of the debarred subcontractor's obligations to be aware of the DBA requirements and to ensure its lower-tier subcontractor complied with wage payment and record keeping requirements. *See Ray Wilson Co.,* ARB No. 02–086, 2004 WL 384729, at *10.

Recordkeeping violations short of falsification have led to debarment in various Related Act cases. *See, e.g., Fontaine Bros., Inc.,* ARB No. 96–162, 1997 WL 578333, at *3 (affirming debarment of a contractor that failed to keep records of any payroll deductions or to keep any records for workers paid in cash); *P.B.M.C., Inc.,* WAB No. 87–57, 1991 WL 494688, at *7 (debarment appropriate where contractor failed to record workers' piecework production and hours worked). The regulations notify contractors that ''failure to submit the required records upon request or to make such records available may be grounds for debarment.'' 29 CFR 5.5(a)(3)(iii) (current). Under the final rule, such required records now also include contracts and related documents. *See* 29 CFR 5.5(a)(3)(iii). In one case, a contractor's failure to submit certified payrolls on a timely basis—it waited 9 weeks before submitting the first nine certified payrolls—also constituted a disregard of its obligations warranting debarment. *Sealtite Corp.,* WAB No. 87–06, 1988 WL 384962, at *4 (Oct. 4 1988).

A disregard of contractors' compliance and oversight

responsibilities could also result in debarment under the DBA standard. ''[F]ailure to properly instruct [subordinates] in the preparation of the payrolls'' could result in debarment under the DBA. *C.M. Bone,* WAB No. 78–04, 1978 WL 22712, at *1 (Sept. 13, 1978); *see also Ray Wilson Co.,* ARB No. 02–086, 2004 WL 384729, at *10. Another example of actions or omissions that could result in debarment under the unitary standard includes a failure to flow down the applicable wage determination and Davis-Bacon and/or CWHSSA labor standards provisions to lower-tier subcontractors.

While there will be a subset of violations that would only have been debarrable under the DBA ''disregard of obligations'' standard but now will be potentially subject to debarment under both the DBA and Related Acts, the Department does not anticipate that this subset of violations will be particularly large or the violations novel. First, as explained in the NPRM and reiterated in this section above, many of the same types of violations have long been debarrable under both the DBA and Related Acts (*e.g.,* falsification of certified payrolls coupled with underpayment or misclassification, kickbacks). Second, in some cases involving projects subject to both DBA and Related Acts, the Board previously has decided debarment based on the laxer DBA ''disregard of obligations'' standard. *See, e.g., Interstate Rock Prods.,* ARB No. 15–024, 2016 WL 5868562, at *8 n.36 (affirming debarment for misclassification under the DBA ''laxer standard'' which ''render[ed] debarment under the [Related Acts] redundant and moot); *P&N, Inc./Thermodyn Mech. Contractors, Inc.,* ARB No. 96–116, 1996 WL 697838, at *2 & n.7 (distinguishing between the DBA and Related Act standards and applying the less strict DBA standard because case involved violations of both DBA and CWHSSA).

The Department expects the change to a single debarment standard—the current ''disregard of obligations'' standard instead of the heightened aggravated or willful standard—will further the remedial goals of the DBRA by more effectively enlisting the regulated community in compliance with the Davis-Bacon and CWHSSA labor standards requirements. The Department's decision to change to a single debarment standard rests in part on its belief that extending the current ''disregard of obligations'' standard to all DBA and Related Act debarments will promote ''the cooperation of the employer, largely through self-enforcement,'' in complying with the DBRA requirements. *Facchiano Constr.,* 987 F.2d at 214. As echoed by various commenters, this change makes particular sense since DBA and Related Act construction work is otherwise generally subject to the same Davis-Bacon labor standards.

The Department agrees with the many commenters who emphasized the importance of preventing repeat violations by contractors who may not be debarred the first time they are found to have violated the DBA or Related Acts. The Department echoes the importance of incentivizing compliance by contractors and their responsible officers on every project, particularly in light of limited enforcement resources vis-a-vis the number of potentially affected workers on DBRA-covered projects. To the extent some unscrupulous contractors' business models even rely on the likelihood of their violations going undetected, as some commenters asserted, strengthening the debarment remedy takes on an even greater importance for repeat, or potential repeat, violators.

Similar concerns animated the 1935 amendments to the DBA, which until then had no enforcement provisions. The legislative history indicates that Congress added debarment, one such enforcement power, in part to address the problem of repeat violators getting new Davis-Bacon contracts. *See, e.g.,* S. Rep. No. 74–332, pt. 3, at 11 (1935) (noting the need to ''speedily remed[y]'' the situation in which the requirement to award contracts to the lowest responsible bidder resulted in ''the anomaly . . . where violators of prevailing wage scales and even contractors who have actually been guilty of dishonest practices, such as defrauding their workmen . . . were granted additional contracts by the Government''). Congress in 1935, thus, implemented a ''[s]ystem of coordination between various Government Departments to assure that the Government will not be in the position of continuing to contract with a contractor who disregards his obligations to his employees and subcontractors.'' H. Rep. No. 74–1756, at 2 (1935); S. Rep. No. 74–1155, at 2 (1935). The debarment provision ''further penalizes offending contractors and subcontractors by disqualifying them for 3 years from their privilege of bidding for Government contracts''—a measure to arm the Department and contracting agencies with another tool for departments not to have to ''continue to deal'' with ''bidders [who] had been notorious violators of the Davis-Bacon Act in the past.'' H. Rep. No. 74–1756, at 3; S. Rep. No. 74–1155, at 3.

As commenters asserted, it is not uncommon for contractors and their responsible officers found to have engaged in debarrable conduct under the DBRA to have committed similar violations on other projects. The Department expects that adopting the ''disregard of obligations'' debarment standard for Related Act violations may reduce repeat violations by contractors, subcontractors, and their responsible officers, since they will face the possibility of debarment on Related Act-only projects for a broader range of actions and inactions than under the current dual debarment framework.

The Department is authorized to harmonize the DBRA debarment standards by substituting the DBA standard for that of the Related Acts. Contrary to commenters who asserted the Department does not have the authority to do so, and as discussed in more detail in section III.B.3.xix (''Anti-Retaliation''), since 1950, Congress has repeatedly recognized the Secretary's authority and functions under Reorganization Plan No. 14 of 1950—as recently as November 2021. *See* IIJA 41101, 42 U.S.C. 18851(b). And in 1984 Congress ratified and affirmed Reorganization Plan No. 14 of 1950 as law. Reorganization Plan No. 14 of 1950 expressly authorizes the Department to adopt regulations that promote consistent enforcement and more efficient administration of the DBRA. The Department anticipates that having one debarment standard instead of two will do just that. Just as the Department was authorized to implement regulatory debarment under the willful or aggravated standard under the Related Acts in 1951, so too may it now adjust that standard to the ''disregard of obligations'' standard in order to more effectively promote the remedial goals of the DBRA.

The Department, therefore, disagrees with commenters that claimed that it lacks authority to adopt the ''disregard of obligations'' standard for debarment under the Related Acts. IEC, for example, did not cite any specific statutory provision or other law to support their contention that this rule exceeds the Department's authority under ''several if not all'' of the Related Acts. Reorganization Plan No. 14 of 1950 has consistently been applied to Related Acts even where it is not specifically referenced in the Related Act.

Regulatory debarment outside the DBRA context as a ''means for accomplishing [a] congressional purpose,'' *Gonzalez* v. *Freeman,* 334

F.2d 570, 577 (D.C. Cir. 1964), or to support ''the integrity and effectiveness of federally funded activities,'' Meunier & Nelson, *supra,* at 556–57, is not uncommon. In the 1980s, debarment and suspension from Federal procurement and nonprocurement transactions was promulgated in the FAR and the Non-procurement Common Rule, respectively. *See* FAR Subpart 9.4, 48 CFR 9.400–409 (procurement debarment, suspension, and ineligibility); 2 CFR part 180 (OMB guidelines to agencies on governmentwide debarment and suspension (nonprocurement, *e.g.,* Federal grants, loans, and other forms of assistance)); *see also* 48 FR 42102, 42148 (Sept. 19, 1983) (establishing the FAR); 53 FR 19161 (May 26, 1988) (memorandum about publication of final government-wide nonprocurement common rule); Meunier & Nelson, *supra,* at 554–57. As such, the regulated community is or should be familiar with the general concept of debarment or suspension being a consequence for misuse of Federal funding or assistance.[271]

In addition to the decisions upholding regulatory debarment for Related Act willful or aggravated violations discussed in the NPRM, courts have upheld regulatory debarment and suspension measures absent express Congressional authority for such provisions, provided there are certain minimum fairness safeguards. *See, e.g., Gonzalez,* 334 F.2d at 576–77 (finding statute that made no explicit provision for debarring contractors doing business with the agency authorized debarment of ''irresponsible, defaulting or dishonest'' bidders and contractors, a power ''inherent and necessarily incidental to the effective administration of the statutory scheme''); *cf. Jacquet,* 569 F.2d at 1345 (upholding regulation temporarily disqualifying households that fraudulently acquired food stamps, which was ''appropriate for the effective and efficient administration of the program'' and ''[gave] the administrative authorities a tool with which to protect the program from those who would abuse it'' and was authorized despite the Food Stamp Act's silence about such disqualification). Such administrative debarment power comes with ''an obligation to deal with uniform minimum fairness as to all.'' *Gonzalez,* 334 F.2d at 577. Specifically, ''[c]onsiderations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.'' *Id.* at 578. Although the Department's rule eliminates the provisions providing for the possibility of debarment for fewer than 3 years and early removal from the debarment list, as mentioned above, the Department's debarment procedures accord contractors and responsible officers extensive due process protections to challenge their debarment in the first instance.[272]

The Department also disagrees with FTBA that it should (or could) make the unitary debarment standard the heightened Related Act standard with the possibility of a shorter period and early removal. The Department cannot change the DBA disregard of obligation standard, the mandatory 3-year period, or the extension of debarment to entities in which a debarred person or firm has an interest because those provisions are statutory, not regulatory. The Department may, however, under its statutory and implied powers of enforcement, bring Related Act debarments within the DBA debarment framework of a lower standard, mandatory 3-year period, and no possibility of early removal. The Department has long had procedures in place that provide contractors, ''responsible officers,'' and other affected parties ample notice of the findings against them, an opportunity to request a hearing in which they could contest those findings, and the ability to appeal adverse decisions. *See* 29 CFR 5.11, 5.12, pts. 6, 7, 18. These robust procedures include safeguards for the regulated community if they choose to challenge—as they have been able to do for decades—3-year debarment for disregarding their obligations, albeit in all DBRA cases under the final rule, not just DBA cases. The rule's harmonized debarment provisions will further the DBRA's remedial goals of protecting workers, with all the attendant procedural safeguards for the regulated community.

As part of the revisions to harmonize debarment provisions, the Department is codifying both existing case law about debarment of ''responsible officers'' in Related Act cases and the Department's position about debarment of entities in which debarred parties have an ''interest.'' The Department agrees with the UA that absent debarment of such individuals and entities, debarred parties could avoid debarment sanctions by setting up shop as a new entity to obtain government contracts. In response to ABC's request for more guidance about how responsible officers would be determined or what constitutes a substantial interest in a debarred company, the Department reiterates that these changes do not effect a substantive change in the law or how it is applied, as noted in the NPRM (and restated above). These determinations—both in the current regulations and final rule—are made on a case-by-case basis considering all relevant facts, and in the relatively rare circumstances in which there are issues regarding who qualifies as a responsible officer or what constitutes an interest in a debarred company, information regarding those issues is available through various public Departmental resources. *See e.g.,* 47 FR 23661 (1982 final rule).

In determining whether an individual responsible officer's debarment is warranted, the Department evaluates factors such as involvement in and responsibility for running the company; status as an officer and/or principal of the entity (although status alone is not determinative); actual or constructive knowledge of or gross negligence with respect to DBRA obligations (*e.g.,* failure to ensure present or future compliance with applicable labor standards, failure to correct ongoing violations, etc.); and/or violations (*e.g.,* underpayments, misclassification, incomplete, inaccurate, or falsified payroll and timekeeping, etc.). *See, e.g., Facchiano Constr.,* 987 F.2d at 213–15; *Pythagoras Gen. Contracting Corp.,* ARB Nos. 08–107, 09–007, 2011 WL 1247207, at *13–14, *13 n.94. Responsible company officials cannot ''avoid debarment by claiming that the labor standards violations were committed by employees of the firm.'' *Superior Masonry, Inc.,* WAB No. 94–19, 1995 WL 256782, at *5 (Apr. 28, 1995). The Department notes much of the same analysis to determine whether a firm has disregarded its obligations and should be debarred will apply to determine whether an individual is a

[271] As with debarment under the DBA and Related Acts, the policy for debarment, suspension, and ineligibility under the FAR underscores that ''[t]he serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment.'' 48 CFR 9.402(b); *see also Gonzalez,* 334 F.2d at 576–77 (''Notwithstanding its severe impact upon a contractor, debarment is not intended to punish but is a necessary 'means for accomplishing the congressional purpose''' at issue in that case).

[272] The Department notes that contrary to the comment from the group of U.S. Senators, the regulations do not change any of the existing evidentiary burdens (*e.g.,* ''burden of persuasion''). WHD will continue to have to prove violations in administrative proceedings by a preponderance of the evidence.

responsible officer of the firm whose debarment is warranted.

To determine whether a debarred firm or person has an ''interest'' in another entity that should also be debarred, the Department will consider such factors as the debarred party's ownership interest, extent of control of the related entity's operations, whether the related entity was formed by a person previously affiliated with or a relative of the debarred party, and whether there is common management. *See, e.g., R.C. Foss & Son, Inc.,* WAB No. 87–46, 1990 WL 484311, at *2, *4 (Dec. 31, 1990) (affirming Related Act debarment of entity owned by wife of debarred subcontractor's principal owner and for which debarred owner was performing same functions as he had performed for debarred subcontractor); *see generally Charles Randall,* LBSCA No. 87–SCA–32, 1991 WL 733572 (Dec. 9, 1991) (SCA and CWHSSA). Entities in which a debarred person or firm holds only a ''nominal interest'' will not be debarred. 47 FR 23661.

Finally, because the Department received no comments specifically about the scope of the debarment proposal, the final rule therefore adopts the change as proposed.

For the foregoing reasons, the final rule adopts the harmonized debarment standards so that—regardless of the source or type of Federal funding—all DBRA contractors, subcontractors, and responsible officers (as well as firms in which they have an interest) that disregard their obligations to workers or subcontractors are subject to a 3-year debarment during which they may not receive any contract or subcontract of the United States or the District of Columbia, as well as any contract or subcontract subject to the labor standards provisions of the laws referenced in § 5.1. Specifically, the Department adopts with no modification the proposed changes to § 5.12 as well as the proposed conforming changes to § 5.6(b) (included in renumbered §§ 5.6(b)(4) and 5.7(a)). In addition, the Department adopts the changes to § 5.5(a)(10) as proposed, except that an inadvertent error in the proposed regulatory text has been corrected. That section referred to ineligibility ''by virtue of 40 U.S.C. 3144(b) or § 5.12(a) or (b),'' but it should only have referred to—and this correction has been made in the final rule—ineligibility ''by virtue of 40 U.S.C. 3144(b) or § 5.12(a)'' to conform to the harmonized debarment provisions in revised § 5.12. Paragraph 5.12(a)(2) has been revised to specify that debarment actions are reflected on the SAM website.

xxii. Employment Relationship Not Required

The Department proposed a few changes throughout parts 1, 3, and 5 to reinforce the well-established principle that Davis-Bacon labor standards requirements apply even when there is no employment relationship between a contractor and worker.

In relevant part, the DBA states that ''the contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.'' 40 U.S.C. 3142(c)(1). The Department has interpreted this language to cover ''[a]ll laborers and mechanics employed or working upon the site of the work,'' § 5.5(a)(1)(i), and the definitions of ''employed'' in parts 3 and 5 of the existing regulations similarly reflect that the term includes all workers on the project and extends beyond the traditional common-law employment relationship. *See* § 3.2(e) (''Every person paid by a contractor or subcontractor in any manner for his labor . . . is *employed* and receiving *wages,* regardless of any contractual relationship alleged to exist between him and the real employer.''); § 5.2(o) (''Every person performing the duties of a laborer or mechanic [on DBRA work] is *employed* regardless of any contractual relationship alleged to exist between the contractor and such person.''); *cf.* 41 U.S.C. 6701(3)(B) (defining ''service employee'' under the SCA to ''include[ ] an individual without regard to any contractual relationship alleged to exist between the individual and a contractor or subcontractor''); 29 CFR 4.155 (providing that whether a person is a ''service employee'' does not depend on any alleged contractual relationship).

The ARB and its predecessors have similarly recognized that the DBRA apply to workers even in the absence of an employment relationship. *See Star Brite Constr. Co., Inc.,* ARB No. 98–113, 2000 WL 960260, at *5 (June 30, 2000) (''[T]he fact that the workers [of a subcontractor] were engaged in construction of the . . . project triggered their coverage under the prevailing wage provisions of the [DBA]; lack of a traditional employee/employer relationship between [the prime contractor] and these workers did not absolve [the prime contractor] from the responsibility to insure that they were compensated in accordance with the requirements of the [DBA].''); *Labor Servs., Inc.,* WAB No. 90–14, 1991 WL 494728, at *2 (May 24, 1991) (stating that the predecessor to section 3142(c) ''applies a functional rather than a formalistic test to determine coverage: if someone works on a project covered by the Act and performs tasks contemplated by the Act, that person is covered by the Act, regardless of any label or lack thereof,'' and requiring a contractor to pay DBA prevailing wages to workers labeled as ''subcontractors''). This broad scope of covered workers also extends to CWHSSA, the Copeland Act, and other Related Acts. *See* 40 U.S.C. 3703(e) (providing that Reorganization Plan No. 14 of 1950 and 40 U.S.C. 3145 apply to CWHSSA); 29 CFR 3.2(e); *see also, e.g., Ray Wilson Co.,* ARB No. 02–086, 2004 WL 384729, at *6 (finding that workers met the DBA's ''functional [rather than formalistic] test of employment'' and affirming an ALJ's order of prevailing wages and overtime pay due to workers of a second-tier subcontractor); *Joseph Morton Co.,* WAB No. 80–15, 1984 WL 161739, at *2–3 (July 23, 1984) (rejecting a contractor's argument that workers were subcontractors not subject to DBA requirements and affirming an ALJ finding that the contractor owed the workers prevailing wage and overtime back wages for work performed on a contract subject to DBA and CWHSSA); *cf. Charles Igwe,* ARB No. 07–120, 2009 WL 4324725, at *3–5 (Nov. 25, 2009) (rejecting contractors' claim that workers were independent contractors not subject to SCA wage requirements, and affirming an ALJ finding that contractors ''violated both the SCA and the CWHSSA by failing to pay required wages, overtime, fringe benefits, and holiday pay, and failing to keep proper records'').

The Department proposed a few specific changes to the regulations in recognition of this principle. First, the Department proposed to amend § 1.2 to add a definition of ''employed'' that is substantively identical to the definition in § 5.2 and to amend § 3.2 to clarify the definition of ''employed'' in part 3. These changes clarify that the DBA's expansive coverage of workers even in the absence of an employment relationship is also relevant to wage surveys and wage determinations under part 1 and certified payrolls under part 3. Second, the Department proposed to change references to employment (*e.g.,* ''employee,'' ''employed,'' ''employing,''

etc.) in § 5.5(a)(3) and (c), as well as elsewhere in the regulations, to refer instead to ''workers,'' ''laborers and mechanics,'' or ''work.'' Notwithstanding the broad scope of worker coverage reflected in the existing definitions and in case law, the Department explained that the additional language proposed, particularly in the DBRA contract clauses, would further clarify the scope of worker coverage and eliminate any ambiguity that laborers and mechanics are covered by the DBRA even in the absence of an employment relationship. Consistent with the above, however, the words ''employee,'' ''employed,'' or ''employment'' when used in this preamble or in the regulations (including the existing regulations), should be interpreted expansively and do not limit coverage to workers in an employment relationship. Finally, the Department proposed to clarify in the definition of ''employed'' in parts 1, 3, and 5 that the broad understanding of that term applies equally in the context of ''public building[s] or public work[s]'' and in the context of ''building[s] or work[s] financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise.''

The Department received several dozen comments on this proposal, most of which supported the proposed changes. Many of these comments contended that this proposal would help address the widespread misclassification of employees as independent contractors in the construction industry by reducing or eliminating the perceived incentives to misclassify employees as independent contractors. Several comments cited to numerous misclassification studies substantiating widespread misclassification of employees as independent contractors. For example, the National Employment Law Project (NELP) cited to a 2007 study of New York's unemployment insurance audits which concluded that the misclassification rate in the construction industry is almost 50 percent higher than the overall misclassification rate in the private sector. LCCHR cited to a study finding 23 percent of Minnesota's, 20 percent of Illinois', and 10 percent of Wisconsin's construction workers were misclassified or paid off-the-books. LCCHR further noted that, according to the study, such misclassification or off-the-books payments cost the three states a combined $360 million in lost tax revenues per year. LCCHR also cited to an estimate that U.S. construction workers were denied over $811 million in overtime premium in 2017 due to misclassification and off-the-books payments.

NELP also stated that the NPRM's proposals to clarify coverage of laborers and mechanics regardless of their employment status would increase accountability and improve work standards in multitiered contracting relationships. TAUC expressed their support for the NPRM's proposed changes because the misclassification of employees as independent contractors gives an unfair competitive advantage to contractors and subcontractors who misclassify and underpay their workers.

The Department appreciates the commenters' concerns about misclassification in the construction industry and expects the NPRM's proposed changes, which are adopted in this final rule, to further emphasize that the DBRA's labor standards requirements apply to workers even in the absence of an employment relationship. The changes may also help to reduce misclassification in the construction industry by eliminating any misperception that DBRA requirements can be avoided by classifying workers as independent contractors or by otherwise denying the existence of an employment relationship.

Smith, Summerset & Associates also supported the proposed changes, but commented that the ''irrelevancy'' of employee status should be further amplified by the specific mention of irrelevancy in the regulations or at least in the preamble. Smith, Summerset & Associates stated that DBRA contractors are overburdened with contracting agency requests for additional documentation that workers are self-employed when workers are listed on certified payrolls without payroll taxes withheld. However, the Department believes that the proposed changes adequately explain that employee status is not relevant to worker coverage under the DBRA, but agencies may still have other relevant purposes for requesting such documentation. As stated in section III.B.3.iii.(B) of this preamble, contracting agencies are free to provide certified payrolls to other enforcement agencies without the Department's authorization or permission where the contracting agency has determined that such a submission is appropriate and is in accordance with relevant legal obligations. In other words, even though employee status is not relevant to worker coverage under the DBRA, there may be other legitimate reasons to request documentation regarding whether a worker has been properly identified as ''self-employed'' or as an independent contractor, and the revisions discussed in this section are not intended to discourage such requests.

CC&M expressed concern over the cost shifting of payroll taxes to workers when they are misclassified as independent contractors. CC&M also noted that even when contractors pay the correct prevailing wages to workers who are misclassified as independent contractors, such workers are excluded from unemployment insurance and other State or Federal employment benefits. Though the Department acknowledges the issues raised by CC&M, these concerns are outside the scope of this rulemaking. The DBA does not address issues related to payroll taxes, unemployment insurance or Federal, State, or local benefit programs that are outside the scope of the wage determinations. Contractors on DBRA-covered projects are required to comply with other applicable laws. Payroll tax laws and other employment benefit programs often have statutory definitions of employment that are properly interpreted and applied by the government agencies with appropriate enforcement and/or regulatory authority over such laws. The Department may, however, refer its findings of misclassification of employees as independent contractors to other tax agencies for further action under their respective authority and discretion.

On the other hand, NAHB opposed the NPRM's proposed changes to employment terms in parts 1, 3, and 5, asserting that such changes would ''seemingly remove[ ] the defining line between general contractor and subcontractor liability by implying [an employment] relationship 'regardless of any contractual relationship alleged to exist between the contractor and such person.''' NAHB further asserted that the Department's proposals would constitute an expansion of joint employer liability, and thus, in NAHB's view, would place nearly all the burden for subcontractor compliance on the prime contractor. Consequently, NAHB requested that the Department clarify in the final rule that ''joint employer'' status will be governed by FLSA case law.

The Department believes that NAHB's concerns about changes to employment terms in the existing regulations are misplaced. As explained in the NPRM, the Department seeks to reinforce the well-established principle that, as already reflected in the statute and existing regulations, Davis-Bacon labor standards requirements apply even when there is no employment

relationship between a contractor and worker. The existing regulations at 29 CFR part 3 and part 5 have long stated that workers are considered to be ''employed'' for the purposes of prevailing wage and certified payroll requirements, regardless of any contractual relationship which may be alleged to exist. The definitional changes adopted in this final rule simply emphasize this fact. Similarly, defining ''employed'' in part 1 clarifies that, just as workers are entitled to prevailing wage rates even where there is no employment relationship, it is appropriate to include wage data for independent contractors and others who are not ''employed'' by a contractor or subcontractor within the meaning of the FLSA in determining prevailing wages under the Davis-Bacon wage survey program. Thus, this final rule does not change the standard for joint employer liability for contractors on Davis-Bacon contracts, as the concept of an employment relationship is simply not relevant to the application of prevailing wage requirements to workers. The Department specifically rejects NAHB's suggestion to incorporate or cross-reference the FLSA standard for joint employer liability in parts 1, 3, and 5, because contractor obligations under the DBA may exist even in the absence of an employment relationship with covered laborers and mechanics. Despite NAHB's assertion that the proposal was contrary to legal precedent, the ARB has repeatedly affirmed that DBRA requirements apply even in the absence of an employment relationship as discussed above in this section.

NAHB's concerns with respect to the proposed changes in § 5.5(a)(6) are more fully discussed in that section of the preamble. However, the Department notes here that a prime contractor's liability for subcontractor violations is based primarily on statutory language of the DBRA and the contract provisions that flow from that language, rather than based on any concept of joint employment between the prime contractor and the workers of its subcontractors.

For the foregoing reasons, the final rule adopts the described changes to reinforce the well-established principle that Davis-Bacon labor standards apply even when there is no employment relationship between a contractor and worker in parts 1, 3, and 5 as proposed.

xxiii. Withholding

The DBA, CWHSSA, and the regulations at 29 CFR part 5 authorize withholding from the contractor accrued payments or advances equal to the amount of unpaid wages due laborers and mechanics under the DBRA. *See* 40 U.S.C. 3142(c)(3), 3144(a)(1) (DBA withholding), 3702(d), 3703(b)(2) (CWHSSA withholding); 29 CFR 5.5(a)(2) and (b)(3) and 5.9. Withholding helps to realize the goal of protecting workers by ensuring that money is available to pay them for the work they performed but for which they were undercompensated. Withholding plays an important role in the statutory schemes to ensure payment of prevailing wages and overtime to laborers and mechanics on Federal and federally assisted construction projects. The regulations currently require, among other things, that upon a request from the Department, contracting agencies must withhold so much of the contract funds as may be considered necessary to pay the full amount of wages required by the contract, and in the case of CWHSSA, liquidated damages. *See* 29 CFR 5.5(a)(2) and (b)(3) and 5.9. The Department proposed a number of regulatory revisions to reinforce the current withholding provisions.

(A) Cross-Withholding

Cross-withholding is a procedure through which agencies withhold contract monies due a contractor from contracts other than those on which the alleged violations occurred. Prior to the 1981–1982 rulemaking, Federal agencies generally refrained from cross-withholding for DBRA liabilities because neither the DBA nor the CWHSSA regulations specifically provided for it. In 1982, however, the Department amended the contract clauses to expressly provide for cross-withholding. *See* 47 FR 23659–60 [273] (cross-withholding permitted as stated in § 5.5(a)(2) and (b)(3)); *Grp. Dir., Claims Grp./GGD,* B–225091, 1987 WL 101454, at *2 (Comp. Gen. Feb. 20, 1987) (the Department's 1983 Davis-Bacon regulatory revisions, *e.g.,* § 5.5(a)(2), ''now provide that the contractor must consent to cross-withholding by an explicit clause in the contract'').

In the NPRM, the Department proposed additional amendments to the cross-withholding contract clause language at § 5.5(a)(2) and (b)(3) to clarify and strengthen the Department's ability to cross-withhold when contractors use single-purpose entities, joint ventures or partnerships, or other similar vehicles to bid on and enter into DBRA-covered contracts. As noted in the earlier discussion of the definition of prime contractor in section III.B.3.ii.(D), the interposition of another entity between the contracting agency and the general contractor is not a new phenomenon. However, the use of single-purpose LLC entities and similar joint ventures and teaming agreements in government contracting generally has been increasing in recent decades. *See, e.g.,* John W. Chierichella & Anne Bluth Perry, ''Teaming Agreements and Advanced Subcontracting Issues,'' Fed. Publ'ns LLC, TAASI GLASS–CLE A, at *1–6 (2007); A. Paul Ingrao, ''Joint Ventures: Their Use in Federal Government Contracting,'' 20 Pub. Cont. L.J. 399 (1991).

The Department explained in the NPRM that in response to this increase in the use of such single-purpose legal entities or arrangements, Federal agencies have often required special provisions to assure that liability among joint venturers will be joint and several. *See, e.g.,* Ingrao, *supra,* at 402–03 (''Joint and several liability special provisions vary with each procuring agency and range from a single statement to complex provisions regarding joint and several liability to the government or third parties.''). While the corporate form may be a way for joint venturers to attempt to insulate themselves from liability, commenters have noted that this ''advantage will rarely be available in a Government contracts context, because the Government will customarily demand financial and performance guarantees from the parent companies as a condition of its 'responsibility' determination.'' Chierichella & Perry, *supra,* at *15–16.

Under the existing regulations, however, the Government is not able to obtain similar guarantees to secure performance of Davis-Bacon labor standards and CWHSSA requirements. It is necessary for the cross-withholding regulations to be amended to ensure that the core DBRA remedy of cross-withholding is available when single-purpose LLCs and similar contracting vehicles are used to contract with the Federal Government. This enforcement gap exists because, as a general matter, cross-withholding (referred to as ''offset'' under the common law) is not available unless there is a ''mutuality of debts'' in that the creditor and debtor involved are exactly the same person or legal entity. *See R.P. Newsom,* 39 Comp. Gen. 438, 439 (1959). That general rule, however, can be waived by agreement of the parties. *See Lila Hannebrink,* 48 Comp. Gen. 365, 365 (1968) (allowing cross-withholding against a joint venture for debt of an individual joint

[273] The May 28, 1982, final rule was implemented in part, including § 5.5(a)(2) and (b)(3), in 1983. 48 FR 19540, 19540, 19545–47 (Apr. 29, 1983).

venturer on a prior contract, where all parties agreed).

The structure of the Davis-Bacon Act, with its implementation in part through the mechanism of contract clauses, provides both the opportunity and the responsibility of the Government to ensure—by contract—that the use of the corporate form does not interfere with Congress's mandate that workers be paid the required prevailing wage and that withholding ensures the availability of funds to pay any back wages and other monetary relief owed. It is a cardinal rule of law that ''the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement.'' *Anderson* v. *Abbott,* 321 U.S. 349, 363 (1944). This principle is generally applied to allow, in appropriate circumstances, for corporate forms to be disregarded by ''piercing the corporate veil.'' [274] However, where a policy is effectuated through contract terms, it can be inefficient and unduly limiting to rely on post hoc veil-piercing to implement that policy. The Government may instead, by contract, make sure that the use of single-purpose entities, subsidiaries, or joint ventures interposed as nominal ''prime contractors'' does not frustrate the Congressional mandate to ensure back wages are available through withholding.[275]

Accordingly, the Department proposed to amend the withholding contract clauses at § 5.5(a)(2) and § 5.5(b)(3), as well as to amend § 5.9, to ensure that any entity that directly enters into a contract covered by Davis-Bacon labor standards must agree to cross-withholding against it to cover liabilities for any DBRA violations on not just that contract, but also on other covered contracts entered into by the entity that directly entered into the contract or by specified affiliates. The covered affiliates were those entities included within the proposed definition of prime contractor in § 5.2, including controlling shareholders or members and joint venturers or partners. Thus, for example, if a general contractor secures two prime contracts for two Related Act-covered housing projects through separate single-purpose entities that it controls, the proposed cross-withholding language would allow the Department to seek cross-withholding against either contract even though the contracts are nominally with separate legal entities.

The Department also proposed to add language to § 5.5(a)(2) and (b)(3) to clarify that the Government may pursue cross-withholding regardless of whether the contract on which withholding is sought was awarded by, or received Federal assistance from, the same agency that awarded or assisted the prime contract on which the violations necessitating the withholding occurred. This revision is in accordance with the Department's longstanding policy, the current language of the withholding clauses, and case law on the use of setoff procedures in other contexts dating to 1946. *See, e.g., United States* v. *Maxwell,* 157 F.3d 1099, 1102 (7th Cir. 1998) (''[T]he federal government is considered to be a single-entity that is entitled to set off one agency's debt to a party against that party's debt to another agency.''); *Cherry Cotton Mills, Inc.* v. *United States,* 327 U.S. 536, 539 (1946) (same). However, because the current Davis-Bacon regulatory language does not explicitly state that funds may be withheld from contracts awarded or assisted by other Federal agencies, some agencies have questioned whether cross-withholding is appropriate in such circumstances. This proposed addition would expressly dispel any such uncertainty or confusion. Conforming edits were also proposed to § 5.9.

The Department also proposed certain non-substantive changes to streamline the withholding clauses. The Department proposed to include in the withholding clause at § 5.5(a)(2)(i) similar language as in the CWHSSA withholding clause at § 5.5(b)(3) authorizing withholding necessary ''to satisfy the liabilities . . . for the full amount of wages . . . and monetary relief'' of the contractor or subcontractor under the contract without reference to the specific, and duplicative, language currently in § 5.5(a)(2) that re-states the lists of the types of covered workers already listed in § 5.5(a)(1)(i). The Department also proposed using the same phrase ''so much of the accrued payments or advances'' in both § 5.5(a)(2) and (b)(3), instead of simply ''sums'' as currently written in § 5.5(b)(3). Finally, the Department proposed to adopt in § 5.5(b)(3) the use of the term ''considered,'' as used in § 5.5(a)(2), instead of ''determined'' as currently used in § 5.5(b)(3), to refer to the determination of the amount of funds to withhold, as this mechanism applies in the same manner under both clauses.

Conforming edits for each of the above changes to the withholding clauses at § 5.5(a)(2) and (b)(3) were also proposed for § 5.9. In addition, the Department proposed clarifying in a new paragraph (c) of § 5.9 that cross-withholding from a contract held by a different legal entity is not appropriate unless the withholding provisions in that different legal entity's contract were incorporated in full or by reference. Absent exceptional circumstances, cross-withholding would not be permitted from a contract held by a different legal entity where Davis-Bacon labor standards were incorporated only by operation of law into that contract.

The Department received multiple comments in support of the proposed revisions to the regulatory language for cross-withholding. Several commenters noted that as the construction industry has evolved over the years to include an increased use of contracting entities that are closely related, particularly single-purpose contracting entities, the Department's regulations must similarly change to ensure that the use of such contracting vehicles does not undercut the remedial purpose of the DBA. These commenters noted that the proposed revisions are necessary both to ensure that workers receive the prevailing wages that they are entitled to for their work and to prevent law-abiding contractors from being undercut by contractors taking advantage of these contracting entities to underpay their workers. They also pointed out that the provisions would make it more difficult for entities to move from contract to contract without making their workers whole for any wage underpayment. *See, e.g.,* ACT Ohio, FFC, III–FFC, LIUNA, NCDCL, REBOUND, SMACNA, UBC. The Department agrees with such commenters that it is necessary for the Davis-Bacon regulations to take modern contracting processes into account, to safeguard the payment of applicable prevailing wages to workers, and to ensure uniform compliance across the industry.

ABC and IEC opposed the proposal and stated that cross-withholding in any circumstances is not authorized by the

[274] The Department has long applied corporate veil-piercing principles under the DBRA. *See, e.g., Thomas J. Clements, Inc.,* ALJ No. 82–DBA–27, 1984 WL 161753, at *9 (June 14, 1984) (recognizing, in the context of a Davis-Bacon Act enforcement action, that a court may ''pierce the corporation veil where failure to do so will produce an unjust result''), *aff'd,* WAB No. 84–12, 1985 WL 167223, at *1 (Jan. 25, 1985) (adopting ALJ's decision as the WAB's own decision); *Griffin* v. *Sec'y of Lab.,* ARB Nos. 00–032, 00–033, 2003 WL 21269140, at *8, n.2 (May 30, 2003) (various contractors and their common owner, who ''made all decisions regarding operations of all of the companies,'' were one another's ''alter egos'' in a DBRA debarment action), *aff'd sub nom Phoenix-Griffin Grp. II, Ltd.* v. *Chao,* 376 F. Supp. 2d 234, 247 (D.R.I. 2005).

[275] *Cf.* Robert W. Hamilton, The Corporate Entity, 49 Tex. L. Rev. 979, 984 (1971) (noting the difference in application of ''piercing the veil'' concepts in contract law because ''the creditor more or less assumed the risk of loss when he dealt with a 'shell'; if he was concerned, he should have insisted that some solvent third person guarantee the performance by the corporation'').

Davis-Bacon Act. They asserted the DBA limits withholding to the contract on which the violations occurred. A comment from Practus, LLP claimed that legislative action was required for the ''ambiguous'' cross-withholding policy. An individual commenter argued that the Davis-Bacon Act does not expressly provide for cross-withholding, and that cross-withholding could result in violations of the ''Purpose Statute'' and the Anti-Deficiency Act when the cross-withholding is effectuated by a contracting agency other than the agency with the contract on which DBRA violations had been found. This commenter requested that language be added to the regulation to clarify that cross-withholding is ''subject to availability of funds in accordance with law.'' IEC also claimed that the Department's explanation for the proposed language acknowledged that there is no ''mutuality of debts'' between a contractor and the government when a contractor owes a worker wages that would justify a cross-withholding. FTBA did not object to cross-withholding as a whole, but objected to cross-withholding on contracts held by separate legal entities that merely have some form of common ownership or control, on the ground that cross-withholding in such circumstances ignores the separate legal status (for contract award, tax, payroll, and myriad other purposes) of such contracting entities.

FTBA and ABC also stated that there is no indication that cross-withholding is necessary to ensure that workers receive back pay for prevailing wage violations. ABC suggested that the Department has ample resources available to enforce findings of violations on a particular DBA-covered contract without the use of cross-withholding. IEC and the group of U.S. Senators also expressed general concern that the cross-withholding process would not provide sufficient due process for contractors, and IEC proposed that the regulations should prohibit funds from being withheld until the ARB had reviewed and approved the proposed withholding. Practus similarly emphasized the need for specific due process safeguards especially when ''underlying claims involving a subcontractor are not yet liquidated or ripe for adjudication.'' Finally, APCA stated that the changes (among others) would have negative effects on contractors' costs, compliance responsibilities, enforcement exposure, and penalties.

The Department does not agree with comments that suggest the DBRA does not permit the use of cross-withholding. The DBA provides that ''there may be withheld from the contractor so much of accrued payments as the contracting officer considers necessary to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by the laborers and mechanics and not refunded to the contractor or subcontractors or their agents.'' 40 U.S.C. 3142(c)(3). The statute does not specify from which contract the funds should be withheld or state that the funds should be only withheld from the contract on which the violations occurred or from payments due for work on that specific contract.[276] The Department rejects IEC's claim that the use of the term ''the work'' in section 3142(c)(3) limits the contracts from which accrued payments may be withheld to the contract on which ''the work'' occurred for which workers were not properly paid, and that this statutory provision therefore does not authorize withholding of funds from a DRBA contract on which no violations were found. The term ''on the work'' in section 3142(c)(3) specifies which workers are to benefit from the withholding—those on the DBRA-covered work on which the violations occurred; ''on the work'' does not limit the accrued payments from which monies can be withheld. Rather, the statute directs that funds may be ''withheld from the contractor'' in an amount considered necessary to pay the difference between the rates required and the rates paid to laborers and mechanics on the work.[277] The regulations have expressly provided for cross-withholding for the past 40 years, as previously explained. And, contrary to commenters' assertions that cross-withholding is unnecessary to make workers whole, the Department has repeatedly used the cross-withholding process to obtain back wages for workers where there would otherwise be insufficient contract funds available to ensure that workers are paid the applicable prevailing wages. *Cf. Silverton Constr. Co., Inc.,* WAB No. 92–09, 1992 WL 515939, at *2–3 (Sept. 29, 1992) (reversing ALJ's decision that prime contractor was not liable for its subcontractor's underpayments because no money had been withheld under the contract on which violations were found because this decision was inconsistent with the Department's regulations in effect since 1983 that permit cross-withholding if necessary to satisfy Davis-Bacon and CWHSSA obligations).

Moreover, as noted in this section above, cross-withholding is related to the common-law right of ''offset.'' It is well settled that no statutory authority at all is necessary for the Federal government to assert the right of offset. ''Like private creditors, the federal government has long possessed the right of offset at common law.'' *Amoco Prod. Co.* v. *Fry,* 118 F.3d 812, 817 (D.C. Cir. 1997) (citing, among other cases, *Gratiot* v. *United States,* 40 U.S. 336, 370 (1841)).[278] To accept the commenters' assertion that the DBA does not permit cross-withholding would mean that, by enacting the withholding provisions in the Act, Congress had limited—and not expanded—the government's authority. There is no basis for such a conclusion. To the contrary, the legislative history of the 1935 amendments to the Act reflects Congress's intent that withholding operate to ensure that workers would be made whole. *See Liberty Mut. Ins. Co.,* ARB No. 00–018, 2003 WL 21499861, at *6 (citing S. Rep. No. 74–1155 (1935)). As the ARB noted in the *Liberty Mutual* decision, ''neither the DBA's terms nor the legislative history indicate Congress's intention to limit the Administrator's withholding authority to the detriment of the laborers and mechanics that are the intended beneficiaries of the Act.'' *Id.*

The Department also disagrees with the individual commenter that cross-withholding contravenes the Anti-Deficiency Act, the Purpose Statute, or other statutes governing the use of appropriated funds, and declines to revise the regulatory text as they

[276] Similarly, CWHSSA does not specify the contract from which funds should be withheld for the payment of unpaid wages, as it states that ''the governmental agency . . . may withhold, or have withheld, from money payable because of work performed by a contractor or subcontractor, amounts administratively determined to be necessary to satisfy the liabilities of the contractor or subcontractor for unpaid wages and liquidated damages as provided in this section.'' 40 U.S.C. 3702(d).

[277] One commenter indicated that by stating that withholding should be for the difference between wages paid and the prevailing wage due to laborers or mechanics on the work, Congress intended to say that funds could only be withheld from the contract on which the violations occurred. However, this language merely addresses the amount of funds that may be withheld, and hence does not identify or limit the contracts from which such withholding may occur.

[278] In *Gratiot,* the Supreme Court explained that ''[t]he United States possess[es] the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant, on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'' *Gratiot,* 40 U.S. at 370.

requested. The Anti-Deficiency Act prohibits, in relevant part, an officer or employee of the United States from ''mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.'' 31 U.S.C. 1341(a)(1)(A). The commenter appears to have conflated the Anti-Deficiency Act with another general prohibition on unauthorized transfers of funds between appropriations accounts. *See* U.S. Gov't Accountability Off., 1 Principles of Federal Appropriations Law ch. 2, at 2–38–39 (3d ed. 2015) (GAO Red Book). Specifically, 31 U.S.C. 1532 provides that ''[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law.'' An unauthorized transfer could lead to a violation of the Anti-Deficiency Act or Purpose Statute if the transfer ''led to overobligating the receiving appropriation'' or ''the use of appropriations for other than their intended purpose,'' respectively. GAO Red Book ch. 2 at 38–40. The commenter also apparently relies on ''a general rule that an agency may not augment its appropriations from outside sources without specific statutory authority.'' NRC Authority to Collect Annual Charges From Federal Agencies, 15 Op. O.L.C. 74, 78 (1991) (referring to the ''anti-augmentation principle''). The commenter's concerns are misplaced because cross-withholding does not involve any impermissible transfer or augmentation, and because cross-withholding and disbursement of cross-withheld funds are authorized by law.

Contrary to this individual commenter's concerns, cross-withholding does not involve an impermissible augmentation of any agency's appropriation. Nor, relatedly, is the cross-withholding agency making payments on the other agency's contract (*i.e.,* augmenting that agency's appropriation) as the individual commenter also appeared to suggest. First, when funds are cross-withheld, they remain in the account of the contracting agency from whose contract the funds are being withheld, typically before being disbursed to workers by the Department, as discussed below. The contracting agency implementing an inter-agency cross-withholding does not actually or effectively transfer the cross-withheld funds to the contracting agency on whose contract DBRA violations occurred. The contracting agency on whose contract DBRA violations were found has no remaining payment obligations to the contractor, thereby creating the need for cross-withholding in the first place, which underscores why cross-withholding does not implicate the purpose of, or impermissibly augment, that agency's appropriation. Second, in the context of inter-agency cross-withholding, contracting agencies neither make payments on another agency's contract nor could be required to do so, as the DBA imposes liability for paying back wages on contractors, not contracting agencies. *See* 40 U.S.C. 3142(c)(1) (''[T]he *contractor or subcontractor* shall pay all mechanics and laborers employed directly on the site of the work . . . the full amounts accrued at time of payment.'' (emphasis added)); *see also* 40 U.S.C. 3702(b)(2) (''[T]he contractor and any subcontractor responsible for the [CWHSSA overtime] violation are liable''). Rather, the cross-withholding agency is ensuring, at the Department's request, that the contractor is not overpaid given the contractor's (or its subcontractor(s)'s) failure to satisfy their statutory and contractual obligation to workers. As such, inter-agency cross-withholding functions as a mechanism to satisfy the contractor's DBRA underpayment liability. The cross-withholding contracting agency thus is not augmenting (by transfer or otherwise) appropriated funds of the contracting agency on whose contract the DBRA violations occurred.

Consistent with the DBA's directive that the Department pay withheld monies ''directly to laborers and mechanics,'' 40 U.S.C. 3144(a), *see also* 40 U.S.C. 3703(b)(3), the cross-withholding contracting agency may eventually transfer the cross-withheld funds to WHD—in its capacity as enforcement agency—for distribution directly to workers to whom the contractor owes DBRA back wages. WHD in turn may only distribute cross-withheld funds to such workers after any challenge to the finding of violations has been resolved. Until then, the withheld funds are effectively held in trust for the benefit of the underpaid workers and cannot be used by DOL for purposes other than disbursement to workers. *Cf. In re Quinta Contractors, Inc.,* 34 B.R. 129, 131 (Bankr. M.D. Pa. 1983) (invoking statutory trust principles in concluding that funds withheld under the DBA were not property of an estate in bankruptcy except to the extent that the amount withheld exceeded the amount of the debtor's liability under the DBA).[279] If there are any unclaimed funds after 3 years, WHD is required to send such funds to the U.S. Treasury.[280] *Cf.* B–256568 (Comp. Gen. Mar. 18, 1994) (finding that, under predecessor provision of DBA under which Comptroller General, not the Department, disbursed withheld funds to workers, 3 years was a suitable period of time for GAO to wait before transferring unclaimed withheld funds to the Treasury). The Department's cross-withholding and distribution process is thus an enforcement mechanism authorized by statute under which WHD acts as an intermediary to return funds to the workers to whom they are owed. *Cf. Grp. Dir., Claims Grp./GGD,* B–225091, 1987 WL 101454, at *2 (stating that under CWHSSA, disbursement of withheld funds is ''purely ministerial''); *Glaude d/b/a Nationwide Indus. Svcs.,* ARB No. 98–081, 1999 WL 1257839, at *1–2, *4 (Nov. 24, 1999) (affirming pre-hearing withholding and cross-withholding from contractor under contracts with two Federal agencies for SCA back wages ALJ found due to contractor's workers on one of those contracts); *Nissi Corp.,* BSCA No. SCA–1233, 1990 WL 656138 (Sept. 25, 1990) (finding it was proper to cross-withhold funds on a contract with one agency for SCA underpayments that an ALJ had found due on another agency's contract with the same contractor).

In any event, the Anti-Deficiency Act permits transfers, expenditures, and obligations where ''specified in . . . any other provision of law.'' 31 U.S.C. 1341(a)(1). The ''other provision of law'' exception applies here because the DBA and CWHSSA authorize contracting agencies to withhold accrued payments needed to pay back wages, *see* 40 U.S.C. secs. 3142(c)(3) & 3702(d), respectively, and require the Department to distribute back wages to underpaid workers, *see* 40 U.S.C. 3144(a)(1) (''The Secretary of Labor shall pay directly to laborers and mechanics from any accrued payments withheld under the terms of a contract any wages found due to laborers and mechanics under this subchapter.''); 40 U.S.C. 3703(b)(3) (''The Secretary of Labor shall pay the amount administratively determined to be due directly to the laborers and mechanics from amounts withheld on account of

[279] Similarly, when an SCA-covered contractor fails to pay required prevailing wages and fringe benefits, the underpaid funds are ''impressed with a trust, either constructive or statutory, for the benefit of the undercompensated employees.'' *Brock* v. *Career Consultants, Inc. (In re Career Consultants, Inc.),* 84 B.R. 419, 424 (Bankr. E.D. Va. 1988); *see also, e.g., In re Frank Mossa Trucking, Inc.,* 65 B.R. 715, 718 (Bankr. D. Mass. 1985).

[280] *See, e.g.,* ''Workers Owed Wages,'' Wage & Hour Div., Dep't of Lab., *https://www.dol.gov/agencies/whd/wow.*

underpayments of wages if the amount withheld is adequate. If the amount withheld is not adequate, the Secretary of Labor shall pay an equitable proportion of the amount due.''). Thus, these statutes expressly contemplate that the funds withheld will be transferred to the custody of the Department of Labor so that it can distribute those withheld funds to remedy violations of the DBRA. The Department's authority to disburse withheld funds to underpaid workers would be meaningless if contracting agencies could not transfer cross-withheld (and withheld) funds to DOL—or withhold accrued payments to begin with.

For similar reasons, cross-withholding does not violate the Purpose Statute. The Purpose Statute states that appropriations ''shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.'' *See* 31 U.S.C. 1301(a). As with the Anti-Deficiency Act, the DBA and CWHSSA satisfy the ''otherwise provided by law'' element. Specifically, contrary to the individual commenter's assertion, both the DBA and CWHSSA authorize contracting agencies to withhold accrued payments needed to pay back wages and expressly authorize the Department to pay such funds directly to underpaid workers. To the extent such withholding and payments could be construed as outside ''the objects for which'' the appropriation underlying the withheld funds was made, the withholding and payment nonetheless are consistent with the Purpose Statute because Congress expressly authorized such actions through the DBA and CWHSSA.

The fact that Congress in the SCA expressly stated that withholding may be from ''the contract or any other contract between the same contractor and the Federal government,'' as this individual commenter noted, does not mean that Congress did not authorize the same practice in the DBA or any Related Acts. As noted above, the DBA authorizes the withholding of funds ''from the contractor,'' without limiting such withholding to the contract on which Davis-Bacon violations occurred. That the SCA and DBA contain differently worded withholding provisions does not establish that cross-withholding is not also authorized under the DBA, or that the DBA should be interpreted as prohibiting cross-withholding. Indeed, Congressional hearings shortly before the SCA's enactment reflect Congressional awareness that both the SCA and DBA provided for withholding, without suggesting that withholding under the SCA was broader than under the DBA. *Service Contract Act of 1965: Hearing before the Subcomm. on Lab. of the S. Comm. on Lab. & Pub. Welfare,* 89th Cong. 11, 15–16 (1965). Moreover, as detailed further in sections II.A (''Statutory and regulatory history'') and III.B.3.xix (''Anti-Retaliation''), in 1984, Congress ratified and affirmed as law Reorganization Plan No. 14 of 1950 and declared that previous actions taken pursuant to such reorganization plans were considered to have been taken pursuant to a reorganization expressly approved by Congress. The 1983 cross-withholding regulation is one such prior action.

It is also not accurate to state that the Department's explanation of the proposed language in the NPRM acknowledged that there is no ''mutuality of debts'' between a contractor and the government when a contractor owes back wages that would justify a cross-withholding. As explained above, under the common law, cross-withholding is *generally* not available unless there is a ''mutuality of debts'' in that the creditor and debtor involved are exactly the same person or legal entity. Under the DBA, however, Congress specifically implemented a withholding provision with the goal of ensuring that workers receive the prevailing wages they are owed, and the provision contemplated that the withholding would be made effective through the use of a contract clause. As the Department noted in the NPRM, any question about mutuality of debts does not prohibit offset or withholding where the parties have expressly contracted to provide for such withholding. For these same reasons, the Department does not agree that the proposed language ignores the separate legal status of such contracting entities for a variety of other purposes; it merely recognizes that while this separate legal status may be valid in other situations, it should not be permitted to undermine one of the DBA's key enforcement mechanisms.

The Department appreciates commenters' suggestion that the Department should be able to obtain back wages for workers in all instances where there has been a finding of violations even without the use of cross-withholding. In WHD's experience in Davis-Bacon enforcement, withholding is the remedy of first resort when Davis-Bacon violations are identified and funds remain to be paid on the contract. However, cross-withholding is necessary and appropriate to satisfy the contractor's potential DBRA liability when there are insufficient funds remaining to be paid under the contract on which violations have been found. In some instances, the Department does not learn of, and does not have the opportunity to fully investigate, potential violations until contract performance is well underway, nearing completion, or even completed. In such circumstances, it is not realistic that the Department or the relevant contracting agency will be able to determine whether violations have occurred, and determine the back wage amount from such violations, in sufficient time to ensure that 100 percent of the back wage liability can be satisfied by straight withholding on the contract. Resource constraints also contribute to the need for cross-withholding as a remedy. As discussed in section V.A.2, approximately 61,200 firms currently hold DBA contracts or subcontracts and approximately 91,700 firms perform on Related Act contracts. While there is probably some overlap in those numbers, many of these contractors hold multiple contracts or subcontracts, resulting in hundreds of thousands of DBRA contracts or subcontracts each year. In contrast, the Department had only 757 Wage and Hour investigators as of December 31, 2021, each of whom is also responsible for enforcing multiple other employment laws. In these circumstances, it is clearly not possible that the Department will be able to determine the nature and extent of any Davis-Bacon violations on every contract before all funds due on the prime contract have been disbursed. Where all funds have been disbursed on such a prime contract, cross-withholding is critical to obtaining the wages that workers are owed.

Similarly, while the Department appreciates commenters' concerns as to whether the cross-withholding procedure provides sufficient due process to contractors, the Department believes that the withholding process, which is the same for both withholding and cross-withholding, provides ample due process. Contractors and subcontractors that choose to dispute WHD's violation findings are afforded an opportunity to request an administrative hearing and appellate process before any withheld funds are disbursed to workers. If the appeal process results in a final determination in favor of the contractor or subcontractor, WHD requests that the contracting agency release withheld funds in accordance with applicable law and contract documents. Moreover, contractors do not have a present entitlement to contract funds, as the contractor is only entitled to payment under the contract to the extent that the contractor has complied with the

contract terms, including the requirement to pay laborers and mechanics the applicable prevailing wage rate. *See Ray Wilson Co.,* ARB No. 02–086, 2004 WL 384729, at * 3–4 (citing *Lujan* v. *G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 195–97 (2001)).

For the foregoing reasons, the final rule adopts these changes as proposed, except for the following additional clarifying edits to the proposed withholding contract clauses in §§ 5.5(a)(2), (b)(3), and 5.9(b).

First, the Department deletes the references to § 5.5(a)(1), (a)(11), (b)(2), and (b)(5) to make clear that the scope of withholding has been and continues to be broad. The final rule therefore states that withholding for the full amount of unpaid wages and monetary relief, including interest, and liquidated damages required by the clauses in § 5.5(a) or (b) is appropriate. The references to paragraphs § 5.5(a)(1) and (11) and (b)(2) and (5) are deleted so as not to unintentionally exclude from the scope of withholding any monies determined to be due under other paragraphs of § 5.5, such as § 5.5(a)(6) or (b)(4) for lower-tier subcontractor violations. Similarly, the final rule in § 5.5(a)(2) replaces the current reference to ''Davis-Bacon prevailing wage requirements'' with ''Davis-Bacon labor standards requirements'' to be consistent with the definition of Davis-Bacon labor standards in § 5.2.

Second, the Department deleted ''under this contract'' from the first paragraph of § 5.5(a)(2) to clarify (consistent with current § 5.5(a)(2)) that withholding may be from the prime contract, as well as from other contracts or federally assisted contracts with the same prime contractor as defined in § 5.2.

Third, the Department added clauses to § 5.5(a)(2)(i) and 5.5(b)(3)(i) to emphasize that withheld and cross-withheld funds ''may be used to satisfy the contractor liability for which the funds were withheld,'' as well as a similar clause in § 5.9(b). These additions were made in response to questions about the source of the DBRA liability, to clarify that the back wage liability is the contractor's and not the contracting agency's.

Fourth, the Department changed ''loan or grant recipient'' to ''recipient of Federal assistance'' in the first sentences of § 5.5(a)(2) and (b)(3) to encompass Related Act assistance other than loans and grants.

Fifth, the Department revised § 5.5(b)(3) to refer to contracts subject to CWHSSA (consistent with current § 5.5(b)(3)) instead of subject to ''Davis-Bacon prevailing wage requirements'' as proposed in the NPRM.

Sixth, the Department clarified in §§ 5.5(a)(2)(i), 5.5(b)(3)(i), and 5.9(a) that Federal and other agencies may withhold on their own initiative and must withhold at the Department's request.

The Department also added language to § 5.9(a) to specify that, as in the withholding contract clause provisions, the suspension of funds must occur until funds are withheld ''as may be considered necessary''—like the similar language in current § 5.5(a)(2) and (b)(3)—to compensate workers, even though there may not yet be a final administrative determination of the back wages and other monetary relief which workers are owed, or of liquidated damages, at the time of the withholding.

(B) Suspension of Funds for Recordkeeping Violations

The Department also proposed to add language in § 5.5(a)(3)(iv) to clarify that funds may be suspended when a contractor has failed to submit certified payroll or provide the required records as set forth at § 5.5(a)(3). Comments relating to this proposal are discussed in the preamble regarding § 5.5(a)(3). In accordance with that discussion, the final rule adopts this change as proposed.

(C) The Department's Priority to Withheld Funds

The Department proposed to revise §§ 5.5(a)(2), 5.5(b)(3), and 5.9 to codify the Department's longstanding position that, consistent with the DBRA's remedial purpose to ensure that prevailing wages are fully paid to covered workers, the Department has priority to funds withheld (including funds that have been cross-withheld) for violations of Davis-Bacon prevailing wage requirements and CWHSSA overtime requirements. *See also* PWRB,[281] DBA/DBRA/CWHSSA Withholding and Disbursement, at 4. To ensure that underpaid workers receive the monies to which they are entitled, contract funds that are withheld to reimburse workers owed Davis-Bacon or CWHSSA wages, or both, must be reserved for that purpose and may not be used or set aside for other purposes until such time as the prevailing wage and overtime issues are resolved.

Affording the Department first priority to withheld funds, above competing claims, ''effectuate[s] the plain purpose of these federal labor standards laws . . . [to] insure that every laborer and mechanic is paid the wages and fringe benefits to which [the DBA and DBRA] entitle them.'' *Quincy Hous. Auth. LaClair Corp.,* WAB No. 87–32, 1989 WL 407468, at *3 (Feb. 17, 1989) (holding that ''the Department of Labor has priority rights to all funds remaining to be paid on a federal or federally-assisted contract, to the extent necessary to pay laborers and mechanics employed by contractors and subcontractors under such contract the full amount of wages required by federal labor standards laws and the contract''). Withholding priority serves an important public policy of providing restitution for work that laborers and mechanics have already performed, but for which they were not paid the full DBA or Related Act wages they were owed.

Specifically, the Department proposed to set forth expressly that it has priority to funds withheld for DBA, CWHSSA, and other Related Act wage underpayments over competing claims to such withheld funds by:

(1) A contractor's surety(ies), including without limitation performance bond sureties, and payment bond sureties;

(2) A contracting agency for its reprocurement costs;

(3) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(4) A contractor's assignee(s);

(5) A contractor's successor(s); or

(6) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–07.

To the extent that a contractor did not have rights to funds withheld for Davis-Bacon wage underpayments, its sureties, assignees, successors, creditors (*e.g.,* IRS), or bankruptcy estate likewise do not have such rights, as it is well established that such entities do not have greater rights to contract funds than the contractor does. *See, e.g., Liberty Mut. Ins. Co.,* ARB No. 00–018, 2003 WL 21499861, at *7–9 (The Department's priority to DBA withheld funds where surety ''ha[d] not satisfied all of the bonded [and defaulted prime] contractor's obligations, including the obligation to ensure the payment of prevailing wages''); *Unity Bank & Tr. Co.* v. *United States,* 5 Cl. Ct. 380, 384 (1984) (assignees acquire no greater rights than their assignors); *Richard T. D'Ambrosia,* 55 Comp. Gen. 744, 746 (1976) (IRS tax levy cannot attach to money withheld for DBA underpayments in which contractor has no interest).

Withheld funds always should, for example, be used to satisfy DBA and Related Act wage claims before any

[281] *See* note 19, *supra.*

reprocurement costs (*e.g.,* following a contractor's default or termination from all or part of the covered work) are collected by the Government. *See* WHD Opinion Letter DBRA–132 (May 8, 1985). The Department has explained that ''[t]o hold otherwise . . . would be inequitable and contrary to public policy since the affected employees already have performed work from which the Government has received the benefit and that to give contracting agency reprocurement claims priority in such instances would essentially require the employees to unfairly pay for the breach of contract between their employer and the Government.'' *Id.; see also* PWRB, DBA/DBRA/CWHSSA Withholding and Disbursement, at 4.[282] This rationale applies with equal force in support of the Department's priority to withheld funds over the other types of competing claims listed in this proposed regulation.

The Department's rights to withheld funds for unpaid earnings also are superior to performance and payment bond sureties of a DBA or DBRA contractor. *See Westchester Fire Ins. Co.* v. *United States,* 52 Fed. Cl. 567, 581–82 (2002) (surety did not acquire rights that contractor itself did not have); *Liberty Mut. Ins. Co.,* ARB No. 00–018, 2003 WL 21499861, at *7–9 (ARB found that Administrator's claim to withheld contract funds for DBA wages took priority over performance (and payment) bond surety's claim); *Quincy Hous. Auth. LaClair Corp.,* WAB No. 87–32, 1989 WL 407468, at *3–4. The Department can withhold unaccrued funds such as advances until ''sufficient funds are withheld to compensate employees for the wages to which they are entitled'' under the DBA. *Liberty Mut. Ins. Co.,* ARB No. 00–018, 2003 WL 21499861, at *6 (quoting 29 CFR 5.9).

Similarly, the Department also explained that it has priority over assignees (*e.g.,* assignees under the Assignment of Claims Act, *see* 31 U.S.C. 3727, 41 U.S.C. 6305) to DBRA withheld funds. For example, in *Unity Bank & Trust Co.,* 5 Cl. Ct. at 383, the employees' claim to withheld funds for a subcontractor's DBA wage underpayments had priority over a claim to those funds by the assignee—a bank that had lent money to the subcontractor to finance the work.

Nor are funds withheld pursuant to the DBRA for prevailing wage underpayments property of a contractor's (debtor's) bankruptcy estate. *See In re Quinta Contractors, Inc.,* 34 B.R. 129; *cf. Pearlman* v. *Reliance Ins. Co.,* 371 U.S. 132, 135–36 (1962) (concluding, in a case under the Miller Act, that ''[t]he Bankruptcy Act simply does not authorize a trustee to distribute other people's property among a bankrupt's creditors''). When a contractor has violated its contract with the government—as well as the DBA or DBRA—by failing to pay required wages and fringe benefits, it has not earned its contractual payment. Therefore, withheld funds are not property of the contractor-debtor's bankruptcy estate. *Cf. Pro. Tech. Servs., Inc.* v. *IRS,* No. 87–780C(2), 1987 WL 47833, at *2 (E.D. Mo. Oct. 15, 1987) (when the Department finds [an SCA] violation and issues a withholding letter, that act ''extinguishe[s]'' whatever property right the debtor (contractor) might otherwise have had to the withheld funds, subject to administrative review if the contractor chooses to pursue it); *In re Frank Mossa Trucking, Inc.,* 65 B.R. 715, 718–19 (Bankr. D. Mass. 1985) (pre-petition and post-petition SCA withholding was not property of the contractor-debtor's bankruptcy estate).

Various Comptroller General decisions further underscore these principles. *See, e.g., Carlson Plumbing & Heating,* B–216549, 1984 WL 47039 (Comp. Gen. Dec. 5, 1984) (DBA and CWHSSA withholding has first priority over IRS tax levy, payment bond surety, and trustee in bankruptcy); *Watervliet Arsenal,* B–214905, 1984 WL 44226, at *2 (Comp. Gen. May 15, 1984) (DBA and CWHSSA wage claims for the benefit of unpaid workers had first priority to retained contract funds, over IRS tax claim and claim of payment bond surety), *aff'd on reconsideration sub nom. Int'l Fid. Ins. Co.,* B–214905, 1984 WL 46318 (Comp. Gen. July 10, 1984); *Forest Serv. Request for Advance Decision,* B–211539, 1983 WL 27408, at *1 (Comp. Gen. Sept. 26, 1983) (The Department's withholding claim for unpaid DBA wages prevailed over claims of payment bond surety and trustee in bankruptcy).

The Department proposed codifying its position that DBRA withholding has priority over claims under the Prompt Payment Act, 31 U.S.C. 3901–07. The basis for this proposed provision is that a contractor's right to prompt payment does not have priority over legitimate claims—such as withholding—arising from the contractor's failure to fully satisfy its obligations under the contract. *See, e.g.,* 31 U.S.C. 3905(a) (requiring that payments to prime contractors be for performance by such contractor that conforms to the specifications, terms, and conditions of its contract).

The Department welcomed comments on whether the listed priorities should be effectuated by different language in the contract clause, such as an agreement between the parties that a contractor forfeits any legal or equitable interest in withheld payments once it commits violations, subject to procedural requirements that allow the contractor to contest the violations.

The Department received multiple comments generally supporting the proposed language explicitly stating that the Department has priority to funds withheld for violations of Davis-Bacon prevailing wage requirements and CWHSSA overtime requirements over other competing claims. These commenters noted that the Department's priority over other competing claims is necessary to ensure that funds are available to pay workers the prevailing wages that they are due. NCDCL and FFC additionally noted that these provisions are particularly important as contractors who underpay their workers frequently have other significant debts. The Department did not receive any suggestions as to alternative language in the contract clause to effectuate these priorities, nor did the Department receive any comments opposing the proposed language prioritizing DBRA withholding over other competing claims. Accordingly, the final rule adopts the changes as proposed.

xxiv. Subpart C—Severability

The Department proposed to add a new subpart C, titled ''Severability,'' which would contain a new § 5.40, also titled ''Severability.'' The proposed severability provision explained that each provision is capable of operating independently from one another, and that if any provision of part 5 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intended that the remaining provisions remain in effect.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed. An expanded discussion of severability is below in section III.B.5.

4. Non-Substantive Changes

i. Plain Language

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, well-organized manner. The Department has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885). The Department encouraged comment with respect to clarity and

[282] *See* note 19, *supra.*

effectiveness of the language used. Comments addressing plain language and plain meaning are discussed in their respective sections.

ii. Other Changes

The Department proposed to make non-substantive revisions throughout the regulations to address typographical and grammatical errors and to remove or update outdated or incorrect regulatory and statutory cross-references. The Department also proposed to adopt more inclusive language, including terminology that is gender-neutral, in the proposed regulations. These changes are consistent with general practice for Federal government publications; for example, guidance from the Office of the Federal Register advises agencies to avoid using gender-specific job titles (*e.g.,* ''foremen'').[283] These non-substantive revisions do not alter the substantive requirements of the regulations.

5. Severability

With respect to this final rule, it is the Department's intent that all provisions and sections be considered separate and severable and operate independently from one another. In this regard, the Department intends that: (1) In the event that any provision within a section of the rule is stayed, enjoined, or invalidated, all remaining provisions within that section will remain effective and operative; (2) in the event that any whole section of the rule is stayed, enjoined, or invalidated, all remaining sections will remain effective and operative; and (3) in the event that any application of a provision is stayed, enjoined, or invalidated, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law.

It is the Department's position, based on its experience enforcing and administering the DBRA, that with limited exceptions described below, the provisions and sections of the rule can function sensibly in the event that any specific provisions, sections, or applications are invalidated, enjoined, or stayed. As an initial matter, the Department notes that this is the first comprehensive update of the DBRA regulations in four decades, and as such covers a wide range of diverse topics. Moreover, parts 1, 3, and 5 function independently as a legal and practical matter. The regulations in part 1 concern the procedures for predetermination of wage rates and fringe benefits, such as the definition of the prevailing wage, the Department's wage surveys, and the circumstances under which state or local wage rates may be adopted. The regulations in part 5, in contrast, establish rules providing for the payment of these minimum wages and fringe benefits, coverage principles and enforcement mechanisms for these obligations, and the clauses to be included in all covered contracts. The incorporation and enforcement of wage determinations and fringe benefits contained within part 5 are functionally independent from the development of those wage determinations discussed in part 1. Therefore, the Department's intent is that all the provisions of part 5 remain in effect if a court should invalidate, stay, or enjoin any provision of part 1, or vice versa. The same is true with regard to part 3, which concerns the anti-kickback and other provisions of the Copeland Act.

Similarly, the Department believes that the various provisions within part 1 and part 5 are generally able to operate independently from one another and need not rise or fall as a whole. For example, the three-step process for calculating the prevailing wage in § 1.2 operates independently from § 1.6, which concerns the appropriate use of general and project wage determinations and when and how wage determinations should be incorporated into contracts, and the description of the wage survey process in § 1.3 operates independently from agencies' obligations to furnish an annual report on their construction programs to the Administrator. Each provision addressing various aspects of how wages are determined also stands on its own as a practical matter, including, for example, the various definitions within § 1.2, and the scope of consideration at § 1.7. Likewise, the final rule's provisions describing specific principles applicable to fringe benefits in §§ 5.22–5.33 are wholly separate from the provisions in § 5.6 concerning enforcement or provisions in § 5.12 concerning debarment proceedings. Accordingly, as described above in sections III.B.1.ix and III.B.3.xxiv, the Department has finalized, as proposed, new severability provisions in §§ 1.10 and 5.40.

The Department recognizes that a limited exception to the general principle of severability will apply where provisions of the final rule or the regulations are contingent upon other provisions for their existence and viability. For example, as discussed in section III.B.3.xx.C above, the Department's proposed revisions to § 3.11 were made to conform this section to the operation-of-law provision in § 5.5(e). If a court were to stay, invalidate, or enjoin § 5.5(e), the Department would have to consider whether changes to § 3.11 would be necessary. However, the Department intends that this exception be applied as narrowly as practicable so as to give maximum effect to the final rule and each regulatory provision within it.

C. Applicability Date

As a part of the Department's general review of potential reliance interests affected by this final rule, it has considered how the rule will affect contractors with contracts that were entered into before the final rule's effective date. With limited exceptions, the final rule will not affect such contracts. The Department concluded, however, that it would be helpful to address the timing of implementation in an ''Applicability Date'' subsection within the **DATES** section of the final rule.

The Applicability Date section of the final rule states that the provisions of the rule regarding wage determination methodology and related part 1 provisions prescribing the content of wage determinations may be applied only to wage determination revisions completed by the Department on or after the effective date of the final rule on October 23, 2023. This means that the Department will apply the amendments to §§ 1.2 (including the definitions of ''prevailing wage'' and ''area''), 1.3 (discussion of functional equivalence), and 1.7 (scope of consideration) only to wage surveys for which data collection is completed after the effective date of the final rule. Similarly, the Department will be able to implement the new provisions in §§ 1.3(f) (frequently conformed rates), 1.3(g)–(j) (adoption of State/local prevailing rates), 1.5(b) (project wage determinations), and 1.6(c)(1) (periodic adjustments to non-collectively bargained rates) only in wage determination revisions and project wage determinations that are issued and applicable after that date.

The Department's wage determination methodology and related provisions prescribing the content of wage determinations, as amended in this final rule, will generally apply only to contracts that are entered into after the effective date of the final rule. This is because, as explained in § 1.6 (''Use and effectiveness of wage determinations''), whenever a new wage determination or wage determination revision is issued (for example, after the completion of a new wage survey or through the new periodic adjustment mechanism), that revision will only apply to contracts that are entered into after the wage

[283] *See* Office of the Federal Register, ''Drafting Legal Documents: Principles of Clear Writing'' section 18, available at *https://www.archives.gov/Federal-register/write/legal-docs/clear-writing.html.*

determination is issued and will not apply to contracts which have already been entered into, with three exceptions. These exceptions are explained in § 1.6(c)(2)(iii). The first exception, discussed in § 1.6(c)(2)(iii)(A), is where a contract or order is changed to include substantial covered work that was not within the scope of work of the original contract. The second exception, discussed in the same paragraph of the rule, is where an option to extend the term of a contract is exercised. Each of these situations is effectively considered to be a new contract for which the most recent wage determination must be included, even if the wage determination was issued after the date that the original contract was first entered into. The third exception is for certain ongoing contracts that are not tied to the completion of any particular project (such as multiyear IDIQ contracts) for which new wage determinations must be incorporated on an annual basis under § 1.6(c)(2)(iii)(B) of the final rule. Accordingly, only for these limited types of contracts may wage determinations issued in accordance with the final rule be incorporated into contracts that were entered into prior to the effective date of the final rule.

The Applicability Date section provides that contracting agencies must apply the terms of § 1.6(c)(2)(iii) to existing contracts of the types referenced in that regulatory provision, without regard to the date of contract award, ''if practicable and consistent with applicable law.'' With regard to ongoing contracts covered by § 1.6(c)(2)(iii), such as long-term IDIQ contracts, this language requires contracting agencies to ensure, to the extent practicable, that any existing umbrella contract be amended to include the most updated wage determination on an annual basis, and to do so through the exercise of any and all authority that may be needed, including, where necessary, a contracting agency's authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination. This requirement applies to both FAR-covered contracts and those that are not. Because this requirement only applies where practicable, it is not necessary for contracting agencies to amend contracts to retroactively impose recent wage determinations. Rather, umbrella contracts must be amended only if they are indefinite or if more than one year remains in their period of performance. In addition, amendment need not be immediate following the effective date of the final rule. Rather, contracting agencies only need to amend covered umbrella contracts within one year of the effective date.

The Department considered whether the applicability of the new wage determination methodologies in this manner would result in harm to reliance interests of contractors that have entered into contracts covered by the exceptions in § 1.6(c)(2)(iii) and determined that there are no such reliance interests that would outweigh the benefits of the implementation of the final rule as described above. The final rule's exceptions for new substantial out-of-scope covered work and for exercises of options represent regulatory codifications of existing subregulatory principles, not substantive changes to the Davis-Bacon program. They are consistent with the Department's guidance, case law, and historical practice, under which such modifications are considered new contracts. S*ee* discussion above in section III.B.1.vi.(B). Accordingly, contractors should already expect that in any such covered circumstance, any new wage determination will be incorporated into the contract, and contracts therefore should already account for any resulting changes to prevailing wage rates in a manner that does not adversely affect contractors. Finally, as noted above in section III.B.1.vi.(B), many existing umbrella contracts that might be affected by this requirement may well have mechanisms requiring the contracting agency to compensate the contractor for increases in labor costs over time generally. Other contracts may not currently have such mechanisms, but compensation may be negotiated consistent with applicable law.

With the exception of § 1.6(c)(2)(iii), all of the remaining provisions of parts 1, 3, and 5 will be applicable only to new contracts entered into after the effective date of October 23, 2023. For any contracts entered into before October 23, 2023, the terms of those contracts and the regulations that were effective at the time those contracts were entered into (as interpreted by case law and the Department's guidance) will continue to govern the duties of contractors and contracting agencies and the enforcement actions of the Department. Accordingly, with regard to the new operation-of-law provision at § 5.5(e), if a contract was entered into prior to the effective date and is missing a required contract clause or wage determination, the Department will seek to address the omission solely through the modification provisions in the existing regulation at § 1.6(f) as it has been interpreted prior to this rulemaking. In other circumstances, where the Department has acted in this final rule only to clarify or codify existing interpretations and practices, the question of whether a contract was entered into prior to or after the applicability date of this final rule may not in practical terms change contractor duties or the parameters of any enforcement action. For contracts entered into after the effective date of this final rule, but before the Federal Acquisition Regulation or the relevant Related Act program regulations are amended to conform to this rule, agencies must use the contract clauses set forth in § 5.5(a) and (b) of this rule to the maximum extent possible under applicable law.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. The Department invited public comments as part of the NPRM. 87 FR 15762 (Mar. 18, 2022).

This final rule would affect existing information collection requirements previously approved under OMB control number 1235–0008 (Davis-Bacon Certified Payroll) and OMB control number 1235–0023 (Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts/Contract Work Hours and Safety Standards Act). As required by the PRA, the Department submitted proposed information collection revisions as part of the NPRM to OMB for review to reflect changes that will result from this rulemaking. OMB issued a Notice of Action related to each Information Collection Request (ICR) continuing the collection and asking the Department to address any comments received and resubmit with the final rule.

Circumstances Necessitating this Collection: The Department administers enforcement of the Davis-Bacon labor standards that apply to Federal and federally assisted construction projects. The Copeland Act requires contractors

and subcontractors performing work on federally financed or assisted construction contracts to furnish weekly a statement on the wages paid each employee during the prior week. *See* 40 U.S.C. 3145; 29 CFR 3.3(b). The Copeland Act specifically requires the regulations to ''include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.'' 40 U.S.C. 3145(a). This requirement is implemented by 29 CFR 3.3 and 3.4 and the standard Davis-Bacon contract clauses set forth at 29 CFR 5.5. The provision at 29 CFR 5.5 (a)(3)(ii)(A) requires contractors to submit weekly a copy of all payrolls to the Federal agency contracting for or financing the construction project. This information collection is assigned OMB control number 1235–0008. Regulations at 29 CFR part 5 prescribe labor standards for federally financed and assisted construction contracts subject to the DBA, 40 U.S.C. 3141 *et seq.,* and Related Acts, including all contracts subject to the CWHSSA, 40 U.S.C. 3701, *et seq.* The DBA and DBRA require payment of locally prevailing wages and fringe benefits, as determined by the Department, to laborers and mechanics on most federally financed or federally assisted construction projects. *See* 40 U.S.C. 3142(a); 29 CFR 5.5(a)(1). CWHSSA requires the payment of one and one-half times the basic rate of pay for hours worked over 40 in a week on most Federal contracts involving the employment of laborers or mechanics. *See* 40 U.S.C. 3702(c); 29 CFR 5.5(b)(1). The requirements of this information collection consist of (A) reports of conformed classifications and wage rates, and (B) requests for approval of unfunded fringe benefit plans. This information collection is assigned OMB control number 1235–0023.

Summary: This final rule amends regulations issued under the Davis-Bacon and Related Acts that set forth rules for the administration and enforcement of the Davis-Bacon labor standards that apply to Federal and federally assisted construction projects.

In the NPRM, the Department proposed to add a new paragraph to § 5.5(a)(1), and has recodified the paragraphs as follows:

Current paragraph	New paragraph
§ 5.5(a)(1)(ii)(A)	§ 5.5(a)(1)(iii)(A).
	§ 5.5(a)(1)(iii)(B) [paragraph added].
§ 5.5(a)(1)(ii)(B)	§ 5.5(a)(1)(iii)(C).
§ 5.5(a)(1)(ii)(C)	§ 5.5(a)(1)(iii)(D).
§ 5.5(a)(1)(ii)(D)	§ 5.5(a)(1)(iii)(E).

The final rule adopts the additions and revisions to § 5.5(a)(1) as proposed in the NPRM.

The Department also proposed to make non-substantive revisions to § 5.5(a)(1)(iii)(C) and (D) to describe the conformance request process more clearly, including by providing that contracting officers should submit the required conformance request information to WHD via email using a specified WHD email address. The Department adopted these proposals without changes as the changes merely clarified the existing conformance request process and did not alter the information collection burden on the public or on the Department.

Additionally, in the NPRM, the Department proposed adding a new paragraph (b)(5) to § 5.28, explicitly stating that unfunded benefit plans or programs must be approved by the Secretary in order to qualify as bona fide fringe benefits, and to replace the text in current paragraph (c) with language explaining the process contractors and subcontractors must use to request such approval. To accommodate these changes, the Department proposed to add a new paragraph (d) that contains the text currently located in paragraph (c) with non-substantive edits for clarity and readability. These changes are summarized as follows:

Current paragraph	New paragraph
	§ 5.28(b)(5) [paragraph added].
	§ 5.28(c) [paragraph added].
§ 5.28(c)	§ 5.28(d).

The final rule adopts the additions and revisions to § 5.28 as proposed in the NPRM, as these changes merely conformed regulatory language in § 5.28 to the existing approval process for unfunded fringe benefit plan under 29 CFR 5.5(a)(1)(iv). These changes did not alter the information collection burden on the public. The Department is adding regulatory citations to the collection under 1235–0023, however there is no change in burden.

The Department is adding two new recordkeeping requirements for contractors (telephone number and email address) to the collection under 1235–0008. However, it did not propose that such data be added to the ''certified payrolls'' submission (often collected on the WH–347 instrument); rather, this information must be provided to DOL and contracting agencies on request. The Department is adding a new requirement to 29 CFR 5.5 at renumbered paragraph (a)(3)(iii), which will require all contractors, subcontractors, and recipients of Federal assistance to maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed. These related documents include contractor and subcontractor bids and proposals, amendments, modifications, and extensions to contracts, subcontracts, and agreements. The Department is amending § 5.5(a)(3)(i) to clarify that regular payrolls and other basic records required by this section must be preserved for a period of at least 3 years after all the work on the prime contract is completed. In other words, even if a project takes more than 3 years to complete, contractors and subcontractors must keep payroll and basic records for at least 3 years after all the work on the prime contract has been completed. This revision expressly states the Department's longstanding interpretation and practice concerning the period of time that contractors and subcontractors must keep payroll and basic records required by § 5.5(a)(3). This is not a change. The Department notes that it is a normal business practice to keep such documents and previously explained that it does not expect an increase in burden associated with this requirement.

Purpose and use: This final rule continues the already existing requirements that contractors and subcontractors must certify their payrolls by attesting that persons performing work on DBRA covered contracts have received the proper payment of wages and fringe benefits. Contracting officials and WHD personnel use the records and certified payrolls to verify contractors pay the required rates for work performed.

Additionally, the Department reviews a proposed conformance action report to determine the appropriateness of a conformance action. Upon completion of review, the Department approves, modifies, or disapproves a conformance request and issues a determination. The Department also reviews requests for approval of unfunded fringe benefit plans to determine the propriety of the plans.

WHD obtains PRA clearance under control number 1235–0008 for an information collection covering the Davis-Bacon Certified Payroll. An ICR Revision will be submitted with this final rule to incorporate the regulatory citations in this final rule and adjust burden estimates to reflect a slight increase in burden associated with the new recordkeeping requirements finalized in this document.

WHD obtains PRA clearance under OMB control number 1235–0023 for an information collection related to reporting requirements related to Conformance Reports and Unfunded Fringe Benefit Plans. An ICR Revision will be submitted with the final rule that includes the shifting regulation citations as well as the addition of references to 29 CFR 5.28. The Agencies will notify the public when OMB approves the ICRs.

Information and technology: There is no particular order or form of records prescribed by the regulations. A respondent may meet the requirements of this final rule using paper or electronic means.

Public comments: The Department invited public comment on its analysis that the final rule created a slight increase in paperwork burden associated with ICR 1235–0008 and no increase in burden to ICR 1235–0023. The Department received some comments related to the PRA aspect of the NPRM.

The FFC–CT indicated their support for an update to the Department's recordkeeping requirements, expressing the view that accurate records are critical to transparency and accountability in the construction industry. McKanna, Bishop, Joffe, LLP, and WA BCTC also expressed that they fully support strengthened recordkeeping requirements. Weinberg, Roger, and Rosenfeld, on behalf of the NCDCL concurred, stating the recordkeeping requirements in the proposed rule were ''vast improvements'' that would ''increase transparency and allow the District Council and other organizations to ensure that contractors are complying with the law.'' The comment also stated that the proposed rule's ''clarifications and supplemental requirements modernize the DBRA's recordkeeping requirements and ensure that contractors maintain their records for years after projects are completed.'' The UBC suggested that additional recordkeeping requirements should be enacted, including requirements to retain timesheets, job site orientation records, contact information for subcontractors, and records of payments to subcontractors.

Alternatively, a comment submitted by the group of U.S. Senators expressed the view that adding to recordkeeping requirements places an impermissible administrative burden on small to mid-size contractors, many of whom lack the administrative resources to keep up with paperwork burdens. The commenters indicated that in addition to the certified payroll data, contractors are required to maintain all contracts and subcontracts, as well as bids, proposals, amendments, modifications, and extensions for those contracts and subcontracts. This requirement is not novel, and the time period for DBRA record retention is consistent with other such regulatory requirements for contractors. For example, the SCA requires that contractors and subcontractors maintain many pay and time records ''for 3 years from the completion of the work.'' 29 CFR 4.6(g)(1). The FAR requires contractors to retain certain records for 3 or 4 years. *See, e.g.,* 48 CFR 4.705–2(a) (contractors must retain certain pay administration records for 4 years); 48 CFR 4.703(a)(1) (requiring contractor retention for 3 years after final payment of ''records, which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General'').

Moreover, maintaining copies of contracts to which you are a party is a sound business practice to document the parties' obligations under the contracts, among other reasons. Not only are DBRA-covered construction contracts needed for reference during performance and completion about scope of work, specifications, pricing, etc., but if there is any dispute about the contract provisions, performance, etc., contract documents are the starting point for resolving contractual disputes. In addition, contract payment terms may be supporting documents for a contractor's business tax filings. The Department is not requiring that contractors maintain originals or even paper copies of contracts and related documents; electronic copies are acceptable so long as they contain a valid electronic signature.

The III–FFC wrote in support of the Department's proposal to add a recordkeeping requirement to retain telephone number and email address, noting that ''[t]he proposed requirements, including maintaining relevant bid and contract information, as well as payroll record information like contact information and correct classifications, help further the purpose of the Act.'' III–FFC added that such requirements are ''particularly necessary where DOL must contact a worker for investigation or audit purposes and will further reduce the incentive to misclassify workers and commit wage theft.'' Some individual commenters supported recordkeeping requirements indicating that it effectively deters misclassification.

However, ABC opposed this requirement, writing that a requirement to disclose worker telephone numbers and email addresses ''constitutes an invasion of employee privacy and exposes employees to the increased possibility of identity theft.'' At a minimum, ABC stated, ''such information should be redacted and not publicly disclosed under any circumstances.''

After consideration of the comments on this topic, the final rule adopts the changes to § 5.5(a)(3)(i) as proposed. As the various comments in support indicate, the proposed changes will clarify the recordkeeping requirements for contractors, discourage misclassification of workers, and increase the efficiency of the Department's enforcement. While the Department appreciates ABC's concerns for workers' privacy and the need to protect workers from the danger of identity theft, the final rule does not require contractors to provide workers' telephone numbers or emails on certified payrolls or post them on a publicly available database, but rather requires contractors to maintain this, like other worker contact information, in contractors' internal records, and make this information available to DOL and contracting agencies upon request for use in the enforcement and administration of the DBRA.

The Department believes that email and telephone number are minimal additional recordkeeping requirements and does not require in this final rule that such data be added to the weekly certified payroll thereby minimizing burden. The Department is, therefore, finalizing these additional recordkeeping requirements as proposed.

The Department received some comments on the proposed changes to § 5.5(a)(1)(iii)(B), which prohibits the use of conformances to ''split, subdivide or otherwise avoid application of classifications listed in the wage determination.'' Similarly, the Department also received comments regarding other revisions to part 1 and part 5 of the DBA regulations. Commenters like the SNBTU supported the Department's proposed rule, as did SMART and SMACNA, and LIUNA.

The Department also received some comments expressing concern about scrutiny related to unfunded fringe benefit plans. CC&M, and IUOE expressed their concerns. The comments appear to be premised on a misconception that the revisions impose

new substantive requirements with respect to unfunded plans. Nothing in these revisions alters the four substantive conditions for unfunded plans set out in § 5.28(b)(1)–(4) or the overall requirements that an unfunded plan must be ''bona fide'' and able to ''withstand a test . . . of actuarial soundness.'' Consistent with §§ 5.5(a)(1)(iv) and 5.29(e), the Department has long required written approval if a contractor seeks credit for the reasonably anticipated costs of an unfunded benefit plan towards its Davis-Bacon prevailing wage obligations, including with respect to vacation and holiday plans. The revisions to § 5.28 merely clarify this preexisting requirement and detail the process through which contractors may request such approval from the Department.

The FTBA expressed the view that the Department's proposal that contractors and subcontractors must make available ''any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1'' is too broad and vague, and they expressed concern that such a requirement would have the effect of subjecting contractors to ''burdensome, varied, unreasonable requests'' left to the discretion of enforcement staff. Alternatively, LIUNA supported the proposed recordkeeping requirements as ''clarifying DOL's 'longstanding' approach to requiring contractors to maintain basic records and certified payrolls, including regular payroll and additional records relating to fringe benefit and apprenticeship and training.''

Smith, Summerset & Associates, LLC, suggested that the WH–347 collection instrument used to collect data for the Davis-Bacon Certified Payroll (under OMB control number 1235–0008) is difficult to understand and indicated that the form needs simplification and rearrangement. The commenter added that, ''[t]he same changes—replacing 'employee' references with 'worker' references—should also be made asap to the WH–347 payroll reporting form. The WH–347 is the primary customer-facing document in the DBRA universe. It is used by thousands of contractors who still submit paper CPRs and, via operation of the computer programs, by other thousands of contractors who submit e-CPRs. It is frequently their main source of information about DBRA. WH–347 page 2, the signature page, still uses the terms 'employees' and 'employed by.' Those references need to be changed asap.'' Smith, Summerset & Associates also suggested additional changes to WH–347 to expand the universe of authorized persons who may sign the WH–347 and to simplify the tool for users. As we note below, changes to the WH–347 are beyond the scope of this rulemaking, but the Department will consider comments submitted as part of the form's revision process.

The MnDOT, commenting on the Department's proposal to require the Social Security number and last known address in payroll records, added that this information should also be included in the certified payroll. They suggested that excluding such data on the certified payroll would make it more difficult to track workers between contractors. With respect to comments about the WH–347, the Department reiterates that it proposed no changes to the form in the NPRM. However, the form is currently under review and the Department is considering such comments in the revision process. The Department appreciates this feedback and invites commenters to provide feedback and suggestions when the notice for revision is published in the **Federal Register.**

A copy of these ICRs may be obtained at *https://www.reginfo.gov* or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Total burden for the subject information collections, including the burdens that will be unaffected by this final rule and any changes are summarized as follows:

Type of review: Revision to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Davis-Bacon Certified Payroll.

OMB Control Number: 1235–0008.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 152,900 (0 from this rulemaking).

Estimated number of responses: 9,194,616 (1,200,000 from this rulemaking).

Frequency of response: On occasion.

Estimated annual burden hours: 7,464,975 (3,333 burden hours due to this rulemaking).

Capital/Start-up costs: $1,143,229 ($0 from this rulemaking).

Type of review: Revision to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act.

OMB Control Number: 1235–0023.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 8,518 (0 from this rulemaking).

Estimated number of responses: 8,518 (0 from this rulemaking).

Frequency of response: on occasion.

Estimated annual burden hours: 2,143 (0 from this rulemaking).

Estimated annual burden costs: 0.

Capital/Start-up costs: $5,366 ($0 from this rulemaking).

V. Executive Order 12866, Regulatory Planning and Review; Executive Order 13563, Improved Regulation and Regulatory Review

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[284] Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OIRA has determined that this final rule is a ''significant regulatory action'' within the scope of section 3(f)(1) of Executive Order 12866. OIRA has also designated this rule as a major rule under Subtitle E of the Small Business Regulatory and Enforcement Fairness Act of 1996. Although the Department has only quantified costs of $39.3 million in Year 1, there are multiple components of the rule that could not be quantified due to data limitations, so it is possible that the aggregate effect of the rule is larger.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits

[284] *See* 58 FR 51735, 51741 (Oct. 4, 1993).

justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when 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. The analysis below outlines the impacts that the Department anticipates may result from this rule and was prepared pursuant to the above-mentioned executive orders.

A. Introduction

1. Background and Need for Rulemaking

In order to provide greater clarity and enhance their usefulness in the modern economy, the Department is updating and modernizing the regulations that implement the Davis-Bacon and Related Acts. The DBA, enacted in 1931, requires the payment of locally prevailing wages and fringe benefits on Federal contracts for construction. *See* 40 U.S.C. 3142. The law applies to workers on contracts awarded directly by Federal agencies and the District of Columbia that are in excess of $2,000 and for the construction, alteration, or repair of public buildings or public works. Congress subsequently incorporated DBA prevailing wage requirements into numerous statutes (referred to as Related Acts) under which Federal agencies assist construction projects through grants, loans, guarantees, insurance, and other methods.

The Department seeks to address a number of outstanding challenges in the program while also providing greater clarity in the DBRA regulations and enhancing their usefulness in the modern economy. In this rulemaking, the Department is updating and modernizing the regulations implementing the DBRA at 29 CFR parts 1, 3, and 5. Among other updates, as discussed more fully earlier in this preamble, under this rule the Department will:

- Return to the definition of ''prevailing wage'' in § 1.2 that it used from 1935 to 1983.[285] Currently, a wage rate may be identified as prevailing in the area only if it is paid to a majority of workers in a classification on the wage survey; otherwise, a weighted average is used. The Department will return instead to the ''three-step'' method in effect before 1983. Under that method, in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. Only if no wage rate is paid to at least 30 percent of workers in a classification will an average rate be used.
- Revise § 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the ECI. The mechanism is intended to keep such rates more current between surveys so that they do not become out-of-date and fall behind prevailing wage rates in the area.
- Expressly give the Administrator authority and discretion to adopt State or local wage determinations as the Davis-Bacon prevailing wage where certain specified criteria are satisfied.
- Return to a prior policy made during the 1981–1982 rulemaking related to the delineation of wage survey data submitted for ''metropolitan'' or ''rural'' counties in § 1.7(b). Through this change, the Department seeks to more accurately reflect modern labor force realities, to allow more wage rates to be determined at smaller levels of geographical aggregation, and to increase the sufficiency of data at the statewide level.
- Include provisions to reduce the need for the use of ''conformances'' where the Department has received insufficient data to publish a prevailing wage for a classification of worker—a process that currently is burdensome for contracting agencies, contractors, and the Department.
- Strengthen enforcement, including by making effective, by operation of law, any contract clauses or wage determinations that were wrongly omitted from contracts, and by codifying the principle of annualization used to calculate the amount of Davis-Bacon credit that a contractor may receive for contributions to a fringe benefit plan when the contractor's workers also work on private projects.
- Clarify and strengthen the scope of coverage under the DBRA, including by revising the definition of ''site of the work'' to further encompass certain construction of significant portions of a building or work at secondary worksites, to better clarify when demolition and similar activities are covered by the Davis-Bacon labor standards, and to clarify that the regulatory definitions of ''building or work'' and ''public building or public work'' can be met even when the construction activity involves only a portion of an overall building, structure, or improvement.

2. Summary of Affected Contractors, Workers, Costs, Transfers, and Benefits

The Department evaluates the impacts of two components of this rule in this regulatory impact analysis:

- The return to the ''three-step'' method for determining the prevailing wage, and
- The provision of a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on ECI data.

The numbers presented in this final rule are generally very similar to the numbers in the proposed rule. Differences are due to the use of more recent data and a larger time estimate for regulatory familiarization costs in response to comments. This rule predominantly affects firms that hold federally funded or assisted construction contracts, with the primary impact resulting from the rule's changes affecting prevailing wage and fringe benefit rate determinations. The Department identified a range of potentially affected firms. The more narrowly defined population (those actively holding DBRA-covered contracts) includes 152,900 firms. The broader population (including those bidding on contracts but without active contracts, or those considering bidding in the future) includes 184,500 firms. Only a subset of potentially affected firms will be substantively affected and fewer may experience a change in payroll costs because some firms already pay above the prevailing wage rates that may result from this proposal.

The Department estimated there are 1.2 million workers on DBRA-covered contracts and who therefore may be potentially affected by this final rule. Some of these workers will not be affected because they work in occupations not covered by DBRA or, if they are covered by DBRA, workers may not be affected by the prevailing wage updates of this final rule because they may already earn above the updated prevailing wage and fringe benefit rates.

The Department estimated both regulatory familiarization costs and implementation costs for affected firms. Year 1 costs are estimated to total $39.3 million. Average annualized costs across the first 10 years are estimated to be $7.3 million (using a 7 percent discount rate). The transfer analysis discussed in section V.D. (''Transfer Payments'') draws on two illustrative analyses conducted by the Department. However, the Department does not definitively quantify annual transfer

[285] The 1981–1982 rulemaking went into effect Apr. 29, 1983. 48 FR 19532.

payments due to data limitations and uncertainty. Similarly, benefits are discussed qualitatively due to data limitations and uncertainty. See Table 1 for a summary of affected contractor firms, workers, and costs.

TABLE 1—SUMMARY OF AFFECTED CONTRACTOR FIRMS, WORKERS, AND COSTS

[2021 Dollars]

	Year 1	Future years		Average annualized value	
		Year 2	Year 10	3% Real rate	7% Real rate
Firms: Narrow definition [a]	152,900	152,900	152,900	.....	.....
Firms: Broad definition [b]	184,500	184,500	184,500	.....	.....
Potentially affected workers (millions)	1.2	1.2	1.2	.....	.....
Direct employer costs (million)	$39.3	$2.4	$2.4	$7.5	$7.3
Regulatory familiarization	$36.9	$0.0	$0.0	$5.1	$4.9
Implementation	$2.4	$2.4	$2.4	$2.4	$2.4

[a] Firms actively holding DBRA-covered contracts.
[b] Firms actively holding DBRA-covered contracts or who may be bidding on DBRA contracts or considering bidding in the future.

B. Number of Potentially Affected Contractor Firms and Workers

1. Number of Potentially Affected Contractor Firms

The Department identified a range of potentially affected firms. The more narrowly defined population (firms actively holding DBRA-covered contracts) includes 152,900 firms: 61,200 impacted by DBA and 91,700 impacted by the Related Acts (Table 2). The broader population (including those bidding on DBA contracts but without active contracts, or those considering bidding in the future) includes 184,500 firms: 92,800 impacted by DBA and 91,700 impacted by the Related Acts. The Department explains how the three components of affected contractor firms were derived separately: (1) firms currently holding DBA contracts, (2) all potentially affected DBA contractors, and (3) firms holding DBRA contracts.

The Department notes that only a subset of these firms will experience a change in payroll costs. Those firms that already pay above the new wage determination rates will not be substantively affected. Because there are no readily usable data on the earnings of workers of these affected firms, the Department cannot definitively identify the number of firms that will experience changes in payroll costs due to changes in prevailing wage rates.

i. Firms Currently Holding DBA Contracts

USASpending.gov—the official source for spending data for the U.S. Government—contains Government award data from the Federal Procurement Data System Next Generation (FPDS–NG), which is the system of record for Federal procurement data. The Department used these data to identify the number of firms that currently hold DBA contracts. Although more recent data are available, the Department used data from 2019 to avoid any shifts in the data associated with the COVID–19 pandemic that began in 2020. Additionally, for the final rule, the Department considered updating to 2021 data, but ultimately decided against it because of the reasoning above as well as variable differences between the 2019 and 2021 data. Any long-run impacts of COVID–19 are speculative because this is an unprecedented situation, so using data from 2019 may be the best approximation the Department has for future impacts. However, the pandemic could cause structural changes to the economy, resulting in shifts in industry employment and wages.

The Department identified firms working on DBA contracts as contracts with either an assigned NAICS code of 23 or if the ''Construction Wage Rate Requirements'' element is ''Y,'' meaning that the contracting agency flagged that the contract is covered by DBA.[286] [287] The Department excluded (1) contracts for financial assistance such as direct payments, loans, and insurance; and (2) contracts performed outside the U.S. because DBA coverage is limited to the 50 states, the District of Columbia, and the U.S. territories.[288]

In 2019, there were 14,000 unique prime contractors with active construction contracts in USASpending. However, subcontractors are also impacted by this final rule. The Department examined 5 years of USASpending data (2015 through 2019) and identified 47,200 unique subcontractors who did not hold contracts as primes in 2019. The Department used 5 years of data for the count of subcontractors to compensate for lower-tier subcontractors that may not be included in *USASpending.gov.* In total, the Department estimates 61,200 firms currently hold DBA contracts and are potentially affected by this rulemaking under the narrow definition; however, to the extent that any of these firms already pay above the prevailing wage rates as determined under this final rule they will not actually be impacted by the rule.

ii. Potentially Affected Contractors Under the DBA

The Department also cast a wider net to identify other potentially affected contractors, both those directly affected (*i.e.,* holding contracts) and those that plan to bid on DBA-covered contracts in the future. To determine the number of these firms, the Department identified construction firms registered in the GSA's System for Award Management (SAM) since all entities bidding on Federal procurement contracts or grants must register in SAM. The Department believes that firms registered in SAM include those that may be affected if the rulemaking impacts their decision to bid on contracts or their competitiveness in the bidding process. However, it is possible that some firms that are not already registered in SAM could decide

[286] The North American Industry Classification System (NAICS) is a method by which Federal statistical agencies classify business establishments in order to collect, analyze, and publish data about certain industries. Each industry is categorized by a sequence of codes ranging from two digits (most aggregated level) to six digits (most granular level). *https://www.census.gov/naics/.*

[287] The Department acknowledges that there may be affected firms that fall under other NAICS codes and for which the contracting agency did not flag in the FPDS–NG system that the contract is covered by DBA. Including these additional NAICS codes could result in an overestimate because they would only be affected by this rule if DBA-covered construction occurs. The data does not allow the Department to determine this.

[288] The DBA only applies in the 50 States and the District of Columbia and does not apply in the territories. However, some Related Acts provide Federal funding of construction in the territories that, by virtue of the Related Act, is subject to DBA prevailing wage requirements. For example, the DBA does not apply in Guam, but a Related Act provides that base realignment construction in Guam is subject to DBA requirements.

to bid on DBA-covered contracts after this rulemaking; these firms are not included in the Department's estimate. The rule could also impact them if they are awarded a future contract.

Using August 2022 SAM data, the Department identified 45,600 registered firms with construction listed as the primary NAICS code.[289] The Department excluded firms with expired registrations, firms only applying for grants,[290] government entities (such as city or county governments),[291] foreign organizations, and companies that only sell products and do not provide services. SAM includes all prime contractors and some subcontractors (those who are also prime contractors or who have otherwise registered in SAM). However, the Department is unable to determine the number of subcontractors that are not in the SAM database. Therefore, the Department added the subcontractors identified in USASpending to this estimate. Adding these 47,200 firms identified in USASpending to the number of firms in SAM, results in 92,800 potentially affected firms.

iii. Firms Impacted by the Related Acts

USASpending does not adequately capture all work performed under the Related Acts. Additionally, there is not a central database, such as SAM, where contractors working on Related Acts contracts must register. Therefore, the Department used a different methodology to estimate the number of firms impacted by the Related Acts. The Department estimated 883,900 workers work on Related Acts contracts (see section V.B.2.iii.), then divided that number by the average number of workers per firm (9.6) in the construction industry.[292] This results in 91,700 firms. Some of these firms likely also perform work on DBA contracts. However, because the Department has no information on the size of this overlap, the Department has assumed all are unique firms.

TABLE 2—RANGE OF NUMBER OF POTENTIALLY AFFECTED FIRMS

Source	Number
Total Count (Davis-Bacon and Related Acts)	
Narrow definition[a]	152,900
Broad definition[b]	184,500
DBA (Narrow Definition)	
Total	61,200
Prime contractors from USASpending	14,000
Subcontractors from USASpending	47,200
DBA (Broad Definition)	
Total	92,800
SAM	45,600
Subcontractors from USASpending	47,200
Related Acts	
Total	91,700
Related Acts workers	883,900
Employees per firm (SUSB)	9.6

[a] Firms actively holding DBRA-covered contracts

[b] Firms actively holding DBRA-covered contracts or who may be bidding on DBRA contracts or considering bidding in the future.

2. Number of Potentially Affected Workers

There are no readily available government data on the number of workers working on DBA contracts; therefore, to estimate the number of these workers, the Department employed the approach used in the 2021 final rule, ''Increasing the Minimum Wage for Federal Contractors,'' which implemented Executive Order 14026.[293] That methodology is based on the 2016 rulemaking implementing Executive Order 13706's paid sick leave requirements, which contained an updated version of the methodology used in the 2014 rulemaking for Executive Order 13658.[294] Using this methodology, the Department estimated the number of workers who work on DBRA contracts, representing the number of ''potentially affected workers,'' is 1.2 million potentially affected workers. Some of these workers will not be affected because while they work on DBRA-covered contracts, they are not in occupations covered by the DBRA prevailing wage requirements.

The Department estimated the number of potentially affected workers in three parts. First, the Department estimated employees and self-employed workers working on DBA contracts in the 50 States and the District of Columbia. Second, the Department estimated the number of potentially affected workers working on contracts covered by the Related Acts in the 50 States and the District of Columbia. Third, the Department estimated the number of potentially affected workers working on contracts covered by the Related Acts in the territories.

i. Workers on DBA Contracts in the 50 States and the District of Columbia

First, the Department calculated the share of construction activity that is covered by DBA by taking the ratio of Federal contracting expenditures[295] to gross output in NAICS 23: Construction.[296] This results in an estimated 3.27 percent of output in the construction industry covered by Federal Government contracts (Table 3).

The Department then multiplied the ratio of covered-to-gross output by private sector employment in the construction industry (9.1 million) to estimate the share of employees working on covered contracts. The Department's private sector employment number is primarily comprised of construction industry employment from the May 2019 OEWS, formerly the Occupational Employment Statistics.[297] However, the OEWS excludes unincorporated self-employed workers, so the Department supplemented OEWS data with data from the 2019 Current Population Survey Merged Outgoing Rotation Group (CPS MORG) to include the unincorporated self-employed.

[289] Data released in monthly files. Available at: *https://www.sam.gov/SAM/pages/public/extracts/samPublicAccessData.jsf.*

[290] Entities registering in SAM are asked if they wish to bid on contracts. If the firm answers ''yes,'' then they are included as ''All Awards'' in the ''Purpose of Registration'' column in the SAM data. The Department included only firms with a value of ''Z2,'' which denotes ''All Awards.''

[291] The Department believes that there may be certain limited circumstances in which State and local governments may be contractors but believes that this number would be minimal and including government entities would result in an inappropriate overestimation.

[292] 2019 Statistics of U.S. Businesses (SUSB). U.S., NAICS sectors, larger employment sizes up to 20,000+. *https://www.census.gov/data/tables/2019/econ/susb/2019-susb-annual.html.*

[293] *See* 86 FR 38816, 38816–38898.

[294] *See* 81 FR 9591, 9591–9671 and 79 FR 60634–60733.

[295] The Department used 2019 Federal contracting expenditures from *USASpending.gov* data excluding (1) financial assistance such as direct payments, loans, and insurance; and (2) contracts performed outside the U.S.

[296] Bureau of Economic Analysis. (2020). Table 8. Gross Output by Industry Group. *https://www.bea.gov/news/2020/gross-domestic-product-industry-fourth-quarter-and-year-2019.* ''Gross output of an industry is the market value of the goods and services produced by an industry, including commodity taxes. The components of gross output include sales or receipts and other operating income, commodity taxes, plus inventory change. Gross output differs from value added, which measures the contribution of the industry's labor and capital to its gross output.''

[297] BLS. OEWS. May 2019. Available at: *https://www.bls.gov/oes/.*

$$Potentially\ Affected\ Employees = \frac{Expenditures}{Gross\ Output} \times Employment$$

According to this methodology, the Department estimated there are 297,900 workers on DBA covered contracts in the 50 States and the District of Columbia. However, this estimate is imprecise for two reasons; one of which results in an overestimate and one that results in an underestimate. First, these laws only apply to wages for mechanics and laborers, so some of these workers would not be affected by these changes to DBA. Second, this methodology represents the number of year-round-equivalent potentially affected workers who work exclusively on DBA contracts. Thus, when the Department refers to potentially affected employees in this analysis, the Department is referring to this conceptual number of people working exclusively on covered contracts. Because workers often work on a combination of covered and non-covered contracts, this bias underestimates the number of unique workers.

ii. Workers on Related Acts Contracts in the 50 States and the District of Columbia

This rulemaking will also impact workers on Related Acts contracts in the 50 States and the District of Columbia. Data are not available on the number of workers covered by the Related Acts. Additionally, neither USASpending nor any other database fully captures this population.[298] Therefore, the Department used a different approach to estimate the number of potentially affected workers for Related Acts contracts.

The Census Bureau reports total State and local government construction spending was $318 billion in 2019.[299] The Department then applied an adjustment factor to account for the share of State and local expenditures that are covered by the Related Acts. The Department assumed half of the total State and local government construction expenditures are subject to a DBRA, resulting in estimated expenditures of $158 billion. To this, the Department added $3 billion to represent HUD backed mortgage insurance for private construction projects.[300]

As was done for DBA, the Department divided contracting expenditures ($161 billion) by gross output ($1.7 billion) and multiplied that ratio by the estimate of private sector employment used above (9.1 million) to estimate the share of workers working on Related Acts-covered contracts (883,900).

iii. Workers on Related Acts Contracts in the U.S. Territories

The methodology to estimate potentially affected workers in the U.S. territories is similar to the methodology above for the 50 States and the District of Columbia. The primary difference is that data on gross output in the territories are not available, and so the Department had to make some additional assumptions. The Department approximated gross output in the territories by calculating the ratio of gross output to Gross Domestic Product (GDP) for the U.S. (1.8), then multiplying that ratio by GDP in each territory to estimate total gross output.[301] To limit gross output to the construction industry, the Department multiplied it by the share of the territory's payroll in NAICS 23. For example, the Department estimated that Puerto Rico's gross output in the construction industry totaled $3.6 billion.[302]

$$Gross\ Output_i = \frac{Gross\ Output}{GDP} \times GDP_i$$

where

i = territory

The rest of the methodology follows the methodology for the 50 States and the District of Columbia. To determine the share of all output associated with Government contracts, the Department divided contract expenditures by gross output. Federal contracting expenditures from *USASpending.gov* data show that the Government spent $993.3 million on construction contracts in 2019 in American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. The Department then multiplied the ratio of covered contract spending to gross output by private sector employment to estimate the number of workers working on covered contracts (6,100).[303]

TABLE 3—NUMBER OF POTENTIALLY AFFECTED WORKERS

	Private output (billions) [a]	Contracting output (millions) [b]	Share output from covered contracting (%)	Private-sector workers (1,000s) [c]	Workers on covered contracts (1,000s) [d]
DBA, excl. territories	$1,662	$54,400	3.27	9,100	297.9
Related Acts, territories	5	993	(e)	35	6.1

[298] USASpending includes information on grants, assistance, and loans provided by the Federal government. However, this does not include all covered projects, it does not capture the full value of the project because it is just the Federal share (*i.e.,* excludes spending by State and local governments or private institutions that are also subject to DBRA labor standards because of the Federal share on the project), and it cannot easily be restricted to construction projects because there is no NAICS or product service code (PSC) variable.

[299] Census Bureau. ''Annual Value of Public Construction Put in Place 2009–2020.'' Available at: *https://www.census.gov/construction/c30/historical_data.html.*

[300] Estimate based on personal communications with the Office of Labor Standards Enforcement and Economic Opportunity at HUD.

[301] GDP limited to personal consumption expenditures and gross private domestic investment.

[302] In Puerto Rico, personal consumption expenditures plus gross private domestic investment equaled $71.2 billion. Therefore, Puerto Rico gross output was calculated as $71.2 billion × 1.8 × 2.7 percent.

[303] For the U.S. territories, the unincorporated self-employed are excluded because CPS data are not available on the number of unincorporated self-employed workers in U.S. territories.

TABLE 3—NUMBER OF POTENTIALLY AFFECTED WORKERS—Continued

	Private output (billions) [a]	Contracting output (millions) [b]	Share output from covered contracting (%)	Private-sector workers (1,000s) [c]	Workers on covered contracts (1,000s) [d]
Related Acts, excl. territories		161,297	9.68	9,135	883.9
Total	1,667	216,700			1,188.0

[a] Bureau of Economic Analysis, NIPA Tables, Gross output. 2019. For territories, gross output estimated by multiplying (1) total GDP for the territory by the ratio of total gross output to total GDP for the U.S. and (2) the share of national gross output in the construction industry.
[b] For DBA, and Related Acts in the territories, data from *USASpending.gov* for contracting expenditures for covered contracts in 2019. For Related Acts, data from Census Bureau on value of State and local government construction put in place, adjusted for coverage ratios. The Census data includes some data for territories but may be underestimated.
[c] OEWS May 2019. For non-territories, also includes unincorporated self-employed workers from the 2019 CPS MORG.
[d] Assumes share of expenditures on contracting is same as share of employment. Assumes workers work exclusively, year-round on DBRA covered contracts.
[e] Varies by U.S. Territory.

3. Demographics of the Construction Industry

To provide information on the types of workers that may be affected by this rule, the Department presents demographic characteristics of production workers in the construction industry. For purposes of this demographic analysis only, the Department is defining the construction industry as workers in the following occupations:

- Construction and extraction occupations
- Installation, maintenance, and repair occupations
- Production occupations
- Transportation and material moving occupations

The Department notes that the demographic characteristics of workers on DBRA projects may differ from the general construction industry; however, data on the demographics of workers on DBRA projects is unavailable. Demographics of the general workforce are also presented for comparison. Tabulated numbers are based on 2019 CPS data for consistency with the rest of the analysis and to avoid potential impacts of COVID–19. Additional information on the demographics of workers in the construction industry can be found in ''The Construction Chart Book: The U.S. Construction Industry and Its Workers.'' [304]

The vast majority of workers in the construction industry are men, 97 percent (Table 4), which is significantly higher than the general workforce where 53 percent are men. Workers in construction are also significantly more likely to be Hispanic than the general workforce; 38 percent of construction workers are Hispanic, compared with 18 percent of the workforce.

Lastly, while many construction workers may have completed registered apprenticeship programs, 84 percent of workers in the construction industry have a high school diploma or less, compared with 54 percent of the general workforce. The Department also looked at data on disability status in the construction industry and found that 6.4 percent of workers with a disability work in the construction industry, compared to 7.2 percent of workers with no disability.[305]

TABLE 4—DEMOGRAPHICS OF WORKERS IN THE CONSTRUCTION INDUSTRY

	Production workers in construction (%)	Total workforce (%)
By Region		
Northeast	16.4	17.9
Midwest	16.4	21.9
South	41.7	36.9
West	25.5	23.3
By Sex		
Male	97.1	53.4
Female	2.9	46.6
By Race		
White only	87.1	77.2
Black only	7.5	12.4
All others	5.4	10.4
By Ethnicity		
Hispanic	38.0	18.1

[304] Dong, Xiuwen, Xuanwen Wang, Rebecca Katz, Gavin West, and Bruce Lippy, ''The Construction Chart Book: The U.S. Construction Industry and Its Workers,'' (6th ed. Silver Spring: CPWR—The Center for Construction Research and Training, 2018) at 18. *https://www.cpwr.com/wp-content/uploads/publications/The_6th_Edition_Construction_eChart_Book.pdf.*

[305] Persons with a Disability: Labor Force Characteristics—2019. Table 4. *https://www.bls.gov/news.release/archives/disabl_02262020.pdf.*

TABLE 4—DEMOGRAPHICS OF WORKERS IN THE CONSTRUCTION INDUSTRY—Continued

	Production workers in construction (%)	Total workforce (%)
Not Hispanic	62.0	81.9
By Race and Ethnicity		
White only, not Hispanic	52.2	61.1
Black only, not Hispanic	6.2	11.6
By Age		
16–25	15.2	16.7
26–55	71.6	64.2
56+	13.3	19.1
By Education		
No degree	23.0	8.9
High school diploma	60.6	45.3
Associate's degree	9.3	10.7
Bachelor's degree or advanced	7.2	35.1

Note: CPS data for 2019.

The Department has also presented some demographic data on Registered Apprentices, as they are the pipeline for future construction workers. These demographics come from Federal Workload data, which covers the 25 states administered by the Department's OA and national registered apprenticeship programs.[306] Note that this data includes apprenticeships for other industries beyond construction, but 68 percent of the active apprentices are in the construction industry, so the Department believes this data could be representative of that industry. Of the active apprentices in this data set, 9.1 percent are female, and 90.9 percent are male. The data show that 78.7 percent of active apprentices are White, 14.1 percent are Black or African American, 3.2 percent are American Indian or Alaska Native, 2.1 percent are Asian, and 1.1 percent are Native Hawaiian or Other Pacific Islander.[307] The data also show that 23.6 percent of active apprentices are Hispanic.

C. Costs of the Final Rule

This section quantifies direct employer costs associated with the final rule. The Department estimated both (1) regulatory familiarization costs and (2) implementation costs associated with more frequently updated rates. Year 1 costs are estimated to total $39.3 million. Average annualized costs across the first 10 years of implementation are estimated to be $7.3 million (using a 7 percent discount rate). These cost estimates are higher than presented in the proposed rule due a larger estimate of the time required to review the regulation. Non-quantified costs are discussed in sections V.C.3 and V.C.4. Transfers resulting from these provisions are discussed in section V.D.

1. Regulatory Familiarization Costs

This rule's direct costs on some covered contractors who will review the regulations to understand how the prevailing wage determination methodology will change and how certain non-collectively bargained rates will be periodically updated will likely be small because not all of these firms will choose to familiarize themselves with the methodologies used to develop those prevailing wage rates, or any periodic adjustments to them. Regulatory familiarization time for other components of this final rule, such as the provisions clarifying regulatory language and coverage, are likely to take time when reviewed but will only be reviewed by a subset of firms. For example, a roofing company does not need to understand how the rule relates to prefabrication or truckers. Costs associated with ensuring compliance are included as implementation costs.

For this analysis, the Department has included all firms that either hold DBA or Related Acts contracts or are considering bidding on work (184,500 firms). However, this may be an overestimate, because firms that are registered in SAM might not bid on a DBRA contract, and therefore may not review these regulations. ABC asserted that this rule extends coverage to new types of construction, industries, and occupations and the associated firms are not covered by the Department's estimate. The Department believes most of these firms are already included in the estimate because the methodology covers all firms bidding, or considering bidding, on Federal construction contracts, not just DBA contracts. Furthermore, as explained below in section V.C.4.v, while some covered firms engaged in construction at secondary worksites may not be classified in the construction industry under NAICS and consequently may not be captured by this methodology, the Department believes that the number of such firms is small given the limited scope of this change to ''site of the work'' in the final rule.

The Department assumes that, on average, 4 hours of a human resources staff member's time will be spent reviewing the rulemaking. This time estimate is the average time per firm; some firms will spend more time reviewing the rule, but others will spend less or no time reviewing the rule. In the proposed rule, the Department used a time estimate of 1 hour. In response to commenters asserting that it would take more time, the Department increased this estimate to 4 hours. Commenters emphasized that the length of the rule and the need to have several employees review necessitate a longer review time estimate. For example, ABC noted,

[306] U.S. Department of Labor, Office of Apprenticeship. ''FY2019 Data and Statistics.'' *https://www.dol.gov/agencies/eta/apprenticeship/about/statistics/2019*.

[307] This excludes apprentices who did not wish to answer or for whom race was not provided.

''reading the 432-page NPRM–clocking in at a robust 118,450 words—would actually take 8.3 hours per person at an average silent reading rate.'' The Department acknowledges that it may take some reviewers at least this long to read the entire rule but, because some of the firms in the cost calculation will not bid on a Davis-Bacon contract and therefore will not spend any time reviewing this rule, an average time estimate of 4 hours is more appropriate.

The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of $49.94 per hour.[308] Therefore, the Department has estimated regulatory familiarization costs to be $36.9 million ($49.94 per hour × 4.0 hours × 184,500 contractors) (Table 5). The Department has included all regulatory familiarization costs in Year 1. New entrants who would have been covered by previous DBA regulations will not incur any additional regulatory familiarization costs attributable to this rule; had this rule not been proposed, they still would have incurred the costs of regulatory familiarization with existing provisions. In addition, while the provision regarding periodic adjustments is new and could involve additional review time, the Department believes that any increased costs associated with that familiarization will be offset by a decrease in time needed to review some of the simplified or harmonized provisions, such as debarment. ABC disagreed with this approach to new entrants and claimed that this rule constitutes an added regulation and cost. The Department acknowledges that for the subset of firms that would not have been covered by Davis-Bacon prior to the implementation of this rule and who may enter Davis-Bacon covered contracting in future years, they may incur future rule familiarization costs. However, the Department does not have data to determine how many firms would be newly-covered in future years. Given these considerations, the Department believes it is appropriate to assume that new entrants in future years would not spend significantly more time reviewing this rule than they would the existing regulations.

Average annualized regulatory familiarization costs over 10 years, using a 7 percent discount rate, are $4.9 million.

2. Implementation Costs for More Frequently Updated Rates

Firms will incur costs associated with implementing updated prevailing wage rates. When preparing a bid on a DBRA-covered contract, the contractor must review the wage determination identified by the contracting agency as appropriate for the work and determine the wage rates applicable for each occupation or classification to perform work on the contract. Once that contract is signed, the specified prevailing wages generally remain in effect through the life of that contract.[309] This section considers only the additional time necessary to update pay rates that change more frequently over time due to the provision to periodically adjust out-of-date prevailing wage and fringe rates. Implementation costs associated with other provisions, such as the provision to clarify and strengthen the scope of coverage under the DBRA, are discussed in section V.C.4.

The periodic adjustment rule will generally affect the frequency with which prevailing wage rates are updated on wage determinations, through both the anticipated initial updates to old, outmoded rates, and moving forward, the periodic updates to certain rates that have not been published through the survey process for the past 3 or more years (see section V.D.). Affected firms may incur implementation costs if they need to update compensation rates in their payroll systems. Currently, only a fraction of non-collectively bargained prevailing wages can be expected to change each year. Firms may spend more time than they have in the past updating payroll systems to account for new prevailing wage rates that the firms must pay as a result of being awarded a DBRA contract that calls for such new rates. This change is because the Department will update older non-collectively bargained rates—as it currently does with collectively bargained prevailing rates—to better represent current wages and benefits being paid in the construction industry. In addition, moving forward, WHD expects to publish wage rates more frequently than in the past.

To estimate the additional cost attributable updated non-collectively bargained rates, it is necessary to estimate the number of firms with DBRA contracts that will need to pay updated rates, the subset of such firms that do not already pay updated prevailing wage rates regularly, and the additional time these firms will spend implementing the new wage and fringe benefit rates. To do so, the Department estimated the number of firms with DBRA contracts that already pay updated prevailing wage rates regularly and will not incur additional implementation costs attributable to the periodic update provision.

First, the Department estimates that new wage rates are published from on average 7.8 wage surveys per year.[310] These surveys may cover an entire State or a subset of counties, and multiple construction types or a single type of construction. For simplicity, the Department assumed that each survey impacts all contractors in the State, all construction types, and all classes of laborers and mechanics covered by DBRA. Under these assumptions, the Department assumed that each year 15.6 percent of firms with DBRA contracts, roughly 23,900 firms (0.156 × 152,900 firms), might already be affected by changes in prevailing wage rates in any given year and thus will not incur additional implementation costs attributable to the rule.[311]

Additionally, there may be some firms that already update prevailing wage rates periodically to reflect CBA increases. These firms generally will not incur any additional implementation costs because of this rule. The Department lacks specific data on how many firms fall into this category but used information on the share of rates that are collectively bargained under the current method to help refine the estimate of firms with implementation costs. According to section V.D., 24 percent of rates are CBA rates under the current method, meaning 31,000 firms (0.24 × (152,900 − 23,900)) might already be affected by changes in prevailing wages in any given year. Combining this number with the 23,900 firms calculated above, 54,800 firms in total would not incur additional implementation costs with this rule.

Therefore, 98,100 firms (152,900 firms − 54,800 firms) are assumed to not update prevailing wage information in any given year, absent this rule, because prevailing wage rates were unchanged in their areas of operation and would therefore incur implementation costs. The Department intends to first update

[308] This includes the median base wage of $30.83 from the 2021 OEWS plus benefits paid at a rate of 45 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data, and overhead costs of 17 percent. OEWS data available at: *http://www.bls.gov/oes/current/oes131141.htm.*

[309] With the exception of certain significant changes; see section III.B.1.vi.(B).

[310] The Department used the number of surveys started between 2002 (first year with data readily available) and 2019 (last year prior to COVID–19) to estimate that 7.8 surveys are started annually. This is a proxy for the number of surveys published on average in a year.

[311] The Department divided 7.8 surveys per year by 50 States to arrive at the 15.6 percent of firms assumption. The District of Columbia and the territories were excluded from the denominator because these tend to be surveyed less often (with the exception of Guam which is surveyed regularly due to Related Act funding).

certain outdated non-collectively bargained rates [312] (currently designated as ''SU'' rates) up to their current value to better track wages and benefits being paid in the construction industry, as soon as reasonably possible. Then, in the future, the Department intends to update non-collectively bargained rates afterward as needed, and not more frequently than every 3 years. The Department assumes that 98,100 firms may be expected to incur additional costs updating rates each year. The Department acknowledges that this estimate of firms may be an overestimate because this rule states that rates will be updated no more frequently than every 3 years. In each year, only a fraction of firms will have to update their prevailing wage rates, but the Department has included all firms in the estimate to not underestimate costs.

The Department estimated it will take a half hour on average for firms to adjust their wage rates each year for purposes of bidding on DBRA contracts. The Department believes that this average estimated time is appropriate because only a subset of firms will experience a change in costs associated with adjusting payroll systems. Firms that already pay above the new wage determination rates will not need to incur any implementation costs.

Several commenters criticized the Department's implementation time estimate as too low. For example, ABC noted that according to their 2022 survey of member contractors, the proposed rule would take more than 30 minutes to implement. ABC states that a more accurate implementation cost is more likely closer to 10–15 hours per impacted company but does not provide specifics as to how that estimate was derived. The Department clarifies here that the time estimate used in the implementation cost calculation is strictly for the marginal time to identify updated rates and insert those rates into the contractor's bid and/or payroll system. Costs associated with other provisions are discussed in section V.C.4. The Department also notes that the estimate of 30 minutes represents an average, because although some firms may spend more time adjusting payroll systems, firms that already pay above the new wage determination rates will not need to spend any time adjusting payroll.

Implementation time will be incurred by human resource workers (or a similarly compensated employee) who will implement the changes. As with previous costs, these workers earn a loaded hourly wage of $49.94. Therefore, total Year 1 implementation costs were estimated to equal $2.4 million ($49.94 × 0.5 hour × 98,100 firms). The average annualized implementation cost over 10 years, using a 7 percent discount rate, is $2.4 million.

TABLE 5—SUMMARY OF COSTS

[2021 Dollars]

Variable	Total costs	Regulatory familiarization costs	Implementation costs for more frequently updated rates
Year 1 Costs			
Potentially affected firms	.....	184,500	98,100
Hours per firm	.....	4	0.5
Loaded wage rate [a]	.....	$49.94	$49.94
Cost ($1,000s)	$39,300	$36,900	$2,400
Years 2–10 ($1,000s)			
Annual cost	$2,400	$0	$2,400
Average Annualized Costs ($1,000s)			
3% discount rate	$7,500	$5,100	$2,400
7% discount rate	$7,300	$4,900	$2,400

[a] 2021 OEWS median wage for Compensation, Benefits, and Job Analysis Specialists (SOC 13–1141) of $30.83 multiplied by 1.62: the ratio of loaded wage to unloaded wage from the 2021 ECEC (45 percent) plus 17 percent for overhead.

3. Construction Costs and Inflation

Several commenters asserted that this rule will increase wages and construction costs, thereby increase government expenditures, and contribute to inflation. The Department believes both the impact on wages will be marginal, as demonstrated in the conceptual transfers analyses (see section V.D.) and the direct employer costs will be manageable. Additionally, the estimated 1.2 million potentially affected workers represent less than 1 percent of the total national workforce. Therefore, any impact on government budgets or inflation should be small. The III–FFC reviewed the relevant literature and reached the same conclusion. They assert that ''[t]he economic consensus is that prevailing wages have no impact on total construction costs.''[313] This conclusion is drawn based on ''19 studies on the impact of prevailing wages on the cost of school construction, highway construction, and municipal building projects that have been published in peer-reviewed academic journals since 2000.''

4. Other Provisions Not Analyzed

The Department provides a qualitative discussion of other provisions of the rule in this section.

i. Adopting of State and Local Governments Prevailing Wage Rates

Under the final rule, prevailing wage rates set by State and local governments may be adopted as Davis-Bacon

[312] The ''SU'' designation currently is used on general wage determinations when the prevailing wage is set through the weighted average method based on non-collectively bargained rates or a mix of collectively bargained rates and non-collectively bargained rates, or when a non-collectively bargained rate prevails.

[313] Kevin Duncan & Russell Ormiston, ''What Does the Research Tell Us about Prevailing Wage Laws,'' 44 Lab. Stud. J., 139 (2018).

prevailing wage rates under specified conditions. Specifically, the Department proposes that the Administrator may adopt such a rate if the Administrator determines that: (1) the State or local government sets wage rates, and collects relevant data, using a survey or other process that is open to full participation by all interested parties; (2) the wage rate reflects both a basic hourly rate of pay as well as any prevailing fringe benefits, each of which can be calculated separately; (3) the State or local government classifies laborers and mechanics in a manner that is recognized within the field of construction; and (4) the State or local government's criteria for setting prevailing wage rates are substantially similar to those the Administrator uses in making wage determinations. These conditions are intended to provide WHD with the flexibility to adopt State and local rates where appropriate while also ensuring that adoption of such rates is consistent with the statutory requirements of the Davis-Bacon Act. These conditions are also intended to ensure that arbitrary distinctions are not created between jurisdictions where WHD makes wage determinations using its own surveys and jurisdictions where WHD adopts State or local prevailing wage rates.

The Department does not currently possess sufficient data to conduct an analysis comparing all prevailing wage rates set by State and local governments nationwide to those established by the Department. However, by definition, any adopted State or local prevailing wage must be set using criteria that are substantially similar to those used by the Administrator, so the resulting wage rates are likely to be similar to those which would have been established by the Administrator. This change will also allow WHD to have more current rates in places where wage surveys are out-of-date, and to avoid WHD duplicating wage survey work that States and localities are already doing. The Department believes that this could result in cost savings, which are discussed further in section V.E.

ii. Combining Rural and Metropolitan County Data

This final rule also eliminates the across-the-board restriction on combining rural and metropolitan county data to allow for a more flexible case-by-case approach to using such data. If sufficient data are not available to determine a prevailing wage in a county, the Department is permitted to use data from surrounding counties, regardless of whether those counties are designated as rural or metropolitan. While sufficient data for analyzing the impact of this provision are not available, the Department believes this provision will improve the quality and accuracy of wage determinations by including data from counties that likely share and reflect the same labor market conditions when appropriate.

iii. Publishing Prevailing Wages When Receiving Insufficient Data

The provision to expressly authorize WHD to list classifications and corresponding wage and fringe benefit rates on wage determinations even when WHD has received insufficient data through its wage survey process is expected to ease the burden on contracting entities, both public and private, by improving the timeliness of information about conformed wage rates. For classifications for which conformance requests are regularly submitted, the Administrator would be authorized to list the classification on the wage determination along with wage and fringe benefit rates that bear a ''reasonable relationship'' to the wage and fringe benefit rates contained in the wage determination, in the same manner that such classifications and rates are currently conformed by WHD pursuant to current § 5.5(a)(1)(ii)(A)(*3*). In other words, for a classification for which conformance requests are regularly submitted, WHD would be expressly authorized to essentially ''pre-approve'' certain conformed classifications and wage rates, thereby providing contracting agencies, contractors, and workers with advance notice of the minimum wage and fringe benefits required to be paid for work within those classifications, reducing uncertainty and delays in determining wage rates for the classifications.

For example, suppose the Department was not able to publish a prevailing wage rate for carpenters on a building wage determination for a county due to insufficient data. Currently, every contractor in that county working on a Davis-Bacon building project that needed a carpenter would have to submit a conformance request for each of their building projects in that county. Moreover, because conformances cannot be submitted until after contract award, those same contractors would have a certain degree of uncertainty in their bidding procedure, as they would not know the exact rate that they would have to pay to their carpenters. This proposal would eliminate that requirement for classifications where conformance requests are common. While the Department does not have information on how much administrative time and money is spent on these tasks, for the commonly requested classifications, this provision could make the process more streamlined and efficient for the contractors.

iv. Clarification of Existing Policies

The final rule adds language in a few places to clarify existing policies. For example, the Department added language to the definitions of ''building or work'' and ''public building or public work'' to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. Also, the Department added or revised language regarding the ''material suppliers'' exemption, application of the ''site of the work'' principle to flaggers, when crew members are laborers or mechanics, and coverage requirements for truck drivers. Although, for the most part, this language is just a clarification of existing guidelines and not a change in policy, the Department understands that contracting agencies may have differed in their implementation of Davis-Bacon labor standards. In these cases, there may be firms that are newly applying Davis-Bacon labor standards because of the clarifications in this rule. This could result in additional rule familiarization, implementation, and administrative costs for these firms, and transfers to workers in the form of higher wages and benefits if the contractors are currently paying below the prevailing wage. Commenters asserted that these provisions would result in additional firms being covered and consequently incurring familiarization, implementation, and administration costs. The Department continues to believe that these provisions are generally clarifications rather than an expansion of scope and, therefore, has not estimated the number of potentially affected small businesses.

v. Modification of Site of the Work Definition To Include Certain Secondary Worksites

In this final rule, the Department revises the definition of ''site of the work'' to further encompass certain construction of significant portions of a building or work at secondary worksites that are dedicated exclusively or nearly so to a project covered by the DBRA. Under this provision, some additional companies may be covered by the DBRA. Specifically, some firms that engage in construction at secondary worksites, such as modular construction firms, may potentially engage in work that was not previously covered by the DBRA regulations, but is now covered.

These firms could incur larger familiarization and implementation costs than currently covered firms (whose costs are discussed above). However, the Department does not have data to determine how many firms would be newly covered by DBRA requirements as a result of this provision and is unable to provide a quantitative estimate of these costs.

Although some commenters asserted that the increased costs under this aspect of the proposed rule would be substantial, no commenters provided applicable data that the Department could use to quantify the costs. The Department does not anticipate that any increased costs associated with this aspect of the final rule will be substantial. Whereas the proposed rule would have revised Davis-Bacon coverage of off-site construction to include sites at which ''significant portions'' of covered buildings or works were constructed for specific use in a designated building or work, the final rule significantly limits the scope of this expansion to sites dedicated exclusively or nearly so to the covered contract or project. Thus, while the Department does not have data to determine how many firms and workers will be newly covered by DBRA requirements as a result of this provision, these significant limitations will ensure that any associated costs will similarly be extremely limited.[314] *Cf.* 65 FR 80277 (projecting that the prevailing wage implications associated with a similar expansion of coverage of off-site construction in the 2000 final rule would not be substantial).

Commenters also noted other potential costs associated with this provision. The CHC stated this provision will ''limit the use of this technology which is currently facilitating construction of affordable housing developments in rural areas where labor is scarcer and costs can be higher.'' Several commenters asserted that this will increase the price of modular construction.

The Department believes any potential cost increases related to this issue will be minimal and will not materially impact the use of modular construction technology. As explained above, based on the comments received, the Department believes that most modular construction facilities are engaged in more than one project at a time and therefore will not be considered ''sites of the work'' under this rule. Conversely, at secondary worksites that are dedicated exclusively or nearly so to a single DBRA-covered project for a period of time, application of the appropriate wage determination to workers at the site during that period of time should not be appreciably more difficult or burdensome than the application of a wage determination at such a site established specifically for contract performance, which is required under current regulations. Additionally, as noted above, the Department intends to work with contractors, agencies, and other stakeholders to resolve any questions associated with the application of wage determinations and classifications at secondary sites as early as possible. Finally, the Department notes that at least two state prevailing wage laws—Washington's and New Jersey's—cover custom components of public buildings or works to a greater degree than this final rule, and the Department is unaware of such laws having had significant detrimental impacts to modular construction in those states. See N.J.S.A. section 34:11–56.26(5), (12) (applying state prevailing wage requirements to components and structures ''pre-fabricated to specifications for a particular project of public work''); Wash. Admin. Code section 296–127–010(7)(a)(vi) (applying prevailing wage regulations to ''[t]he fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project''). The revisions regarding offsite construction are significantly less expansive than those proposed in the NPRM. The final rule only expands coverage to sites dedicated exclusively or nearly so to a single covered contract or project, and therefore will not encompass offsite facilities engaged in modular construction for more than one project or area.

vi. Post-Award Determinations and Operation-of-Law

This final rule also updates and codifies the procedures through which the Department enforces DBRA requirements when contract clauses and appropriate wage determinations are wrongly omitted from a contract. The final rule includes a provision that requires contract clauses and applicable wage determinations to be effective by operation of law in covered contracts, a requirement that will affect those cases in which the clauses and/or wage determinations have not been either properly included in a covered contract when awarded or otherwise retroactively incorporated at a later date by contract modification. These changes are intended to improve efficiency, reduce delays in investigations, and remedy enforcement challenges WHD has encountered under current regulations.

The Department does not have sufficient data to estimate how many firms would be affected by this provision, because any calculation would require information on the number of contracts that do not already include contract clauses and appropriate wage determinations, and those that would not include these requirements in absence of this rule. However, the Department believes that any impacts associated with this rule change will be minimal, because the Department already interprets the post-award modification provision at 29 CFR 1.6(f) to require agencies to incorporate missing contract clauses and wage determinations with retroactive effect in appropriate circumstances, and the new operation-of-law provision will therefore affect only a limited subset of matters in which the current regulations would not have resulted in timely compliance.

Some commenters expressed concerns that this provision would lead to increased costs, because firms would need to spend more time familiarizing themselves with the regulations in order to ensure that they are in compliance even if the contract clauses are not included in a contract. The Department notes that many such compliance costs are already borne by contractors as a best practice because under the current regulations contracts may be modified post-award to incorporate missing clauses retroactively—which has a similar effect as the operation-of-law provision. In addition, the Department's cost estimates already account for rule familiarization.

To the extent that there are any workers who, in the absence of this final

[314] A theoretical upper bound of newly-covered firms would likely be the 1,364 total firms in NAICS codes 321991, Manufactured Home (Mobile Home) Manufacturing, 321992, Prefabricated Wood Building Manufacturing, and 332311 Prefabricated Metal Building and Component Manufacturing. *See* U.S. Census Bureau, 2019 Survey of U.S. Businesses data, *https://www2.census.gov/programs-surveys/susb/datasets/2019/us_state_naics_detailedsizes_2019.txt.* However, as a result of the limits in the final rule, Davis-Bacon coverage will apply *only* when such firms (1) are working on DBRA-covered projects, (2) are constructing ''significant portions'' of such projects, as defined in the final rule, as opposed to prefabricated components, (3) are building such significant portions for specific use in a designated building or work, *and* (4) are doing so at a site either established for a particular covered contract or project or dedicated exclusively or nearly so to a single covered contract or project. While the Department does not have the data to estimate how many firms not already covered by the DBRA would meet all of these criteria, the Department believes that the number be small, particularly given the numerous comments from stakeholders indicating that modular construction facilities typically work on multiple projects at a time and therefore will not be covered under the final rule. *See supra* section III.B.3.ii.G.2.a.

rule, would not have received timely compensation required under the DBRA, this provision could lead to limited transfers to workers in the form of increased wages. Because the operation-of-law provision requires contractors to be compensated for any increases in wages that result from a determination of missing clauses or wage determinations, any transfers associated with the rule change would ultimately come from the government in the way of reimbursement to contractors. The Department has not estimated these limited transfers because there is not sufficient data on the prevalence of missing contract clauses or wage determinations, or the extent to which the inclusion of these items by operation-of-law would lead to increases in wages for contract workers.

vii. Other Provisions

Some contracts call for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project. The requirement for the contracting agency to incorporate into the contract the most recent revision(s) of any applicable wage determination(s) on each anniversary date of the contract's award could result in some minimal increased burden for contracting agencies. The contracting officer would need to locate the wage determinations that are currently incorporated in the master contract and incorporate the applicable wage determinations into their task or purchase order. As noted in the preamble, however, in the Department's experience contracting agencies' procedures for updating wage determinations for these types of contracts vary widely. Some contracting agencies incorporate the most recent wage determination modification in effect at the time each task order is issued, a process that would generally take more time than merely flowing down wage determination modifications that have already been incorporated into the master contract, as those contracting officers must identify the correct wage determination modification on *sam.gov* before incorporating it for each of the multiple task orders issued each year. Other agencies are already updating these orders annually and incorporating the updated wage determination, while others do not update wage determinations at all for at least some of these contracts. The Department does not have data to determine how many additional contracts would have to be updated annually following this rule or how many contracts currently require wage determinations to be flowed down to or updated for each task order. As a result, the Department cannot determine the extent to which this revision would result in an increased or reduced administrative burden across agencies. However, the Department anticipates that to the extent that additional time would be needed to update these contracts and task orders, the total amount of time involved would not be significant.

Other provisions are also likely to have no significant economic impact, such as the provision regarding the applicable apprenticeship ratios and wage rates when work is performed by apprentices in a different State than the State in which the apprenticeship program was originally registered. Recordkeeping revisions are also expected to have a negligible cost and to generate benefits from enhanced compliance, enforcement, and clarity for the regulated community that outweigh such costs. The Department expanded on this topic and addressed public comments in section III.B.3.iii.B.

D. Transfer Payments

The Department conducted demonstrations to provide an indication of the possible transfers attributable to the provision revising the definition of ''prevailing wage,'' and the provision to update out-of-date SU rates using the ECI. Both provisions may cause some prevailing wage rates to increase (relative to the existing method), while the former may cause other prevailing wage rates to decrease (relative to the existing method). However, due to many uncertainties in calculating a transfer estimate, the Department instead only presents this demonstration characterizing how wage and fringe rates may change.

1. The Return to the ''Three-Step'' Method for Determining the Prevailing Wage

i. Overview

The revision to the definition of prevailing wage (*i.e.,* the return to the ''three-step process'') may lead to income transfers to or from workers. Under the ''three-step process'' when a wage rate is not paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. Thus, fewer future wage determinations will be established based on a weighted average. The Department is not able to quantify the impact of this change because it will apply to surveys yet to be conducted, covering classifications and projects in locations not yet determined. Nonetheless, in an effort to illustrate the potential impact, the Department conducted a retrospective analysis that considers the impact of the 30-percent threshold had it been used to set the wage determinations for several occupations in recent years.

Specifically, to demonstrate the impact of this provision, the Department compiled data for 7 key classifications from 19 surveys across 17 states from 2015 to 2018 (see Appendix A).[315] This sample covers all four construction types, and includes metro and rural counties, and a variety of geographic regions. The seven select key classifications considered are as follows:

- Building and residential construction: Bricklayers, common laborers, plumbers, and roofers.
- Heavy and highway construction: Common laborers, cement masons, and electricians.

In total, the sample is comprised of 3,097 county-classification observations. Because this sample only covers seven out of the many occupations covered by DBRA and all classification-county observations are weighted equally in the analysis, the Department believes the results need to be interpreted with care and cannot be extrapolated to definitively quantify the overall impact of the 30-percent threshold. Instead, these results should be viewed as an informative illustration of the potential direction and magnitude of transfers that will be attributed to this provision.

The Department began its retrospective analysis by applying the current prevailing wage setting protocols (see Appendix B) to this sample of wage data to calculate the current prevailing wage and fringe benefit rates.[316] The Department then applied the 30-percent threshold to the same sample of wage data.[317] Then the Department compared the wage rates determined under the two methods. Results are reported at the county level

[315] Data were obtained from the Automated Survey Data System (ASDS), the data system used by the Department to compile and process WD–10 submissions. Out of the 21 surveys that occurred during this time period and met sufficiency standards, these 19 surveys are all of the ones with usable data for this analysis; the other two had anomalies that could not be reconciled.

[316] The calculated current rates generally match the published wage and the fringe benefit rates within a few cents. However, there are a few instances that do not match, but the Department does not believe these differences bias the comparisons to the calculated 30 percent prevailing definition.

[317] This model, while useful for this illustrative analysis, may not be relevant for future surveys. The methodology assumes that the level of participation by firms in WHD's wage survey process would be the same if the standard were 30 percent and is mostly reflective of states with lower union densities.

(*i.e.,* one observation represents one classification in one county).

The results differ depending on how heavily unionized the construction industry is in the states analyzed (and thus how many union rates are submitted in response to surveys). In Connecticut, for example, the Department found that estimated rates were little changed because the construction industry in Connecticut is highly unionized and union rates prevail under both the 30 percent and the 50 percent threshold. Conversely, in Florida, which is less unionized, there is more variation in how wage rates would change. For the rates that changed in Florida, calculated prevailing wage rates generally changed from an average rate (*e.g.,* insufficient identical rates to determine a modal prevailing rate under the current protocol) to a non-collectively bargained modal prevailing rate. Depending on the classification and county, the prevailing hourly wage rate may have increased or decreased because of the change in methodology.

Results may also differ by construction type. In particular, changes to highway prevailing wages may differ from changes in other construction types because they frequently rely on certified payroll. Thus, many of the wages used to calculate the prevailing wage reflect prevailing wages at the time of the survey.

ii. Results

Tables 6 and 7 compare the share of counties with calculated wage determinations by ''publication rule'' (*i.e.,* the rule under which the wage rate was or would be published): (1) an average rate, (2) a collectively bargained single (modal) prevailing rate, and (3) a non-collectively bargained single (modal) prevailing rate. Fringe benefit rate results also include the number of counties where the majority of workers received zero fringe benefits. The tables also show the change in the number of rates in each publication rule category.

For the surveys analyzed, the majority of current county wage rates were based on averages (1,954 ÷ 3,097 = 63 percent), about 25 percent were a single (modal) prevailing collectively bargained rate, and 12 percent were a modal prevailing non-collectively bargained rate. Using the 30 percent requirement for a modal prevailing rate, the number of county wage rates that would be based on averages decreased to 31 percent (948 ÷ 3,097). The percentage of rates that would be based on a modal wage rate increased for both non-collectively bargained and collectively bargained rates, although more wage rates would be based on non-collectively bargained rates than collectively bargained rates.

For fringe benefit rates, fringe benefits do not prevail for a similar percent in both scenarios, (*i.e.,* ''no fringes''): 50 percent of current rates, 48 percent of ''three-step process'' rates. The share determined as average rates decreased from 22 percent to 10 percent. The prevalence of modal prevailing fringe benefit rates increased for both non-collectively bargained and collectively bargained rates, with slightly more becoming collectively bargained rates than non-collectively bargained rates.

The total number of counties will differ by classification based on the State, applicable survey area (*e.g.,* statewide, metro only), and whether the data submitted for the classification met sufficiency requirements.

TABLE 6—PREVALENCE OF CALCULATED PREVAILING WAGES IN ANALYZED SUBSET, BY PUBLICATION RULE, BY CLASSIFICATION

	Laborers	Plumbers	Roofers	Bricklayers	Cement masons	Electricians	Total
Count	949	504	545	379	360	360	3,097
Current Hourly Rate							
Average	82%	57%	55%	42%	68%	53%	63%
Modal Prevailing—Union	12%	40%	23%	39%	4%	44%	25%
Modal Prevailing—Non-Union	6%	3%	22%	19%	28%	4%	12%
''Three-Step Process'' Hourly Rate [a]							
Average	47%	22%	26%	18%	40%	11%	31%
Modal Prevailing-Union	21%	46%	25%	45%	7%	80%	34%
Modal Prevailing-Non-Union	32%	31%	49%	37%	53%	9%	36%
Change for Hourly Rate (Percentage Points)							
Average	−35	−35	−29	−23	−28	−42	−32
Modal Prevailing-Union	9	7	2	5	3	36	9
Modal Prevailing-Non-Union	26	28	27	18	25	5	23
Current Fringe Benefit Rate							
Average	23%	27%	12%	13%	9%	48%	22%
Modal Prevailing-Union	14%	41%	23%	39%	4%	44%	25%
Modal Prevailing-Non-Union	4%	5%	3%	2%	2%	0%	3%
No fringes	59%	27%	62%	46%	85%	8%	50%
''Three-Step Process'' Fringe Benefit Rate [a]							
Average	13%	13%	9%	6%	5%	13%	10%
Modal Prevailing-Union	21%	47%	25%	46%	7%	80%	34%
Modal Prevailing-Non-Union	9%	13%	4%	2%	3%	7%	7%
No fringes	57%	27%	62%	46%	85%	0%	48%

TABLE 6—PREVALENCE OF CALCULATED PREVAILING WAGES IN ANALYZED SUBSET, BY PUBLICATION RULE, BY CLASSIFICATION—Continued

	Laborers	Plumbers	Roofers	Bricklayers	Cement masons	Electricians	Total
Change for Fringe Benefit Rate (Percentage Points)							
Average	−11	−14	−3	−7	−4	−35	−11
Modal Prevailing − Union	7	6	2	7	3	36	9
Modal Prevailing − Non − Union	6	8	1	0	1	7	4
No fringes	−2	0	0	0	0	−8	−2

[a] Using a threshold of 30 percent of employees' wage or fringe benefit rates being identical.

TABLE 7—PREVALENCE OF CALCULATED PREVAILING WAGES IN ANALYZED SUBSET, BY PUBLICATION RULE, BY CONSTRUCTION TYPE

	Residential	Building	Heavy	Highway	Total
Count	563	1,436	810	288	3,097
Current Hourly Rate					
Average	423	769	573	189	1,954
Majority—Union	99	456	143	64	762
Majority—Non-Union	41	211	94	35	381
Proposed "Three-Step Process" Hourly Rate [a]					
Average	197	313	331	107	948
Modal Prevailing—Union	118	570	257	104	1,049
Modal Prevailing—Non-Union	248	553	222	77	1,100
Change for Hourly Rate					
Average	−226	−456	−242	−82	−1006
Modal Prevailing—Union	19	114	114	40	287
Modal Prevailing—Non-Union	207	342	128	42	719
Current Fringe Benefit Rate					
Average	26	347	235	65	673
Modal Prevailing—Union	99	470	154	64	787
Modal Prevailing—Non-Union	0	76	19	1	96
No fringes	438	543	402	158	1,541
Proposed "Three-Step Process" Fringe Benefit Rate [a]					
Average	0	185	115	23	323
Modal Prevailing—Union	118	578	259	105	1,060
Modal Prevailing—Non-Union	7	150	51	14	222
No fringes	438	523	385	146	1,492
Change for Fringe Benefit Rate					
Average	−26	−162	−120	−42	−350
Modal Prevailing-Union	19	108	105	41	273
Modal Prevailing—Non-Union	7	74	32	13	126
No fringes	0	−20	−17	−12	−49

[a] Using a threshold of 30 percent of employees' wage or fringe benefit rates being identical.

Table 8 and Table 9 summarize the difference in calculated prevailing wage rates using the three-step process compared to the current process. Table 8 disaggregates results by craft and Table 9 disaggregated results by construction type. The first row entitled ''Total'' refers to the number of rates for the classification in the subset of surveys that the Department analyzed. The results show both average changes across all observations and average changes when limited to those classification-county observations where rates are different (about 32 percent of all observations in the sample). Notably, all classification-county observations are weighted equally in the calculations. On average:

- Across all observations, the average hourly rate increases by only one cent, or 0.1 percent of the average hourly wage rate. Across affected classification-counties only, the calculated hourly rate increases by 4 cents on average, or 0.2 percent of the average hourly wage rate. However, there is significant variation. The calculated hourly rate increased by as much as $7.80 and decreased by as much as $5.78.
- Across all observations, the average hourly fringe benefit rate increases by 19 cents, or 3.7 percent of the average

hourly fringe rate. Across affected classification-counties only, the calculated hourly fringe benefit rate increases by $1.42 on average, or 26.8 percent of the average hourly fringe rate. As a percent of the average fringe rate, this percent change is large because many of these prevailing wage rates previously did not have prevailing fringes. The change ranges from −$6.17 to $11.16.

- Some crafts and construction types have larger changes than others. However, it should be noted that when considering only one craft or construction type, the results are based on smaller samples and consequently less precise.

Based on this demonstration of the impact of changing from the current to the new definition of ''prevailing,'' some published wage rates and fringe benefit rates may increase and others may decrease. In the sample considered, wage rates changed very little on average, but fringe benefit rates increased on average. As discussed above, the Department believes that these results need to be interpreted with care and cannot be extrapolated to definitively quantify the overall impact of the 30-percent threshold. Instead, these results should be viewed as an informative illustration of the potential direction and magnitude of transfers that will be attributed to this provision.

TABLE 8—CHANGE IN RATES ATTRIBUTABLE TO CHANGE IN DEFINITION OF ''PREVAILING''

	Laborers	Plumbers	Roofers	Bricklayers	Cement masons	Electricians	Total
Hourly Rate							
Total	949	504	545	379	360	360	3,097
Number changed	330	175	160	89	101	150	1,005
Increased	121	130	36	66	17	106	476
Decreased	209	45	124	23	84	44	529
Percent changed	35%	35%	29%	23%	28%	42%	32%
Increased	13%	26%	7%	17%	5%	29%	15%
Decreased	22%	9%	23%	6%	23%	12%	17%
Average (non-zero)	$0.37	$1.10	−$1.06	$0.44	−$1.35	$0.94	$0.04
Average (all)	$0.13	$0.38	−$0.31	$0.10	−$0.38	$0.39	$0.01
Maximum	$7.80	$7.07	$4.40	$1.02	$2.54	$4.14	$7.80
Minimum	−$3.93	−$4.23	−$2.51	−$0.95	−$5.78	−$4.74	−$5.78
Fringe Benefit Rate							
Total	949	504	545	379	360	360	3,097
Number changed	137	69	17	26	14	184	447
Increased	109	59	9	19	11	174	381
Decreased	28	10	8	7	3	10	66
Percent changed	14%	14%	3%	7%	4%	51%	14%
Increased	11%	12%	2%	5%	3%	48%	12%
Decreased	3%	2%	1%	2%	1%	3%	2%
Average (non-zero)	$2.10	$2.14	−$1.67	$1.21	$0.74	$2.11	$1.42
Average (all)	$0.30	$0.29	−$0.05	$0.08	$0.03	$1.08	$0.19
Max	$9.42	$11.16	$1.42	$2.19	$6.00	$4.61	$11.16
Min	−$4.82	−$1.35	−$4.61	−$0.17	−$6.17	−$0.86	−$6.17

TABLE 9—CHANGE IN RATES ATTRIBUTABLE TO CHANGE IN DEFINITION OF ''PREVAILING,'' BY CONSTRUCTION TYPE

	Residential	Building	Heavy	Highway	Total
Hourly Rate					
Total	563	1,436	810	288	3,097
Number changed	226	455	242	82	1,005
Increased	102	215	118	41	476
Decreased	124	240	124	41	529
Percent changed	40%	32%	30%	28%	32%
Increased	18%	15%	15%	14%	15%
Decreased	22%	17%	15%	14%	17%
Average (non-zero)	$0.45	$0.04	−$0.09	$1.10	$0.04
Average (all)	$0.18	$0.01	−$0.03	$0.31	$0.01
Maximum	$6.57	$7.07	$7.80	$4.14	$7.80
Minimum	−$1.73	−$4.23	−$5.78	−$4.74	−$5.78
Fringe Benefit Rate					
Total	563	1,436	810	288	3,097
Number changed	26	201	154	66	447
Increased	26	163	139	53	381
Decreased	0	38	15	13	66
Percent changed	5%	14%	19%	23%	14%
Increased	5%	11%	17%	18%	12%
Decreased	0%	3%	2%	5%	2%

TABLE 9—CHANGE IN RATES ATTRIBUTABLE TO CHANGE IN DEFINITION OF ''PREVAILING,'' BY CONSTRUCTION TYPE—Continued

	Residential	Building	Heavy	Highway	Total
Average (non-zero)	$6.89	$1.27	$1.34	$2.95	$1.42
Average (all)	$0.32	$0.18	$0.26	$0.68	$0.19
Max	$9.42	$11.16	$4.61	$6.19	$11.16
Min	$0.01	−$4.82	−$6.17	−$2.21	−$6.17

2. Adjusting Out-of-Date Prevailing Wage and Fringe Benefit Rates

Updating older Davis-Bacon prevailing wage and fringe benefit rates will increase the minimum required hourly compensation paid to workers on Davis-Bacon projects. This would result in transfers of income to workers on Davis-Bacon projects who are currently being paid only the required minimum hourly rate and fringe benefits. To the extent that the Federal Government pays for increases to the prevailing wage through higher contract bids, an increase in the prevailing wage will transfer income from the Federal Government to the worker. This transfer will be reflected in increased costs paid by the Federal Government for construction.

However, to estimate transfers, many assumptions need to be made. For example, the Department would need to determine if workers really are being paid the prevailing wage rate; some published rates are so outdated that it is highly likely effective labor market rates exceed the published rates, and the published prevailing wage rates are functionally irrelevant. In addition, the Department would need to predict which Davis-Bacon projects would occur each year, in which counties these projects will occur, and the number of hours of work required from each class of laborer and mechanic. Because of many uncertainties, the Department instead characterizes the number and size of the changes in published Davis-Bacon hourly rates and fringe benefits rather than formally estimating the income change to those potentially affected by the proposal to update rates.

To provide an illustrative analysis, the Department used the entire set of wage and fringe benefit rates published on wage determinations as of May 2019 to demonstrate the potential changes in Davis-Bacon wage and fringe benefit rates resulting from updating certain out-of-date non-collectively bargained rates to 2021 values using the BLS ECI. For this demonstration, the Department considered the impact of updating rates for key classifications published prior to 2019 that were based on weighted averages, which comprises 172,112 wage and fringe benefit rates lines in 3,999 wage determinations.[318] The Department has focused on wage and fringe benefit rates prior to 2019 because these are the universe of key classification rates that are likely to be more than 3 years old at the time of this final rule, and the rule calls for updating non-collectively-bargained wage rates that are 3 or more years old.

After dropping hourly wages greater than $100 and wage rates that were less than $7.25 when originally published but were updated to the minimum wage of $7.25 in 2009, 159,562 wage rates were updated for this analysis.[319] To update these wage rates, the Department used the BLS ECI, which measures the change over time in the cost of labor total compensation.[320] The Department believes that the ECI for private industry workers, total compensation, ''construction, and extraction, farming, fishing, and forestry'' occupations, not seasonally adjusted, is the most appropriate index. However, the index for this group is only available starting in 2001. Thus, for updating wages and fringe benefits from 1979 through 2000, the Department determined the ECI for private industry workers, total compensation, in the goods-producing industries was the most appropriate series to use that was available back to 1979.[321]

To consider potential transfers to workers due to changes in wages, the full increase in the hourly rate would only occur if workers on DBRA projects are currently paid the exact prevailing rates.[322] However, due to market conditions in some areas, workers already may be receiving more than the published rate. While completely comparable data on wages paid to workers on DBRA projects in specific classifications and counties are not readily available and usable for this analysis, the BLS OEWS data provide a general estimate of wages paid to certain categories of workers performing construction and construction-related duties. Although the OEWS data can be informative for this illustrative analysis, it is not a representative data set of professional construction workers performing work on DBRA projects and it does not include benefits.

To provide an example of transfers, the Department compared the ECI-updated Davis-Bacon wage rates to the applicable median hourly rate in the OEWS data.[323] To estimate the approximate median 2021 wage rates, the Department used the median hourly wage rate for each key classification in the construction industry in the May 2021 State OEWS data. Using the OEWS as a general measure of the market conditions for construction worker wages in a given State, the Department assumed that an updated Davis-Bacon wage rate below the median OEWS rates would likely not lead to sizable income transfers to construction workers because most workers are likely already paid more than the updated Davis-Bacon rate. After removing the 99,337 updated Davis-Bacon wage rates that were less than the corresponding OEWS median rates, there remained 60,225 updated Davis-Bacon wage rates that may result in transfers to workers. However, the Department notes that some of the updated Davis-Bacon rates may be lower than the median because they are a wage rate for a rural county, and the OEWS data represents the statewide median.

[318] In each type of construction covered by the DBRA, some classifications are called ''key'' because most projects require these workers. Building construction has 16 key classifications, residential construction has 12 key classifications and heavy and highway construction each have the same eight key classifications. A line reflects a key classification by construction type in a specific geographic area. For example, a line could reflect a plumber in building construction in Fulton County, GA.

[319] The 54 wage rates greater than $100 were day or shift rates. The remaining 12,496 rates excluded were less than $7.25 prior to July 24, 2009, but were published from surveys conducted before the establishment of the Department's ASDS in 2002. The Department no longer has records of the original published wage rates in these cases.

[320] Available at: *https://www.bls.gov/ect/*.

[321] Continuous Occupational and Industry Series, Table 5. *https://www.bls.gov/web/eci/eci-continuous-dollar.txt*.

[322] The hourly wage rate increase would only occur when the next contract goes into effect and a new wage determination with an updated wage rate is incorporated into the contract.

[323] The Department used OEWS data for certain occupations matching key classifications in the construction industry by State.

Further investigating the ECI-updated Davis-Bacon wage rates in this example that were substantially above the OEWS median wage rate, the Department found that 23,200 of the originally published Davis-Bacon wage rates were already higher than the OEWS median. For at least some of these wage rates, the comparison to the OEWS median may not be appropriate because such Davis-Bacon wage rates are for work in specialty construction. For example, most of the prevailing wage rates published specifically for a 2014 wage determination for Iowa Heavy Construction River Work exceed the 2021 OEWS median rates for the same classifications in Iowa.[324] This may be an indication that comparing Davis-Bacon rates for this type of construction to a more general measure of wages may not be appropriate because workers are generally paid more for this type of specialty construction than for other types of construction work measured by the OEWS data.

Therefore, to measure possible transfers per hour to workers on Davis-Bacon projects due to the periodic updating of certain non-collectively bargained wage rates, the Department began by taking the lesser of:

- The difference between the updated wage rate and the OEWS median wage rate.
- The difference between the updated and currently published wage rates.

The second difference accounts for the 23,200 Davis-Bacon wage rates that were higher than the 2021 OEWS median rate even before they were updated, because otherwise the Department would overestimate the potential hourly wage transfer.

The Department also examined an additional adjustment for DBA wage rates because they are also subject to Executive Order 13658: Establishing a Minimum Wage for Contractors, which sets the minimum wage paid to workers on Federal contracts at $11.25 in 2022.[325] Thus, the Department analyzed an additional restriction that the maximum possible hourly transfer to workers on Davis-Bacon projects cannot exceed the difference between the updated wage rate and $11.25.

However, the added restriction has no impact on estimated transfers because any updated wage rates that were less than $11.25 were also less than the OEWS median wage rate. Thus, the potential possible hourly transfers attributable to updated Davis-Bacon wage rates are identical for construction projects covered by the Davis-Bacon Act and by the Related Acts.

Table 10 provides the summary statistics of the per hour transfers to workers that may occur due to updating out-of-date non-collectively bargained Davis-Bacon wage rates. Among the wage rates considered in this demonstration, there are 60,225 wage rate updates that may result in transfers to workers. On average, the potential hourly transfer is $4.11.

TABLE 10—DISTRIBUTION OF POTENTIAL PER HOUR TRANSFERS DUE TO UPDATED RATES

	Number of rates	Mean	Median	Standard deviation
Wage rates	60,225	$4.11	$3.29	$3.93
Fringe benefits	75,480	1.50	1.06	1.62
Total compensation	94,050	3.83	2.32	4.70

Of the 172,112 pre-2019 non-collectively bargained key classification fringe benefit rates, 75,480 were non-zero, and thus would be updated, possibly resulting in some transfers to workers (Table 10). On average, these non-zero fringe benefits would increase by $1.50 per hour.

Adding the required Davis-Bacon wage and fringe benefit rates together measures the required total compensation rate on DBRA projects. Due to updating old rates, 94,050 Davis-Bacon total compensation hourly rates would increase by $3.83 on average.[326]

The two demonstrations provide an indication of the possible changes to Davis-Bacon wage rates and fringe benefit rates attributable to the proposed provision revising the definition of ''prevailing,'' and the provision to update out-of-date SU rates using the ECI (only one of which would affect a location-occupation pair at a particular time). Both provisions may lead to higher hourly payments, while the former also has the potential to lead to lower hourly payments.

Because accurate data to measure the current county-level labor conditions for specific construction classifications are not available, it is unclear if an increase or decrease in Davis-Bacon minimum required rates will impact what workers earn on DBRA projects. Furthermore, even if some of these rate changes do lead to different rates paid to workers on DBRA projects, data are not available to estimate how large transfers might be. To do so would require detailed information on what federally funded construction contracts will be issued, the types of projects funded, where the projects will occur (specific county or counties), the value of the projects, and the labor mix needed to complete the project.

E. Cost Savings

This final rule could lead to cost savings for both contractors and the Federal Government because the rule would reduce ambiguity and increase efficiency, which could reduce the amount of time necessary to comply with the rule. For example, as discussed in section V.C.4, expressly authorizing WHD to list classifications and corresponding wage and fringe benefit rates on wage determinations when WHD has received insufficient data through its wage survey process will increase certainty and reduce administrative burden for contracting entities. It would reduce the number of conformance requests needed, which could save time for the contractors, contracting agencies, and the Department. Additionally, permitting the Administrator to adopt prevailing wage rates set by State and local governments could result in cost savings for the Department, because it avoids WHD duplicating wage survey work that states and localities are already doing. It could also result in cost savings in the form of time savings for contractors, as they will only have one wage determination that they will have to reference.

[324] WD IA20190002.

[325] The Department also ran an analysis using the minimum wage of $15.00 as proposed by Executive Order 14026, ''Increasing the Minimum Wage for Federal Contractors.'' The results were similar.

[326] The average increase in total compensation is less than the average wage increase because more wage and fringe benefit lines are included for total compensation.

Additionally, the Department is providing clarifications throughout the rule, which will make clear which contract workers are covered by DBRA. For example, the Department is clarifying provisions related to the site of work, demolition and removal workers, and truck drivers and their assistants, among others. These clarifications will make it clear to both contractors and contract workers who is covered, and therefore could help reduce legal disputes between the two, resulting in cost savings.

Because the Department does not have information on how much additional time contractors and the Federal Government currently spend complying with this rule due to lack of clarity, these cost savings are discussed qualitatively.

F. Benefits

Among the multiple provisions discussed above, the Department recognizes that the provision to update the definition of prevailing wage using the ''30 percent rule'' could have various impacts on wage rates. The effect of this proposal on actual wages paid is uncertain for the reasons discussed in section V.D.1. However, the Department's proposal to update out-of-date wage rates using the ECI would result in higher prevailing wage rates due to the increases in employer costs over time. Any DBRA-covered workers that were not already being paid above these higher wage rates would receive a raise when these updated rates were implemented. These higher wages could lead to benefits such as improved government services, increased productivity, and reduced turnover, which are all discussed here qualitatively. The magnitude of these wage increases could influence the magnitude of these benefits.

The Department notes that the literature cited in this section sometimes does not directly consider changes in the DBRA prevailing wages. Additionally, much of the literature is based on voluntary changes made by firms. However, the Department has presented the information here because the general findings may still be applicable in this context.

1. Improved Government Services

For workers who are paid higher wage rates as a result of this rulemaking, the Department expects that the quality of construction could improve. Higher wages can be associated with a higher number of bidders for Government contracts, which can be expected to generate greater competition and an improved pool of contractors. Multiple studies have shown that the bidding for municipal contracts remained competitive or even improved when living wage ordinances were implemented (Thompson and Chapman, 2006).[327] In a study on the impact of bid competition on final outcomes of State department of transportation construction projects, Delaney (2018) demonstrated that each additional bidder reduces final project cost overruns by 2.2 percent and increases the likelihood of achieving a high-quality bid by 4.9 times.[328]

A comment submitted by two individuals agreed with the Department's assertion that the number of bidders would not decrease. They pointed to a paper that found no difference in the number of bidders on federally funded projects and state-funded projects.[329] Conversely, the NAHB asserted that DBRA requirements can be a deterrent to small businesses considering bidding and that this rule could further discourage these contractors from participating. The Department believes this final rule clarifies the requirements and thus would not deter small businesses from participating.

2. Increased Productivity

For workers whose wages increase as a result of the Department's provision to update out-of-date wage rates, these increases could result in increased productivity. Increased productivity could occur through numerous channels, such as employee morale, level of effort, and reduced absenteeism. A strand of economic research, commonly referred to as ''efficiency wage'' theory, considers how an increase in compensation may be met with greater productivity.[330] Efficiency wages may elicit greater effort on the part of workers, making them more effective on the job.[331] A comment submitted by two individuals affirmed the likely relationship between this final rule and increased productivity.

Allen (1984) estimates the ratio of the marginal product of union and non-union labor.[332] He finds that union workers are 17 to 22 percent more productive than non-union members. Although it is unclear whether this entire productivity difference is attributable to higher wages, it is likely a large contributing factor. The Construction Labor Research Council (2004) compared the costs to build a mile of highway in higher wage and lower wage states using data reported to the FHWA from 1994 to 2002.[333] They found that in higher wage states, 32 percent fewer labor hours are needed to complete a mile of highway than in lower wage states, despite hourly wage rates being 69 percent higher in those states. While this increased worker productivity could be due in part to other factors such as greater worker experience or more investment in capital equipment in higher wage states, the higher wages likely contribute.

Conversely, Vedder (1999) compared output per worker across states with and without prevailing wage laws.[334] Data on construction workers is from the Department of Labor and data on construction contracts is from the Department of Commerce. A worker in a prevailing wage law State produced $63,116 of value in 1997 while a worker from a non-prevailing wage law State produced $65,754. Based on this simple comparison, workers are more productive without prevailing wage laws. However, this is a somewhat basic comparison in that it does not control for other differences between states that may influence productivity (for example, the amount of capital used or other State regulations) and it is unclear whether this difference is statistically significant.

Studies on absenteeism have demonstrated that there is a negative effect on firm productivity as absentee rates increase.[335] Zhang et al., in their study of linked employer-employee data in Canada, found that a 1 percent

[327] Thompson, J. and J. Chapman. (2006). ''The Economic Impact of Local Living Wages,'' EPI, Briefing Paper #170, 2006.

[328] Delaney, J. (2018). ''The Effect of Competition on Bid Quality and Final Results on State DOT Projects.'' *https://www.proquest.com/openview/33655a0e4c7b8a6d25d30775d350b8ad/1?pq-origsite=gscholar&cbl=18750.*

[329] Duncan, K. (2015). ''The Effect of Federal Davis-Bacon and Disadvantaged Business Enterprise Regulations on Highway Maintenance Costs.'' ILR Review, 68(1), pp. 212–237. *https://doi.org/10.1177/0019793914546304.*

[330] Akerlof, G.A. (1982). ''Labor Contracts as Partial Gift Exchange.'' The Quarterly Journal of Economics, 97(4), 543–569.

[331] Another model of efficiency wages, which is less applicable here, is the adverse selection model in which higher wages raise the quality of the pool of applicants.

[332] Allen, S.G. (1984). ''Unionized Construction Workers are More Productive.'' The Quarterly Journal of Economics, 251–174.

[333] The Construction Labor Research Council (2004). ''The Impact of Wages on Highway Construction Costs.'' *http://niabuild.org/WageStudybooklet.pdf.*

[334] Vedder, R. (1999). ''Michigan's Prevailing Wage Law and Its Effects on Government Spending and Construction Employment. Midland, Michigan: Mackinac Center for Public Policy,'' *https://www.mackinac.org/archives/1999/s1999–07.pdf.*

[335] Allen, S.G. (1983). ''How Much Does Absenteeism Cost?,'' Journal of Human Resources, 18(3), 379–393. *https://www.jstor.org/stable/145207?seq=1.*

decline in the attendance rate reduces productivity by 0.44 percent.[336] Allen (1983) similarly noted that a 10-percentage point increase in absenteeism corresponds to a decrease of 1.6 percent in productivity.[337] Hanna et al. (2005) find that while absenteeism rates of between 0 and 5 percent among contractors on electrical construction projects lead to no loss of productivity, absenteeism rates of between 6 and 10 percent can spark a 24.4 percent drop in productivity.[338]

Fairris et al. (2005) demonstrated that as a worker's wage increases there is a reduction in unscheduled absenteeism.[339] They attribute this effect to workers standing to lose more if forced to look for new employment and an increase in pay paralleling an increase in access to paid time off. Pfeifer's (2010) study of German companies provides similar results, indicating a reduction in absenteeism if workers experience an overall increase in pay.[340] Conversely, Dionne and Dostie (2007) attribute a decrease in absenteeism to mechanisms other than an increase in worker pay, specifically scheduling that provides both the option to work-at-home and for fewer compressed work weeks.[341] However, the relevance of such policies in the context of construction is unclear. The Department believes both the connection between prevailing wages and absenteeism, and the connection between absenteeism and productivity are well enough established that this is a feasible benefit of this final rule.

3. Reduced Turnover

Little evidence is available on the impact of prevailing wage laws and turnover, but an increase in the minimum wage has been shown to decrease both turnover rates and the rate of worker separation (Dube, Lester and Reich, 2011; Liu, Hyclak and Regmi, 2015; Jardim et al., 2018).[342] This decrease in turnover and worker separation can lead to an increase in the profits of firms, as the hiring process can be both expensive and time consuming. A review of 27 case studies found that the median cost of replacing an employee was 21 percent of the employee's annual salary.[343] Fairris et al. (2005) [344] found the cost reduction due to lower turnover rates ranges from $137 to $638 for each worker.

Although the impacts cited here are not limited to government construction contracting, because data specific to government contracting and turnover are not available, the Department believes that a reduction in turnover could be observed among those workers on DBRA contracts whose wages increase following this final rule. The potential reduction in turnover is a function of several variables: the current wage, the change in the wage rate, hours worked on covered contracts, and the turnover rate. Therefore, the Department has not quantified the impacts of potential reduction in turnover.

4. Additional Benefits

A comment submitted by two individuals mentioned several other potential benefits. First, they noted that research has shown a positive correlation between state prevailing wage laws and apprenticeship enrollment. Second, they pointed to literature demonstrating that states with prevailing wage laws have lower injury and disability rates. Depending on the channel through which these correlations occur, this final rule could result in more apprenticeships and reduced workplace injuries, disabilities and fatalities. The extent to which these impacts occur would likely depend on the extent of coverage expansion and wage rate changes.

VI. Final Regulatory Flexibility Act (FRFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on 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 proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604.

Response to comments from small businesses and SBA's Office of Advocacy are incorporated throughout the FRFA where applicable.

A. Need for Rulemaking and Objectives of the Final Rule

In order to provide greater clarity and enhance their usefulness in the modern economy, this final rule updates and modernizes the regulations at 29 CFR parts 1, 3, and 5, which implement the DBRA. The Department has not undertaken a comprehensive revision of the DBRA regulations since 1982. Since that time, Congress has expanded the reach of the DBRA regulations significantly, adding numerous new Related Act statutes to which they apply. The DBA and now more than 70 active Related Acts collectively apply to an estimated tens of billions of dollars in Federal and federally assisted construction spending per year and provide minimum wage rates for hundreds of thousands of U.S. construction workers. The Department expects these numbers to continue to grow as Congress seeks to address the significant infrastructure needs in the country, including, in particular, energy and transportation infrastructure necessary to address climate change. These regulations will provide additional clarity that will be helpful given the increased number of

[336] Zhang, W., Sun, H., Woodcock, S., & Anis, A. (2013). ''Valuing Productivity Loss Due to Absenteeism: Firm-level Evidence from a Canadian Linked Employer-Employee Data.'' Health Economics Review, 7(3). *https://healtheconomicsreview.biomedcentral.com/articles/10.1186/s13561-016-0138-y.*

[337] Allen, S.G. (1983). ''How Much Does Absenteeism Cost?,'' Journal of Human Resources, 18(3), *379–393. https://www.jstor.org/stable/145207?seq=1.*

[338] Hanna, A., Menches, C., Sullivan, K., & Sargent, J. (2005) ''Factors Affecting Absenteeism in Electrical Construction.'' Journal of Construction Engineering and Management 131(11). *https://ascelibrary.org/doi/abs/10.1061/(ASCE)0733-9364(2005)131:11(1212).*

[339] Fairris, D., Runstein, D., Briones, C., & Goodheart, J. (2005). ''Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses.'' LAANE. *https://laane.org/downloads/Examinig_the_Evidence.pdf.*

[340] Pfeifer, C. (2010). ''Impact of Wages and Job Levels on Worker Absenteeism.'' International Journal of Manpower 31(1), 59–72. *https://doi.org/10.1108/01437721011031694.*

[341] Dionne, G., & Dostie, B. (2007). ''New Evidence on the Determinants of Absenteeism Using Linked Employer-Employee Data.'' Industrial and Labor Relations Review 61(1), 108–120. *https://journals.sagepub.com/doi/abs/10.1177/001979390706100106.*

[342] Dube, A., Lester, T.W., & Reich, M. (2011). ''Do Frictions Matter in the Labor Market? Accessions, Separations, and Minimum Wage Effects.'' (Discussion Paper No. 5811). IZA. *https://www.iza.org/publications/dp/5811/do-frictions-matter-in-the-labor-market-accessions-separations-and-minimum-wage-effects.*

Liu, S., Hyclak, T.J., & Regmi, K. (2015). ''Impact of the Minimum Wage on Youth Labor Markets.'' Labour 29(4). *https://doi.org/10.1111/labr.12071.*

Jardim, E., Long, M.C., Plotnick, R., van Inwegen, E., Vigdor, J., & Wething, H. (Oct. 2018). ''Minimum Wage Increases and Individual Employment Trajectories'' (Working paper No. 25182). NBER. *https://doi.org/10.3386/w25182.*

[343] Boushey, H. and Glynn, S. (2012). ''There are Significant Business Costs to Replacing Employees. Center for American Progress.'' Available at: *http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.*

[344] Fairris, D., Runstein, D., Briones, C., & Goodheart, J. (2005). ''Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses.'' LAANE. *https://laane.org/downloads/Examinig_the_Evidence.pdf.*

construction projects subject to Davis-Bacon labor standards requirements, due to the substantial increases in federally funded construction provided for in legislation such as the IIJA.

Additionally, the Federal contracting system itself has undergone significant changes since 1982. Federal agencies have increased spending through the use of interagency Federal schedules. Contractors have increased their use of single-purpose entities such as joint ventures and teaming agreements. Offsite construction of significant components of public buildings and works has also increased. The regulations need to be updated to ensure their continued effectiveness in the face of changes such as these.

In this final rule, the Department seeks to address a number of outstanding challenges in the program while also providing greater clarity in the DBRA regulations and enhancing their usefulness in the modern economy. Specifically, the Department returns to the definition of ''prevailing wage'' that was used from 1935 to 1983 to address the overuse of average rates and ensure that prevailing wages reflect actual wages paid to workers in the local community. The Department will also periodically update non-collectively bargained prevailing wage rates to address out-of-date wage rates. The final rule will allow WHD to adopt State or local wage determinations as the Federal prevailing wage where certain specified criteria are satisfied, to issue supplemental rates for key classifications where there is insufficient survey data, to modernize the scope of work to include energy infrastructure and the site of work to include certain secondary worksites, to ensure that DBRA requirements protect workers by operation of law, and to strengthen enforcement, including through debarment and anti-retaliation protections. See section III.B. for a full discussion of the Department's changes to these regulations.

B. Significant Issues Raised by Public Comment, Including Those Filed by the Chief Counsel for Advocacy of the Small Business Administration

SBA Advocacy commented that DOL's Initial Regulatory Flexibility Analysis did not properly inform the public about the impact of this rule on small entities. They asserted that DOL should have estimated the compliance costs of expanding DBRA coverage to new industries and state that the proposed rule expands coverage to prefabrication companies, material suppliers, and truck drivers, professional surveyors, and additional small businesses.

As explained above, neither the proposed nor the final rule expanded coverage to prefabrication companies, which remain generally outside the scope of the DBRA. While the proposed rule would have broadened coverage to include secondary construction sites at which ''significant portions'' of buildings or works (as opposed to prefabricated components) are constructed, the final rule limits such coverage to facilities dedicated exclusively or nearly so to a particular covered contract or project. While the Department cannot estimate the precise number of small entities that will be impacted by this change, as explained above in Section V.C.4.v, the Department expects that number to be small since, based on the comments received, most modular construction companies' facilities are engaged in more than one project at a time and therefore will be outside the scope of the ''site of the work'' under the final rule. Additionally, as explained above, the final rule does not expand coverage to material suppliers or truck drivers but rather codifies existing policy with minor changes. Likewise, the preamble's guidance on coverage of survey crews is consistent with the Department's current interpretation and emphasizes that coverage of survey crews is highly fact-dependent. As such, the Department does not anticipate that it will substantially broaden coverage to entities not previously covered.

Small business commenters also noted that DOL underestimated rule familiarization costs. As discussed further in Section V.C.1, the Department reconsidered the time it would take for the regulated community to read this Final Rule and has increased the time estimate to an average of 4 hours. The Department believes that this average estimate is appropriate, because while some firms will spend more time reading the rule, other firms in our estimate will not bid on a DBA contract and will spend zero time reading the rule.

They also claimed that the changes to the methodology for calculating prevailing wages will increase wages for covered Federal contractors, which will add costs for covered contractors. As explained in Section V.D., the Department does not have data on the current wages of DBRA-covered workers, so it is not possible to definitively calculate how wages will change following this proposed rule. Although the Department performed an illustrative analysis of example changes in wage rates, without data on actual wages paid this analysis cannot be used to estimate the total impact of this rule on wages. Furthermore, if businesses do see a significant increase in the wage that they must pay for a classification of worker because of an increase prevailing wage rate for that classification (beyond the rate the business is already paying its workers in that classification), the business will be able to account for this cost by incorporating the increased cost into their bid or price negotiation and will be in effect reimbursed by the Federal government.

Overall, the Department believes that the data analysis it has provided is sufficient given the lack of available data on covered workers.

C. Estimating the Number of Small Businesses Affected by the Rulemaking

As discussed in section V.B., the Department identified a range of firms potentially affected by this rulemaking. This includes both firms impacted by the Davis-Bacon Act and firms impacted by the Related Acts. The more narrowly defined population includes firms actively holding Davis-Bacon contracts and firms affected by the Related Acts. The broader population includes those bidding on Davis-Bacon and Related Acts contracts but without active contracts, or those considering bidding in the future. As described in section V.B., the total number of potentially affected firms ranges from 152,900 to 184,500. This includes firms that pay at or above the new wage determination rates and thus will not be substantially affected. The Department does not have data to identify the number of firms that will experience changes in payroll costs.

To identify the number of small firms, the Department began with the total population of firms and identified some of these firms as small based on several methods.

- For prime contractors in USASpending, the Department used the variable ''Contracting Officer's Determination of Business Size.'' [345]
- For subcontractors from USASpending, the Department identified those with ''small'' or ''SBA'' in the ''Subawardee Business Types'' variable.[346]

[345] The description of this variable in the *USAspending.gov* Data Dictionary is: ''The Contracting Officer's determination of whether the selected contractor meets the small business size standard for award to a small business for the NAICS code that is applicable to the contract.'' The Data Dictionary is available at: *https://www.usaspending.gov/data-dictionary*.

[346] The description of this variable in the *USAspending.gov* Data Dictionary is: ''Comma separated list representing sub-contractor business types pulled from FPDS–NG or the System for Award Management (SAM).''

• For SAM data, the Department used the small business determination in the data, in variable ''NAICS Code String.'' This is flagged separately for each NAICS reported for the firm; therefore, the Department classified a company as a small business if SAM identified it as a small business in any 6-digit NAICS beginning with 23.

This results in an estimated number of potentially affected small businesses ranging from 101,700 to 127,800 (Table 11).

TABLE 11—RANGE OF NUMBER OF POTENTIALLY AFFECTED SMALL FIRMS

Source	Small firms
Total Count (Davis-Bacon and Related Acts)	
Narrow definition	101,700
Broad definition	127,800
DBA (Narrow Definition)	
Total	26,700
Prime contractors from USASpending	11,200
Subcontractors from USASpending [a]	15,500
DBA (Broad Definition)	
Total	52,800
SAM	37,300
Subcontractors from USASpending [a]	15,500
Related Acts	
Total	75,000

[a] Determination based on inclusion of ''small'' or ''SBA'' in the business types.

Several commenters believe the number of small businesses is underestimated. ABC and SBA's Office of Advocacy assert that the methodology excludes newly covered firms. The Department believes most of these firms are included in the estimate because the methodology covers all firms bidding, or considering bidding, on Federal construction contracts, not just those currently holding DBA contracts. However, the Department notes that there may be limited cases in which some firms covered by the final rule's modification of the ''site of the work'' to include certain secondary worksites may not be classified in the construction industry and consequently may not be captured by this methodology. As noted in the Executive Order 12866 analysis, the Department believes the extent to which these firms are not captured is small, given that the final rule significantly limits the circumstances under which such secondary worksites are covered.[347] The Department estimated in section V.B. that 1.2 million employees are potentially affected by the rulemaking. That methodology does not include a variation to identify only workers employed by small firms. The Department therefore assumed that the share of contracting expenditures attributed to small businesses is the best approximation of the share of employment in small businesses. In USASpending, expenditures are available by firm size. In 2019, $55.4 billion was spent on DBA covered contracts (see section V.B.2.) and of that, $19.8 billion (36 percent) was awarded to small business prime contractors.[348] For territories, the share of expenditures allocated to small businesses is 38 percent.

Data on expenditures by firm size are unavailable for the Related Acts (Table 12). Therefore, the Department assumed the same percentage applies to such expenditures as for Davis-Bacon contracts. In total, an estimated 424,800 workers are employed by potentially affected small businesses.

TABLE 12—NUMBER OF POTENTIALLY AFFECTED WORKERS IN SMALL COVERED CONTRACTING FIRMS

	Total workers (thousands)	Percent of expenditures in small contracting firms [a]	Workers in small businesses (thousands)
DBA, excl. territories	297.9	35.7	106.4
DBA, territories	6.1	38.2	2.3
Related Acts [b]	883.9	35.8	316.0
Total	1,188.0	.....	424.8

[a] Source: *USASpending.gov.* Percentage of contracting expenditures for covered contracts in small businesses in 2019.
[b] Because data on expenditures by firm size are unavailable for Related Acts. The Department assumed the same percentage applied as for Davis-Bacon.

[347] *See* section V.C.4.v and *supra* note 314.

[348] If subcontractors are more likely to be small businesses than prime contractors, then this methodology may underestimate the number of workers who are employed by small businesses.

In several places, the final rule adds or revises language to clarify existing policies rather than substantively changes them. For example, the final rule adds language to the definitions of ''building or work'' and ''public building or public work'' to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. Also, the Department added language clarifying the applicability of the ''material supplier'' exemption, the applicability of the DBRA to truck drivers and flaggers, and the extent to which demolition activities are covered by the DBRA. However, the Department acknowledges that some contracting agencies may not have been applying Davis-Bacon in accordance with those policies. Where this was the case, the clarity provided by this rule could lead to expanded application of the Davis-Bacon labor standards, which could lead to more small firms being required to comply with Davis-Bacon labor standards. Additionally, the Department's provision to revise the definition of ''site of the work'' to further encompass certain construction of significant portions of a building or work at secondary worksites, which could clarify and strengthen the scope of coverage under DBA and would also lead to more small firms being required to comply with Davis-Bacon labor standards. The Department does not have data to determine how many of these small firms exist.

D. Compliance Requirements, Including Reporting and Recordkeeping

Many of the provisions in this rule only affect how the prevailing wage rate is calculated. For these provisions there will be no new compliance requirements for small firms, as they will still need to pay the published prevailing wage. The Department is also making a number of revisions to existing recordkeeping requirements to better effectuate compliance and enforcement, including revisions to clarify the record retention period and add requirements to maintain worker telephone numbers and email addresses. The Department is clarifying language used to better distinguish the records that contractors must make and maintain (regular payrolls and other basic records) from the payroll documents that contractors must submit weekly to contracting agencies (certified payrolls). The Department is also clarifying that electronic signatures and certified payroll submission methods may be used.

E. Calculating the Impact of the Final Rule on Small Business Firms

The Department considered employer costs associated with both (a) the change in determining the prevailing wage based on a 30 percent threshold instead of a 50 percent threshold and (b) the incorporation of using the change in the ECI to update certain non-collectively bargained prevailing wage rates. The Department estimated both regulatory familiarization costs and implementation costs associated with these two provisions. An overview of these costs is explained here but additional details can be found in section V.C. Non-quantified direct employer costs are explained in section V.C.4.

The Department acknowledges that if some wage rates increase due to either of the provisions listed above, there could be an increase in payroll costs for some small firms. Due to data limitations and uncertainty, the Department did not quantify payroll costs (*i.e.,* transfers). The change in the definition of prevailing wage will only be applied to wage data received through surveys finalized after the effective date of this rule, for geographic areas and classifications that have not yet been identified. Both this provision and the updating of out-of-date rates will not have any impact if firms are already paying at or above the new prevailing wage rate because of labor market forces. Please see section V.D. for a more thorough discussion of these potential payroll costs, including an illustrative example of the potential impact of the rule on prevailing wage rates.

Year 1 direct employer costs for small businesses are estimated to total $39.3 million. Average annualized costs across the first 10 years are estimated to be $7.3 million (using a 7 percent discount rate). On a per firm basis, direct employer costs are estimated to be $224.73 in Year 1. These costs are somewhat higher than the costs presented in the NPRM because the Department increased the time for regulatory familiarization in response to comments.

The rule will impose direct costs on some covered contractors who will review the regulations to understand how the prevailing wage setting methodology will change. However, the Department believes these regulatory familiarization costs will be small because firms are not required to understand how the prevailing wage rates are set in order to comply with DBRA requirements, they are just required to pay the prevailing wage rates. The Department included all small potentially affected firms (127,800 firms). The Department assumed that on average, 4 hours of a human resources staff member's time will be spent reviewing the rulemaking. This was increased from 1 hour in the NPRM per comments.

The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of $49.94 per hour.[349] Therefore, the Department has estimated regulatory familiarization costs to be $25.5 million ($49.94 per hour × 4.0 hour × 127,800 contractors) (Table 13). The Department has included all regulatory familiarization costs in Year 1. New entrants will not incur any additional regulatory familiarization costs attributable to this rule. Average annualized regulatory familiarization costs over 10 years, using a 7 percent discount rate, are $3.4 million.

TABLE 13—DIRECT EMPLOYER COSTS TO SMALL BUSINESSES

(2021 Dollars)

Variable	Total	Regulatory familiarization costs	Implementation costs
Year 1 Costs			
Potentially affected firms		127,800	65,200
Hours per firm		4	0.5
Loaded wage rate		$49.94	$49.94

[349] This includes the median base wage of $30.83 from the May 2020 OEWS estimates plus benefits paid at a rate of 45 percent of the base wage, as estimated from the BLS's ECEC data, and overhead costs of 17 percent. OEWS data available at: *http://www.bls.gov/oes/current/oes131141.htm.*

TABLE 13—DIRECT EMPLOYER COSTS TO SMALL BUSINESSES—Continued
(2021 Dollars)

Variable	Total	Regulatory familiarization costs	Implementation costs
Cost ($1,000s)	$27,157	$25,529	$1,628
Years 2–10 ($1,000s)			
Annual cost	$1,628	$0	$1,628
Average Annualized Costs ($1,000s):			
3% discount rate	$5,156	$3,528	$1,628
7% discount rate	$2,025	$3,397	$1,628

When firms update prevailing wage rates, they can incur costs associated with adjusting payrolls, adjusting contracts, and communicating this information to employees (if applicable). This rule will generally affect the frequency with which prevailing wage rates are updated through the anticipated update of old, outmoded rates to their present value, and moving forward, to periodically update rates when that does not occur through the survey process. Currently, only a fraction of non-collectively bargained prevailing wages can be expected to change each year. Firms may spend more time than they have in the past updating payroll systems to account for new prevailing wage rates that the firms must pay as a result of being awarded a DBRA contract that calls for such new rates. This change is because the Department will update older non-collectively bargained rates—as it currently does with collectively bargained prevailing rates—to better represent current wages and benefits being paid in the construction industry. In addition, moving forward, WHD expects to publish wage rates more frequently than in the past.

The Department does not believe that there will be additional implementation costs associated with the proposal to update the definition of the prevailing wage (30 percent threshold). This change will only apply to new surveys, for which employers would have already had to update wage rates.

To estimate the size of the implementation cost associated with the periodic updates, the Department assumed that each year a share of potentially affected firms are already checking rates due to newly published surveys (section V.C.2.).[350] Multiplying the remaining 64.1 percent by the 101,700 small firms holding DBRA contracts results in 65,200 firms impacted annually (Table 13). The change to update current non-collectively bargained rates will have a one-time implementation cost to firms. The change to update non-collectively bargained rates moving forward will result in ongoing implementation costs. Each time a non-collectively bargained weighted average rate is updated on a wage determination applicable to a newly awarded DBRA contract, firms will incur some costs to adjust payroll (if applicable) and communicate the new rates to employees. The Department assumed that this provision would impact all small firms currently holding DBRA contracts (65,200 firms). For the initial increase, the Department estimated this will take approximately 0.5 hours for firms to adjust their rates. As with previous costs, implementation time costs are based on a loaded hourly wage of $49.94. Therefore, total Year 1 implementation costs were estimated to equal $1.6 million ($49.94 × 0.5 hour × 65,200 firms). The average annualized implementation cost over 10 years, using a 7 percent discount rate, is $1.6 million.

To determine direct employer costs on a per firm basis, the Department considers only those firms who are fully affected. These are firms who actively hold DBRA contracts, and who have new wage rates to incorporate into their bids and, as needed, into their payroll systems. For these firms, the Year 1 costs are estimated as four and a half hours of time (4 hour for regulatory familiarization and 0.5 hours for implementation) valued at $49.94 per hour. This totals $224.73 in Year 1 costs per firm.

Several commenters believed the costs presented here are too low. Some commenters noted that regulatory familiarization time will be much longer than the one hour estimated. The Department agrees and has consequently increased this time to 4 hours. Many commenters focus on implementation and administration costs for newly covered firms. As noted above, the Department only quantified implementation costs for impacts of the provision to update out-of-date SU rates using the ECI. Costs associated with provisions that clarify coverage are not quantified because they are merely clarifications, and thus are not an expansion of scope. Additionally, data are not available to estimate the number of newly covered firms.

Commenters asserted that compliance costs for newly covered small firms will be prohibitive. MBI wrote that ''[m]any small and disadvantaged businesses in the modular sector will not have the budget to cover the costs of DBA prevailing wages.'' ABC similarly noted that this rule will discourage small businesses participation. They also presented findings from a survey of members demonstrating that many small businesses believe the DBA increases administrative costs and labor costs. The Department disagrees that costs are prohibitive and points to the many contractors, both large and small, who already work on DBRA covered projects. Additionally, the added clarity from this rule may increase small business participation.

Commenters noted a range of costs for newly covered small entities. These commenters asserted that small businesses do not employ staff familiar with regulatory or legal affairs, and consequently this rule will entail hiring outside consultants. The Department provides compliance assistance resources to assist small businesses comply but acknowledges that sometimes businesses will want to engage their own counsel. The SBA noted that any potential scope expansion could also deter small businesses from participating due to the associated risks, such as citations and back wages. They also stated that newly covered small businesses will incur paperwork costs, such as submitting

[350] 15.6 percent update rates due to newly published survey data and 24 percent of the remainder update rates due to CBA escalators. Therefore, 64.1 percent are impacted [(1–0.156) × (1–0.24)].

certified payroll and evaluating prevailing wages, and administrative burdens. As discussed above, the Department believes that the number of newly covered entities will be small. The final rule does not significantly expand the scope of Davis-Bacon coverage, as most of the coverage-related regulatory provisions primarily represent clarifications of existing coverage principles, not expansions of coverage.

Furthermore, the Department does not believe that this rule would deter small businesses from participating. For example, a study that looked at the highway construction industry found no difference in bids between Federal projects with Davis-Bacon prevailing wage determinations and less-regulated state projects.[351] Also, as discussed above, the Department estimated that 101,700 small firms currently hold Davis-Bacon contracts, representing 67 percent of all firms holding Davis-Bacon contracts. Given the prevalence of small businesses in performing DBRA-covered construction, it seems reasonable to conclude that existing Davis-Bacon requirements do not impose a substantial barrier to entry for small businesses. To the extent that any firms would see a significant increase in wages paid to covered contract workers, the firms could incorporate any increased labor costs into their bids or contract price negotiations with the contacting agency.

F. Alternatives to the Final Rule and Steps Taken To Minimize Significant Economic Impact on Small Entities

The RFA directs agencies to assess the impacts that various regulatory alternatives would have on small entities and to consider ways to minimize those impacts. Regarding the alternatives considered by the Department in the NPRM, the NFIB commented that the Department should ''tailor its Davis-Bacon regulations to meet the needs of small and independent businesses.'' SBA's Office of Advocacy also suggested the Department develop less-costly alternatives for small businesses. ABC noted that the Department should discuss the impact of the proposed rule and describe the steps the agency took to minimize the significant economic impact of the rule on small entities. Accordingly, the Department has revised its discussion of alternatives, but believes the approach taken in this final rule is the best way to provide greater clarity in the DBRA regulations and enhance their usefulness in the modern economy.

One potential alternative to this rule would be to relax the requirements regarding recordkeeping. Currently the regulations require contractors and subcontractors to keep payrolls and basic records (including the name, address, and social security number of each worker, their correct classification, hourly rates of wages paid, daily and weekly number of hours worked, deductions made and actual wages paid) and records related to apprentices. It would be within the Department's discretion to not require some of these records, but the Department has decided that continuing to require these documents would promote substantially more effective compliance and enforcement. Furthermore, it is likely that many contractors already keep these records of their workers, so the requirement does not represent too large of a burden.

Another alternative would be for the Department not to finalize the proposed rule, which would therefore result in no rule familiarization or implementation costs to small businesses. However, as discussed throughout the rule, the Department believes that the changes in this regulation will lead to improved government services, increased productivity, and reduced turnover. Clarifications made in this rule will also help businesses comply with the Davis-Bacon regulations and improve enforcement efforts for the Department.

The Department notes that in other places in this final rule, the Department has chosen alternatives that minimize the impact of the rule on small businesses. For example, in their comments on the proposed rule, small businesses stated that the potential administrative costs associated with the proposed expansion to the site of the work would deter them from participating, because tracking time and wage rates at facilities engaged in work on multiple projects at once would be infeasible. In the final rule, the Department has chosen to narrow the scope of coverage at secondary construction sites to locations where specific portions of a building or work are constructed and were either established specifically for contract performance or are dedicated exclusively or nearly so to the contract or project. This narrower scope will help alleviate the cost concerns of small businesses.

VII. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any unfunded Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and Tribal governments in the aggregate, or by the private sector. This rulemaking is not expected exceed that threshold. *See* section V. for an assessment of anticipated costs, transfers, and benefits.

VIII. Executive Order 13132, Federalism

The Department has (1) reviewed this rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

IX. Executive Order 13175, Indian Tribal Governments

This rule would not have Tribal implications under Executive Order 13175 that would 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.

Appendix A: Surveys Included in the Prevailing Wage Demonstration

Survey year	Publication date	State	Metro/rural	Construction type(s)
Surveys Included				
2018	12/25/2020	Utah	Metro	Heavy.

[351] Duncan, K. ''Do Federal Davis-Bacon and Disadvantaged Business Enterprise Regulations Affect Aggressive Bidding? Evidence from Highway Resurfacing Procurement Actions,'' Journal of Public Procurement 15(3), 291–316. 2015.

Survey year	Publication date	State	Metro/rural	Construction type(s)
2017	12/14/2018	Nevada	Both	Highway.
2017	12/25/2020	New York	Rural	Building.
2017	12/25/2020	North Dakota	Both	Heavy.
2017	2/7/2020	Oklahoma	Metro	Residential.
2017	2/7/2020	Pennsylvania	East Metro	Residential.
2017	1/24/2020	Vermont	Both	Heavy, highway.[a]
2016	12/14/2018	Connecticut	Metro[b]	Building.
2016	12/14/2018	New Mexico	Metro	Building and heavy.
2016	9/29/2017	New York	4 metro counties	Building.
2016	2/7/2020	North Carolina	Both	Residential.
2016	12/8/2017	South Carolina	Metro[c]	Residential.
2015	10/6/2017	Alabama	Both[d]	Building and heavy.
2016	2/7/2020	Alabama	Both	Highway.
2015	4/21/2017	Arkansas	Both	Building and heavy.
2015	9/28/2018	Minnesota	Both	Building.
2015	7/28/2017	Mississippi	Both	Building and heavy.
2015	9/29/2017	New Hampshire	Both	Building and heavy.
2014	12/16/2016	Florida	Metro[c]	Building.

[a] Building component not sufficient.
[b] Only one rural county so excluded.
[c] Rural component of survey was not sufficient.
[d] Excludes heavy rural which were not sufficient.

This includes most surveys with published rates that began in 2015 or later. They include all four construction types, metro and rural counties, and a variety of geographic regions. Two surveys were excluded because they did not meet sufficiency standards (2016 Alaska residential and 2015 Maryland highway). A few surveys were excluded due to anomalies that could not be reconciled. These include:

- 2016 Kansas highway
- 2016 Virginia highway

Appendix B: Current DOL Wage Determination Protocols

Sufficiency requirement: For a classification to have sufficient responses there generally must be data on at least six workers from at least three contractors. Additionally, if data is received for either exactly six workers or exactly three contractors, then no more than 60 percent of the total can be employed by any one contractor. Exceptions to these criteria are allowed under limited circumstances. Examples include surveys conducted in rural counties, or residential and heavy surveys with limited construction activity, or for highly specialized classifications. In these circumstances, the rule can be three workers and two contractors.

Aggregation: If the classification is not sufficient at the county level, data are aggregated to the surrounding-counties group level, an intermediate grouping level, and a Statewide level (metro or rural), respectively. For building and residential construction, at each level of aggregation (as well as at the county level) WHD first attempts to calculate a prevailing rate using data only for projects not subject to Davis-Bacon labor standards; if such data are insufficient to calculate a prevailing rate, then data for projects subject to Davis-Bacon labor standards is also included.

Majority rate: If more than 50 percent of workers are paid the exact same hourly rate, then that rate prevails. If not, the Department calculates a weighted average. If a majority of workers are not paid the same wage rate, but all of the data reflects the payment of collectively bargained rates, then a union weighted average rate is calculated.

Prevailing fringe benefits: Before a fringe benefit is applicable, it must prevail. The first step is to determine if more than 50 percent of the workers in the reported classification receive a fringe benefit. If more than 50 percent of the workers in a single classification are paid any fringe benefits, then fringe benefits prevail. If fringe benefits prevail in a classification and:

- more than 50 percent of the workers receiving fringe benefits are paid the same total fringe benefit rate, then that total fringe benefit rate prevails.
- more than 50 percent of the workers receiving benefits are *not* paid at the same total rate, then the average rate of fringe benefits weighted by the number of workers who received fringe benefits prevails. If more than 50 percent are not paid the same total rate, but 100 percent of the data are union, then a union weighted average is calculated.

However, if 50 percent or less of the workers in a single classification are paid a fringe benefit, then fringe benefits will not prevail, and a fringe benefit rate of $0.00 will be published for that classification.

List of Subjects

29 CFR Part 1

Administrative practice and procedure, Construction industry, Government contracts, Government procurement, Law enforcement, Reporting and recordkeeping requirements, Wages.

29 CFR Part 3

Administrative practice and procedure, Construction industry, Government contracts, Government procurement, Law enforcement, Penalties, Reporting and recordkeeping requirements, Wages.

29 CFR Part 5

Administrative practice and procedure, Construction industry, Government contracts, Government procurement, Law enforcement, Penalties, Reporting and recordkeeping requirements, Wages.

For reasons stated in the preamble, the Wage and Hour Division, Department of Labor, amends 29 CFR subtitle A as follows:

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

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

Authority: 5 U.S.C. 301; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 40 U.S.C. 3141 *et seq.;* 40 U.S.C. 3145; 40 U.S.C. 3148; Secretary of Labor's Order 01–2014, 79 FR 77527; and the laws referenced by 29 CFR 5.1.

■ 2. Amend § 1.1 by revising paragraphs (a) and (b) to read as follows:

§ 1.1 Purpose and scope.

(a) The procedural rules in this part apply under the Davis-Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 3141 *et seq.*), and any laws now existing or subsequently enacted, which require the payment of minimum wages, including fringe benefits, to laborers and mechanics engaged in construction activity under contracts entered into or financed by or with the assistance of agencies of the United States or the District of Columbia, based on

determinations by the Secretary of Labor of the wage rates and fringe benefits prevailing for the corresponding classes of laborers and mechanics employed on projects similar to the contract work in the local areas where such work is to be performed.

(1) A listing of laws requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act can be found at *www.dol.gov/agencies/whd/government-contracts* or its successor website.

(2) Functions of the Secretary of Labor under these statutes and under Reorganization Plan No. 14 of 1950 (15 FR 3176, effective May 24, 1950, reprinted as amended in 5 U.S.C. app. 1 and in 64 Stat. 1267), except for functions assigned to the Office of Administrative Law Judges (*see* part 6 of this subtitle) and appellate functions assigned to the Administrative Review Board (*see* part 7 of this subtitle) or reserved by the Secretary of Labor (*see* Secretary's Order 01–2020 (Feb. 21, 2020)), have been delegated to the Administrator of the Wage and Hour Division and authorized representatives.

(b) The regulations in this part set forth the procedures for making and applying such determinations of prevailing wage rates and fringe benefits pursuant to the Davis-Bacon Act and any laws now existing or subsequently enacted providing for determinations of such wages by the Secretary of Labor in accordance with the provisions of the Davis-Bacon Act.

* * * * *

■ 3. Revise § 1.2 to read as follows:

§ 1.2 Definitions.

Administrator. The term ''Administrator'' means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or authorized representative.

Agency. The term ''agency'' means any Federal, State, or local agency or instrumentality, or other similar entity, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards, as defined in § 5.2 of this subtitle.

(1) *Federal agency.* The term ''Federal agency'' means an agency or instrumentality of the United States or the District of Columbia, as defined in this section, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards.

(2) [Reserved]

Area. The term ''area'' means the city, town, village, county or other civil subdivision of the State in which the work is to be performed.

(1) For highway projects, the area may be State department of transportation highway districts or other similar State geographic subdivisions.

(2) Where a project requires work in multiple counties, the area may include all counties in which the work will be performed.

Department of Labor-approved website for wage determinations (DOL-approved website). The term ''Department of Labor-approved website for wage determinations'' means the government website for both Davis-Bacon Act and Service Contract Act wage determinations. In addition, the DOL-approved website provides compliance assistance information. The term will also apply to any other website or electronic means that the Department of Labor may approve for these purposes.

Employed. Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise, is employed regardless of any contractual relationship alleged to exist between the contractor and such person.

Prevailing wage. The term ''prevailing wage'' means:

(1) The wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question;

(2) If the same wage is not paid to a majority of those employed in the classification, the prevailing wage will be the wage paid to the greatest number, *provided* that such greatest number constitutes at least 30 percent of those employed; or

(3) If no wage rate is paid to 30 percent or more of those so employed, the prevailing wage will be the average of the wages paid to those employed in the classification, weighted by the total employed in the classification.

Type of construction (or construction type). The term ''type of construction (or construction type)'' means the general category of construction, as established by the Administrator, for the publication of general wage determinations. Types of construction may include, but are not limited to, building, residential, heavy, and highway. As used in this part, the terms ''type of construction'' and ''construction type'' are synonymous and interchangeable.

United States or the District of Columbia. The term ''United States or the District of Columbia'' means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, and any corporation for which all or substantially all of the stock of which is beneficially owned by the United States, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

■ 4. Revise § 1.3 to read as follows:

§ 1.3 Obtaining and compiling wage rate information.

For the purpose of making wage determinations, the Administrator will conduct a continuing program for the obtaining and compiling of wage rate information. In determining the prevailing wages at the time of issuance of a wage determination, the Administrator will be guided by the definition of prevailing wage in § 1.2 and will consider the types of information listed in this section.

(a) The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area. The Administrator may also obtain data from agencies on wage rates paid on construction projects under their jurisdiction. The information submitted should reflect the wage rates paid to workers employed in a particular classification in an area, the type or types of construction on which such rate or rates are paid, and whether or not such wage rates were paid on Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements.

(b) The following types of information may be considered in making wage rate determinations:

(1) Statements showing wage rates paid on projects, including the names and addresses of contractors, including subcontractors; the locations, approximate costs, dates of construction and types of projects, as well as whether or not the projects are Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements; and the number of workers employed in each classification

on each project and the respective wage rates paid such workers.

(2) Signed collective bargaining agreements, for which the Administrator may request that the parties to such agreements submit statements certifying to their scope and application.

(3) Wage rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation.

(4) Wage rate data submitted to the Department of Labor by contracting agencies pursuant to § 5.5(a)(1)(iii) of this subtitle.

(5) For Federal-aid highway projects under 23 U.S.C. 113, information obtained from the highway department(s) of the State(s) in which the project is to be performed. For such projects, the Administrator must consult the relevant State highway department and give due regard to the information thus obtained.

(6) Any other information pertinent to the determination of prevailing wage rates.

(c) The Administrator may initially obtain or supplement such information obtained on a voluntary basis by such means, including the holding of hearings, and from any sources determined to be necessary. All information of the types described in paragraph (b) of this section, pertinent to the determination of the wages prevailing at the time of issuance of the wage determination, will be evaluated in light of the definition of prevailing wage in § 1.2.

(d) In compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data. Data from Federal or federally assisted projects will be used in compiling wage rate data for heavy and highway wage determinations.

(e) In determining the prevailing wage, the Administrator may treat variable wage rates paid by a contractor or contractors to workers within the same classification as the same wage where the pay rates are functionally equivalent, as explained by one or more collective bargaining agreements or written policies otherwise maintained by a contractor or contractors.

(f) If the Administrator determines that there is insufficient wage survey data to determine the prevailing wage for a classification for which conformance requests are regularly submitted pursuant to § 5.5(a)(1)(iii) of this subtitle, the Administrator may list the classification and wage and fringe benefit rates for the classification on the wage determination, provided that:

(1) The work performed by the classification is not performed by a classification in the wage determination;

(2) The classification is used in the area by the construction industry; and

(3) The wage rate for the classification bears a reasonable relationship to the wage rates contained in the wage determination.

(g) Under the circumstances described in paragraph (h) of this section, the Administrator may make a wage determination by adopting, with or without modification, one or more prevailing wage rates determined for public construction by State and/or local officials. Provided that the conditions in paragraph (h) are met, the Administrator may do so even if the methods and criteria used by State or local officials differ in some respects from those that the Administrator would otherwise use under the Davis-Bacon Act and the regulations in this part. Such differences may include, but are not limited to, a definition of prevailing wage under a State or local prevailing wage law or regulation that differs from the definition in § 1.2, a geographic area or scope that differs from the standards in § 1.7, and/or the restrictions on data use in paragraph (d) of this section.

(h) The Administrator may adopt a State or local wage rate as described in paragraph (g) of this section if the Administrator, after reviewing the rate and the processes used to derive the rate, determines that:

(1) The State or local government sets wage rates, and collects relevant data, using a survey or other process that is open to full participation by all interested parties;

(2) The wage rate reflects both a basic hourly rate of pay as well as any prevailing fringe benefits, each of which can be calculated separately;

(3) The State or local government classifies laborers and mechanics in a manner that is recognized within the field of construction; and

(4) The State or local government's criteria for setting prevailing wage rates are substantially similar to those the Administrator uses in making wage determinations under this part. This determination will be based on the totality of the circumstances, including, but not limited to, the State or local government's definition of prevailing wage; the types of fringe benefits it accepts; the information it solicits from interested parties; its classification of construction projects, laborers, and mechanics; and its method for determining the appropriate geographic area(s).

(i) In order to adopt wage rates of a State or local government entity pursuant to paragraphs (g) and (h) of this section, the Administrator must obtain the wage rates and any relevant supporting documentation and data from the State or local government entity. Such information may be submitted via email to *dba.statelocalwagerates@dol.gov*, via mail to U.S. Department of Labor, Wage and Hour Division, Branch of Wage Surveys, 200 Constitution Avenue NW, Washington, DC 20210, or through other means directed by the Administrator.

(j) Nothing in paragraphs (g), (h), and (i) of this section precludes the Administrator from otherwise considering State or local prevailing wage rates, consistent with paragraph (b)(3) of this section, or from giving due regard to information obtained from State highway departments, consistent with paragraph (b)(4) of this section, as part of the Administrator's process of making prevailing wage determinations under this part.

■ 5. Revise § 1.4 to read as follows:

§ 1.4 Report of agency construction programs.

On an annual basis, each Federal agency using wage determinations under the Davis-Bacon Act or any of the laws referenced by § 5.1 of this subtitle, must furnish the Administrator with a report that contains a general outline of its proposed construction programs for the upcoming 3 fiscal years based on information in the Federal agency's possession at the time it furnishes its report. This report must include a list of proposed projects (including those for which options to extend the contract term of an existing construction contract are expected during the period covered by the report); the estimated start date of construction; the anticipated type or types of construction; the estimated cost of construction; the location or locations of construction; and any other project-specific information that the Administrator requests. The report must also include notification of any significant changes to previously reported construction programs, such as the delay or cancellation of previously reported projects. Reports must be submitted no later than April 10 of each year by email to *DavisBaconFedPlan@dol.gov*, and must include the name, telephone number, and email address of the official responsible for coordinating the submission.

■ 6. Revise § 1.5 to read as follows:

§ 1.5 Publication of general wage determinations and procedure for requesting project wage determinations.

(a) *General wage determinations.* A ''general wage determination'' contains, among other information, a list of wage and fringe benefit rates determined to be prevailing for various classifications of laborers or mechanics for specified type(s) of construction in a given area. The Department of Labor publishes ''general wage determinations'' under the Davis-Bacon Act on the DOL-approved website.

(b) *Project wage determinations.* (1) A ''project wage determination'' is specific to a particular project. An agency may request a ''project wage determination'' for an individual project under any of the following circumstances:

(i) The project involves work in more than one county and will employ workers who may work in more than one county;

(ii) There is no general wage determination in effect for the relevant area and type(s) of construction for an upcoming project, or

(iii) All or virtually all of the work on a contract will be performed by a classification that is not listed in the general wage determination that would otherwise apply, and contract award (or bid opening, in contracts entered into using sealed bidding procedures) has not yet taken place.

(2) To request a project wage determination, the agency must submit Standard Form (SF) 308, Request for Wage Determination and Response to Request, to the Department of Labor, either by mailing the form to U.S. Department of Labor, Wage and Hour Division, Branch of Construction Wage Determinations, Washington, DC 20210, or by submitting the form through other means directed by the Administrator.

(3) In completing Form SF–308, the agency must include the following information:

(i) A sufficiently detailed description of the work to indicate the type(s) of construction involved, as well as any additional description or separate attachment, if necessary, for identification of the type(s) of work to be performed. If the project involves multiple types of construction, the requesting agency must attach information indicating the expected cost breakdown by type of construction.

(ii) The location (city, county, state, zip code) or locations in which the proposed project is located.

(iii) The classifications needed for the project. The agency must identify only those classifications that will be needed in the performance of the work. Inserting a note such as ''entire schedule'' or ''all applicable classifications'' is not sufficient. Additional classifications needed that are not on the form may be typed in the blank spaces or on a separate list and attached to the form.

(iv) Any other information requested in Form SF–308.

(4) A request for a project wage determination must be accompanied by any pertinent wage information that may be available. When the requesting agency is a State highway department under the Federal-Aid Highway Acts as codified in 23 U.S.C. 113, such agency must also include its recommendations as to the wages which are prevailing for each classification of laborers and mechanics on similar construction in the area.

(5) The time required for processing requests for project wage determinations varies according to the facts and circumstances in each case. An agency should anticipate that such processing by the Department of Labor will take at least 30 days.

■ 7. Revise § 1.6 to read as follows:

§ 1.6 Use and effectiveness of wage determinations.

(a) *Application, validity, and expiration of wage determinations*—(1) *Application of incorporated wage determinations.* Once a wage determination is incorporated into a contract (or once construction has started when there is no contract award), the wage determination generally applies for the duration of the contract or project, except as specified in this section.

(2) *General wage determinations.* (i) ''General wage determinations'' published on the DOL-approved website contain no expiration date. Once issued, a general wage determination remains valid until revised, superseded, or canceled.

(ii) If there is a current general wage determination applicable to a project, an agency may use it without notifying the Administrator, *Provided* that questions concerning its use are referred to the Administrator in accordance with paragraph (b) of this section.

(iii) When a wage determination is revised, superseded, or canceled, it becomes inactive. Inactive wage determinations may be accessed on the DOL-approved website for informational purposes only. Contracting officers may not use such an inactive wage determination in a contract action unless the inactive wage determination is the appropriate wage determination that must be incorporated to give retroactive effect to the post-award incorporation of a contract clause under § 5.6(a)(1)(ii) of this subtitle or a wage determination under paragraph (f) of this section. Under such circumstances, the agency must provide prior notice to the Administrator of its intent to incorporate an inactive wage determination and may not incorporate it if the Administrator instructs otherwise.

(3) *Project wage determinations.* (i) ''Project wage determinations'' initially issued will be effective for 180 calendar days from the date of such determinations. If a project wage determination is not incorporated into a contract (or, if there is no contract award, if construction has not started) in the period of its effectiveness it is void.

(ii) Accordingly, if it appears that a project wage determination may expire between bid opening and contract award (or between initial endorsement under the National Housing Act or the execution of an agreement to enter into a housing assistance payments contract under section 8 of the U.S. Housing Act of 1937, and the start of construction) the agency must request a new project wage determination sufficiently in advance of the bid opening to assure receipt prior thereto.

(iii) However, when due to unavoidable circumstances a project wage determination expires before award but after bid opening (or before the start of construction, but after initial endorsement under the National Housing Act, or before the start of construction but after the execution of an agreement to enter into a housing assistance payments contract under section 8 of the U.S. Housing Act of 1937), the head of the agency or the agency head's designee may request the Administrator to extend the expiration date of the project wage determination in the bid specifications instead of issuing a new project wage determination. Such request must be supported by a written finding, which must include a brief statement of factual support, that the extension of the expiration date of the project wage determination is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all of the circumstances, including an examination to determine if the previously issued rates remain prevailing. If the request for extension is denied, the Administrator will proceed to issue a new wage determination for the project.

(b) *Identifying and incorporating appropriate wage determinations.* (1) Contracting agencies are responsible for making the initial determination of the appropriate wage determination(s) for a project and for ensuring that the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications and that inapplicable wage determinations are not incorporated. When a contract involves construction in more than one area, and no multi-county project wage determination has been obtained, the solicitation and contract must incorporate the applicable wage determination for each area. When a contract involves more than one type of construction, the solicitation and contract must incorporate the applicable wage determination for each type of construction involved that is anticipated to be substantial. The contracting agency is responsible for designating the specific work to which each incorporated wage determination applies.

(2) The contractor or subcontractor has an affirmative obligation to ensure that its pay practices are in compliance with the Davis-Bacon Act labor standards.

(3) Any question regarding application of wage rate schedules or wage determinations must be referred to the Administrator for resolution. The Administrator should consider any relevant factors when resolving such questions, including, but not limited to, relevant area practice information.

(c) *Revisions to wage determinations.* (1) General and project wage determinations may be revised from time to time to keep them current. A revised wage determination replaces the previous wage determination. ''Revisions,'' as used in this section, refers both to modifications of some or all of the rates in a wage determination, such as periodic updates to reflect current rates, and to instances where a wage determination is re-issued entirely, such as after a new wage survey is conducted. Revisions include adjustments to non-collectively bargained prevailing wage and fringe benefit rates on general wage determinations, with the adjustments based on U.S. Bureau of Labor Statistics Employment Cost Index (ECI) data or its successor data. Such rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication. Such periodic revisions to wage determinations are distinguished from the circumstances described in paragraphs (d), (e), and (f) of this section.

(2)(i) Whether a revised wage determination is effective with respect to a particular contract or project generally depends on the date on which the revised wage determination is issued. The date on which a revised wage determination is ''issued,'' as used in this section, means the date that a revised general wage determination is published on the DOL-approved website or the date that the contracting agency receives actual written notice of a revised project wage determination.

(ii) If a revised wage determination is issued before contract award (or the start of construction when there is no award), it is effective with respect to the project, except as follows:

(A) For contracts entered into pursuant to sealed bidding procedures, a revised wage determination issued at least 10 calendar days before the opening of bids is effective with respect to the solicitation and contract. If a revised wage determination is issued less than 10 calendar days before the opening of bids, it is effective with respect to the solicitation and contract unless the agency finds that there is not a reasonable time still available before bid opening to notify bidders of the revision and a report of the finding is inserted in the contract file. A copy of such report must be made available to the Administrator upon request. No such report is required if the revision is issued after bid opening.

(B) In the case of projects assisted under the National Housing Act, a revised wage determination is effective with respect to the project if it is issued prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

(C) In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, a revised wage determination is effective with respect to the project if it is issued prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is signed, whichever occurs first.

(D) If, in the case of a contract entered into pursuant to sealed bidding procedures under paragraph (c)(2)(ii)(A) of this section the contract has not been awarded within 90 days after bid opening, or if, in the case of projects assisted under the National Housing Act or receiving housing assistance payments section 8 of the U.S. Housing Act of 1937 under paragraph (c)(2)(ii)(B) or (C) of this section, construction has not begun within 90 days after initial endorsement or the signing of the agreement to enter into a housing assistance payments contract, any revised general wage determination issued prior to award of the contract or the beginning of construction, as appropriate, is effective with respect to that contract unless the head of the agency or the agency head's designee requests and obtains an extension of the 90-day period from the Administrator. Such request must be supported by a written finding, which includes a brief statement of the factual support, that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all the circumstances.

(iii) If a revised wage determination is issued after contract award (or after the beginning of construction where there is no contract award), it is not effective with respect to that project, except under the following circumstances:

(A) Where a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or to require the contractor to perform work for an additional time period not originally obligated, including where an option to extend the term of a contract is exercised, the contracting agency must include the most recent revision of any wage determination(s) at the time the contract is changed or the option is exercised. This does not apply where the contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

(B) Some contracts call for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project. Examples of such contracts include, but are not limited to, indefinite-delivery-indefinite-quantity construction contracts to perform any necessary repairs to a Federal facility over a period of time; long-term operations-and-maintenance contracts that may include construction, alteration, and/or repair work covered by Davis-Bacon labor standards; or schedule contracts or blanket purchase agreements in which a contractor agrees to provide certain construction work at agreed-upon prices to Federal agencies. These types of contracts often involve a general commitment to perform necessary construction as the need arises, but do not necessarily specify the exact construction to be performed. For the types of contracts described here,

the contracting agency must incorporate into the contract the most recent revision(s) of any applicable wage determination(s) on each anniversary date of the contract's award (or each anniversary date of the beginning of construction when there is no award) unless the agency has sought and received prior written approval from the Department for an alternative process. The Department may grant such an exception when it is necessary and proper in the public interest or to prevent injustice and undue hardship. Such revised wage determination(s) will apply to any construction work that begins or is obligated under such a contract during the 12 months following that anniversary date until such construction work is completed, even if the completion of that work extends beyond the twelve-month period. Where such contracts have task orders, purchase orders, or other similar contract instruments awarded under the master contract, the master contract must specify that the applicable updated wage determination must be included in such task orders, purchase orders, or other similar contract instrument, and the ordering agency must so incorporate the applicable updated wage determinations into their orders. Once the applicable updated wage determination revision has been incorporated into such task orders, purchase orders, or other similar contract instruments, that wage determination revision remains applicable for the duration of such order, unless the order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work, when the wage determination must be updated as set forth in paragraph (c)(2)(iii)(A) of this section, or the order itself includes the exercise of options. Where such orders do include the exercise of options, updated applicable wage determination revision, as incorporated into the master contract must be included when an option is exercised on such an order.

(C) For contracts to which both paragraphs (c)(2)(iii)(A) and (B) of this section apply, updated wage determinations must be incorporated pursuant to the requirements of both paragraphs. For example, if a contract calls for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project and also has an option provision to extend the contract's term, the most recent revision(s) of any applicable wage determination(s) must be incorporated any time an option is exercised, as described in paragraph (c)(2)(iii)(A) of this section, and on the contract anniversary date, as described in paragraph (c)(2)(iii)(B) of this section. However, when a contract has been changed as described in paragraph (c)(2)(iii)(A) of this section, including by the exercise of an option, the date of that modification will be considered the contract anniversary date for the purpose of annually updating the wage determination(s) in accordance with paragraph (c)(2)(iii)(B) of this section for that year and any subsequent years of contract performance.

(d) *Corrections for clerical errors.* Upon the Administrator's own initiative or at the request of an agency, the Administrator may correct any wage determination, without regard to paragraph (a) or (c) of this section, whenever the Administrator finds that it contains clerical errors. Such corrections must be included in any solicitations, bidding documents, or ongoing contracts containing the wage determination in question, and such inclusion, and application of the correction(s), must be retroactive to the start of construction if construction has begun.

(e) *Pre-award determinations that a wage determination may not be used.* A wage determination may not be used for a contract, without regard to whether bid opening (or initial endorsement or the signing of a housing assistance payments contract) has occurred, if, prior to the award of a contract (or the start of construction under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award), the Administrator provides written notice that:

(1) The wrong wage determination or the wrong schedule was included in the bidding documents or solicitation; or

(2) A wage determination included in the bidding documents or solicitation was withdrawn by the Department of Labor as a result of a decision by the Administrative Review Board.

(f) *Post-award determinations and procedures.* (1) If a contract subject to the labor standards provisions of the laws referenced by § 5.1 of this subtitle is entered into without the correct wage determination(s), the agency must, upon the request of the Administrator or upon its own initiative, incorporate the correct wage determination into the contract or require its incorporation. Where the agency is not entering directly into such a contract but instead is providing Federal financial assistance, the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the correct wage determination(s) into its contracts.

(2) The Administrator may require the agency to incorporate a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act or has used a wage determination which by its terms or the provisions of this part clearly does not apply to the contract. Further, the Administrator may require the application of the correct wage determination to a contract after contract award or after the beginning of construction when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's request for the wage determination.

(3) Under any of the circumstances described in paragraphs (f)(1) and (2) of this section, the agency must either terminate and resolicit the contract with the correct wage determination or incorporate the correct wage determination into the contract (or ensure it is so incorporated) through supplemental agreement, change order, or any other authority that may be needed. The method of incorporation of the correct wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable law. Additionally, the following requirements apply:

(i) Unless the Administrator directs otherwise, the incorporation of the correct wage determination(s) must be retroactive to the date of contract award or start of construction if there is no award.

(ii) If incorporation occurs as the result of a request from the Administrator, the incorporation must take place within 30 days of the date of that request, unless the agency has obtained an extension from the Administrator.

(iii) Before the agency requires incorporation upon its own initiative, it must provide notice to the Administrator of the proposed action.

(iv) The contractor must be compensated for any increases in wages resulting from incorporation of a missing wage determination.

(v) If a recipient or sub-recipient of Federal assistance under any of the applicable laws referenced by § 5.1 of this subtitle refuses to incorporate the wage determination as required, the agency must make no further payment, advance, grant, loan, or guarantee of funds in connection with the contract

until the recipient incorporates the required wage determination into its contract, and must promptly refer the dispute to the Administrator for further proceedings under § 5.13 of this subtitle.

(vi) Before terminating a contract pursuant to this section, the agency must withhold or cross-withhold sufficient funds to remedy any back-wage liability resulting from the failure to incorporate the correct wage determination or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.

(4) Under any of the above circumstances, notwithstanding the requirement to incorporate the correct wage determination(s) within 30 days, the correct wage determination(s) will be effective by operation of law, retroactive to the date of award or the beginning of construction (under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award), in accordance with § 5.5(e) of this subtitle.

(g) *Approval of Davis-Bacon Related Act Federal funding or assistance after contract award.* If Federal funding or assistance under a statute requiring payment of wages determined in accordance with the Davis-Bacon Act is not approved prior to contract award (or the beginning of construction where there is no contract award), the applicable wage determination must be incorporated based upon the wages and fringe benefits found to be prevailing on the date of award or the beginning of construction (under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award), as appropriate, and must be incorporated in the contract specifications retroactively to that date, *Provided* that upon the request of the head of the Federal agency providing the Federal funding or assistance, in individual cases the Administrator may direct incorporation of the wage determination to be effective on the date of approval of Federal funds or assistance whenever the Administrator finds that it is necessary and proper in the public interest to prevent injustice or undue hardship, *Provided further* that the Administrator finds no evidence of intent to apply for Federal funding or assistance prior to contract award or the start of construction, as appropriate.

■ 8. Revise § 1.7 to read as follows:

§ 1.7 Scope of consideration.

(a) In making a wage determination, the ''area'' from which wage data will be drawn will normally be the county unless sufficient current wage data (data on wages paid on current projects or, where necessary, projects under construction no more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate) is unavailable to make a wage determination.

(b) If sufficient current wage data is not available from projects within the county to make a wage determination, wages paid on similar construction in surrounding counties may be considered.

(c) If sufficient current wage data is not available in surrounding counties, the Administrator may consider wage data from similar construction in comparable counties or groups of counties in the State, and, if necessary, overall statewide data.

(d) If sufficient current statewide wage data is not available, wages paid on projects completed more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate, may be considered.

(e) The use of ''helpers and apprentices'' is permitted in accordance with part 5 of this subtitle.

■ 9. Revise § 1.8 to read as follows:

§ 1.8 Reconsideration by the Administrator.

(a) Any interested party may seek reconsideration of a wage determination issued under this part or of a decision of the Administrator regarding application of a wage determination.

(b) Such a request for reconsideration must be in writing, accompanied by a full statement of the interested party's views and any supporting wage data or other pertinent information. Requests must be submitted via email to *dba.reconsideration@dol.gov*; by mail to Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave., NW, Washington, DC 20210; or through other means directed by the Administrator. The Administrator will respond within 30 days of receipt thereof, or will notify the requestor within the 30-day period that additional time is necessary.

(c) If the decision for which reconsideration is sought was made by an authorized representative of the Administrator of the Wage and Hour Division, the interested party seeking reconsideration may request further reconsideration by the Administrator of the Wage and Hour Division. Such a request must be submitted within 30 days from the date the decision is issued; this time may be extended for good cause at the discretion of the Administrator upon a request by the interested party. The procedures in paragraph (b) of this section apply to any such reconsideration requests.

■ 10. Add § 1.10 to read as follows:

§ 1.10 Severability.

The provisions of this part are separate and severable and operate independently from one another. If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision is to be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of utter invalidity or unenforceability, in which event the provision is severable from this part and will not affect the remaining provisions.

Appendix A to Part 1—[Removed]

■ 11. Remove appendix A to part 1.

Appendix B to Part 1—[Removed]

■ 12. Remove appendix B to part 1.

PART 3—CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING OR PUBLIC WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES

■ 13. The authority citation for part 3 continues to read as follows:

Authority: R.S. 161, 48 Stat. 848, Reorg. Plan No. 14 of 1950, 64 Stat. 1267; 5 U.S.C. 301; 40 U.S.C. 3145; Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 14. Revise § 3.1 to read as follows:

§ 3.1 Purpose and scope.

This part prescribes ''anti-kickback'' regulations under section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 3145), popularly known as the Copeland Act. This part applies to any contract which is subject to Federal wage standards and which is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States. The part is intended to aid in the enforcement of the minimum wage provisions of the Davis-Bacon Act and the various statutes dealing with federally assisted construction that contain similar minimum wage provisions, including those provisions which are not subject to Reorganization Plan No. 14 of 1950 (*e.g.,* the College Housing Act of 1950, the Federal Water Pollution Control Act, and the Housing Act of 1959), and in the enforcement of the overtime provisions of the Contract Work Hours and Safety

Standards Act whenever they are applicable to construction work. The part details the obligation of contractors and subcontractors relative to the weekly submission of statements regarding the wages paid on work covered thereby; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work; and delineates the methods of payment permissible on such work.

■ 15. Revise § 3.2 to read as follows:

§ 3.2 Definitions.

As used in the regulations in this part:

Affiliated person. The term ''affiliated person'' includes a spouse, child, parent, or other close relative of the contractor or subcontractor; a partner or officer of the contractor or subcontractor; a corporation closely connected with the contractor or subcontractor as parent, subsidiary, or otherwise, and an officer or agent of such corporation.

Agency. The term ''agency'' means any Federal, State, or local government agency or instrumentality, or other similar entity, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, for a project subject to the Davis-Bacon labor standards, as defined in § 5.2 of this subtitle.

(1) *Federal agency.* The term ''Federal agency'' means an agency or instrumentality of the United States or the District of Columbia, as defined in this section, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards.

(2) [Reserved]

Building or work. The term ''building or work'' generally includes construction activity of all types, as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The term includes, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, solar panels, wind turbines, broadband installation, installation of electric car chargers, plants, highways, parkways, streets, subways, tunnels, sewers, mains, powerlines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals; dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The term ''building or work'' also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.

(1) *Building or work financed in whole or in part by loans or grants from the United States.* The term ''building or work financed in whole or in part by loans or grants from the United States'' includes any building or work for which construction, prosecution, completion, or repair, as defined in this section, payment or part payment is made directly or indirectly from funds provided by loans or grants by a Federal agency. The term includes any building or work for which the Federal assistance granted is in the form of loan guarantees or insurance.

(2) [Reserved]

Construction, prosecution, completion, or repair. The term ''construction, prosecution, completion, or repair'' mean all types of work done on a particular building or work at the site thereof as specified in § 5.2 of this subtitle, including, without limitation, altering, remodeling, painting and decorating, installation on the site of the work of items fabricated offsite, covered transportation as reflected in § 5.2, demolition and/or removal as reflected in § 5.2, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work, performed by laborers and mechanics at the site.

Employed (and wages). Every person paid by a contractor or subcontractor in any manner for their labor in the construction, prosecution, completion, or repair of a public building or public work or building or work financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise, is ''employed'' and receiving ''wages'', regardless of any contractual relationship alleged to exist between the contractor and such person.

Public building (or public work). The term ''public building (or public work)'' includes a building or work the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of or with funds of a Federal agency to serve the general public regardless of whether title thereof is in a Federal agency. The construction, prosecution, completion, or repair of a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work, may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by the Federal agency, as long as the construction, prosecution, completion, or repair of that portion of the building or work, or the installation (where appropriate) of equipment or components into that building or work, is carried on by authority of or with funds of a Federal agency to serve the interest of the general public.

United States or the District of Columbia. The term ''United States or the District of Columbia'' means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, and any corporation for which all or substantially all of the stock of which is beneficially owned by the United States, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

■ 16. Revise § 3.3 to read as follows:

§ 3.3 Certified payrolls.

(a) [Reserved]

(b) Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the United States, each week must provide a copy of its weekly payroll for all laborers and mechanics engaged on work covered by this part and part 5 of this chapter during the preceding weekly payroll period, accompanied by a statement of compliance certifying the accuracy of the weekly payroll information. This statement must be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages, and must be on the back of Form WH–347, ''Payroll (For Contractors Optional Use)'' or on any form with identical wording. Copies of WH–347 may be obtained from the contracting or sponsoring agency or from the Wage and Hour Division website at *https://www.dol.gov/agencies/whd/government-contracts/construction/forms* or its successor site. The signature by the contractor, subcontractor, or the authorized officer or employee must be an original handwritten signature or a legally valid electronic signature.

(c) The requirements of this section do not apply to any contract of $2,000 or less.

(d) Upon a written finding by the head of a Federal agency, the Secretary of Labor may provide reasonable limitations, variations, tolerances, and exemptions from the requirements of

this section subject to such conditions as the Secretary of Labor may specify.

■ 17. Revise § 3.4 to read as follows:

§ 3.4 Submission of certified payroll and the preservation and inspection of weekly payroll records.

(a) *Certified payroll.* Each certified payroll required under § 3.3 must be delivered by the contractor or subcontractor, within 7 days after the regular payment date of the payroll period, to a representative at the site of the building or work of the agency contracting for or financing the work, or, if there is no representative of the agency at the site of the building or work, the statement must be delivered by mail or by any other means normally assuring delivery by the contractor or subcontractor, within that 7 day time period, to the agency contracting for or financing the building or work. After the certified payrolls have been reviewed in accordance with the contracting or sponsoring agency's procedures, such certified payrolls must be preserved by the agency for a period of 3 years after all the work on the prime contract is completed and must be produced for inspection, copying, and transcription by the Department of Labor upon request. The certified payrolls must also be transmitted together with a report of any violation, in accordance with applicable procedures prescribed by the United States Department of Labor.

(b) *Recordkeeping.* Each contractor or subcontractor must preserve the regular payroll records for a period of 3 years after all the work on the prime contract is completed. The regular payroll records must set out accurately and completely the name; Social Security number; last known address, telephone number, and email address of each laborer and mechanic; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid. The contractor or subcontractor must make such regular payroll records, as well as copies of the certified payrolls provided to the contracting or sponsoring agency, available at all times for inspection, copying, and transcription by the contracting officer or their authorized representative, and by authorized representatives of the Department of Labor.

■ 18. Revise § 3.5 to read as follows:

§ 3.5 Payroll deductions permissible without application to or approval of the Secretary of Labor.

Deductions made under the circumstances or in the situations described in the paragraphs of this section may be made without application to and approval of the Secretary of Labor:

(a) Any deduction made in compliance with the requirements of Federal, State, or local law, such as Federal or State withholding income taxes and Federal social security taxes.

(b) Any deduction of sums previously paid to the laborer or mechanic as a bona fide prepayment of wages when such prepayment is made without discount or interest. A bona fide prepayment of wages is considered to have been made only when cash or its equivalent has been advanced to the person employed in such manner as to give him complete freedom of disposition of the advanced funds.

(c) Any deduction of amounts required by court process to be paid to another, unless the deduction is in favor of the contractor, subcontractor, or any affiliated person, or when collusion or collaboration exists.

(d) Any deduction constituting a contribution on behalf of the laborer or mechanic employed to funds established by the contractor or representatives of the laborers or mechanics, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries, illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment benefits, vacation pay, savings accounts, or similar payments for the benefit of the laborers or mechanics, their families and dependents: *Provided, however,* That the following standards are met:

(1) The deduction is not otherwise prohibited by law;

(2) It is either:

(i) Voluntarily consented to by the laborer or mechanic in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of or for the continuation of employment; or

(ii) Provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its laborers or mechanics;

(3) No profit or other benefit is otherwise obtained, directly or indirectly, by the contractor or subcontractor or any affiliated person in the form of commission, dividend, or otherwise; and

(4) The deductions must serve the convenience and interest of the laborer or mechanic.

(e) Any deduction requested by the laborer or mechanic to enable him or her to repay loans to or to purchase shares in credit unions organized and operated in accordance with Federal and State credit union statutes.

(f) Any deduction voluntarily authorized by the laborer or mechanic for the making of contributions to governmental or quasi-governmental agencies, such as the American Red Cross.

(g) Any deduction voluntarily authorized by the laborer or mechanic for the making of contributions to charitable organizations as defined by 26 U.S.C. 501(c)(3).

(h) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments: *Provided, however,* That a collective bargaining agreement between the contractor or subcontractor and representatives of its laborers or mechanics provides for such deductions and the deductions are not otherwise prohibited by law.

(i) Any deduction not more than for the ''reasonable cost'' of board, lodging, or other facilities meeting the requirements of section 3(m) of the Fair Labor Standards Act of 1938, as amended, and 29 CFR part 531. When such a deduction is made the additional records required under 29 CFR 516.25(a) must be kept.

(j) Any deduction for the cost of safety equipment of nominal value purchased by the laborer or mechanic as their own property for their personal protection in their work, such as safety shoes, safety glasses, safety gloves, and hard hats, if such equipment is not required by law to be furnished by the contractor, if such deduction does not violate the Fair Labor Standards Act or any other law, if the cost on which the deduction is based does not exceed the actual cost to the contractor where the equipment is purchased from the contractor and does not include any direct or indirect monetary return to the contractor where the equipment is purchased from a third person, and if the deduction is either:

(1) Voluntarily consented to by the laborer or mechanic in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance; or

(2) Provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and

representatives of its laborers and mechanics.

■ 19. Revise § 3.7 to read as follows:

§ 3.7 Applications for the approval of the Secretary of Labor.

Any application for the making of payroll deductions under § 3.6 must comply with the requirements prescribed in the following paragraphs of this section:

(a) The application must be in writing and addressed to the Secretary of Labor. The application must be submitted by email to *dbadeductions@dol.gov*, by mail to the United States Department of Labor, Wage and Hour Division, Director, Division of Government Contracts Enforcement, 200 Constitution Ave., NW, Room S–3502, Washington, DC 20210, or by any other means normally assuring delivery.

(b) The application need not identify the contract or contracts under which the work in question is to be performed. Permission will be given for deductions on all current and future contracts of the applicant for a period of 1 year. A renewal of permission to make such payroll deduction will be granted upon the submission of an application which makes reference to the original application, recites the date of the Secretary of Labor's approval of such deductions, states affirmatively that there is continued compliance with the standards set forth in the provisions of § 3.6, and specifies any conditions which have changed in regard to the payroll deductions.

(c) The application must state affirmatively that there is compliance with the standards set forth in the provisions of § 3.6. The affirmation must be accompanied by a full statement of the facts indicating such compliance.

(d) The application must include a description of the proposed deduction, the purpose of the deduction, and the classes of laborers or mechanics from whose wages the proposed deduction would be made.

(e) The application must state the name and business of any third person to whom any funds obtained from the proposed deductions are to be transmitted and the affiliation of such person, if any, with the applicant.

■ 20. Revise § 3.8 to read as follows:

§ 3.8 Action by the Secretary of Labor upon applications.

The Secretary of Labor will decide whether or not the requested deduction is permissible under provisions of § 3.6; and will notify the applicant in writing of the decision.

■ 21. Revise § 3.11 to read as follows:

§ 3.11 Regulations part of contract.

All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part must expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see § 5.5(a) of this subtitle. However, these requirements will be considered to be effective by operation of law, whether or not they are incorporated into such contracts, as set forth in § 5.5(e) of this subtitle.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

■ 22. The authority citation for part 5 is revised to read as follows:

Authority: 5 U.S.C. 301; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 28 U.S.C. 2461 note; 40 U.S.C. 3141 *et seq.;* 40 U.S.C. 3145; 40 U.S.C. 3148; 40 U.S.C. 3701 *et seq.;* Secretary's Order No. 01–2014, 79 FR 77527; and the laws referenced by § 5.1(a).

■ 23. Revise § 5.1 to read as follows:

§ 5.1 Purpose and scope.

(a) The regulations contained in this part are promulgated under the authority conferred upon the Secretary of Labor by Reorganization Plan No. 14 of 1950 (64 Stat. 1267, as amended, 5 U.S.C. appendix) and the Copeland Act (48 Stat. 948; 18 U.S.C. 874; 40 U.S.C. 3145) in order to coordinate the administration and enforcement of labor standards provisions contained in the Davis-Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 3141 *et seq.*) and its related statutes (''Related Acts'').

(1) A listing of laws requiring Davis-Bacon labor standards provisions can be found at *www.dol.gov/agencies/whd/government-contracts* or its successor website.

(2) [Reserved]

(b) Part 1 of this subtitle contains the Department's procedural rules governing requests for wage determinations and the issuance and use of such wage determinations under the Davis-Bacon Act and its Related Acts.

■ 24. Revise § 5.2 to read as follows:

§ 5.2 Definitions.

Administrator. The term ''Administrator'' means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or authorized representative.

Agency. The term ''agency'' means any Federal, State, or local government agency or instrumentality, or other similar entity, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards, as defined in this section.

(1) *Federal agency.* The term ''Federal agency'' means an agency or instrumentality of the United States or the District of Columbia, as defined in this section, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards.

(2) [Reserved]

Agency Head. The term ''Agency Head'' means the principal official of an agency and includes those persons duly authorized to act on behalf of the Agency Head.

Apprentice and *helper.* The terms ''apprentice'' and ''helper'' are defined as follows:

(1) ''Apprentice'' means:

(i) A person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship; or

(ii) A person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;

(2) These provisions do not apply to apprentices and trainees employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c).

(3) A distinct classification of helper will be issued in wage determinations applicable to work performed on construction projects covered by the labor standards provisions of the Davis-Bacon and Related Acts only where:

(i) The duties of the helper are clearly defined and distinct from those of any

other classification on the wage determination;

(ii) The use of such helpers is an established prevailing practice in the area; and

(iii) The helper is not employed as a trainee in an informal training program. A ''helper'' classification will be added to wage determinations pursuant to § 5.5(a)(1)(iii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

Building or work. The term ''building or work'' generally includes construction activities of all types, as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The term includes, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, solar panels, wind turbines, broadband installation, installation of electric car chargers, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The term ''building or work'' also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.

Construction, prosecution, completion, or repair. The term ''construction, prosecution, completion, or repair'' means the following:

(1) These terms include all types of work done—

(i) On a particular building or work at the site of the work, as defined in this section, by laborers and mechanics employed by a contractor or subcontractor, or

(ii) In the construction or development of a project under a development statute.

(2) These terms include, without limitation (except as specified in this definition):

(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated offsite;

(ii) Painting and decorating;

(iii) Manufacturing or furnishing of materials, articles, supplies or equipment, but only if such work is done by laborers or mechanics

(A) Employed by a contractor or subcontractor, as defined in this section, on the site of the work, as defined in this section, or

(B) In the construction or development of a project under a development statute;

(iv) ''Covered transportation,'' defined as any of the following activities:

(A) Transportation that takes place entirely within a location meeting the definition of ''site of the work'' in this section;

(B) Transportation of one or more ''significant portion(s)'' of the building or work between a ''secondary construction site'' as defined in this section and a ''primary construction site'' as defined in this section;

(C) Transportation between an ''adjacent or virtually adjacent dedicated support site'' as defined in this section and a ''primary construction site'' or ''secondary construction site'' as defined in this section;

(D) ''Onsite activities essential or incidental to offsite transportation,'' defined as activities conducted by a truck driver or truck driver's assistant on the site of the work that are essential or incidental to the transportation of materials or supplies to or from the site of the work, such as loading, unloading, or waiting for materials to be loaded or unloaded, but only where the driver or driver's assistant's time spent on the site of the work is not *de minimis;* and

(E) Any transportation and related activities, whether on or off the site of the work, by laborers and mechanics employed in the construction or development of the project under a development statute.

(v) Demolition and/or removal, under any of the following circumstances:

(A) Where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing building or work. Examples of such activities include the removal of asbestos, paint, components, systems, or parts from a facility that will not be demolished; as well as contracts for hazardous waste removal, land recycling, or reclamation that involve substantial earth moving, removal of contaminated soil, re-contouring surfaces, and/or habitat restoration.

(B) Where subsequent construction covered in whole or in part by the labor standards in this part is contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract. In determining whether covered construction is contemplated within the meaning of this provision, relevant factors include, but are not limited to, the existence of engineering or architectural plans or surveys of the site; the allocation of, or an application for, Federal funds; contract negotiations or bid solicitations; the stated intent of the relevant government officials; and the disposition of the site after demolition.

(C) Where otherwise required by statute.

(3) Except for transportation that constitutes ''covered transportation'' as defined in this section, construction, prosecution, completion, or repair does not include the transportation of materials or supplies to or from the site of the work.

Contract. The term ''contract'' means any prime contract which is subject wholly or in part to the labor standards provisions of any of the laws referenced by § 5.1 and any subcontract of any tier thereunder, let under the prime contract. With the exception of work performed under a development statute, the terms contract and subcontract do not include agreements with employers that meet the definition of a material supplier under this section.

Contracting officer. The term ''contracting officer'' means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of an agency, sponsor, owner, applicant, or other similar entity.

Contractor. The term ''contractor'' means any individual or other legal entity that enters into or is awarded a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced by § 5.1, including any prime contract or subcontract of any tier under a covered prime contract. In addition, the term contractor includes any surety that is completing performance for a defaulted contractor pursuant to a performance bond. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers or joint employers for purposes of the labor standards provisions of any of the laws referenced by § 5.1. A State or local government is not regarded as a contractor or subcontractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees. However, under development statutes or other statutes requiring payment of prevailing wages to all laborers and mechanics employed on the assisted project, such as the U.S. Housing Act of 1937, State and local recipients of Federal-aid must pay these workers according to Davis-Bacon labor standards. The term ''contractor'' does not include an entity that is a material supplier, except if the entity is performing work under a development statute.

Davis-Bacon labor standards. The term ''Davis-Bacon labor standards'' as

used in this part means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes referenced in § 5.1, and the regulations in this part and in parts 1 and 3 of this subtitle.

Development statute. The term ''development statute'' includes the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, and any other Davis-Bacon Related Act that requires payment of prevailing wages under the Davis-Bacon labor standards to all laborers and mechanics employed in the development of a project and for which the Administrator determines that the statute's language and/or legislative history reflected clear congressional intent to apply a coverage standard different from the Davis-Bacon Act itself.

Employed. Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise, is ''employed'' regardless of any contractual relationship alleged to exist between the contractor and such person.

Laborer or *mechanic.* The term ''laborer or mechanic'' includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term ''laborer'' or ''mechanic'' includes apprentices, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchpersons or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or mechanics. Forepersons who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.

Material supplier. The term ''material supplier'' is defined as follows:

(1) A material supplier is an entity meeting all of the following criteria:

(i) Its only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup of the same in addition to, but not exclusive of, delivery, and which may also include activities incidental to such delivery and pickup, such as loading, unloading, or waiting for materials to be loaded or unloaded; and

(ii) Its facility or facilities that manufactures the materials, articles, supplies, or equipment used for the contract or project:

(A) Is not located on, or does not itself constitute, the project or contract's primary construction site or secondary construction site as defined in this section; and

(B) Either was established before opening of bids on the contract or project, or is not dedicated exclusively, or nearly so, to the performance of the contract or project.

(2) If an entity, in addition to being engaged in the activities specified in paragraph (1)(i) of this definition, also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier.

Prime contractor. The term ''prime contractor'' means any person or entity that enters into a contract with an agency. For the purposes of the labor standards provisions of any of the laws referenced by § 5.1, the term prime contractor also includes the controlling shareholders or members of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, and any contractor (*e.g.,* a general contractor) that has been delegated the responsibility for overseeing all or substantially all of the construction anticipated by the prime contract. For the purposes of the provisions in §§ 5.5 and 5.9, any such related entities holding different prime contracts are considered to be the same prime contractor.

Public building or *public work.* The term ''public building or public work'' includes a building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. The construction, prosecution, completion, or repair of a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work, may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by a Federal agency, as long as the construction, prosecution, completion, or repair of that portion of the building or work, or the installation (where appropriate) of equipment or components into that building or work, is carried on by authority of or with funds of a Federal agency to serve the interest of the general public.

Secretary. The term ''Secretary'' includes the Secretary of Labor, and their authorized representative.

Site of the work. The term ''site of the work'' is defined as follows:

(1) ''Site of the work'' includes all of the following:

(i) The primary construction site(s), defined as the physical place or places where the building or work called for in the contract will remain.

(ii) Any secondary construction site(s), defined as any other site(s) where a significant portion of the building or work is constructed, *provided* that such construction is for specific use in that building or work and does not simply reflect the manufacture or construction of a product made available to the general public, and *provided further* that the site is either established specifically for the performance of the contract or project, or is dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time. A ''significant portion'' of a building or work means one or more entire portion(s) or module(s) of the building or work, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly of the portions or modules at the place where the building or work will remain. A ''significant portion'' does not include materials or prefabricated component parts such as prefabricated housing components. A ''specific period of time'' means a period of weeks, months, or more, and does not include circumstances where a site at which multiple projects are in progress is shifted exclusively or nearly so to a single project for a few hours or days in order to meet a deadline.

(iii) Any adjacent or virtually adjacent dedicated support sites, defined as:

(A) Job headquarters, tool yards, batch plants, borrow pits, and similar facilities of a contractor or subcontractor that are dedicated exclusively, or nearly so, to performance of the contract or project, *and* adjacent or virtually adjacent to either a primary construction site or a secondary construction site, and

(B) Locations adjacent or virtually adjacent to a primary construction site at which workers perform activities associated with directing vehicular or

pedestrian traffic around or away from the primary construction site.

(2) With the exception of locations that are on, or that themselves constitute, primary or secondary construction sites as defined in paragraphs (1)(i) and (ii) of this definition, site of the work does not include:

(i) Permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project; or

(ii) Fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a material supplier, which are established by a material supplier for the project before opening of bids and not on the primary construction site or a secondary construction site, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

Subcontractor. The term ''subcontractor'' means any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1. The term subcontractor includes subcontractors of any tier.

United States or the District of Columbia. The term ''United States or the District of Columbia'' means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including non-appropriated fund instrumentalities and any corporation for which all or substantially all of its stock is beneficially owned by the United States or by the foregoing departments, establishments, agencies, or instrumentalities.

Wages. The term ''wages'' means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

Wage determination. The term ''wage determination'' includes the original decision and any subsequent decisions revising, modifying, superseding, correcting, or otherwise changing the provisions of the original decision. The application of the wage determination must be in accordance with the provisions of § 1.6 of this subtitle.

■ 25. Amend § 5.5 by:
■ a. Revising paragraphs (a) introductory text and (a)(1) through (4), (6), and (10);
■ b. Adding paragraph (a)(11);
■ c. Revising paragraphs (b) introductory text and (b)(2) through (4);
■ d. Adding paragraph (b)(5);
■ e. Revising paragraph (c); and
■ f. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

§ 5.5 Contract provisions and related matters.

(a) *Required contract clauses.* The Agency head will cause or require the contracting officer to require the contracting officer to insert in full, or (for contracts covered by the Federal Acquisition Regulation (48 CFR chapter 1)) by reference, in any contract in excess of $2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the laws referenced by § 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency, *Provided,* That such modifications are first approved by the Department of Labor):

(1) *Minimum wages*—(i) *Wage rates and fringe benefits.* All laborers and mechanics employed or working upon the site of the work (or otherwise working in construction or development of the project under a development statute), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of basic hourly wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. As provided in paragraphs (d) and (e) of this section, the appropriate wage determinations are effective by operation of law even if they have not been attached to the contract. Contributions made or costs reasonably anticipated for bona fide fringe benefits under the Davis-Bacon Act (40 U.S.C. 3141(2)(B)) on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(v) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics must be paid the appropriate wage rate and fringe benefits on the wage determination for the classification(s) of work actually performed, without regard to skill, except as provided in paragraph (a)(4) of this section. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided,* That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph (a)(1)(iii) of this section) and the Davis-Bacon poster (WH–1321) must be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii) *Frequently recurring classifications.* (A) In addition to wage and fringe benefit rates that have been

determined to be prevailing under the procedures set forth in 29 CFR part 1, a wage determination may contain, pursuant to § 1.3(f), wage and fringe benefit rates for classifications of laborers and mechanics for which conformance requests are regularly submitted pursuant to paragraph (a)(1)(iii) of this section, provided that:

(*1*) The work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined;

(*2*) The classification is used in the area by the construction industry; and

(*3*) The wage rate for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination.

(B) The Administrator will establish wage rates for such classifications in accordance with paragraph (a)(1)(iii)(A)(*3*) of this section. Work performed in such a classification must be paid at no less than the wage and fringe benefit rate listed on the wage determination for such classification.

(iii) *Conformance.* (A) The contracting officer must require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract be classified in conformance with the wage determination. Conformance of an additional classification and wage rate and fringe benefits is appropriate only when the following criteria have been met:

(*1*) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(*2*) The classification is used in the area by the construction industry; and

(*3*) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) The conformance process may not be used to split, subdivide, or otherwise avoid application of classifications listed in the wage determination.

(C) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken will be sent by the contracting officer by email to *DBAconformance@dol.gov*. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30–day period that additional time is necessary.

(D) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer will, by email to *DBAconformance@dol.gov,* refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30–day period that additional time is necessary.

(E) The contracting officer must promptly notify the contractor of the action taken by the Wage and Hour Division under paragraphs (a)(1)(iii)(C) and (D) of this section. The contractor must furnish a written copy of such determination to each affected worker or it must be posted as a part of the wage determination. The wage rate (including fringe benefits where appropriate) determined pursuant to paragraph (a)(1)(iii)(C) or (D) of this section must be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iv) *Fringe benefits not expressed as an hourly rate.* Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor may either pay the benefit as stated in the wage determination or may pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(v) *Unfunded plans.* If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided,* That the Secretary of Labor has found, upon the written request of the contractor, in accordance with the criteria set forth in § 5.28, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(vi) *Interest.* In the event of a failure to pay all or part of the wages required by the contract, the contractor will be required to pay interest on any underpayment of wages.

(2) *Withholding*—(i) *Withholding requirements.* The [write in name of Federal agency or the recipient of Federal assistance] may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for the full amount of wages and monetary relief, including interest, required by the clauses set forth in paragraph (a) of this section for violations of this contract, or to satisfy any such liabilities required by any other Federal contract, or federally assisted contract subject to Davis-Bacon labor standards, that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon labor standards requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld. In the event of a contractor's failure to pay any laborer or mechanic, including any apprentice or helper working on the site of the work (or otherwise working in construction or development of the project under a development statute) all or part of the wages required by the contract, or upon the contractor's failure to submit the required records as discussed in paragraph (a)(3)(iv) of this section, the [Agency] may on its own initiative and after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(ii) *Priority to withheld funds.* The Department has priority to funds withheld or to be withheld in accordance with paragraph (a)(2)(i) or (b)(3)(i) of this section, or both, over claims to those funds by:

(A) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(B) A contracting agency for its reprocurement costs;

(C) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(D) A contractor's assignee(s);

(E) A contractor's successor(s); or

(F) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–3907.

(3) *Records and certified payrolls*—(i) *Basic record requirements*—(A) *Length of record retention.* All regular payrolls and other basic records must be maintained by the contractor and any subcontractor during the course of the work and preserved for all laborers and mechanics working at the site of the work (or otherwise working in construction or development of the project under a development statute) for a period of at least 3 years after all the work on the prime contract is completed.

(B) *Information required.* Such records must contain the name; Social Security number; last known address, telephone number, and email address of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid.

(C) *Additional records relating to fringe benefits.* Whenever the Secretary of Labor has found under paragraph (a)(1)(v) of this section that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act, the contractor must maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(D) *Additional records relating to apprenticeship.* Contractors with apprentices working under approved programs must maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable programs.

(ii) *Certified payroll requirements*—(A) *Frequency and method of submission.* The contractor or subcontractor must submit weekly, for each week in which any DBA- or Related Acts-covered work is performed, certified payrolls to the [write in name of appropriate Federal agency] if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the certified payrolls to the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records, for transmission to the [write in name of agency]. The prime contractor is responsible for the submission of all certified payrolls by all subcontractors. A contracting agency or prime contractor may permit or require contractors to submit certified payrolls through an electronic system, as long as the electronic system requires a legally valid electronic signature; the system allows the contractor, the contracting agency, and the Department of Labor to access the certified payrolls upon request for at least 3 years after the work on the prime contract has been completed; and the contracting agency or prime contractor permits other methods of submission in situations where the contractor is unable or limited in its ability to use or access the electronic system.

(B) *Information required.* The certified payrolls submitted must set out accurately and completely all of the information required to be maintained under paragraph (a)(3)(i)(B) of this section, except that full Social Security numbers and last known addresses, telephone numbers, and email addresses must not be included on weekly transmittals. Instead, the certified payrolls need only include an individually identifying number for each worker (*e.g.,* the last four digits of the worker's Social Security number). The required weekly certified payroll information may be submitted using Optional Form WH–347 or in any other format desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division website at *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347/.pdf* or its successor website. It is not a violation of this section for a prime contractor to require a subcontractor to provide full Social Security numbers and last known addresses, telephone numbers, and email addresses to the prime contractor for its own records, without weekly submission by the subcontractor to the sponsoring government agency (or the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records).

(C) *Statement of Compliance.* Each certified payroll submitted must be accompanied by a ''Statement of Compliance,'' signed by the contractor or subcontractor, or the contractor's or subcontractor's agent who pays or supervises the payment of the persons working on the contract, and must certify the following:

(*1*) That the certified payroll for the payroll period contains the information required to be provided under paragraph (a)(3)(ii) of this section, the appropriate information and basic records are being maintained under paragraph (a)(3)(i) of this section, and such information and records are correct and complete;

(*2*) That each laborer or mechanic (including each helper and apprentice) working on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in 29 CFR part 3; and

(*3*) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification(s) of work actually performed, as specified in the applicable wage determination incorporated into the contract.

(D) *Use of Optional Form WH–347.* The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH–347 will satisfy the requirement for submission of the ''Statement of Compliance'' required by paragraph (a)(3)(ii)(C) of this section.

(E) *Signature.* The signature by the contractor, subcontractor, or the contractor's or subcontractor's agent must be an original handwritten signature or a legally valid electronic signature.

(F) *Falsification.* The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 3729.

(G) *Length of certified payroll retention.* The contractor or subcontractor must preserve all certified payrolls during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

(iii) *Contracts, subcontracts, and related documents.* The contractor or subcontractor must maintain this contract or subcontract and related documents including, without limitation, bids, proposals, amendments, modifications, and extensions. The contractor or subcontractor must preserve these contracts, subcontracts, and related

documents during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

(iv) *Required disclosures and access*—(A) *Required record disclosures and access to workers.* The contractor or subcontractor must make the records required under paragraphs (a)(3)(i) through (iii) of this section, and any other documents that the [write the name of the agency] or the Department of Labor deems necessary to determine compliance with the labor standards provisions of any of the applicable statutes referenced by § 5.1, available for inspection, copying, or transcription by authorized representatives of the [write the name of the agency] or the Department of Labor, and must permit such representatives to interview workers during working hours on the job.

(B) *Sanctions for non-compliance with records and worker access requirements.* If the contractor or subcontractor fails to submit the required records or to make them available, or refuses to permit worker interviews during working hours on the job, the Federal agency may, after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, that maintains such records or that employs such workers, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available, or to permit worker interviews during working hours on the job, may be grounds for debarment action pursuant to § 5.12. In addition, any contractor or other person that fails to submit the required records or make those records available to WHD within the time WHD requests that the records be produced will be precluded from introducing as evidence in an administrative proceeding under 29 CFR part 6 any of the required records that were not provided or made available to WHD. WHD will take into consideration a reasonable request from the contractor or person for an extension of the time for submission of records. WHD will determine the reasonableness of the request and may consider, among other things, the location of the records and the volume of production.

(C) *Required information disclosures.* Contractors and subcontractors must maintain the full Social Security number and last known address, telephone number, and email address of each covered worker, and must provide them upon request to the [write in name of appropriate Federal agency] if the agency is a party to the contract, or to the Wage and Hour Division of the Department of Labor. If the Federal agency is not such a party to the contract, the contractor, subcontractor, or both, must, upon request, provide the full Social Security number and last known address, telephone number, and email address of each covered worker to the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records, for transmission to the [write in name of agency], the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or other compliance action.

(4) *Apprentices and equal employment opportunity*—(i) *Apprentices*—(A) *Rate of pay.* Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship (OA), or with a State Apprenticeship Agency recognized by the OA. A person who is not individually registered in the program, but who has been certified by the OA or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice, will be permitted to work at less than the predetermined rate for the work they perform in the first 90 days of probationary employment as an apprentice in such a program. In the event the OA or a State Apprenticeship Agency recognized by the OA withdraws approval of an apprenticeship program, the contractor will no longer be permitted to use apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(B) *Fringe benefits.* Apprentices must be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringe benefits must be paid in accordance with that determination.

(C) *Apprenticeship ratio.* The allowable ratio of apprentices to journeyworkers on the job site in any craft classification must not be greater than the ratio permitted to the contractor as to the entire work force under the registered program or the ratio applicable to the locality of the project pursuant to paragraph (a)(4)(i)(D) of this section. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in paragraph (a)(4)(i)(A) of this section, must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under this section must be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(D) *Reciprocity of ratios and wage rates.* Where a contractor is performing construction on a project in a locality other than the locality in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) applicable within the locality in which the construction is being performed must be observed. If there is no applicable ratio or wage rate for the locality of the project, the ratio and wage rate specified in the contractor's registered program must be observed.

(ii) *Equal employment opportunity.* The use of apprentices and journeyworkers under this part must be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

* * * * *

(6) *Subcontracts.* The contractor or subcontractor must insert in any subcontracts the clauses contained in paragraphs (a)(1) through (11) of this section, along with the applicable wage determination(s) and such other clauses or contract modifications as the [write in the name of the Federal agency] may by appropriate instructions require, and a clause requiring the subcontractors to include these clauses and wage determination(s) in any lower tier subcontracts. The prime contractor is responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in this section. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier

subcontractors, and may be subject to debarment, as appropriate.

* * * * *

(10) *Certification of eligibility.* (i) By entering into this contract, the contractor certifies that neither it nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of 40 U.S.C. 3144(b) or § 5.12(a).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of 40 U.S.C. 3144(b) or § 5.12(a).

(iii) The penalty for making false statements is prescribed in the U.S. Code, Title 18 Crimes and Criminal Procedure, 18 U.S.C. 1001.

(11) *Anti-retaliation.* It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

(i) Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the DBA, Related Acts, this part, or 29 CFR part 1 or 3;

(ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under the DBA, Related Acts, this part, or 29 CFR part 1 or 3;

(iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under the DBA, Related Acts, this part, or 29 CFR part 1 or 3; or

(iv) Informing any other person about their rights under the DBA, Related Acts, this part, or 29 CFR part 1 or 3.

(b) *Contract Work Hours and Safety Standards Act (CWHSSA).* The Agency Head must cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1) through (5) of this section in full, or (for contracts covered by the Federal Acquisition Regulation) by reference, in any contract in an amount in excess of $100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses must be inserted in addition to the clauses required by paragraph (a) of this section or 29 CFR 4.6. As used in this paragraph (b), the terms ''laborers and mechanics'' include watchpersons and guards.

* * * * *

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages and interest from the date of the underpayment. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchpersons and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of $31 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1).

(3) *Withholding for unpaid wages and liquidated damages*—(i) *Withholding process.* The [write in the name of the Federal agency or the recipient of Federal assistance] may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for any unpaid wages; monetary relief, including interest; and liquidated damages required by the clauses set forth in this paragraph (b) on this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to the Contract Work Hours and Safety Standards Act and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld.

(ii) *Priority to withheld funds.* The Department has priority to funds withheld or to be withheld in accordance with paragraph (a)(2)(i) or (b)(3)(i) of this section, or both, over claims to those funds by:

(A) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(B) A contracting agency for its reprocurement costs;

(C) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(D) A contractor's assignee(s);

(E) A contractor's successor(s); or

(F) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–3907.

(4) *Subcontracts.* The contractor or subcontractor must insert in any subcontracts the clauses set forth in paragraphs (b)(1) through (5) of this section and a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor is responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (5). In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and associated liquidated damages and may be subject to debarment, as appropriate.

(5) *Anti-retaliation.* It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

(i) Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the Contract Work Hours and Safety Standards Act (CWHSSA) or its implementing regulations in this part;

(ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under CWHSSA or this part;

(iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under CWHSSA or this part; or

(iv) Informing any other person about their rights under CWHSSA or this part.

(c) *CWHSSA required records clause.* In addition to the clauses contained in paragraph (b) of this section, in any contract subject only to the Contract Work Hours and Safety Standards Act

and not to any of the other laws referenced by § 5.1, the Agency Head must cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor must maintain regular payrolls and other basic records during the course of the work and must preserve them for a period of 3 years after all the work on the prime contract is completed for all laborers and mechanics, including guards and watchpersons, working on the contract. Such records must contain the name; last known address, telephone number, and email address; and social security number of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid; daily and weekly number of hours actually worked; deductions made; and actual wages paid. Further, the Agency Head must cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph must be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview workers during working hours on the job.

(d) *Incorporation of contract clauses and wage determinations by reference.* Although agencies are required to insert the contract clauses set forth in this section, along with appropriate wage determinations, in full into covered contracts, and contractors and subcontractors are required to insert them in any lower-tier subcontracts, the incorporation by reference of the required contract clauses and appropriate wage determinations will be given the same force and effect as if they were inserted in full text.

(e) *Incorporation by operation of law.* The contract clauses set forth in this section (or their equivalent under the Federal Acquisition Regulation), along with the correct wage determinations, will be considered to be a part of every prime contract required by the applicable statutes referenced by § 5.1 to include such clauses, and will be effective by operation of law, whether or not they are included or incorporated by reference into such contract, unless the Administrator grants a variance, tolerance, or exemption from the application of this paragraph. Where the clauses and applicable wage determinations are effective by operation of law under this paragraph, the prime contractor must be compensated for any resulting increase in wages in accordance with applicable law.

■ 26. Revise § 5.6 to read as follows:

§ 5.6 Enforcement.

(a) *Agency responsibilities.* (1)(i) The Federal agency has the initial responsibility to ascertain whether the clauses required by § 5.5 and the appropriate wage determination(s) have been incorporated into the contracts subject to the labor standards provisions of the laws referenced by § 5.1. Additionally, a Federal agency that provides Federal financial assistance that is subject to the labor standards provisions of the Act must promulgate the necessary regulations or procedures to require the recipient or sub-recipient of the Federal assistance to insert in its contracts the provisions of § 5.5. No payment, advance, grant, loan, or guarantee of funds will be approved by the Federal agency unless it ensures that the clauses required by § 5.5 and the appropriate wage determination(s) are incorporated into such contracts. Furthermore, no payment, advance, grant, loan, or guarantee of funds will be approved by the Federal agency after the beginning of construction unless there is on file with the Federal agency a certification by the contractor that the contractor and its subcontractors have complied with the provisions of § 5.5 or unless there is on file with the Federal agency a certification by the contractor that there is a substantial dispute with respect to the required provisions.

(ii) If a contract subject to the labor standards provisions of the applicable statutes referenced by § 5.1 is entered into without the incorporation of the clauses required by § 5.5, the agency must, upon the request of the Administrator or upon its own initiative, either terminate and resolicit the contract with the required contract clauses, or incorporate the required clauses into the contract (or ensure they are so incorporated) through supplemental agreement, change order, or any and all authority that may be needed. Where an agency has not entered directly into such a contract but instead has provided Federal financial assistance, the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the clauses required into its contracts. The method of incorporation of the correct wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable law. Additionally, the following requirements apply:

(A) Unless the Administrator directs otherwise, the incorporation of the clauses required by § 5.5 must be retroactive to the date of contract award or start of construction if there is no award.

(B) If this incorporation occurs as the result of a request from the Administrator, the incorporation must take place within 30 days of the date of that request, unless the agency has obtained an extension from the Administrator.

(C) The contractor must be compensated for any increases in wages resulting from incorporation of a missing contract clause.

(D) If the recipient refuses to incorporate the clauses as required, the agency must make no further payment, advance, grant, loan, or guarantee of funds in connection with the contract until the recipient incorporates the required clauses into its contract, and must promptly refer the dispute to the Administrator for further proceedings under § 5.13.

(E) Before terminating a contract pursuant to this section, the agency must withhold or cross-withhold sufficient funds to remedy any back wage liability resulting from the failure to incorporate the correct wage determination or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.

(F) Notwithstanding the requirement to incorporate the contract clauses and correct wage determination within 30 days, the contract clauses and correct wage determination will be effective by operation of law, retroactive to the beginning of construction, in accordance with § 5.5(e).

(2)(i) Certified payrolls submitted pursuant to § 5.5(a)(3)(ii) must be preserved by the Federal agency for a period of 3 years after all the work on the prime contract is completed, and must be produced at the request of the Department of Labor at any time during the 3-year period, regardless of whether the Department of Labor has initiated an investigation or other compliance action.

(ii) In situations where the Federal agency does not itself maintain certified payrolls required to be submitted pursuant to § 5.5(a)(3)(ii), upon the request of the Department of Labor the Federal agency must ensure that such certified payrolls are provided to the Department of Labor. Such certified payrolls may be provided by the applicant, sponsor, owner, or other entity, as the case may be, directly to the Department of Labor, or to the Federal agency which, in turn, must provide those records to the Department of Labor.

(3) The Federal agency will cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by § 5.5 and the applicable statutes referenced in § 5.1. Investigations will be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations will include interviews with workers, which must be taken in confidence, and examinations of certified payrolls, regular payrolls, and other basic records required to be maintained under § 5.5(a)(3). In making such examinations, particular care must be taken to determine the correctness of classification(s) of work actually performed, and to determine whether there is a disproportionate amount of work by laborers and of apprentices registered in approved programs. Such investigations must also include evidence of fringe benefit plans and payments thereunder. Federal agencies must give priority to complaints of alleged violations.

(4) In accordance with normal operating procedures, the contracting agency may be furnished various investigatory material from the investigation files of the Department of Labor. None of the material, other than computations of back wages, liquidated damages, and monetary relief for violations of § 5.5(a)(11) or (b)(5), and the summary of back wages due, may be disclosed in any manner to anyone other than Federal officials charged with administering the contract or program providing Federal assistance to the contract, without requesting the permission and views of the Department of Labor.

(b) *Department of Labor investigations and other compliance actions.* (1) The Administrator will investigate and conduct other compliance actions as deemed necessary in order to obtain compliance with the labor standards provisions of the applicable statutes referenced by § 5.1, or to affirm or reject the recommendations by the Agency Head with respect to labor standards matters arising under the statutes referenced by § 5.1.

(2) Federal agencies, contractors, subcontractors, sponsors, applicants, owners, or other entities, as the case may be, must cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all other aspects of the investigations or other compliance actions.

(3) The findings of such an investigation or other compliance action, including amounts found due, may not be altered or reduced without the approval of the Department of Labor.

(4) Where the underpayments disclosed by such an investigation or other compliance action total $1,000 or more, where there is reason to believe that the contractor or subcontractor has disregarded its obligations to workers or subcontractors, or where liquidated damages may be assessed under CWHSSA, the Department of Labor will furnish the Federal agency an enforcement report detailing the labor standards violations disclosed by the investigation or other compliance action and any action taken by the contractor or subcontractor to correct the violations, including any payment of back wages or any other relief provided workers or remedial actions taken for violations of § 5.5(a)(11) or (b)(5). In other circumstances, the Department of Labor will furnish the Federal agency a notification summarizing the findings of the investigation or other compliance action.

(c) *Confidentiality requirements.* It is the policy of the Department of Labor to protect from disclosure the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of a worker or other informant who makes a written or oral statement as a complaint or in the course of an investigation or other compliance action, as well as portions of the statement which would tend to reveal the identity of the informant, will not be disclosed in any manner to anyone other than Federal officials without the prior consent of the informant. Disclosure of such statements is also governed by the provisions of the ''Freedom of Information Act'' (5 U.S.C. 552, see part 70 of this subtitle) and the ''Privacy Act of 1974'' (5 U.S.C. 552a, see part 71 of this subtitle).

■ 27. Amend § 5.7 by revising paragraph (a) to read as follows:

§ 5.7 Reports to the Secretary of Labor.

(a) *Enforcement reports.* (1) Where underpayments by a contractor or subcontractor total less than $1,000, where there is no reason to believe that the contractor or subcontractor has disregarded its obligations to workers or subcontractors, and where restitution has been effected and future compliance assured, the Federal agency need not submit its investigative findings and recommendations to the Administrator, unless the investigation or other compliance action was made at the request of the Department of Labor. In the latter case, the Federal agency will submit a factual summary report detailing any violations including any data on the amount of restitution paid, the number of workers who received restitution, liquidated damages assessed under the Contract Work Hours and Safety Standards Act, corrective measures taken (such as ''letters of notice'' or remedial action taken for violations of § 5.5(a)(11) or (b)(5)), and any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages under § 5.8.

(2) Where underpayments by a contractor or subcontractor total $1,000 or more, or where there is reason to believe that the contractor or subcontractor has disregarded its obligations to workers or subcontractors, the Federal agency will furnish within 60 days after completion of its investigation, a detailed enforcement report to the Administrator.

* * * * *

■ 28. Revise § 5.9 to read as follows:

§ 5.9 Suspension of funds.

(a) *Suspension and withholding.* In the event of failure or refusal of the contractor or any subcontractor to comply with the applicable statutes referenced by § 5.1 and the labor standards clauses contained in § 5.5, whether incorporated into the contract physically, by reference, or by operation of law, the Federal agency (and any other agency), may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, take such action as may be necessary to cause the suspension of the payment, advance, or guarantee of funds until such time as the violations are discontinued and/or until sufficient funds are withheld as may be considered necessary to compensate workers for the full amount of wages and monetary relief to which they are entitled, and to cover any liquidated damages and pre-judgment or post-judgment interest which may be due.

(b) *Cross-withholding.* To satisfy a contractor's liability for back wages on a contract, in addition to the suspension and withholding of funds from the contract(s) under which the violation(s) occurred, the necessary funds also may be withheld under any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon labor standards and/or the Contract Work Hours and Safety Standards Act and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency.

(c) *Cross-withholding from different legal entities.* Cross-withholding of

funds may be requested from contracts held by other entities that may be considered to be the same prime contractor as that term is defined in § 5.2. Such cross-withholding is appropriate where the separate legal entities have independently consented to it by entering into contracts containing the withholding provisions at § 5.5(a)(2) and (b)(3). Cross-withholding from a contract held by a different legal entity is not appropriate unless the withholding provisions were incorporated in full or by reference in that different legal entity's contract. Absent exceptional circumstances, cross-withholding is not permitted from a contract held by a different legal entity where the Davis-Bacon labor standards were incorporated only by operation of law into that contract.

■ 29. Revise § 5.10 to read as follows:

§ 5.10 Restitution, criminal action.

(a) In cases other than those forwarded to the Attorney General of the United States under paragraph (b) of this section where violations of the labor standards clauses contained in § 5.5 and the applicable statutes referenced by § 5.1 result in underpayment of wages to workers or monetary damages caused by violations of § 5.5(a)(11) or (b)(5), the Federal agency or an authorized representative of the Department of Labor will request that restitution be made to such workers or on their behalf to plans, funds, or programs for any type of bona fide fringe benefits within the meaning of 40 U.S.C. 3141(2)(B), including interest from the date of the underpayment or loss. Interest on any back wages or monetary relief provided for in this part will be calculated using the percentage established for the underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(b) In cases where the Agency Head or the Administrator finds substantial evidence that such violations are willful and in violation of a criminal statute, the matter will be forwarded to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Administrator will be informed simultaneously of the action taken.

■ 30. Revise § 5.11 to read as follows:

§ 5.11 Disputes concerning payment of wages.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, proper classification, or monetary relief for violations of § 5.5(a)(11) or (b)(5). The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor.

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor and subcontractor, if any, by registered or certified mail to the last known address or by any other means normally assuring delivery, of the investigation findings. If the Administrator determines that there is reasonable cause to believe that either the contractor, the subcontractor, or both, should also be subject to debarment under the Davis-Bacon Act or any of the other applicable statutes referenced by § 5.1, the notification will so indicate.

(2) A contractor or subcontractor desiring a hearing concerning the Administrator's investigation findings must request such a hearing by letter or by any other means normally assuring delivery, sent within 30 days of the date of the Administrator's notification. The request must set forth those findings which are in dispute and the reasons therefor, including any affirmative defenses.

(3) Upon receipt of a timely request for a hearing, the Administrator will refer the case to the Chief Administrative Law Judge by Order of Reference, with an attached copy of the notification from the Administrator and the response of the contractor or subcontractor, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearings will be conducted in accordance with the procedures set forth in part 6 of this subtitle.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 5.12, the Administrator will notify the contractor and subcontractor, if any, by registered or certified mail to the last known address or by any other means normally assuring delivery, of the investigation findings, and will issue a ruling on any issues of law known to be in dispute.

(2)(i) If the contractor or subcontractor disagrees with the factual findings of the Administrator or believes that there are relevant facts in dispute, the contractor or subcontractor must advise the Administrator by letter or by any other means normally assuring delivery, sent within 30 days of the date of the Administrator's notification. In the response, the contractor or subcontractor must explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a response under paragraph (c)(2)(i) of this section alleging the existence of a factual dispute, the Administrator will examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator will refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator will so rule and advise the contractor and subcontractor, if any, accordingly.

(3) If the contractor or subcontractor desires review of the ruling issued by the Administrator under paragraph (c)(1) or (2) of this section, the contractor or subcontractor must file a petition for review thereof with the Administrative Review Board within 30 days of the date of the ruling, with a copy thereof to the Administrator. The petition for review must be filed in accordance with part 7 of this subtitle.

(d) If a timely response to the Administrator's findings or ruling is not made or a timely petition for review is not filed, the Administrator's findings or ruling will be final, except that with respect to debarment under the Davis-Bacon Act, the Administrator will advise the Comptroller General of the Administrator's recommendation in accordance with § 5.12(a)(2). If a timely response or petition for review is filed, the findings or ruling of the Administrator will be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Administrative Review Board.

■ 31. Revise § 5.12 to read as follows:

§ 5.12 Debarment proceedings.

(a) *Debarment standard and ineligible list.* (1) Whenever any contractor or subcontractor is found by the Secretary of Labor to have disregarded their obligations to workers or subcontractors under the Davis-Bacon Act, any of the other applicable statutes referenced by § 5.1, this part, or part 3 of this subtitle, such contractor or subcontractor and their responsible officers, if any, and any firm, corporation, partnership, or association in which such contractor, subcontractor, or responsible officer has an interest will be ineligible for a period of 3 years to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor

standards provisions of any of the statutes referenced by § 5.1.

(2) In cases arising under contracts covered by the Davis-Bacon Act, the Administrator will transmit to the Comptroller General the name(s) of the contractors or subcontractors and their responsible officers, if any, and any firms, corporations, partnerships, or associations in which the contractors, subcontractors, or responsible officers are known to have an interest, who have been found to have disregarded their obligations to workers or subcontractors, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. In cases arising under contracts covered by any of the applicable statutes referenced by § 5.1 other than the Davis-Bacon Act, the Administrator determines the name(s) of the contractors or subcontractors and their responsible officers, if any, and any firms, corporations, partnerships, or associations in which the contractors, subcontractors, or responsible officers are known to have an interest, to be debarred. The names of such ineligible persons or firms will be published on SAM or its successor website, and an ineligible person or firm will be ineligible for a period of 3 years from the date of publication of their name on the ineligible list, to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of any of the statutes referenced by § 5.1.

(b) *Procedure.* (1) In addition to cases under which debarment action is initiated pursuant to § 5.11, whenever as a result of an investigation conducted by the Federal agency or the Department of Labor, and where the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed violations which constitute a disregard of its obligations to workers or subcontractors under the Davis-Bacon Act, the labor standards provisions of any of the other applicable statutes referenced by § 5.1, this part, or part 3 of this subtitle, the Administrator will notify by registered or certified mail to the last known address or by any other means normally assuring delivery, the contractor or subcontractor and responsible officers, if any, and any firms, corporations, partnerships, or associations in which the contractors, subcontractors, or responsible officers are known to have an interest of the finding.

(i) The Administrator will afford such contractor, subcontractor, responsible officer, and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under paragraph (a) of this section. The Administrator will furnish to those notified a summary of the investigative findings.

(ii) If the contractor, subcontractor, responsible officer, or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request must be made by letter or by any other means normally assuring delivery, sent within 30 days of the date of the notification from the Administrator, and must set forth any findings which are in dispute and the basis for such disputed findings, including any affirmative defenses to be raised.

(iii) Upon timely receipt of such request for a hearing, the Administrator will refer the case to the Chief Administrative Law Judge by Order of Reference, with an attached copy of the notification from the Administrator and the responses of the contractor, subcontractor, responsible officers, or any other parties notified, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute.

(iv) In considering debarment under any of the statutes referenced by § 5.1 other than the Davis-Bacon Act, the Administrative Law Judge will issue an order concerning whether the contractor, subcontractor, responsible officer, or any other party notified is to be debarred in accordance with paragraph (a) of this section. In considering debarment under the Davis-Bacon Act, the Administrative Law Judge will issue a recommendation as to whether the contractor, subcontractor, responsible officers, or any other party notified should be debarred under 40 U.S.C. 3144(b).

(2) Hearings under this section will be conducted in accordance with part 6 of this subtitle. If no hearing is requested within 30 days of the date of the notification from the Administrator, the Administrator's findings will be final, except with respect to recommendations regarding debarment under the Davis-Bacon Act, as set forth in paragraph (a)(2) of this section.

(c) *Interests of debarred parties.* (1) A finding as to whether persons or firms whose names appear on the ineligible list have an interest under 40 U.S.C. 3144(b) or paragraph (a) of this section in any other firm, corporation, partnership, or association, may be made through investigation, hearing, or otherwise.

(2)(i) The Administrator, on their own motion or after receipt of a request for a determination pursuant to paragraph (c)(3) of this section, may make a finding on the issue of interest.

(ii) If the Administrator determines that there may be an interest but finds that there is insufficient evidence to render a final ruling thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with paragraph (c)(4) of this section.

(iii) If the Administrator finds that no interest exists, or that there is not sufficient information to warrant the initiation of an investigation, the requesting party, if any, will be so notified and no further action taken.

(iv)(A) If the Administrator finds that an interest exists, the person or firm affected will be notified of the Administrator's finding (by certified mail to the last known address or by any other means normally assuring delivery), which will include the reasons therefore, and such person or firm will be afforded an opportunity to request that a hearing be held to decide the issue.

(B) Such person or firm will have 20 days from the date of the Administrator's ruling to request a hearing. A person or firm desiring a hearing must request it by letter or by any other means normally assuring delivery, sent within 20 days of the date of the Administrator's notification. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, must be submitted with the request for a hearing.

(C) If no hearing is requested within the time mentioned in paragraph (c)(2)(iv)(B) of this section, the Administrator's finding will be final and the Administrator will notify the Comptroller General in cases arising under the DBA. If a hearing is requested, the ruling of the Administrator will be inoperative unless and until the Administrative Law Judge or the Administrative Review Board issues an order that there is an interest.

(3)(i) A request for a determination of interest may be made by any interested party, including contractors or prospective contractors and associations of contractors, representatives of workers, and interested agencies. Such a request must be submitted in writing to the Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

(ii) The request must include a statement setting forth in detail why the petitioner believes that a person or firm whose name appears on the ineligible list has an interest in any firm, corporation, partnership, or association

that is seeking or has been awarded a contract or subcontract of the United States or the District of Columbia, or a contract or subcontract that is subject to the labor standards provisions of any of the statutes referenced by § 5.1. No particular form is prescribed for the submission of a request under this section.

(4) The Administrator, on their own motion under paragraph (c)(2)(ii) of this section or upon a request for hearing where the Administrator determines that relevant facts are in dispute, will by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who will conduct such hearings as may be necessary to render a decision solely on the issue of interest. Such proceedings must be conducted in accordance with the procedures set forth in part 6 of this subtitle.

(5) If the person or firm affected requests a hearing and the Administrator determines that relevant facts are not in dispute, the Administrator will refer the issue and the record compiled thereon to the Administrative Review Board to render a decision solely on the issue of interest. Such proceeding must be conducted in accordance with the procedures set forth in part 7 of this subtitle.

■ 32. Revise § 5.13 to read as follows:

§ 5.13 Rulings and interpretations.

(a) All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to part 1 of this subtitle, of the rules contained in this part and in parts 1 and 3 of this subtitle, and of the labor standards provisions of any of the laws referenced in § 5.1 must be referred to the Administrator for appropriate ruling or interpretation. These rulings and interpretations are authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be submitted via email to *dgceinquiries@dol.gov*; by mail to Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave., NW, Washington, DC 20210; or through other means directed by the Administrator.

(b) If any such ruling or interpretation is made by an authorized representative of the Administrator of the Wage and Hour Division, any interested party may seek reconsideration of the ruling or interpretation by the Administrator of the Wage and Hour Division. The procedures and time limits set out in § 1.8 of this subtitle apply to any such request for reconsideration.

■ 33. Amend § 5.15 by revising paragraphs (c)(4) and (d)(1) to read as follows:

§ 5.15 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.

* * * * *

(c) * * *

(4)(i) Time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship programs may be excluded from working time if the criteria prescribed in paragraphs (c)(4)(ii) and (iii) of this section are met.

(ii) The apprentice comes within the definition contained in § 5.2.

(iii) The time in question does not involve productive work or performance of the apprentice's regular duties.

(d) * * *

(1) In the event of failure or refusal of the contractor or any subcontractor to comply with overtime pay requirements of the Contract Work Hours and Safety Standards Act, if the funds withheld by Federal agencies for the violations are not sufficient to pay fully the unpaid wages and any back pay or other monetary relief due laborers and mechanics, with interest, and the liquidated damages due the United States, the available funds will be used first to compensate the laborers and mechanics for the wages to which they are entitled (or an equitable portion thereof when the funds are not adequate for this purpose); and the balance, if any, will be used for the payment of liquidated damages.

* * * * *

§ 5.16 [Removed and Reserved]

■ 34. Remove and reserve § 5.16.

§ 5.17 [Removed and Reserved]

■ 35. Remove and reserve § 5.17.

■ 36. Add § 5.18 to subpart A to read as follows:

§ 5.18 Remedies for retaliation.

(a) *Administrator request to remedy violation.* When the Administrator finds that any person has discriminated in any way against any worker or job applicant in violation of § 5.5(a)(11) or (b)(5), or caused any person to discriminate in any way against any worker or job applicant in violation of § 5.5(a)(11) or (b)(5), the Administrator will notify the person, any contractors for whom the person worked or on whose behalf the person acted, and any upper tier contractors, as well as the relevant contracting agency(ies) of the discrimination and request that the person and any contractors for whom the person worked or on whose behalf the person acted remedy the violation.

(b) *Administrator directive to remedy violation and provide make-whole relief.* If the person and any contractors for whom the person worked or on whose behalf the person acted do not remedy the violation, the Administrator in the notification of violation findings issued under § 5.11 or § 5.12 will direct the person and any contractors for whom the person worked or on whose behalf the person acted to provide appropriate make-whole relief to affected worker(s) and job applicant(s) or take appropriate remedial action, or both, to correct the violation, and will specify the particular relief and remedial actions to be taken.

(c) *Examples of available make-whole relief and remedial actions.* Such relief and remedial actions may include, but are not limited to, employment, reinstatement, front pay in lieu of reinstatement, and promotion, together with back pay and interest; compensatory damages; restoration of the terms, conditions, and privileges of the worker's employment or former employment; the expungement of warnings, reprimands, or derogatory references; the provision of a neutral employment reference; and the posting of a notice to workers that the contractor or subcontractor agrees to comply with the Davis-Bacon Act and Related Acts anti-retaliation requirements.

■ 37. Revise § 5.20 to read as follows:

§ 5.20 Scope and significance of this subpart.

The 1964 amendments (Pub. L. 88–349) to the Davis-Bacon Act require, among other things, that the prevailing wage determined for Federal and federally assisted construction include the basic hourly rate of pay and the amount contributed by the contractor or subcontractor for certain fringe benefits (or the cost to them of such benefits). The purpose of this subpart is to explain the provisions of these amendments and make available in one place official interpretations of the fringe benefits provisions of the Davis-Bacon Act. These interpretations will guide the Department of Labor in carrying out its responsibilities under these provisions. These interpretations are intended also to provide guidance to contractors and their associations; laborers and mechanics and their organizations; and local, State, and Federal agencies. The interpretations contained in this subpart are authoritative and may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C.

259). The omission to discuss a particular problem in this subpart or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor with respect to such problem or to constitute an administrative interpretation, practice, or enforcement policy. Questions on matters not fully covered by this subpart may be referred to the Secretary for interpretation as provided in § 5.13.

■ 38. Revise § 5.22 to read as follows:

§ 5.22 Effect of the Davis-Bacon fringe benefits provisions.

The Davis-Bacon Act and the prevailing wage provisions of the statutes referenced in § 1.1 of this subtitle confer upon the Secretary of Labor the authority to predetermine, as minimum wages, those wage rates found to be prevailing for corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the area in which the work is to be performed. See the definitions of the terms ''prevailing wage'' and ''area'' in § 1.2 of this subtitle. The fringe benefits amendments enlarge the scope of this authority by including certain bona fide fringe benefits within the meaning of the terms ''wages'', ''scale of wages'', ''wage rates'', ''minimum wages'', and ''prevailing wages'', as used in the Davis-Bacon Act.

■ 39. Revise § 5.23 to read as follows:

§ 5.23 The statutory provisions.

Pursuant to the Davis-Bacon Act, as amended and codified at 40 U.S.C. 3141(2), the term ''prevailing wages'' and similar terms include the basic hourly rate of pay and, for the listed fringe benefits and other bona fide fringe benefits not required by other law, the contributions irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan, or program, and the costs to the contractor or subcontractor that may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the affected laborers and mechanics. Section 5.29 discusses specific fringe benefits that may be considered to be bona fide.

■ 40. Amend § 5.25 by adding paragraph (c) to read as follows:

§ 5.25 Rate of contribution or cost for fringe benefits.

* * * * *

(c) Except as provided in this section, contractors must ''annualize'' all contributions to fringe benefit plans (or the reasonably anticipated costs of an unfunded benefit plan) to determine the hourly equivalent for which they may take credit against their fringe benefit obligation. The ''annualization'' principle reflects that DBRA credit for contributions made to bona fide fringe benefit plans (or the reasonably anticipated costs of an unfunded benefit plan) is allowed based on the effective rate of contributions or costs incurred for total hours worked during the year (or a shorter time period) by a laborer or mechanic.

(1) *Method of computation.* To annualize the cost of providing a fringe benefit, a contractor must divide the total cost of the fringe benefit contribution (or the reasonably anticipated costs of an unfunded benefit plan) by the total number of hours worked on both private (non-DBRA) work and work covered by the Davis-Bacon Act and/or Davis-Bacon Related Acts (DBRA-covered work) during the time period to which the cost is attributable to determine the rate of contribution per hour. If the amount of contribution varies per worker, credit must be determined separately for the amount contributed on behalf of each worker.

(2) *Exception requests.* Contractors, plans, and other interested parties may request an exception from the annualization requirement by submitting a request to the WHD Administrator. A request for an exception may be granted only if each of the requirements of paragraph (c)(3) of this section is satisfied. Contributions to defined contribution pension plans (DCPPs) are excepted from the annualization requirement, and exception requests therefore are not required in connection with DCPPs, provided that each of the requirements of paragraph (c)(3) is satisfied and the DCPP provides for immediate participation and essentially immediate vesting (*i.e.,* the benefit vests within the first 500 hours worked). Requests must be submitted in writing to the Division of Government Contracts Enforcement by email to *DBAannualization@dol.gov* or by mail to Director, Division of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave. NW, Room S–3502, Washington, DC 20210.

(3) *Exception requirements.* Contributions to a bona fide fringe benefit plan (or the reasonably anticipated costs of an unfunded benefit plan) are excepted from the annualization requirement if all of the following criteria are satisfied:

(i) The benefit provided is not continuous in nature. A benefit is not continuous in nature when it is not available to a participant without penalty throughout the year or other time period to which the cost of the benefit is attributable; and

(ii) The benefit does not compensate both private work and DBRA-covered work. A benefit does not compensate both private and DBRA-covered work if any benefits attributable to periods of private work are wholly paid for by compensation for private work.

■ 41. Revise § 5.26 to read as follows:

§ 5.26 ''* * * contribution irrevocably made * * * to a trustee or to a third person''.

(a) *Requirements.* The following requirements apply to any fringe benefit contributions made to a trustee or to a third person pursuant to a fund, plan, or program:

(1) Such contributions must be made irrevocably;

(2) The trustee or third person may not be affiliated with the contractor or subcontractor;

(3) A trustee must adhere to any fiduciary responsibilities applicable under law; and

(4) The trust or fund must not permit the contractor or subcontractor to recapture any of the contributions paid in or any way divert the funds to its own use or benefit.

(b) *Excess payments.* Notwithstanding the above, a contractor or subcontractor may recover sums which it had paid to a trustee or third person in excess of the contributions actually called for by the plan, such as excess payments made in error or in order to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions is not yet known. For example, a benefit plan may provide for definite insurance benefits for employees in the event of contingencies such as death, sickness, or accident, with the cost of such definite benefits borne by the contractor or subcontractor. In such a case, if the insurance company returns the amount that the contractor or subcontractor paid in excess of the amount required to provide the benefits, this will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan. (*See* Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 963, 88th Cong., 2d Sess., p. 5.)

■ 42. Revise § 5.28 to read as follows:

§ 5.28 Unfunded plans.

(a) The costs to a contractor or subcontractor which may be reasonably

anticipated in providing benefits of the types described in the Act, pursuant to an enforceable commitment to carry out a financially responsible plan or program, are considered fringe benefits within the meaning of the Act (*see* 40 U.S.C. 3141(2)(B)(ii)). The legislative history suggests that these provisions were intended to permit the consideration of fringe benefits meeting these requirements, among others, and which are provided from the general assets of a contractor or subcontractor. (Report of the House Committee on Education and Labor, H. Rep. No. 308, 88th Cong., 1st Sess., p. 4; *see also* S. Rep. No. 963, p. 6.)

(b) Such a benefit plan or program, commonly referred to as an unfunded plan, may not constitute a fringe benefit within the meaning of the Act unless:

(1) It could be reasonably anticipated to provide the benefits described in the Act;

(2) It represents a commitment that can be legally enforced;

(3) It is carried out under a financially responsible plan or program;

(4) The plan or program providing the benefits has been communicated in writing to the laborers and mechanics affected; and

(5) The contractor or subcontractor requests and receives approval of the plan or program from the Secretary, as described in paragraph (c) of this section.

(c) To receive approval of an unfunded plan or program, a contractor or subcontractor must demonstrate in its request to the Secretary that the unfunded plan or program, and the benefits provided under such plan or program, are ''bona fide,'' meet the requirements set forth in paragraphs (b)(1) through (4) of this section, and are otherwise consistent with the Act. The request must include sufficient documentation to enable the Secretary to evaluate these criteria. Contractors and subcontractors may request approval of an unfunded plan or program by submitting a written request in one of the following manners:

(1) By mail to the United States Department of Labor, Wage and Hour Division, Director, Division of Government Contracts Enforcement, 200 Constitution Ave. NW, Room S–3502, Washington, DC 20210;

(2) By email to *unfunded@dol.gov* (or its successor email address); or

(3) By any other means directed by the Administrator.

(d) Unfunded plans or programs may not be used as a means of avoiding the Act's requirements. The words ''reasonably anticipated'' require that any unfunded plan or program be able to withstand a test of actuarial soundness. Moreover, as in the case of other fringe benefits payable under the Act, an unfunded plan or program must be ''bona fide'' and not a mere simulation or sham for avoiding compliance with the Act. To prevent these provisions from being used to avoid compliance with the Act, the Secretary may direct a contractor or subcontractor to set aside in an account assets which, under sound actuarial principles, will be sufficient to meet future obligations under the plan. Such an account must be preserved for the purpose intended. (S. Rep. No. 963, p. 6.)

■ 43. Amend § 5.29 by revising paragraph (e) and adding paragraph (g) to read as follows:

§ 5.29 Specific fringe benefits.

* * * * *

(e) Where the plan is not of the conventional type described in paragraph (d) of this section, the Secretary must examine the facts and circumstances to determine whether fringe benefits under the plan are ''bona fide'' in accordance with requirements of the Act. This is particularly true with respect to unfunded plans discussed in § 5.28. Contractors or subcontractors seeking credit under the Act for costs incurred for such plans must request specific approval from the Secretary under § 5.5(a)(1)(iv).

* * * * *

(g) For a contractor or subcontractor to take credit for the costs of an apprenticeship program, the following requirements must be met:

(1) The program, in addition to meeting all other relevant requirements for fringe benefits in this subpart, must be registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship (''OA''), or with a State Apprenticeship Agency recognized by the OA.

(2) The contractor or subcontractor may only take credit for amounts reasonably related to the costs of the apprenticeship benefits actually provided to the contractor's employees, such as instruction, books, and tools or materials. It may not take credit for voluntary contributions beyond such costs. Amounts the employer is required to contribute by a collective bargaining agreement or by a bona fide apprenticeship plan will be presumed to be reasonably related to such costs in the absence of evidence to the contrary.

(3) Costs incurred for the apprenticeship for one classification of laborer or mechanic may not be used to offset costs incurred for another classification.

(4) In applying the annualization principle to compute the allowable fringe benefit credit pursuant to § 5.25, the total number of working hours of employees to which the cost of an apprenticeship program is attributable is limited to the total number of hours worked by laborers and mechanics in the apprentice's classification. For example, if a contractor enrolls an employee in an apprenticeship program for carpenters, the permissible hourly Davis-Bacon credit is determined by dividing the cost of the program by the total number of hours worked by the contractor's carpenters and carpenters' apprentices on covered and non-covered projects during the time period to which the cost is attributable, and such credit may only be applied against the contractor's prevailing wage obligations for all carpenters and carpenters' apprentices for each hour worked on the covered project.

■ 44. Revise § 5.30 to read as follows:

§ 5.30 Types of wage determinations.

(a) When fringe benefits are prevailing for various classes of laborers and mechanics in the area of proposed construction, such benefits are includable in any Davis-Bacon wage determination. The examples contained in paragraph (c) of this section demonstrate how fringe benefits may be listed on wage determinations in such cases.

(b) Wage determinations do not include fringe benefits for various classes of laborers and mechanics whenever such benefits do not prevail in the area of proposed construction. When this occurs, the wage determination will contain only the basic hourly rates of pay which are prevailing for the various classes of laborers and mechanics. An illustration of this situation is contained in paragraph (c) of this section.

(c) The following illustrates examples of the situations discussed in paragraph (a) and (b) of this section:

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Figure 1 to Paragraph (c)

CLASSIFICATION	RATE	FRINGES
Bricklayer	$21.96	$0.00
Electrician	$47.65	3%+$14.88
Elevator mechanic	$48.60	$35.825+a+b a. PAID HOLIDAYS: New Year's Day, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day, Christmas Day and the Friday after Thanksgiving. b. VACATIONS: Employer contributes 8% of basic hourly rate for 5 years or more of service; 6% of basic hourly rate for 6 months to 5 years of service as vacation pay credit.
Ironworker, structural	$32.00	$12.01
Laborer: common or general	$21.93	$6.27
Operator: bulldozer	$18.11	$0.00
Plumber (excludes HVAC duct, pipe and unit installation)	$38.38	$16.67

Note 1 to paragraph (c): This format is not necessarily in the exact form in which determinations will issue; it is for illustration only.

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■ 45. Revise § 5.31 to read as follows:

§ 5.31 Meeting wage determination obligations.

(a) A contractor or subcontractor performing work subject to a Davis-Bacon wage determination may discharge their minimum wage obligations for the payment of both straight time wages and fringe benefits by paying in cash, making payments or incurring costs for ''bona fide'' fringe benefits of the types listed in the applicable wage determination or otherwise found prevailing by the Secretary of Labor, or by a combination thereof.

(b) A contractor or subcontractor may discharge their obligations for the payment of the basic hourly rates and the fringe benefits where both are contained in a wage determination applicable to their laborers or mechanics in the following ways:

(1) By paying not less than the basic hourly rate to the laborers or mechanics and by making contributions for ''bona fide'' fringe benefits in a total amount not less than the total of the fringe benefits required by the wage determination. For example, the obligations for ''Laborer: common or general'' in § 5.30, figure 1 to paragraph (c), will be met by the payment of a straight time hourly rate of not less than $21.93 and by contributions of not less than a total of $6.27 an hour for ''bona fide'' fringe benefits; or

(2) By paying in cash directly to laborers or mechanics for the basic hourly rate and by making an additional cash payment in lieu of the required benefits. For example, where an employer does not make payments or incur costs for fringe benefits, they would meet their obligations for ''Laborer: common or general'' in § 5.30,

figure 1 to paragraph (c), by paying directly to the laborers a straight time hourly rate of not less than $28.60 ($21.93 basic hourly rate plus $6.27 for fringe benefits); or

(3) As stated in paragraph (a) of this section, the contractor or subcontractor may discharge their minimum wage obligations for the payment of straight time wages and fringe benefits by a combination of the methods illustrated in paragraphs (b)(1) and (2) of this section. Thus, for example, their obligations for ''Laborer: common or general'' may be met by an hourly rate, partly in cash and partly in payments or costs for fringe benefits which total not less than $28.60 ($21.93 basic hourly rate plus $6.27 for fringe benefits).

■ 46. Add § 5.33 to read as follows:

§ 5.33 Administrative expenses of a contractor or subcontractor.

(a) *Creditable costs.* The costs incurred by a contractor's insurance carrier, third-party trust fund, or other third-party administrator that are directly related to the administration and delivery of bona fide fringe benefits to the contractor's laborers and mechanics can be credited towards the contractor's obligations under a Davis-Bacon wage determination. Thus, for example, a contractor may take credit for the premiums it pays to an insurance carrier or the contributions it makes to a third-party trust fund that both administers and delivers bona fide fringe benefits under a plan, where the insurance carrier or third-party trust fund uses those monies to pay for bona fide fringe benefits and for the administration and delivery of such benefits, including evaluating benefit claims, deciding whether they should be paid, approving referrals to specialists, and other reasonable costs of administering the plan. Similarly, a contractor may also take credit for monies paid to a third-party administrator to perform tasks that are directly related to the administration and delivery of bona fide fringe benefits, including under an unfunded plan.

(b) *Noncreditable costs.* A contractor's own administrative expenses incurred in connection with the provision of fringe benefits are considered business expenses of the firm and are therefore not creditable towards the contractor's prevailing wage obligations, including when the contractor pays a third party to perform such tasks in whole or in part. For example, a contractor may not take credit for the costs of office employees who perform tasks such as filling out medical insurance claim forms for submission to an insurance carrier, paying and tracking invoices from insurance carriers or plan administrators, updating the contractor's personnel records when workers are hired or separate from employment, sending lists of new hires and separations to insurance carriers or plan administrators, or sending out tax documents to the contractor's workers, nor can the contractor take credit for the cost of paying a third-party entity to perform these tasks. Additionally, recordkeeping costs associated with ensuring the contractor's compliance with the Davis-Bacon fringe benefit requirements, such as the cost of tracking the amount of a contractor's fringe benefit contributions or making sure contributions cover the fringe benefit amount claimed, are considered a contractor's own administrative expenses and are not considered directly related to the administration and delivery of bona fide fringe benefits. Thus, such costs are not creditable whether the contractor performs those tasks itself or whether it pays a third party a fee to perform those tasks.

(c) *Questions regarding administrative expenses.* Any questions regarding whether a particular cost or expense is creditable towards a contractor's prevailing wage obligations should be referred to the Administrator for resolution prior to any such credit being claimed.

■ 47. Add subpart C, consisting of § 5.40, to read as follows:

Subpart C—Severability

§ 5.40 Severability.

The provisions of this part are separate and severable and operate independently from one another. If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision is to be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of utter invalidity or unenforceability, in which event the provision is severable from this part and will not affect the remaining provisions.

Julie A. Su,

Acting Secretary, Department of Labor.

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Part III

Office of Management and Budget

2 CFR Parts 184 and 200
Guidance for Grants and Agreements; Final Rule

OFFICE OF MANAGEMENT AND BUDGET

2 CFR Parts 184 and 200

Guidance for Grants and Agreements

AGENCY: Office of Federal Financial Management, Office of Management and Budget.

ACTION: Final rule; notification of final guidance.

SUMMARY: The Office of Management and Budget is revising the OMB Guidance for Grants and Agreements. The revisions are limited in scope to support implementation of the Build America, Buy America Act provisions of the Infrastructure Investment and Jobs Act and to clarify existing provisions related to domestic preferences. These revisions provide further guidance on implementing the statutory requirements and improve Federal financial assistance management and transparency.

DATES: The effective date for the revised guidance is October 23, 2023.

FOR FURTHER INFORMATION CONTACT: Please contact Callie Conroy, Office of Management and Budget, via phone at 202–395–2747; via email at *MBX.OMB.Media@OMB.eop.gov*.

SUPPLEMENTARY INFORMATION:

Executive Summary

The Office of Management and Budget (OMB) is revising its guidance in title 2 of the Code of Federal Regulations (2 CFR) to add a new part 184 and revise 2 CFR 200.322. The revisions implement the requirement for the Director of OMB to issue guidance to the head of each Federal agency to assist in the implementation of the requirements of the Build America, Buy America Act (BABA), Public Law 117–58, 135 Stat. 429, 70901–70927, Nov. 15, 2021.

As required by BABA, the new part 184 of 2 CFR provides clear and consistent guidance to Federal agencies about how to apply the domestic content procurement preference (Buy America or BABA preference) as set forth in BABA to Federal awards for infrastructure projects. *See* BABA 70915. For example, the new part 184 includes definitions for key terms, including iron or steel products, manufactured products, construction materials, and materials identified in section 70917(c) (section 70917(c) materials) of BABA. These definitions provide a common system for Federal agencies to distinguish between the product categories established under the statutory text in BABA. The new part also offers standards that define ''all manufacturing processes'' in the case of construction materials.

The new part 184 also includes guidance for determining the cost of components of manufactured products. The part 184 text uses a modified version of the ''cost of components'' test found in the Federal Acquisition Regulation (FAR) at 48 CFR 25.003, which is used for Federal procurement. Using this approach for determining the cost of components of manufactured products in the context of Federal financial assistance aims to provide a consistent approach for industry, with only minor modifications which are explained in this document.

The new part 184 also includes guidance on proposing and issuing Buy America waivers. For example, based on the statutory text of BABA, it restates the circumstances under which a waiver may be justified. The new part also includes guidance on the type of process that a Federal agency should implement to allow recipients to request waivers, including the process a Federal agency should follow in issuing proposed and final waivers.

The revised provision in 2 CFR part 200 specifies that Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184, as required under section 70914(a) BABA, as of the effective date of the guidance, unless specified otherwise.

Background

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58, which includes BABA, at sections 70901 through 70927. BABA establishes a domestic content procurement preference for Federal financial assistance obligated for infrastructure projects. That preference is generally referred to in this document as the Buy America preference or BABA preference. The BABA preference applies to three separate product categories: (i) iron or steel products; (ii) manufactured products; and (iii) construction materials. *See* BABA 70912 and 70914.

BABA required that by May 14, 2022, the head of each covered Federal agency must ensure that ''none of the funds made available for a Federal financial assistance program for infrastructure may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States [(U.S.)].'' BABA 70914(a). BABA is consistent with this the Administration's policy in Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers (E.O. 14005), to ''use terms and conditions of Federal financial assistance awards . . . to maximize the use of goods, products, and materials produced in, and services offered in, the [U.S.].''

BABA requires OMB to issue guidance to the head of each Federal agency to ''assist in applying new domestic content procurement preferences.'' BABA 70915. BABA also allows OMB to amend 2 CFR, if necessary, to provide guidance to Federal agencies on imposing the Buy America preference through the terms and conditions of Federal awards. *Id.*

On April 18, 2022, OMB released M–22–11, entitled ''Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure'' (Memorandum M–22–11). Memorandum M–22–11 provided initial implementation guidance to Federal agencies on the application of the Buy America preference to Federal financial assistance programs for infrastructure, the Buy America waiver process, and other topics. Memorandum M–22–11 also provided ''preliminary and non-binding'' guidance on the definition of ''construction materials'' and associated standards for determining when all manufacturing processes of the construction material occur in the U.S. while OMB obtained stakeholder input to refine that definition and the associated standard for ''all manufacturing processes'' for each construction material.

On April 21, 2022, OMB issued a Notice of Listening Session(s) and Request for Information (RFI) in the **Federal Register**, which explained that OMB was beginning the process of seeking public input for its revised guidance and standards for construction materials. 87 FR 23888 (Apr. 21, 2022).

On February 9, 2023, OMB issued a Notification of Proposed Guidance in the **Federal Register**, which explained that OMB was proposing a new part 184 in 2 CFR chapter I to support implementation of BABA and clarify existing provisions in 2 CFR 200.322. 88 FR 8374 (Feb. 9, 2023).

In accordance with BABA, through this document, OMB is now amending 2 CFR, subtitle A, chapter I by adding a new part 184 to support implementation of BABA. OMB is also amending 2 CFR 200.322 to clarify existing provisions within part 200. The guidance in part 184 is intended to improve consistency in the implementation of BABA requirements across the Federal Government.

Prior to the effective date of the part 184 guidance, OMB will also issue an updated M-Memorandum to replace Memorandum M–22–11. The purpose of the update to Memorandum M–22–11 is to remove direct conflicts between Memorandum M–22–11 and the revised guidance in part 184. Parts and provisions of Memorandum M–22–11 that do not directly conflict with the revised guidance will generally be retained. OMB intends to issue the successor M-Memorandum before the effective date of the new part 184. OMB also intends the updated M-Memorandum to become effective concurrently with part 184. The updated M-Memorandum will continue to provide supplemental guidance to Federal agencies on implementation of BABA, which OMB did not believe was needed in the more succinct part 184 text. Sometimes, when OMB refers to Memorandum M–22–11 in this document, it refers to the initial guidance contained in Memorandum M–22–11, which OMB intends to carry over to the updated M-Memorandum except in cases of direct conflict.

OMB also notes, as explained in response to several commenters, that part 184 is not intended as comprehensive guidance on all topics related to the implementation of BABA. Instead, part 184 is intended to be high-level coordinating guidance for Federal agencies to use in their own direct implementation of BABA, as required under section 70914 of BABA. The guidance will help to ensure clear and consistent application of the key requirements under the statutory text. It is not possible for OMB to issue comprehensive guidance on every issue that may arise for different Federal agencies in the context of directly implementing their own unique Federal financial assistance programs, or on all topics raised by commenters, some of which are beyond the scope of what OMB intended to include in part 184.

BABA is a new and complex statute, which became effective in 2022. As such, establishing governmentwide guidance on these new statutory requirements has been an iterative process. OMB issued initial guidance in 2022 through Memorandum M–22–11. Following notice and comment, OMB is announcing revised guidance, which complements the initial guidance and, following the effective date, replaces it in cases of direct conflict. Federal agencies, in directly implementing BABA, may issue further guidance and provide further information to their recipients and other stakeholders on their own Federal financial assistance programs for infrastructure. OMB may also issue additional guidance in the future as it receives additional stakeholder feedback from Federal agencies, recipients of Federal awards, contractors, manufacturers, labor organizations, suppliers, industry associations, and others on this guidance. The revised guidance OMB announces in this document is an important next step in OMB's efforts to provide guidance to Federal agencies on implementing the statutory requirements in a coordinated way. The revised guidance is also an important step toward achieving this Administration's policy objectives set forth in E.O. 14005.

Statutory Authority for Final Guidance

OMB is required by section 70915(a) of BABA to issue guidance to the head of each Federal agency to assist in applying new Buy America preferences under section 70914 of BABA. Section 70915(a) of BABA also instructs OMB to, if necessary, amend subtitle A of title 2, Code of Federal Regulations (or successor regulations), to ensure that domestic content procurement preference requirements required under BABA or other Federal law are imposed through the terms and conditions of awards of Federal financial assistance.

OMB is also required by section 70915(b) of BABA to issue standards that define ''all manufacturing processes'' in the case of construction materials. While Memorandum M–22–11 provided ''preliminary and non-binding'' guidance on the definition of ''construction materials,'' the new part 184 includes OMB's standards for ''all manufacturing processes'' for the manufacture of construction materials. In issuing standards, BABA requires OMB to ensure that each manufacturing process required for the manufacture of the construction material and the inputs of the construction material occurs in the U.S. Section 70915(b) of BABA also requires OMB to take into consideration and seek to maximize the direct and indirect jobs benefited or created in the production of the construction material. The standards set forth in the revised guidance are based on industry feedback, agency consultation, and public comments received in response to the proposed guidance for each construction material as detailed further below.

Need for This Final Guidance

The new part 184 provides guidance to Federal agencies on how to implement the BABA requirements and standards in a consistent and coordinated way. In addition to providing clarity to Federal agencies and recipients of federally funded infrastructure project awards, this part will help to send clear market signals to the industries manufacturing products about what is needed to satisfy the BABA requirements.

The congressional findings at section 70911 of BABA (Findings) recognize several policy justifications for establishing Buy America preferences. The policy rationale in the Findings includes creating demand for domestically produced goods, helping to develop and sustain domestic manufacturing, and supporting millions of domestic manufacturing jobs. Congress also recognized that a robust domestic manufacturing sector is a vital component of the national security of the U.S. In addition, Congress recognized the importance of supporting domestic manufacturers that meet commitments of the U.S. to environmental, worker, and workplace safety protections; and in reinvesting tax dollars in companies and processes using the highest labor and environmental standards in the world. These justifications are consistent with the polices of this Administration set forth in E.O. 14005 to use terms and conditions of Federal awards to maximize the use of goods, products, and materials produced in, and services offered in, the U.S.

The revised guidance announced by OMB in this document adopts a unified scheme addressing how each covered Federal agency should apply the Buy America preference established by section 70914 of BABA to Federal awards for infrastructure. This includes providing key definitions and other provisions on how to classify products in the categories established under BABA. The revised guidance also includes other provisions providing manufacturing standards for each identified construction material. OMB is committed to ensuring strong and effective Buy America implementation consistent with BABA, other applicable law, and E.O. 14005.

Summary of Comments

On February 9, 2023, OMB solicited feedback from the public through proposed guidance published in the **Federal Register** on February 9, 2023. *See* 88 FR 8374 (Feb. 9, 2023). The period for public comments closed on March 13, 2023. Comments were received via *Regulations.gov* at Docket No. OMB–2023–0004. OMB received approximately 1,950 public comments from a broad range of interested stakeholders, such as States and State departments of transportation, local governments, manufacturers, labor

organizations, suppliers, construction contractors, industry associations, universities, foreign governments, and individuals.

Section-by-Section Discussion

OMB developed this revised guidance following review and consideration of comments received on the notification of proposed guidance. In this document, OMB summarizes significant comments received in response to its proposal and any substantive changes made to each section of the revised guidance. Minor changes to the language of the guidance are not addressed in all cases. These include minor plain language revisions, the addition of paragraph headings, and other minor editorial changes in the part 184 text. For sections where no substantive changes are discussed, the substantive proposal from the notification of proposed guidance was adopted.

Summary of Significant Changes Made in This Final Guidance as Compared to the Proposed Guidance

Section 184.1 was revised to clarify that the policy in the part 184 text applies to products ''incorporated into'' an infrastructure project. This is consistent with OMB Memorandum M–22–11 and other sections of the part 184 text. A similar change was also made to the definition of ''Buy America Preference'' in § 184.3.

Section 184.2 was revised to further clarify the non-applicability of part 184 to certain existing Buy America preferences. Section 184.2 was also revised to add an effective date for part 184, a modified effective date for certain projects, and a severability clause.

Section 184.3 was revised to modify certain definitions and add new ones.

The definition of ''construction materials'' at § 184.3 was revised to apply to ''only one'' of the listed materials. The list of construction materials was expanded to include engineered wood. Text was added to clarify that drop cable is included within the meaning of fiber optic cable. Language relating to minor additions was also added to the second paragraph of the definition.

The definition of ''manufactured products'' at § 184.3 was revised to provide an affirmative definition for the term instead of just explaining, in the negative, what the term does not include. The negative element of the definition was moved to the second paragraph of the definition. The second paragraph of the definition also includes clarifying language on items that may be considered components of a manufactured products.

Section 184.3 was also revised to add definitions for terms including component, manufacturer, predominantly of iron or steel or a combination of both, and section 70917(c) materials.

Section 184.4 was revised to provide additional guidance on the categorization of articles, materials, and supplies and how to apply of the Buy America preference by item category.

Section 184.5 includes minor changes in terminology but in substance remains similar to the proposed guidance.

Section 184.6 was revised to modify the manufacturing standard for certain construction materials including fiber optic cable. The standard for fiber optic cable was revised to clarify that it incorporates the standards for glass and optical fiber. The standard for plastic and polymer-based products was modified slightly to incorporate the proposed standard for composite building materials, which are a sub-category of plastic and polymer-based products. Because composite building materials are intended as a sub-category of plastic and polymer-based products, the standalone standard for composite building materials was eliminated. A new paragraph (b) was added to clarify that, except as specifically provided, only a single standard applies to a single construction material.

A few editorial changes were made to § 184.7 to provide clarity on the process for requesting and issuing waivers.

Summary of Significant Changes Made in This Final Guidance as Compared to the Initial Guidance in Memorandum M–22–11

Section 184.2 modifies existing guidance in Memorandum M–22–11 by providing an effective date for part 184.

Section 184.3 modifies existing guidance in Memorandum M–22–11 by modifying certain existing definitions and adding new ones.

The definition of ''construction materials'' at § 184.3 remains similar to Memorandum M–22–11 in applying to ''only one'' of the listed materials, but further clarifying language is now provided including the second paragraph on minor additions. The list of construction materials is expanded to include fiber optic cable (including drop cable), optical fiber, and engineered wood.

The definition of ''manufactured products'' at § 184.3 modifies existing guidance in Memorandum M–22–11 by providing an affirmative definition for the term as explained above in the summary of changes relative to the proposed guidance. Other clarifying language is also provided including on how to categorize products that could fall into multiple categories and on what items may be considered components of manufactured products.

Section 184.3 also modifies existing guidance in Memorandum M–22–11 by adding definitions for terms including ''component,'' ''manufacturer,'' ''predominantly of iron or steel or a combination of both,'' and ''section 70917(c) materials.''

Section 184.4 modifies existing guidance in Memorandum M–22–11 to provide additional guidance on the categorization of articles, materials, and supplies and how to apply the Buy America Preference by category.

Section 184.5 modifies existing guidance in Memorandum M–22–11 by offering more detail on how Federal agencies should implement the cost of components test.

Section 184.6 modifies existing guidance in Memorandum M–22–11 by providing revised manufacturing standards for each listed construction material, including materials that were not included in Memorandum M–22–11 such as fiber optic cable, optical fiber, and engineered wood.

A few editorial changes were made, but §§ 184.7 and 184.8 otherwise remain similar to existing guidance in Memorandum M–22–11.

General Comments—Consistency and Uniformity for Buy America Requirements

Many commenters emphasized the need for Federal agencies to apply and implement Buy America preferences in a consistent manner. For example, some commenters urged OMB to preserve the existing body of regulations, interpretations, and determinations related to Federal domestic content preferences as much as possible. Some commenters suggested using definitions already in use under the FAR in the procurement context or using existing Buy America standards implemented by specific Federal agencies with Buy America requirements that existed prior to passage of BABA in 2021. Other commenters suggested maintaining continuity with existing BABA guidance provided by OMB in Memorandum M–22–11.

Other commenters explained that further clarity was needed in the guidance on a variety of specific topics to ensure consistent application by Federal agencies. For example, some suggested establishing a unified certification process for Buy America compliance. Others suggested operational improvements to the Buy America waiver process, such as streamlining and expediting the waiver

process. Other commenters suggested creating a website or database of BABA approved materials or manufacturers. Some also suggested granting broad waivers for certain types of projects (for example, water projects), programs (for example, Broadband Equity, Access, and Deployment (BEAD)), or products (for example, commercial off the shelf (COTS) items).

OMB Response: In general, OMB agrees with commenters on the value of consistent implementation of Buy America requirements. OMB believes the guidance it issues in this document will help to achieve this. OMB will also continue to convene inter-agency workgroups on a recurring basis to ensure, to the extent possible, that Federal agencies implement BABA in a consistent, uniform, efficient, and transparent manner.

In the revised guidance, OMB has aimed to provide general consistency with certain provisions in the FAR. For example, see discussion below of the definition of ''predominantly of iron or steel or a combination of both'' in § 184.3, the ''brought to the work site'' language added in § 184.4, and the ''cost of components'' test used in § 184.5. However, the Buy America requirements established by Congress under BABA are not identical to the Buy American Act requirements implemented in the FAR. The FAR implements the Buy American Act (BAA) (41 U.S.C. 8301–8305). BAA applies to direct Federal procurement—what the Federal Government buys for its own use. By contrast, BABA applies to Federal financial assistance for infrastructure projects—or grants, cooperative agreements, and other Federal awards that Federal agencies provide to recipients constructing such projects. *See* 2 CFR 200.1. There are many substantive differences between the BAA, implemented in the FAR, and BABA. These differences include the applicable product categories that the domestic content preferences apply to and also the standards that apply to the categories. These differences do not allow for complete consistency on all topics between the FAR and the implementing guidance for BABA in part 184. However, OMB has aimed for a reasonable degree of consistency on certain specific provisions discussed below.

OMB also recognizes that certain Federal agencies, such as the Environmental Protection Agency (EPA) and operating administrations within the U.S. Department of Transportation (U.S. DOT), including the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), already had Buy America requirements for Federal financial assistance that applied to Federal awards for infrastructure prior to passage of BABA in 2021. OMB also recognizes that section 70917(b) of BABA states that ''[n]othing in this part affects a [BABA preference] for a Federal financial assistance program for infrastructure that is in effect and that *meets* the requirements of section 70914'' (emphasis added). This topic is addressed specifically at § 184.2(a) of the guidance, and the discussion of that provision in this preamble. Section 184.2(a) generally allows Federal agencies to maintain Buy America preferences meeting or exceeding the requirements of BABA if the preferences existed before November 15, 2021. However, to the extent existing Buy America preferences did not meet or exceed the requirements for all of the product categories under BABA, these Federal agencies must supplement their existing requirements. For example, BABA established the Buy America preference for the ''construction materials'' category, which is addressed in several sections of the new part 184 and throughout this preamble. Because the construction material category was first established under BABA—and the term is used there in a novel way—provisions of OMB's guidance offering definitions and standards related to constructions materials will be used by all Federal agencies with Federal financial assistance programs for infrastructure in their own direct implementation of BABA. *See* BABA 70912(6)(C), 70914(a), 70915(b), and 70917(b).

Regarding other comments and suggestions for greater consistency on certification procedures, a database of approved products, and other topics, OMB notes that its revised guidance in part 184 is intended to be limited in scope. Some of these topics may possibly be the subject of future guidance for OMB or individual Federal agencies, but are not addressed in the current revised guidance issued in this document. Comments on the waiver process are addressed below.

General Comments—Burden Reduction for Grant Recipients and Industry

Many commenters raised concerns related to the implementation of BABA requirements and the burden these requirements may impose on industry and recipients of Federal financial assistance and their contractors. For example, some of these commenters maintained that OMB's guidance on Buy America requirements may impose a burden on companies involved in constructing or providing supplies for federally funded infrastructure projects, which may lead to project delays or increased project costs. Many commenters advocated for changes to the guidance that would reduce the burden for industry. For example, some commenters maintained that OMB should avoid creating new or different definitions that would modify existing guidance in Memorandum M–22–11. These commenters stated that, in some cases, modifying existing guidance might lead to confusion, project delays, or increased project costs.

Several State departments of transportation also explained that they have expended substantial effort and resources to implement OMB's initial guidance in Memorandum M–22–11. These commenters maintained that any significant changes to the Buy America preferences would create additional administrative burden for them. For example, they noted that significant changes in how to distinguish between product categories may result in voiding existing product categorization lists created by State departments of transportation based on OMB's preliminary guidance, or in making product categorization more difficult for them. These commenters urged OMB to maintain continuity with the preliminary guidance in Memorandum M–22–11 on how to distinguish between product categories.

OMB Response: Responses to comments regarding the effective date for the guidance are addressed separately under § 184.2(b) below. OMB must ensure that its revised guidance enables Federal agencies to implement the Buy America requirements in a way that is consistent with the text and statutory objectives of BABA and the policy of E.O. 14005. Memorandum M–22–11 provided initial implementation guidance to Federal agencies on the application of the Buy America preference to Federal financial assistance programs for infrastructure, the Buy America waiver process, and other topics. Memorandum M–22–11 also provided ''preliminary and non-binding'' guidance on the definition of ''construction materials'' and associated standards for manufacturing processes for an interim period.

BABA requires Federal agencies to ensure that all of the iron, steel, manufactured products, and construction materials used in federally funded infrastructure projects are produced in the U.S., and directs OMB to issue guidance to assist Federal agencies in achieving this objective. BABA 70914(a) and 70915(a). Congress explained its policy rationale for the

Buy America preference in its Findings at section 70911 of BABA, which includes ensuring that entities using taxpayer-financed Federal financial assistance should give a commonsense preference for the materials and products produced by companies and workers in the U.S. BABA 70911(4). The basic statutory requirements of BABA have been effective for all covered Federal agencies since May 14, 2022.

In issuing the revised guidance, OMB is fulfilling its obligations to assist Federal agencies in implementing BABA in a manner consistent with the statutory text and the polices of this Administration set forth in E.O. 14005. Implementing the statutory Buy America preference may impose a burden on some stakeholders in some circumstances; however, clear and consistent implementation of the BABA standards also provides significant opportunity for manufacturers across the U.S. On many topics OMB's discretion is limited, such as in the case of construction material standards, which must ''require that each manufacturing process required for the manufacture of the construction material and the inputs of the construction material'' occurs in the U.S. BABA 70915(b)(2)(A).

On certain topics, OMB recognized commenters' concerns regarding how its proposed guidance could have created confusion. For example, regarding OMB's product categorization system, which is based on OMB's definitions for the three top-level product categories established by Congress in BABA, OMB discusses below in this preamble how it has aimed to maintain continuity with Memorandum M–22–11 on a key element of the definition of ''construction materials'' that several commenters were specifically concerned about. Under the revised guidance, OMB returns to its approach under M–22–11 of classifying a combination of two separate construction materials as a manufactured product except in cases where the resulting product is specifically identified by OMB in the list of construction materials at § 184.3. Consistent with the preliminary guidance, this approach, for example, results in a plastic-framed sliding window being treated as a manufactured product, and it results in plate glass, on its own, being treated as a construction material. In this case, OMB recognized the concerns raised by commenters on the proposed guidance. OMB aimed to provide a definition of ''construction materials'' that would not create additional or excessive burden while also implementing BABA in a manner consistent with the statutory intent. While recipients may likely have to make some adjustments to ensure consistency with the revised guidance, the structure of the definition of ''construction materials'' should provide a reasonable degree of continuity for State agencies with product categorization lists based on Memorandum M–22–11.

OMB acknowledges that other elements of the product category definitions, and other provisions of the final guidance, which are explained below, will have some impacts on how products are categorized under BABA relative to Memorandum M–22–11. OMB's definitions for construction materials, iron or steel products, and manufactured products are discussed in more detail below, including OMB's supporting rationale for the final definitions and changes relative to the proposed guidance and Memorandum M–22–11.

OMB also acknowledges that is has provided further specification on certain items from Memorandum M–22–11. As Memorandum M–22–11 itself explained, OMB never intended to leave all provisions of that guidance in place permanently; rather, Memorandum M–22–11 provided initial implementation guidance to Federal agencies on the application of the Buy America preference to Federal financial assistance programs for infrastructure, the Buy America waiver process, and other topics. OMB has consistently explained in public notices on BABA that revised guidance and standards would follow the initial guidance. Memorandum M–22–11 identified itself as ''initial'' implementation guidance providing ''preliminary and non-binding guidance'' with regards to construction materials. Three days after the issuance of Memorandum M–22–11, OMB issued the RFI in the **Federal Register**, which explained that OMB was beginning the process of seeking public input for its revised guidance and standards for construction materials. 87 FR 23888 (Apr. 21, 2022). Through the Notification of Proposed Guidance issued by OMB in February 2023, OMB explained that it was seeking notice and comment for this revised guidance, which now modifies 2 CFR. 88 FR 8374 (Feb. 9, 2023). To the extent OMB has made material changes to its initial policy in Memorandum M–22–11, those changes are identified in this document along with OMB's reasons for making them.

OMB has also sought, where possible, to avoid being overly prescriptive; for example, this guidance leaves significant discretion to Federal agencies to apply the term ''minor additions'' for purposes of the definition of ''construction materials'' in the context of their own Federal financial assistance programs for infrastructure.

Section 184.1: Purpose and Policy

Section 184.1 of the revised guidance generally restates the purpose and policy from the statutory text of BABA with minimal modification. OMB received many comments, however, on the topic of whether products and supplies temporarily used on a work site, but not permanently incorporated into an infrastructure project, would be subject to the Buy America preference. Many commenters expressed concern that OMB may have intended to modify its policy in Memorandum M–22–11 on this topic, which stated that BABA only applies to products that are ''consumed in, incorporated into, or affixed to an infrastructure project.'' For example, one commenter observed that the proposed guidance did not include an equivalent provision and requested OMB to restate this clarifying language in the revised guidance in part 184.

OMB Response: OMB made a slight change in § 184.1(b) to replace the phrase ''used in the project'' with ''incorporated into the project.'' The intention of this change is to clarify that OMB's policy from Memorandum M–22–11 remains unchanged under the revised guidance in part 184 relative to the distinction between temporary use and permanent incorporation. As explained above, OMB has not rescinded Memorandum M–22–11. In cases of direct conflict, certain portions of Memorandum M–22–11 will be superseded by the revised guidance on the effective date of part 184—such as the preliminary standard for construction materials standards—but other parts and provisions of Memorandum M–22–11 that do not directly conflict with the revised guidance will remain in effect. OMB intends to issue an updated M-Memorandum to replace Memorandum M–22–11. The updated version of the memorandum will be revised to remove conflicts with the revised guidance in part 184.

On the issue of permanent incorporation, Memorandum M–22–11 explained that the Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the

infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project. This policy is not modified by the revised guidance issued in this document in part 184.

Section 184.2: Applicability, Effective Date, and Severability

Section 184.2(a)—Non-Applicability of This Part to Existing Buy America Preferences

OMB received a variety of comments on the intended meaning of this section, such as how it would apply to specific Federal agencies. For example, some commenters asked how the revised guidance would apply to agencies like FTA and FHWA with preexisting and long-standing Buy America requirements. Other commenters were confused by the purpose of this provision as it appeared in the proposed guidance.

OMB Response: The purpose of this provision is to identify Buy America preferences to which the revised guidance does not apply. Certain Federal agencies, such as the EPA and operating administrations within the U.S. DOT, such as FHWA and FTA, have Buy America preferences that existed prior to passage of BABA. Section 70917(b) of BABA states that ''[n]othing in this part affects a [BABA preference] for a Federal financial assistance program for infrastructure that is in effect and that *meets* the requirements of section 70914'' (emphasis added). OMB notes that BABA's savings provision specifies that existing programs must meet the requirements of section 70914 of BABA. Hence, part 184 does not apply to a Buy America preference implemented by those agencies that either meets or exceeds the requirements of section 70914 of BABA if the preference was applied to Federal awards for infrastructure projects before November 15, 2021. Other provisions of part 184, however, should be used by agencies with existing requirements if they do not have comparable standards. For example, the construction material category—with specific materials identified by OMB in this guidance—is newly created under BABA. This category should be used by agencies that continue to apply their own existing regulations and implementing guidance for other categories. Other procedural elements of the revised guidance, such as those addressing the waiver process, will also apply to all Federal agencies. Individual Federal agencies are best positioned to provide more specific information on how BABA, part 184, and their existing requirements apply to specific infrastructure projects or Federal financial assistance programs that they oversee and implement.

Section 184.2(b) and (c)—Effective Date of This Part and Modified Effective Date for Certain Infrastructure Projects

OMB received many comments on the effective date for the guidance. Many commenters requested OMB to provide additional time before the guidance becomes effective. For example, some of these commenters indicated that supply chains needed more time to adjust to the guidance. Other commenters indicated that they needed more time to educate and train their staff on how to comply with the guidance. Other commenters indicated that Federal agencies responsible for implementing the guidance needed additional time to update their policies and practices and that recipients and subrecipients of Federal financial assistance subject to the Federal agency policies will then need time to apply those policies and practices. Still other commenters suggested that Federal agencies needed additional time to implement changes to their waiver processes to make it more transparent and efficient before the guidance goes into effect. OMB received many other comments on similar themes asking OMB to provide a delayed effective date for all or some provisions the guidance to allow affected or potentially affected entities more time to prepare for implementation, oversight, and compliance.

Many commenters recommended that OMB adopt a phased or incremental approach that would phase-in the guidance over time. Several commenters suggested delaying implementation until the next construction season in 2024. Some commenters specifically noted concerns related to projects started prior to the effective date of BABA.

Regarding the new standards for construction materials in particular, several commenters also requested phasing-in the standards over a longer period of time or only applying them after confirming that a sufficient domestic supply is available for all Federal infrastructure projects. Again, some commenters also noted concerns about applying requirements for construction materials on projects that began prior to passage of BABA or the effective date of the statutory BABA requirements.

A number of commenters also questioned the advisability of applying the revised guidance on projects that were already in planning, design, or later implementation phases prior to its issuance, or that had received prior Federal awards either before passage of BABA or under OMB's initial guidance in Memorandum M–22–11. Some commenters questioned whether this approach would be feasible. Others stated that additional guidance was needed to reduce uncertainty for such projects. Other commenters supported rapid implementation of the BABA standards.

OMB Response: By statute, the Buy America preferences under BABA became effective more than a year ago on May 14, 2022. BABA 70914(a); *see also* Memorandum M–22–11. OMB explained in Memorandum M–22–11 that it was issuing ''initial'' implementation guidance, including ''preliminary'' standards, to be followed by issuance of this revised guidance. The Buy America preferences under BABA, including the preliminary and non-binding standards for construction materials under Memorandum M–22–11, have now applied to Federal financial assistance for infrastructure for over a year.

Based on guidance in Memorandum M–22–11, many Federal agencies took the opportunity to propose and issue adjustment period waivers, and waivers for previously planned projects, finding that an adjustment or phase-in period was in the public interest after the BABA requirements initially became effective on May 14, 2022. Memorandum M–22–11 provided that ''agencies should consider whether brief, time limited waivers to allow recipients and agencies to transition to new rules and processes may be in the public interest.'' These waivers provided additional time beyond the statutory effective date of May 14, 2022 for Federal agencies to implement the statutorily-required Buy America preference. For one example of such an adjustment period waiver, see the ''Temporary Waiver of Buy America Requirements for Construction Materials'' issued by the U.S. DOT in May 2022. 87 FR 31931. For agencies that took the opportunity to propose and issue adjustment period waivers, the phase-in period provided recipients of Federal financial assistance and their suppliers additional time to adjust to, and plan to comply with, the new Buy America preference established by Congress at section 70914(a) of BABA as implemented by the relevant agency.

Since May 2022, many Federal agencies have also proposed and issued other types of general applicability waivers based on OMB's guidance in M–22–11, which also eased the transition to the new statutory requirements. Consistent with examples provided in Memorandum M–22–11, these other general applicability waivers included *de minimis,* small grant, and minor component waivers that individual Federal agencies and the Made in America Office at OMB found to be in the public interest and consistent with policy following the public comment period required under BABA.

In addition to its guidance on waivers, other sections of Memorandum M–22–11 also functioned as an on-ramp for phasing-in BABA requirements. For example, Memorandum M–22–11 provided preliminary and non-binding standards for the new category of construction materials, including a preliminary definition for that term. The preliminary standards in M–22–11 were less stringent than the standards now provided in the revised guidance. Specifically, the preliminary construction material standards in Memorandum M–22–11 only covered ''the final manufacturing process and the immediately preceding manufacturing stage for the [identified] . . . material[s].'' Memorandum M–22–11 explained that, following additional stakeholder input, OMB would issue further guidance on the meaning of the term construction materials and revised manufacturing standards for each identified material consistent with section 70915(b) of BABA.

OMB has now received stakeholder input through issuance of the RFI in April 2022 and the proposed guidance in February 2023. Based on consideration of that stakeholder input and the statutory requirements under BABA, the standards provided in the revised guidance now provide specific manufacturing standards for agencies to apply to each listed construction material. Consistent with BABA, the standards now enumerate the list of ''all manufacturing processes'' to occur in the U.S. BABA 70915(b). This includes ''each manufacturing process required for the manufacture of the construction material and the inputs of the construction material.'' *Id.* A period with less stringent standards for construction materials was already provided by Memorandum M–22–11.

OMB acknowledges that it added three construction materials to its list in the revised guidance in part 184. OMB identified all three materials in the proposed guidance issued in February 2023, with fiber optic cable and optical fiber identified in the proposed part 184 text and engineered wood identified in the preamble as a material that OMB was considering for its final list. To the extent that supply chain concerns arise due to the addition of these materials, or due to the clarification of the applicability of BABA to other construction materials, a Federal agency may use the waiver process described at section 70914(a) of BABA, and in § 184.7 of the guidance, to provide additional relief on the construction materials standards set forth in the revised guidance.

In addition to providing guidance on waivers and preliminary guidance on construction materials, Memorandum M–22–11 also provided initial implementation guidance on many other topics including iron or steel products, manufactured products, the applicability of BABA, the meaning of infrastructure and infrastructure projects, and exemptions to BABA. As discussed in this preamble, OMB acknowledges that the revised guidance makes changes and adjustments on several topics relative to the initial guidance. In many cases, however, OMB believes these changes are modest or limited in scope. The revised guidance remains consistent with the statutory framework provided by Congress in November 2021 and generally consistent with the framework provided by OMB through Memorandum M–22–11 over a year ago in April 2022. Thus, the revised guidance does not represent a wholesale change or replacement of the initial guidance, but only a refinement and revision of certain elements in responses to comments that OMB received related to both the RFI and the proposed guidance. As explained above, OMB is not rescinding the guidance in Memorandum M–22–11, but it is superseded in cases of direct conflict. OMB intends to issue an updated M-Memorandum to eliminate conflicts between the two sources of guidance.

From before the May 2022 effective date of BABA through the present, OMB has actively engaged with a wide array of stakeholders including Federal agencies, manufacturers, labor organizations, suppliers, nonprofits, State and local governments, and other entities and individuals that may be affected by Federal agencies' implementation of OMB's guidance. Engagement activities included public listening sessions, public comment periods, inter-agency coordination with the Federal Government, meetings with industry, and other public engagements. OMB has carefully considered public comments received in response to the proposed guidance in developing the revised guidance in this document. OMB intends to continue active engagement with stakeholders, but does not believe that an additional phase-in period is needed beyond the phase-in period provided by Memorandum M–22–11 and the adjustment period and other waivers issued by Federal agencies. Accordingly, OMB has decided on an effective date of 60 days after publication for the revised guidance.

OMB acknowledges commenters' concerns about applying the revised guidance on projects that had received prior Federal awards under OMB's initial guidance in Memorandum M–22–11. For infrastructure projects that received prior Federal awards on or after May 14, 2022, but before the effective date of the revised guidance, OMB adds language clarifying that Federal agencies should allow a project that receives a subsequent Federal award within one year of the effective date to be subject to Memorandum M–22–11 instead of the revised guidance. In this case, the project would remain subject to the original version of Memorandum M–22–11 published on April 18, 2022, not the updated or successor version that will remove direct conflicts with part 184. The purpose of this language is to provide additional flexibility for certain projects in the implementation phase.

OMB also includes clarifying language related to projects in the category described in the preceding paragraph that make significant design or planning changes after the effective of the revised guidance. If significant design or planning changes are made to the infrastructure project, the Federal awarding agency may apply the revised guidance to the additional Federal award instead of Memorandum M–22–11. This provision recognizes that, depending on their scope or nature, design or planning changes may warrant application of the revised guidance, such as in cases where the changes introduce novel project elements that were never evaluated under Memorandum M–22–11. However, the provision leaves discretion to the agency to consider the fact-specific circumstances of the project and which guidance should be applied.

OMB also includes language to clarify that even in the case of projects that qualify to continue applying Memorandum M–22–11 to obligations within one year of the effective date, Federal agencies eventually should apply the revised guidance if the projects receive additional Federal awards after the one-year period.

OMB also acknowledges commenters' concerns about applying the revised guidance on other projects that were in the planning, design, of other phases of implementation before the effective date of the revised guidance, but which had not received prior Federal awards. OMB finds that the waiver process is generally the appropriate mechanism for additional relief on these projects. If the Federal agency finds that a waiver is justified under the circumstances—and follows the processes set forth in § 184.7 of the revised guidance—a waiver may be available. The waiver process may also be the appropriate mechanism where the revised guidance may be considered excessively disruptive and contrary to the public interest. OMB will continue working with Federal agencies to identify any additional flexibilities that agencies can deploy to address the concerns raised in the comments about timelines.

Section 184.2(d)—Severability

BABA requires OMB to issue coordinating guidance and standards to Federal agencies on how to apply the statutorily required Buy America preferences. BABA 70915. For the reasons discussed in the preamble, OMB believes that its decisions on all provisions and elements of the revised guidance are well-supported by its authority under BABA and should be upheld in any legal challenge. OMB also believes that its exercise of its authority in the revised guidance reflects sound policy.

In the revised guidance, OMB adopts a unified scheme addressing how each covered Federal agency will apply a Buy America preference to Federal awards for infrastructure. While the unified scheme best serves the statutory objectives of BABA if left intact as adopted by OMB, the benefits of the revised guidance related to coordination across the Federal Government do not hinge on any single element or provision of the guidance. Accordingly, OMB considers individual elements and provisions adopted in the revised guidance to be separate and severable from one another. In the event of a stay or invalidation of any element or provision of the guidance, or any element or provision as it applies to a particular person or circumstance, OMB's intent is to otherwise preserve the revised guidance to the fullest possible extent. The elements that remained in effect would continue to provide vital guidance to Federal agencies to ensure coordinated implementation of the Buy America preference set forth in BABA.

Specifically, in the event that any element or provision of the revised guidance is held to be invalid or unenforceable as applied to a particular person or circumstance, the part 184 text explains that the provision should be construed so as to continue to give the maximum effect permitted by law as applied to other persons not similarly situated or to dissimilar circumstances. If any provision is determined to be wholly invalid and unenforceable, it should be severed from the remaining provisions of the revised guidance, which should remain in effect.

Regarding its coordinating function, the product categorization system provided by the definitions of key terms in § 184.3 and other provisions in § 184.4 ensure that Federal agencies will apply the Buy America preference in consistent, uniform, efficient, and transparent manner. The revised guidance, along with Federal agencies' coordinated efforts to directly implement the guidance, will send an important signal to recipients of Federal awards, contractors, industry, and suppliers on how to comply with BABA. Congress expressly recognizes the need for coordinating guidance and standards from OMB in section 70915 of BABA.

The guidance OMB issues in this document will continue to provide necessary coordinating information to Federal agencies and stakeholders even if individual elements or provisions were stayed or invalidated. For example, although OMB believes that the final list of construction materials in § 184.3 is well-supported and sound policy, if a reviewing court issued a stay or invalidation of OMB's inclusion of any individual item on the list, Federal agencies could still continue to implement the remainder of the revised guidance. This approach would allow Federal agencies to continue to implement statutory requirements under BABA, based on OMB's coordinating guidance, pending further decisions by the court or action by OMB on the stayed or invalidated provisions. The same would also be true if a reviewing court issued a stay or invalidation of OMB's inclusion of any specific types of products or components of products under the definition of ''manufactured products.''

Similarly, the construction material standards under § 184.6 each provide important coordinating information to Federal agencies, recipients and subrecipients of Federal awards, contractors, manufacturers, suppliers, and other stakeholders in the relevant industries. If any one of the construction material standards were stayed or invalidated by a reviewing court, the remaining standards should remain in effect. For any stayed or invalidated standard, as an interim measure, for that standard only, a reviewing court could revert to the preliminary and less stringent standard for construction materials that applied under Memorandum M–22–11. In that circumstance, Federal agencies could continue to implement the remaining standards for other construction materials without interruption and meet the statutory requirements under BABA.

Many commenters also expressed concerns on the topic of whether materials identified in section 70917(c) of BABA—referred to collectively in this document as the section 70917(c) materials—should be included in the category of manufactured products. In the revised guidance, as discussed below, OMB defines the circumstances in which section 70917(c) materials may be considered components of manufactured products under the Buy America preference at section 70914(a) of BABA. In the event that a reviewing court stayed or invalidated elements of OMB's guidance as applied to section 70917(c) materials, as an interim measure those materials could be excluded from BABA coverage without impacting the remainder of the guidance. This approach would allow Federal agencies to continue to fully implement remaining provisions of the OMB guidance pending further decisions by the reviewing court or action by OMB on treatment of section 70917(c) materials.

OMB believes that it is in the interest of Federal agencies, recipients and subrecipients of Federal awards, contractors, manufacturers, suppliers, other stakeholders, and the nation as a whole to leave the final coordinating guidance in place to the fullest extent possible and permitted by law. In addition to more fully implementing the statutory requirements of BABA, the revised guidance provides common guidelines, to be implemented by Federal agencies, for all stakeholders. It also provides important market signals to industry—many of which are making significant investments in American manufacturing and production in response to these standards—which will best allow the Federal Government to achieve the statutory objectives provided by Congress under BABA.

Section 184.3: Definitions

Section 184.3—Definition of Component

OMB received many suggestions on how to define the term component, which is used in the cost of components

test in § 184.5. Many commenters believed that OMB should use the definition of component in FAR 25.003. OMB also received suggestions to provide a definition for the related term ''end product,'' in which components are incorporated. Commenters indicated that it was important to be able to distinguish between end products and their components.

OMB Response: OMB defines component to mean an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: (i) a manufactured product; or, where applicable, (ii) an iron or steel product. This definition is a modified form of the definition used at FAR 25.003. The definition recognizes that the term component is used in the revised guidance in the context of both manufactured products and iron or steel products. Although the revised guidance does not directly use the term end product, the process for identifying end products—as distinguished from components—is generally addressed at § 184.4, at paragraphs (e) and (f), and in the associated preamble text in this document.

Section 184.3—Definition of Construction Materials—General

OMB received many comments on its proposed definition of ''construction materials.'' Some commenters stated that OMB should include only materials specifically listed in the Findings in section 70911(5) of BABA. Some of these commenters maintained that OMB did not have statutory authority to expand the list beyond the specific items mentioned in the Findings.

Other commenters urged OMB to more closely adhere to the definition of construction materials provided in Memorandum M–22–11. For example, one commenter expressed concern that the newly proposed definition would expand the scope of covered construction materials far beyond the initial guidance. This commenter observed that the proposed definition would include combinations of listed materials that would better be categorized as manufactured products. The commenter explained that this change would lead to significant confusion among contractors, suppliers, and recipients of Federal awards. The commenter also explained that State departments of transportation developed approved products lists and material vendor lists based on Memorandum M–22–11. The commenter feared that OMB's proposed revision would void months of work put in by State departments of transportation to implement the original non-binding implementation guidance. For related reasons, many commenters were opposed to OMB adding an ''other construction materials'' category because it would be too open-ended and create too much uncertainty for both Federal agencies and Federal award recipients.

A few commenters suggested that OMB should consider using the FAR's definition of construction materials at FAR 25.003. These commenters believed that using a similar definition to the FAR would reduce administrative burden and increase consistency across the Federal Government. However, another commenter observed that the FAR's definition of construction materials does not match the specific way the term is used in the statutory text of BABA. This commenter suggested that using the FAR definition would be confusing to administer because the more general definition under the FAR would not allow for distinguishing between construction materials and other product categories such as manufactured products. This commenter preferred the structure of a specific list of materials provided by OMB in Memorandum M–22–11.

Other comments suggested that OMB should modify the list of construction materials based on studies on the availability and costs of specific materials. These commenters also maintained that further market research should be completed to verify that any additional construction materials added to the list are produced in the U.S. in the quantities necessary to implement Federal financial assistance programs for infrastructure under the IIJA and other laws.

OMB also received many comments on specific construction materials. These comments are discussed further below.

OMB Response: In reaching its final list of construction materials for the guidance, OMB used the list provided by Congress in its Findings at section 70911(5) of BABA for guidance. Congress identified non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall. OMB acknowledges that the congressional findings do not constitute a statutory definition of the term. However, because no statutory definition is provided under BABA at section 70912, the congressional findings were helpful indicators of specific types of materials and items that Congress considers to be ''common construction materials used in public works infrastructure projects'' that ''are not adequately covered by a domestic content procurement preference.'' *See* BABA 70911(5).

The final list of construction materials is generally consistent with the list of items in the Findings in section 70911(5) of BABA and that were previously identified by OMB in Memorandum M–22–11. The list continues to include non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall.

OMB acknowledges the concerns raised over adding additional construction materials to its final list. However, OMB determined that certain items that represent a clear-cut logical extension of materials specifically mentioned in the Findings at section 70911(5) of BABA should also be treated as construction materials. Each new item added to the list in the proposed or revised guidance—fiber optic cable, optical fiber, and engineered wood—represents an extension of items already listed in the Findings and identified in Memorandum M–22–11. For example, the congressional list of ''common construction materials'' includes ''polymers used in fiber optic cables'' as an example of ''plastic and polymer-based products.'' The congressional list also includes ''optic glass'' as an example of ''glass.'' These two are the primary constituent elements of fiber optic cable, which are not, in general, incorporated on their own into an infrastructure project related to fiber optic cable. The congressional list also includes both lumber and plastic, which are constituent elements of engineered wood. Accordingly, OMB added these items to its final list.

Based on the structure of the final definition of ''construction materials,'' which is discussed further below, if these three items were not added they would instead be treated as manufactured products because they consist of inputs of more than one listed item. Fiber optic cable includes inputs of at least plastics and polymers, glass, and non-ferrous metals. Optical fiber includes inputs of at least plastics and polymers and glass. Engineered wood includes inputs of at least lumber and plastics and polymers. Treating these items as manufactured products instead of construction materials would result in a different and less-stringent domestic content preference applying to them. *See* BABA 70912(6).

OMB believes its decision to set forth in this guidance that Federal agencies should add these three items to its list of construction materials is well-supported by its authority under BABA and reflects sound policy. All three items are direct extensions of common construction materials identified by Congress in its Findings in section 70911(5) of BABA. By treating these

items as construction materials, OMB can define manufacturing standards for each item in § 184.6 of the guidance and seek to maximize the impact of taxpayer-funded Federal awards to enhance supply chains for their production in the U.S. This approach is consistent with the statutory framework in BABA. It will also support key statutory objectives including incentivizing domestic manufacturing of these items.

OMB also believes that adding these three items to its list provides needed clarity on its intent. For example, based on the definition proposed in February 2023, many commenters indicated that further guidance was needed on how to apply BABA to hybrid or composite items—consisting of inputs of more than one construction material—like engineered wood or fiber optic cable. OMB provides further discussion of each of these items below. Except for items specially included in the list, other hybrid or composite products, which combine listed construction materials to make a new product, will be treated as manufactured products. This topic is also discussed below. Further analysis is provided on the inclusion of fiber optic cable, optical fiber, and engineered wood under the topic headings for those items below under both §§ 184.3 and 184.6.

OMB also acknowledges that the congressional list of ''common construction materials'' in section 70911(5) of BABA includes three items that are not included in OMB's list of construction materials. These items are steel, iron, and manufactured products. It is clear, however, from sections 70912(2), 70912(6), and 70914(a) of BABA that Congress did not intend iron or steel products or manufactured products to be included in the construction material product category. For example, section 70912(6) of BABA establishes three separate product categories with different domestic manufacturing standards applicable to each one of them.

Based on review of public comments, OMB finds that including additional items to the list of construction materials—such as coatings, paint, or bricks—is not warranted at this time. This decision is discussed further below. In future revisions of part 184, OMB may consider adding new items to its list of construction materials or revising the definition in other ways consistent with BABA.

Another topic related to this definition that received many public comments was OMB's proposal to change its approach for how to apply the list in distinguishing between construction materials and manufactured products. Memorandum M–22–11 provided that a construction material is an item that ''is or consists primarily of'' only one of the listed materials. By contrast, the proposed guidance provided that a construction material is an item consisting ''of only one *or more* of'' the listed materials. 88 FR 8374 (emphasis added). Commenters were often confused by this change and observed that it would result in the key example of a manufactured product in Memorandum M–22–11—a plastic-framed sliding window made of glass and plastic—being reclassified as a construction material. Commenters also observed that, based on this proposed change, the construction material category would expand far beyond its current scope to include many item that industry currently considers manufactured products.

OMB acknowledges commenters' concerns on this topic and has returned to an approach that is more consistent with Memorandum M–22–11. In the revised guidance OMB defines construction materials to mean, ''articles, materials, or supplies that consist of only one of'' the listed materials. OMB also identifies certain specific exceptions to this provision in the including listed items that contain inputs of other listed items. Another exception to the general rule for distinguishing between construction materials and manufactured products in the revised guidance is in the case of minor additions of other materials to construction materials, which are discussed in paragraph (2) of the definition of ''construction materials.'' This topic is also discussed further below.

Consistent with the preliminary guidance, the approach in the revised guidance results in the example of a plastic-framed sliding window being treated as a manufactured product. As under Memorandum M–22–11, OMB intends that categorization as a manufactured product should generally be clear if a single item incorporated into an infrastructure project is not specifically identified on the list of construction materials and contains significant inputs of multiple listed or non-listed materials. Maintaining general consistency with Memorandum M–22–11 on this particular topic should prevent imposing unnecessary administrative burden on contractors, suppliers, and recipients, which commenters indicated was of significant concern.

OMB also recognized commenters' concerns that, under the approach in the proposed guidance, hybrid construction materials could have many standards applicable to them, which would create many implementation questions and complexities. For example, under the approach in the proposed guidance in February 2023, a product made of glass, plastic and polymer-based products, and copper could have been subject to three or more applicable standards. By contrast, under the approach in the revised guidance, the definition at § 184.3 and the standards at § 184.6 clarify that only a single standard applies to a single item, which is defined at § 184.6 in the case of each item. This approach should reduce administrative burden and ease the implementation of both the ''construction materials'' definition and associated standards.

To clarify how OMB intends agencies to implement the final definition in practice, following completion of all manufacturing processes for an item listed in paragraph (1) of the definition, if the finished item is combined together with another item listed in paragraph (1), or with a material that is not listed in paragraph (1), before it is brought to the work site, then except as provided in paragraph (2) of the definition regarding minor additions, the resulting article, material, or supply should be classified as a manufactured product, rather than as a construction material. However, the definition also explains that to the extent one of the items listed in paragraph (1), such as fiber optic cable, contains as inputs other items listed in paragraph (1), such as glass or plastics in the case of fiber optic cable, it is nonetheless a construction material. Minor additions to construction materials are addressed in paragraph (2) of the definition. This topic is discussed in further detail below.

Consistent with the example from Memorandum M–22–11, a plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material. For another example, engineered wood, as a standalone product, should be classified as a construction material. However, if before the engineered wood is brought to the work site, it is combined together through a manufacturing process with glass or other items or materials to produce a new product, which is not listed in paragraph (1), such as a sliding window, the new product should be classified as a manufactured product.

OMB also observes that the manufacturing process standards in § 184.6 for some construction materials include the application of ''coatings.'' Coatings frequently constitute different materials than the construction material

itself and may or may not be considered minor additions under paragraph (2) of OMB's definition of ''construction materials.'' To clarify OMB's intent, other additions, such as coatings, do not change the categorization of a construction material if they are added through a manufacturing process specifically described in the standard for that construction material at § 184.6. For example, adding a coating to aluminum, even if not considered a minor addition, would not convert the aluminum ''construction material'' to a ''manufactured product'' because coatings are specifically identified in the manufacturing processes for non-ferrous metals. However, the coatings themselves do not require domestic sourcing in this scenario if comprised of different materials. In other words, it is not OMB's intent to require domestic sourcing directly for the coating itself. See also discussion at § 184.4(f).

OMB believes the definition provided in the revised guidance on the meaning of construction materials will provide clarity to stakeholders. OMB also believes its approach in the revised guidance will provide continuity with certain key elements of its initial guidance in Memorandum M–22–11.

Section 184.3—Definition of Construction Materials—Inclusion of Non-Ferrous Metals

OMB received several comments on whether and how to include non-ferrous metals in its list of construction materials. Some commenters concurred with OMB's inclusion of non-ferrous metals while others questioned this choice. Other commenters indicated that additional information was needed to help differentiate between a construction material and a manufactured product, including specifically in the case of non-ferrous metals. The commenter maintained the non-ferrous metal category includes complex products that should be considered manufactured products.

Regarding aluminum, one commenter urged OMB to make explicit in its final guidance that primary aluminum is a ''construction material.'' Another commenter asked OMB to specifically define ''construction materials'' to include aluminum extrusions. Some commenters suggested that the domestic supply of aluminum is inadequate and that it should be excluded on that basis. One commenter requested clarity on whether copper or aluminum wire with a protective coating or sheathing made of plastic should be treated under the new regulations as a construction material or manufactured product.

OMB Response: In reaching its final list of construction materials for the revised guidance, OMB started with the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Non-ferrous metals are included on that list and OMB includes that term in the revised guidance without modification.

OMB does not believe it is necessary to further define or provide specific examples of non-ferrous metals in the part 184 text. OMB understands a non-ferrous metal to be a metal not containing, including, or relating to iron or steel. As discussed by commenters, examples include aluminum and copper. OMB addresses how to distinguish between construction materials and manufactured products in other sections of the guidance and associated areas of this preamble. Further discussion of the manufacturing standard for non-ferrous metals is provided in § 184.6. If stakeholders believe that waivers are justified under section 70914(b) of BABA and § 184.8 of the revised guidance in relation to non-ferrous metals, the waiver process would be the appropriate mechanism to address concerns such as non-availability.

Section 184.3—Definition of Construction Materials—Inclusion of Plastic and Polymer-Based Products

OMB received several comments on whether and how to include plastic and polymer-based products in its list of construction materials. Many of these commenters requested further clarity on how differentiate between a construction material and manufactured product, including specifically in the case of plastic and polymer-based products. The commenter maintained the plastic and polymer-based products category includes complex products that should be considered manufactured products. Commenters stated that further clarity was needed on this topic to understand what manufacturing standards would apply to specific items. As an example, one commenter noted that ''epoxies and adhesives'' can be treated differently by different organizations, which would create uncertainty for manufacturers. Another commenter noted that epoxies, which are used in infrastructure projects, should be specifically addressed, such as by including them in the definition of ''plastic and polymer-based products''.

Another commenter suggested that providing a definition of ''plastic and resin'' would be sufficient. This commenter argued that as long as the composite material is made up of all plastic or resin, then creating a separate category for ''composite building materials'' was not needed. This commenter added that the term ''composite material'' is vague and could be interpreted differently by stakeholders.

See also discussion of comments on the topic of composite building materials below.

OMB Response: In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Plastic and polymer-based products are included on that list and OMB includes that term in the revised guidance. By a plastic and polymer-based product, OMB refers to a product comprised primarily of inputs of plastics and polymers, but which may also include some minor additions of other materials. OMB discusses how to distinguish between construction materials and manufactured products—including its understanding of the term ''minor additions''—in other sections of the guidance and associated areas of this preamble. Further discussion of the manufacturing standard for plastic and polymer-based products is provided in § 184.6.

Section 184.3—Definition of Construction Materials—Modified Inclusion of Composite Building Materials as a Plastic and Polymer-Based Products

Many commenters observed that composite building materials are more appropriately categorized as a subset of plastic and polymer-based products. The commenters raised concerns that if composite building materials were included in a standalone category, it could encompass far more materials than was intended by the use of that term in section 70911(5) of BABA. For example, one commenter stated that composite building materials may include a multitude of materials, such as concrete, reinforced plastics, cement, steel, reinforced concrete, and composite wooden beams. Similarly, some commenters pointed to language in Memorandum M–22–11, which included composite building materials as a subset of plastic and polymer-based products.

One commenter suggested that if a separate category were maintained for composite building materials, the term could be defined as ''products made with combinations of polymer and reinforcing fiber, where the polymer and fiber remain as distinct components but

the combination results in properties not found in the individual materials, such as high strength combined with low weight.'' Alternatively, some commenters noted that if composite building materials remained a standalone category of construction material, the definition should simply be clarified to ensure that it only includes materials made of plastic and polymers. Some commenters suggested that epoxies should be included in the definition of composite building materials.

OMB Response: After considering public comments on the issue, as well as the language in BABA and Memorandum M–22–11, OMB has adjusted the revised guidance to remove the standalone category for composite building materials. Plastic and polymer-based composite building materials should instead be evaluated under the category of plastic and polymer-based products, described above.

Section 184.3—Definition of Construction Materials—Inclusion of Glass

OMB received many comments on whether and how to include glass products in its list of construction materials. Again, many of these commenters requested further clarity on how to differentiate between a construction material and manufactured product.

Several commenters agreed that OMB should classify glass (including optic glass) as a type of construction material. Other commenters opposed including glass as a construction material. For example, one commenter suggested that OMB's inclusion of glass in the definition of ''construction materials'' could threaten safety, reduce competition, and impact costs for Federal recipients because certain glass ceramics are processed and produced internationally. This commenter suggested that OMB should revise its definition of ''construction materials'' to eliminate glass entirely or, alternatively, provide an exception for all glass used to support safety and chemical protection.

Other commenters requested clarification on the inclusion of ''optic glass'' in the ''glass'' category of construction materials. One commenter was unsure if the term should include glass in telecommunications cables, corrective eyewear, or lenses like in a lighthouse. One commenter urged OMB to not create new subsets of definitions for materials such a ''optic glass.'' Another commenter suggested that optic glass should be included in the manufacturing standard for optical fiber. Other commenters requested clarification on the application of the guidance to recycled glass. Several commenters had specific questions about optic glass in the context of the broadband industry, with one commenter suggesting that OMB does not need to define ''optic glass'' as part of the glass construction material because OMB had added ''optical fiber'' as a separate item to the list of construction materials in § 184.3. Other commenters thought that OMB provided sufficient guidance in the preliminary guidance.

Multiple commenters sought guidance on what types of glass should be considered a construction material versus a manufactured product. Several examples provided by commenters included glass utilized in plate glass, traffic line painting, glass insulator, fiber optic communications, windows, doors, and skylights. One commenter suggested that the distinction could be based on whether glass is: (i) delivered in panes to an infrastructure project; (ii) not treated with coating; (iii) optical or structural glass; or (iv) not used in complex applications or meeting advanced specifications, such as is used in certain types of U.S. DOT and FHWA road-marking projects.

Commenters also had specific questions about these classifications within the context of specific glass products. For example, several commenters requested clarification on the issue of glass beads used for retro-reflective pavement markings. Commenters indicated that there is uncertainty on how to classify these products under Memorandum M–22–11. For example, approaches may differ based on what materials the glass beads are combined with and when. The manufacturing process also includes steps such as selecting a specific formula of glass inputs, blending to customer specifications, formulaic combination using a blending auger machine, and application of complex, multi-purpose coatings. As a result, high-performance glass beads are of a wholly different type of glass than that used for typical construction material purposes, such as windows, doors, insulation, and external glazing. Consequently, one commenter suggested that glass beads should be considered manufactured products. However, another commenter urged OMB to clarify that glass used for retro-reflective pavement markings is a construction material. That commenter noted that those glass beads are never used by themselves. The commenter was concerned that State departments of transportation had reached inconsistent determinations on this topic based on M–22–11.

OMB Response: In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. OMB notes that Congress specifically identified ''glass'' in section 70911, ''Findings,'' as one of several ''common construction materials.'' While OMB believes that this list is not exhaustive, OMB includes all items in the Findings section as listed construction materials. Thus, OMB has included glass in the revised guidance as a construction material. More detailed discussion on that approach is provided above.

OMB has not included a separate category for optic glass in the revised guidance. The general principles that apply throughout the revised guidance should be used to determine how to treat glass products such as recycled glass and glass beads. Federal agencies may decide to provide additional guidance on those topics for products that are used on infrastructure projects they provide funding for. If stakeholders believe that waivers are justified in the public interest or for other reasons in relation to glass, the waiver process would be the appropriate mechanism to address concerns related to this topic. However, OMB has included a separate category for ''optical fiber.'' As described in further detail below, OMB believes that given the unique features of the broadband industry, it is appropriate to provide more specific guidance.

OMB discusses how to distinguish between construction materials and manufactured products in other sections of the guidance and associated areas of this preamble. Further discussion of the manufacturing standard for glass is provided in § 184.6. OMB believes that this discussion will provide commenters with the guidance that they need to classify the glass-based products identified above, including glass beads.

Section 184.3—Definition of Construction Materials—Inclusion of Fiber Optic Cable and Optical Fiber

Many commenters—including industry, State and local governments, trade groups, and potential grant recipients—sought additional clarity and guidance from OMB on the treatment of fiber optic cable and optical fiber under BABA. Multiple commenters noted that BABA could have a significant impact on service providers' ability to participate in the Broadband Equity, Access, and Deployment (''BEAD'') program, which is administered by the National

Telecommunications and Information Administration (''NTIA''), and other Federal broadband programs.

Several commenters, including certain State departments of transportation, supported the OMB's classification of ''fiber optic cable'' and ''optical fiber'' as construction materials in § 184.3. One commenter requested a definition of what counts as ''optical fiber'' to better implement the requirements under BABA. Several commenters supported the classification but suggested amending § 184.6, which specifies the standards required for a construction material to be considered ''produced in the United States.''

Other commenters opposed including either fiber optic cable or optical fiber as new standalone categories of construction materials. Some commenters based their opposition on the statutory text of BABA. Others questioned OMB's rationale for distinguishing between construction materials and manufactured products. Some also questioned the capacity of domestic supply chains to produce optic fiber and fiber optic cables meeting the Buy America preference for construction materials.

Commenters opposing the classification based on the statutory text of BABA offered a variety of suggestions on interpreting the statutory text. Some commenters believed that Congress enumerated only five items as ''common construction materials'' in its Findings in section 70911(5) that ''are not adequately covered by a domestic content procurement preference.'' These commenters noted that while the Findings explicitly identify ''polymers used in fiber optic cables'' and ''optic glass,'' they do not explicitly identify fiber optic cable itself as a construction material or any other elements of fiber optic cable. They suggested that Congress, by including only polymers and glass, was excluding fiber optic cable and other inputs of fiber optic cable as ''common construction materials'' by omission.

One commenter suggested that the inclusion of ''fiber optic cable'' and ''optical fiber'' as construction materials would exceed section 70915(b)(2) by reaching back many stages into the manufacturing process. According to that commenter, OMB's proposed guidance would require a manufactured product, fiber optic cable, to effectively satisfy a compliance test that is more stringent than the 55 percent standard provided by Congress under section 70912(6)(B) by layering construction material manufacturing standards on the principal components of fiber optic cable.

This group of commenters generally suggested that the inclusion of ''fiber optic cable'' and ''optical fiber'' as construction materials would run contrary to the intent of BABA. They suggested that OMB instead should consider only components of fiber optic cables and optical fibers, that Congress specifically enumerated, as construction materials.

One commenter suggested that OMB could set the ''manufacturing process'' standards for these two construction materials in a manner that would create uniform standards for all fiber optic cabling. Another commenter suggested that classifying only optic glass and polymers as construction materials was preferable because it would reduce compliance costs and avoid confusion.

Several commenters also questioned the logical coherence of including ''optical fiber'' and ''fiber optic cable'' as construction materials. For ''optical fiber,'' some commenters sought clarity on how to distinguish between optical fiber and optic glass. These commenters questioned whether OMB intended ''optical fiber'' to represent ''optic glass'' or if it was an additional, separate material. One commenter noted that these two terms can be used colloquially in imprecise ways. For instance, a State department of transportation suggested that OMB did not need to make a standalone category for ''optic fiber'' because OMB had already defined ''optic glass'' as a construction material in § 184.3. Some manufacturers also stated that a separate definition is not necessary.

However, other commenters warned that the definitions and manufacturing processes of polymers and optic glass in other industries and products may not be appropriate in the context of fiber optic cables. Thus, one commenter suggested that OMB's guidance should provide separate definitions of ''optical fiber, ''optic glass,'' and ''polymers'' that apply to these other construction materials and industries. The commenter suggested that separate definitions of these items in § 184.3 would allow OMB provide a comprehensive standard uniquely applicable to fiber optic cable in § 184.6. The commenter cautioned against layering other standards on top of the fiber optic cable standard. A State department of transportation also suggested that providing specific guidance for each different construction material would avoid misinterpretation.

On comments suggesting that ''fiber optic cables'' should be classified as a ''manufactured product,'' commenters provided a variety of rationales. Some noted that while ''optic glass'' is listed as a subset of glass products, fiber optic cables are a distinct product. To create a fiber optic cable, these commenters noted that a manufacturer needs to combine several of the listed construction materials, including optic glass and polymers, through multiple, complex, and capital-intensive processes. For example, fiber optic cables are fabricated using optical fiber encased in a sheathing made from various materials by the different manufacturers. Several commenters stated that an end product, such as fiber optic cable, should not be classified as a construction material. Some commenters suggested the appropriate test should be whether you could walk into a store and buy it. For instance, one could buy a roll of fiber optic cable, which would make it an end product, rather than an input into an end product. One commenter suggested that OMB be consistent with other domestic preference regimes—noting that it was unaware of any other domestic preference regime where Congress or any agency had classified a construction material to be made up of other construction materials.

Other commenters focused on Memorandum M–22–11. Under their understanding of OMB's initial guidance, a fiber optic cable would have been categorized as a manufactured product, unlike the proposed guidance, which would have treated it as a construction material. Several commenters wanted to better understand OMB's rationale for the classification. Relatedly, several commenters stated that the proposed classification runs counter to congressional intent and the logical meaning of manufactured product. They suggested that OMB should revert to the list of construction materials published in Memorandum M–22–11, which did not include either ''fiber optic cable'' or ''optical fiber'' as standalone construction materials.

Relatedly, several commenters suggested that OMB use a single category—instead of spelling out ''optical fiber'' and ''fiber optic cable.'' One commenter noted that a broadband grant recipient will only purchase fiber optic cable. Because optical fibers are a construction material for fiber optic cable, rather than an independent final product, every material in optical fibers will already be included in fiber optic cables. Another commenter noted that optical fiber and fiber optic cable ultimately serve a singular, similar purpose.

Several commenters also suggested that OMB consider the capacity of domestic supply chains before

categorizing either ''optical fiber'' or ''fiber optic cable'' as construction materials. For example, some commenters emphasized the unique nature of the broadband manufacturing sector, differentiating it from some sectors, like steel, cement, or wallboard, in which the U.S. has established industrial capacity. These commenters believed that other industrial sectors could grow more easily to meet the demand occasioned by the IIJA programs and other Federal funding for infrastructure.

Alternatively, other commenters noted that substantial domestic manufacturing capacity already exists for fiber optic cables and that this capacity can be expanded to meet the demands of Federal programs such as BEAD. According to one commenter, more than 100 businesses currently manufacture fiber optic cables in the U.S., representing annual aggregate revenues of approximately $4 billion utilizing approximately 7,000 total employees. Commenters identified several existing manufacturing companies, including AFL, CommScope, Corning, OFS, and Prysmian. One commenter indicated that the domestic industry for optical cable has grown by 22 percent since 2020 and is expected to continue to grow as these firms and others have announced substantial investments to enhance domestic capacity. While this commenter acknowledged that supply chain constraints have increased delivery intervals for fiber optic cable, the commenter still believed that it was viable to treat fiber optic cable as a construction material. However, the commenter proposed some modifications to ''all manufacturing processes,'' as detailed below under § 184.6. Other commenters, focusing on the treatment of the electronics that go into a broadband network, stated that industry would have an easier time complying with BABA for fiber optic cables. Others noted the fact that a waiver of Buy America requirements for broadband under the American Recovery and Reinvestment Act (''ARRA'') of 2009 excluded fiber optic cable.

However, several other commenters stated that they believed the U.S. lacks sufficient domestic production capacity. Commenters indicated that there has been a shortage of fiber optic cables and optical fiber for several years due to global supply chain issues—which they predicted will continue for several more years. According to these commenters, infrastructure developers rely on imports or assembly work from other countries, such as Mexico and Korea. One commenter specifically noted that—even with the doubling of its domestic optical fiber capacity—it would still need to supplement its optical fiber production from Japan and Denmark, its preform inputs from Germany and Japan, and its fiber optic cable and optical connectivity from Mexico. Its domestic facilities rely on a complex web of U.S.-based and international facilities. Commenters also noted that the BEAD program would also greatly increase the demand for fiber, increasing supply chain issues. Consequently, they maintained that excluding foreign sources may make significantly less fiber available for BEAD deployments, leading to an increase in prices and schedule delays. These commenters feared that higher prices and delays would translate into reduced quantity of high-speed broadband mileage built through Federal programs and may also lead to price polarization—as the private market may turn to imported products—which could negatively impact smaller U.S.-based companies in the private market sector. A State department of transportation expressed that this may be a particular issue for utility owners and requested that OMB investigate this issue further.

Given the above concerns, several commenters sought a delay of BABA compliance until 2024 for fiber optic cables, optical fiber, and other materials now listed as construction materials that were not listed in M–22–11. Some of these commenters noted that States have already worked hard to develop contract specifications based on materials listed in Memorandum M–22–11 and requested stability.

Separately, several commenters noted that the actual composition of fiber optic cables may vary greatly, whether in the number of strands of glass and other specifications. For instance, cable designed for residential use may have a limited number of strands, while a transport fiber may have hundreds of strands, and cable designed for underground use may have additional armoring to reduce the chance of the cable being cut. Cable for aerial use may have minimal armor to reduce the weight the poles must bear.

Some commenters requested additional specifications on, or carve outs for, ''specialty cables,'' which they argued possess substantively distinct characteristics, manufacturing processes, and supply chains. These include drop cables and submarine cables, which have distinct supply chains that commenters claim would not be sufficient for BABA compliance as construction materials. For example, drop cables are typically classified together with connectivity products as they are cut to very short lengths and are utilized for the last hundred feet from a network to a home, business, or other end user (versus outside plant cables which can span multiple miles and have high fiber count). This leads to a different manufacturing process.

OMB Response: After careful review of the comments, OMB has decided to categorize ''optical fiber'' and ''fiber optic cable'' as separate, standalone construction materials in § 184.3. OMB notes that this categorization is consistent with the proposed guidance, although it differs from Memorandum M–22–11, which did not explicitly address the classification of either material. OMB believes that classifying these items as construction materials is consistent with BABA, has a logical basis, and furthers BABA's goals of enhancing domestic supply chains.

On comments regarding the statutory text, OMB believes that the classification of ''fiber optic cable'' and ''optical fiber'' is consistent with BABA. OMB recognizes that Congress identified in its Findings in section 70911(5) several ''common construction materials,'' including non-ferrous metals, plastic and polymer-based products (including polymers in fiber optic cables), glass (including optic glass), lumber, and drywall. This list also included steel, iron, and manufactured products, which Congress explicitly treated differently in the subsequent parts of BABA. For the reasons set forth above, OMB decided that items that represent a clear logical extension of materials specifically mentioned in the list should be treated as construction materials. This includes fiber optic cable and optical fiber.

OMB notes that Congress had the opportunity to define the term ''construction materials'' in section 70912, ''Definitions.'' While section 70912 defines several terms, including ''Domestic Content Procurement Preference,'' and ''Produced in the United States,'' which specifically use the term ''construction materials,'' it does not define ''construction materials'' itself. OMB also recognizes that the statute intentionally defines ''infrastructure'' to include ''broadband infrastructure,'' of which one of the main construction inputs is fiber optic cables. OMB also notes that section 70915 of BABA, ''OMB Guidance and Standards,'' explicitly requires OMB to ''issue guidance . . . to assist in applying new domestic content procurement preferences under section 70914,'' which implies that OMB has flexibility to determine what constitutes

a ''construction material'' as long as it is consistent with the statute.

Because OMB has defined fiber optic cable as a ''construction material,'' OMB believes it has avoided the issue of ''reaching back many stages into the manufacturing process'' that one commenter had flagged. In fact, by identifying fiber optic cable and optical fiber as separate, singular construction materials and applying specific standards to each in § 184.6, OMB believes that it will reduce confusion and compliance costs. For example, commenters specifically noted the confusion and compliance costs that may have resulted from attempting to separately apply every construction material standard that applied to different components of fiber optic cable, such as the standard for plastic and polymer-based products.

On OMB's rationale for the classification of these items as construction materials, OMB believes that the classification of ''fiber optic cable'' and ''optical fiber'' is logically consistent with BABA. A fiber optic cable primarily consists of optical fiber, aluminum (in the buffer tube) and plastic and polymer-based products (in the casing or jacketing that surrounds the optical fiber and buffer tube). An optical fiber primarily consists of glass, or plastic, or both. Consequently, OMB does not view the proposed guidance as necessarily adding additional items to the list of construction materials, but rather clarifying the standards for ''optic glass'' and ''polymers used in fiber optic cables'' in the context of broadband, creating a coherent and straightforward definition and standard, rather than shoehorning everything into those two definitions.

OMB recognizes, as several commenters noted, that the fiber optic manufacturing sector is unique, relative to other glass or plastic products. Even within the fiber optic manufacturing industry, fiber optic cables can be produced with similar, yet distinct, manufacturing processes, such as is the case for drop cable. Because of these nuances, OMB believes that it would be confusing to industry if it tried to capture these items in the definition and manufacturing process standards for ''optic glass'' and ''polymers used in fiber optic cables.'' As a result, OMB believes it is important to separately define ''fiber optic cable'' and ''optic fiber.'' Because optic fiber is an input into a fiber optic cable, it is important that the processes of producing optic fiber are captured in the manufacturing process for fiber optic cable. However, per industry guidance in the public comments, they are seen as two separate items. By spelling out both, OMB believes that its guidance is in line with industry standards, minimizing confusion and compliance costs.

In terms of the capacity of supply chains to produce fiber optic cables, OMB notes that several commenters identified both existing capacity and new investment in domestic fiber optic cable manufacturing. Per the statute, OMB recognizes that key elements of fiber optic cable are ''not adequately covered by a domestic content procurement preference'' and that Congress has specifically applied the Buy America preference to ''broadband infrastructure.'' IIJA 70911(5) and 70912(5)(J). To the extent justified under section 70914 of BABA, § 184.7 of the revised guidance, and E.O. 14005, relevant Federal agencies retain the flexibility to propose waivers on this topic. Related to concerns about supply chain availability and increased costs, the waiver process recognizes both as potential rationales for the head of a Federal agency to propose a waiver. OMB notes that a waiver was recently issued on April 19, 2023, applicable to certain Federal awards under NTIA's Middle Mile Grant program for broadband infrastructure.

In addition, OMB has clarified in the revised guidance that ''fiber optic cable'' includes ''drop cable,'' a frequently used sub-type of fiber optic cable. Based on public comments, OMB recognizes that the industry sometimes views drop cable as a separate product. However, because the process for creating drop cables is considered less complex than that of a standard fiber optic cable, OMB believes that the standards that apply to fiber optic cables generally—as outlined in § 184.6—are appropriate to also apply to drop cables. In terms of additional variation with fiber optic cables, Federal agencies may, as necessary, provide clarifying guidance to recipients and stakeholders to avoid any additional ambiguity or confusion. Because this guidance influences all Federal awards for infrastructure programs generally, OMB does not want to offer overly prescriptive, granular definitions that may constrain innovation or variability in industry practice. Such variations may be more appropriately recognized and addressed by the awarding Federal agency.

Section 184.3—Definition of Construction Materials—Inclusion of Lumber

Several commenters proposed removing lumber from the list of construction materials based on concerns about the limited supply of lumber. One commenter expressed concerns about including lumber and drywall on the list of construction materials due to existing supply constraints for each of these materials. This commenter observed that lumber is a key component in residential housing construction and domestic lumber production has never been high enough to fully meet demand at the national level. Accordingly, lumber has been imported from other countries to make up the shortfall. The commenter noted that Canada is one of the largest exporters of softwood lumber products to the U.S. The commenter indicated that including lumber on the list of construction materials would compound the challenges with already existing supply constraints and add significant challenges for the residential construction industry.

Another commenter suggested that to avoid disrupting the North American softwood lumber market for federally funded infrastructure projects, OMB should ensure that the process of obtaining a waiver for Canadian lumber is clear, expeditious, consistent with international obligations, and supportive of the American public interest. The Government of British Columbia urged OMB in the final guidance to: (1) exclude lumber and non-ferrous metals entirely from its definition of ''construction materials;'' or (2) specifically exempt lumber and non-ferrous metals from Canada from the definition of ''construction materials.''

Other commenters noted that lumber should include ''dimensional lumber only'' and not a combination of materials.

OMB Response: In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Lumber is included on that list and OMB includes it in the revised guidance. OMB understands a lumber product to be a product comprised primarily of lumber, but which may also include some minor additions of other materials (such as glue or other binding agents). Further discussion is provided on the newly listed material ''engineered wood'' below. If stakeholders believe that waivers are justified under section 70914(b) of BABA and § 184.8 of the revised guidance in relation to lumber, the waiver process would be the appropriate mechanism to address concerns related to this topic.

Section 184.3—Definition of Construction Materials—Inclusion of Engineered Wood

Several commenters supported including ''engineered wood'' as a separate construction material from lumber. Several commenters noted the unique manufacturing processes and complex supply chains for engineered wood products.

Some commenters suggested that the separate category should be titled ''other wood products'' to also include non-lumber manufactured wood products. They suggested the category be expanded to include plywood, oriented strand board, I-joists, glue laminated timber, cross-laminated timber, and structural composite lumber.

Other commenters agreed that engineered wood was a construction material but opposed the proposal to create a new stand-alone category for ''engineered wood'' items because they believed the ''lumber'' category already captured engineered wood. The commenters believed that a separate classification could create confusion, as some products could be considered both lumber and engineered wood. Another commenter noted that engineered wood is a laminar composite and already meets the requirements of lumber mixed with a binding agent, making a new category unnecessary.

Finally, other commenters thought that engineered wood should not be considered a construction material at all, and instead should be categorized as a ''manufactured product.'' Many commenters, as discussed prior, were generally opposed to including any new materials on the list of construction materials. Some commenters had specific concerns. For example, some commenters opposed classifying engineered wood products as a construction material because they consist of a mixture of multiple raw materials. Another commenter noted that engineered wood products are part of a system and that installation is not accomplished with simple binding agents. Several State departments of transportation noted that they already interpreted engineered wood to be a manufactured product and that labeling it as a construction material would be a significant change and require additional time to implement. Other commenters cautioned against including engineered wood products as a construction material based on domestic availability and supply chain concerns. One commenter noted engineered wood is highly price-sensitive to supply and demand. That commenter believed that applying the Buy America requirements to extremely price-sensitive materials would generate excessive requests for waivers due to project cost escalation, creating administrative backlog and project delays.

Separately, other commenters, who were neither explicitly supportive or opposed to the inclusion of engineered wood as a standalone category, sought further clarification from OMB. One commenter indicated that fiberboard and plywood are typical examples of engineered wood products and was uncertain how OMB would treat them. One of these commenters expressed a concern that a number of products could inappropriately be included under engineered wood, including hardwood plywood, hardwood veneer, and engineered wood floors. This commenter emphasized that particular parts of the manufacturing process for these products, such as splicing, currently occur in Canada and cannot be easily transitioned to the U.S. Another commenter noted that it interpreted lumber to be a narrowly defined construction material that does not generally include engineered wood products. Similarly, a separate commenter wrote that, as written in the preliminary guidance, it would treat the wood component as lumber and the adhesive as a manufactured product. One commenter suggested that OMB clarify the definition based on the domestic industry's ability to provide 100% of the required materials necessary for Federal projects.

OMB Response: After careful review of the comments, OMB has decided to categorize ''engineered wood'' as a separate, standalone construction material in § 184.3. Multiple commenters viewed engineered wood as an input into an infrastructure project. In addition, engineered wood can represent a logical extension of the categories of lumber, on the one hand, and plastic and polymer-based products, on the other, both of which are listed in the Findings in section 70911(5) of BABA and identified in Memorandum M–22–11. Both lumber and plastic and polymer-based products are constituent elements of engineered wood.

Engineered wood is also an input into an infrastructure project that is a substitute for traditional, non-engineered lumber. While manufacturers typically buy engineered wood in the specific forms that commenters identified, such as structural composite lumber and cross-laminated timber, they may then apply it to an infrastructure project in a similar manner as lumber. For example, a wood frame for roofing or flooring could be made out of either lumber or engineered wood. Manufacturers may choose one type over the other for a variety of reasons, including better quality, weight resistance, or appropriateness for the specific nature of an infrastructure project. Both products can serve identical functions in an infrastructure project and have similar manufacturing processes. Other similarities between engineered wood and lumber include the generally cohesive nature of standalone products and the lack of discrete components. Also like lumber, it is feasible, in most cases, to define a single manufacturing standard applicable to the engineered wood products that OMB intends to include in this category.

OMB also observes, however, that the manufacturing processes applicable to lumber and engineered wood, while similar in some ways, are not identical. Engineered wood involves additional material inputs that strengthen or modify it. Given the complementary nature of engineered wood with traditional lumber, and the fact that engineered wood consists of lumber, OMB did not want to artificially incentivize economic activity toward engineered wood over lumber simply because the former was categorized differently under OMB's guidance and thus subject to different domestic content preferences. Based on the structure of the final definition of ''construction materials,'' if engineered wood was not added to the list of construction materials, it would instead be treated as a manufactured product because it consists of inputs of more than one listed item. Because converting lumber into engineered wood only involves additions that would represent a small percentage of engineered wood's overall cost, OMB believes it would be possible for manufacturers to buy ''engineered wood'' subject to a different and less-stringent domestic content preference to avoid the domestic content preference for lumber. *See* BABA 70912(6). In doing so, it would defeat the purpose of including ''lumber'' as a specific construction material because it would disproportionately advantage engineered wood as an input into an infrastructure project.

To ensure that the construction material standard would apply to engineered wood, OMB added it to the list of construction materials in instances where an input is lumber. OMB notes that there may be cases where an engineered product is made up of non-lumber manufactured wood products. Such products do not fall under this category. However, if they are

made up of plastic and polymer-based products, they may be a construction material under the ''plastic and polymer-based products'' category. Further information on OMB's rationale for the products included under the category of construction materials is provided above, which was generally guided by the Findings in section 70911(5) of BABA.

OMB acknowledges the concerns raised by commenters on adding additional construction materials to its list. However, in the case of engineered wood, OMB found that this step was necessary to ensure treatment of this product as a construction material, and to allow stakeholders to distinguish between lumber, plastic and polymer-based products, and engineered wood when applying the standards at § 184.6.

While OMB believes that engineered wood could be seen as a subset of lumber, OMB recognized multiple commenters noted that engineered wood products have a unique production process that differs from lumber. Lumping both products in one general category could create confusion when applying the standard at § 184.6. OMB also notes that it has modified the standard in § 184.6 for engineered wood: ''All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.'' OMB believes that this will provide further clarity. Additional explanation on these changes can be found below.

Section 184.3—Definition of Construction Materials—Exclusion of Additional Materials

OMB received multiple comments about adding additional materials to the list of construction materials, such as paint, coatings, bricks, and geotextiles. Several commenters supported including paint and coatings as a construction material, and provided specific suggestions for defining the manufacturing processes for this item, which could range from mixing of the raw materials through packaging. Other commenters expressed opinions on whether coatings should, or should not, be considered construction materials, including both field-applied coatings and shop-applied coating. These commenters explained practical consequences that may result from this distinction.

For paint and coatings, some parties observed that requiring all manufacturing process to occur in the U.S.—from mixing of pigments, resin solvents and additives through final canning/packaging—could be difficult to monitor. For example, one commenter believed that it would be impossible to track where all components of coatings come from. Some commenters raised concerns that requiring the mixing of pigments in the U.S. could eliminate certain coatings that do not contain pigments.

Other commenters questioned whether paint and coatings should be included on the list at all. These commenters suggested that paint and coatings would more appropriately be categorized as a ''manufactured product'' because they consist of a disparate mixture of materials and chemicals. Other commenters suggested that paint and coatings are not construction materials, but instead should be treated as ''*de minimis*'' additions to construction materials that do not change the categorization of listed items. Another commenter suggested incorporating the application of coatings into the standards in § 184.6 of the guidance for items already listed, such as non-ferrous metals, rather than identifying coatings as a separate construction material. Other commenters observed that classifying paint and coatings as a type of construction material would represent a significant change from OMB's initial guidance in Memorandum M–22–11 that could impose an additional burden on stakeholders and take additional time to implement.

On bricks, some commenters noted that bricks should be considered a ''manufactured product'' because they are a mixture of multiple materials. Other commenters noted that bricks are a mixture of section 70917(c) materials. These commenters—beginning their analysis from the premise that combinations of section 70917(c) materials should not be treated as either construction materials or manufactured products—believed that OMB should not apply a Buy America to bricks under either category that reason. Some commenters did not express a strong preference, observing that bricks could reasonably be considered either a construction material or a manufactured product.

OMB Response: In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Paint, coatings, and bricks are not included on that list, nor does OMB consider these items to constitute a clear logical extension of items that are included on the list, at least as would warrant including them as separately listed construction materials. OMB aimed to generally adhere to the Findings in developing its final list for the guidance in part 184. Thus, at this time, OMB does not include these items in its list of construction materials in the definition in § 184.3.

In reaching this conclusion, OMB acknowledges the concerns and questions raised by several commenters about adding items such as paint and coatings to the list. Some commenters expressed concerns about complexity, confusion, and administrative burden that could be added to process of applying the Buy America preference if these items were included as listed construction materials. Consistent with guidance and principles explained elsewhere in part 184, paint, coatings, and brick incorporated into an infrastructure project will generally continue to be classified as manufactured products. This is generally consistent with the initial guidance provided in Memorandum M–22–11. OMB may consider adding additional items to the list of constructure materials in future iterations of its guidance through revisions to part 184. OMB will follow appropriate notice and comment procedures before adding additional items to the list.

Regarding comments maintaining that bricks are excluded as section 70917(c) materials, OMB explains its treatment of section 70917(c) materials below. Under the approach set forth in the revised guidance, bricks will generally be treated as manufactured products.

Section 184.3—Definition of Construction Materials—Topic of Minor Additions and Binding Agents

Many commenters recommended that OMB establish a reasonable standard for *de minimis* additions to construction materials, which would specify which minor additions of other materials would not change a construction material into a manufactured product.

Some commenters advocated for clear and specific metrics for determining what should be considered a *de minimis* addition. For example, one commenter requested OMB to provide a specific *de minimis* exception for construction materials to ensure that minor components or inputs—such as fillers, waxes, or similar materials—do not result in the exclusion of items such as structural engineered wood products from the construction material category.

Other commenters noted that trying to define and apply a single *de minimis* percentage or amount for all construction materials could be time-consuming, burdensome, and a

potentially a poor fit in some circumstances, such as for specific materials or agency programs.

OMB also received a mix of comments on binding agents, with some comments supporting OMB's proposal and others seeking further clarification. Many of the comments on binding agents came from the aggregate, paving, and cement industries. These comments are addressed separately below in the context of manufactured products.

There were also comments that expressed concerns over introducing ''new rules'' related to binding agents that have yet to be defined.

OMB Response: In the revised guidance, OMB adopts a simplified approach for the topic of both minor additions and binding agents. Instead of treating binding agents separately, the revised guidance provides that minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material. OMB elected to use the term ''minor additions'' instead of ''*de minimis*'' additions to reduce potential for confusion with *de minimis* waivers, which are described separately in Memorandum M–22–11 and have a different meaning and application.

OMB does not propose a specific definition of minor additions in this revised guidance, nor does OMB provide a specific percentage or amount that the term must correspond to in all cases for all Federal agencies. Instead, OMB emphasizes that Federal agencies should exercise reasonable discretion in applying this term within their respective Federal financial assistance programs for infrastructure. OMB has decided on this approach based on recognition of the wide diversity of infrastructure programs and projects funded by the Federal Government. For example, considering that the cost of construction materials may vary widely, a specific dollar amount threshold appropriate for the types of construction materials incorporated on smaller-scale projects funded by one agency may not be appropriate for much larger-scale projects funded by a different agency. Similarly, a single percentage threshold may not always be an equally good fit for all of the different the types of construction materials used on federally funded infrastructure projects. OMB will continue to engage with stakeholders to monitor and assess the implementation of the minor additions provision and may revisit this topic as necessary. Although not identical, OMB believes that this approach is generally consistent with the approach already in use by Federal agencies under Memorandum M–22–11 and BABA, and is also consistent with OMB's goals as outlined in the proposed guidance. OMB also believes that this approach—which leaves some flexibility—may also reduce burden on stakeholders.

For an example of OMB's intended application of this provision, wax added to engineered wood generally should not disqualify the engineered wood from being categorized as a construction material. However, if before the engineered wood is brought to the work site, it is combined with glass or other items or materials to produce a new product, which is not listed in paragraph (1) of the definition, such as a sliding window, the new product would be classified as a manufactured product, not a construction material.

To reduce complexity and potential for confusion, OMB has blended the provision in the proposed guidance related to binding agents into the new provision related to minor additions. This approach avoids the need for a new definition of the term binding agent in this context, which could potentially be confused with the alternative use of that term in the context of section 70917(c) materials. Instead, as with other additions or inputs, the relevant consideration is whether the binding agent added to a construction material is a minor addition.

OMB also explains above in this preamble that other additions, such as coatings, do not change the categorization of a construction material if they are added through a manufacturing process specifically described in the standard for that construction material at § 184.6 of the guidance. An example in the case of non-ferrous metals is provided above.

Federal agencies may consider issuing their own guidance on the topic of minor additions for their respective Federal funding programs for infrastructure. For example, agency guidance may provide additional qualitative or quantitative factors to consider in making a determination on whether an addition should be considered a minor addition. A relevant factor could be whether the addition will, or will not, constitute a significant portion of the total cost of the construction material.

Section 184.3—Definition of Infrastructure Project

Several commenters advocated for a more precise definition of ''infrastructure project'' and suggested possible changes to the definition to reduce confusion. For example, some comments suggested removing the phrase ''any activity related to,'' which they believe was unnecessary and could be confusing. Some commenters suggested using ''physical structures or facilities'' to define infrastructure. Another commenter suggested removing ''in the United States'' because this commenter believed that BABA applies to federally funded infrastructure without any limitations on where the infrastructure is built. Another commenter suggested adding ''using federal funds'' to the definition for additional clarity. Other commenters provided a range of other suggestions to further clarify, expand, or narrow the definition of this term.

A State agency observed that several independent infrastructure projects are often funded under one Federal award. Alternatively, in some cases only a portion of an infrastructure project, which is part of a larger project, may receive Federal funding. This State agency explained that it had received many questions regarding whether the term ''infrastructure project'' refers just to the federally funded parts of the project, an entire Federal award that may include other non-infrastructure components, the minimum amount of recipient funds required to receive a Federal award, or all matching recipient funds associated with a Federal award. The commenter recommended providing a clear definition of what the ''infrastructure project'' to resolve these questions and facilitate compliance with BABA requirements.

OMB Response: The definition of ''infrastructure project'' in § 184.3 is based on guidance already provided in Memorandum M–22–11, which was based on the definitions of ''infrastructure,'' ''project,'' and ''Federal financial assistance'' in section 70912 of BABA in addition to other statutory provisions. OMB added a ''see also'' signal to the definition to direct stakeholders to additional guidance provided in § 184.4 at paragraphs (c) and (d).

Regarding concerns about the phrase ''any activity related to,'' OMB notes that other effective guidance provides limiting principles related to the application of this term, such as the distinction between temporary use and permanent incorporation in Memorandum M–22–11, as discussed above, which remains effective. Although temporary items may fall under the broad scope of an infrastructure project, the Buy America preference does not apply to them if they are not permanently incorporated into the project. The initial guidance in Memorandum M–22–11, through the successor M-Memorandum, remains in effect except in cases of direct conflict

with part 184. OMB retains the phrase ''any activity related to'' for consistency with the guidance in § 184.4(d), which explains that Federal agencies should interpret the term ''infrastructure'' broadly. This broad interpretation, however, remains subject to other specific limiting principles in part 184, Memorandum M–22–11, or any successor M-Memorandum that OMB issues to replace Memorandum M–22–11. For similar reasons, OMB does not find it necessary to specifically limit the definition to ''physical structures or facilities.''

On the comment suggesting removing ''in the United States,'' OMB notes that the definition of ''infrastructure'' at section 70912(5) of BABA is limited to ''structures, facilities, and equipment . . . in the United States.'' Regarding the suggestion to add ''using federal funds,'' this topic is addressed elsewhere in the guidance such as §§ 184.1(b) and 184.4(b).

On the comment requesting more specificity on the scope of an infrastructure project, OMB first reminds stakeholders of its existing guidance in Memorandum M–22–11, which defines ''project'' as the construction, alteration, maintenance, or repair of infrastructure in the U.S. OMB explains in its initial guidance that the Buy America preference ''only applies to the iron and steel, manufactured products, and construction materials used for the infrastructure project under an award.'' OMB explains that if ''an agency has determined that no funds from a particular award under a covered program will be used for infrastructure, a Buy America preference does not apply to that award.'' Similarly, OMB explains that, ''for a covered program, a Buy America preference does not apply to non-infrastructure spending under an award that also includes a covered project.'' This should clarify the commenter's concern on application of BABA to other non-infrastructure components of an infrastructure project.

OMB also clarifies in Memorandum M–22–11 that a ''Buy America preference applies to *an entire infrastructure project,* even if it is funded by both Federal and non-Federal funds under one or more awards'' (emphasis in original). This guidance from Memorandum M–22–11 remains in effect. Federal agencies may consider providing further guidance on this topic to further address the risk of improper segmentation of infrastructure projects by funding source or in other ways in order to avoid BABA coverage. As Memorandum M–22–11 explains, the BABA preference should be applied to the entire infrastructure project. At this time OMB leaves Federal agencies with discretion on how best to ensure proper application of the Buy America preference to the entire infrastructure project receiving a Federal award.

On the definition of this term in general, considering the guidance already available on this topic from BABA itself, in Memorandum M–22–11, and in other provisions of the revised guidance in part 184, OMB did not find it necessary to make additional changes to the definition in the part 184 text beyond inserting the ''see also'' signal directing readers to further guidance in § 184.4 at paragraphs (c) and (d). Further discussion on those paragraphs is provided below in this preamble.

Section 184.3—Definition of (1) Iron or Steel Products and (2) Predominantly of Iron or Steel or a Combination of Both

Because the definition of ''iron or steel products'' is closely intertwined with the definition of ''predominantly of iron or steel or a combination of both,'' OMB discusses comments related to both definitions here. Many commenters supported providing a clear definition in the revised guidance for ''predominantly'' iron or steel items. Commenters generally agreed that using the definition at FAR 25.003 would provide the needed clarity. Some commenters also expressed support for including in that definition language from the FAR that would provide an exception for commercial off the shelf (COTS) fasteners. Other commenters recommended clarifying that the calculation could be defined by weight, volume, cost, or other measures. Some commenters also suggested increasing the threshold for ''predominantly iron or steel'' products above the 50 precent threshold used in the FAR.

Other commenters suggested adopting the definition of iron and steel from the American Iron and Steel (AIS) standard used by EPA. Some commenters also suggested using the word ''primarily'' as it is used in the AIS standard in place of the word ''predominantly.''

Some commenters observed that the word ''predominantly'' does not appear in the statute, and questioned whether it should be included in the revised guidance at all. Commenters also sought clarity on topics including what domestic content standard applies to components that are not made of iron or steel and when stakeholders should determine the cost of the iron or steel in the product.

OMB Response: In part 184, OMB adopts a definition for predominantly of iron or steel or a combination of both, which is generally consistent with the FAR definition. The definition adopted by OMB, however, does not incorporate FAR-specific waivers or exemptions, such as the language related to COTS fasteners. OMB also notes that when determining whether the product meets the applicable threshold, labor costs are not included.

OMB believes that a clear method is needed to distinguish between iron or steel products and other product categories to ensure that stakeholders will understand what domestic content standards to apply to individual items. OMB finds that using a definition based largely on the existing FAR definition will provide consistency and predictability for stakeholders, ensuring that similar principles are applied in the context of both Federal procurement and Federal financial assistance.

OMB also observes the similarity of its adopted standard to the AIS standard used by EPA. OMB acknowledges that the standards are not identical, but their use of a common 50 percent threshold should lead to similar results on product classification in many cases. OMB also clarifies that it does not modify the AIS standard used by EPA through this guidance. EPA is the best source of information on what Federal awards made by EPA are subject to its AIS standard based on section 70917 of BABA and § 184.2(a) of this guidance. OMB also observes that the term ''predominantly'' as used in the revised guidance is not identical to the term ''primarily'' used by EPA. Again, the terms both use a 50 percent threshold, but have other variations and will lead to different results on product classification in certain cases.

OMB addresses questions on what domestic content standard applies to components that are not made of iron or steel in other sections of the guidance and preamble.

Section 184.3—Definition of Manufactured Products—General

OMB received many comments on its proposed definition of ''manufactured products.'' For example, OMB received many comments requesting additional guidance on how to identify what constitutes a ''manufactured product'' relative to a construction material, an iron or steel product, or a section 70917(c) material (referred to as an ''excluded material'' in the preamble to the proposed guidance). Some commenters noted that the proposed guidance did not provide sufficient clarity on how to treat products that are a combination of multiple construction materials. Other commenters, including many State departments of transportation, questioned OMB's rationale for proposing to deviate from

the initial guidance in Memorandum M–22–11 on this topic, and potentially reclassifying many manufactured products as construction materials. These commenters explained various practical consequences of a deviation from the initial guidance on this topic, which are discussed above under the general comment summary for the definition of ''construction materials.''

Other commenters maintained that OMB's proposed definition of manufactured products was overly broad and should be narrowed and more tailored. For example, one commenter stressed the importance of providing an affirmative definition of the term, which would define what set of items OMB intends to be included in the category, rather than just explaining what items are not included. This commenter favored the affirmative language proposed in the preamble to OMB's proposed guidance, which would only classify an item as a manufactured product if it was either ''processed into a specific form and shape'' or consisted of a combination of raw materials ''to create a material that has different properties than the properties of the individual raw materials.''

Some commenters who favored narrowing the definition of ''manufactured products'' believed that the intent of BABA was only to include products that are commonly or frequently used in federally funded infrastructure projects. Some also suggested that a product should only be included if its use on federally funded infrastructure projects is broad or substantial enough to encourage or drive investment in American manufacturing based specifically on application of the Buy America preference. Commenters also expressed concerns that supply chains were already stressed and projects were already delayed prior to the enactment of BABA. These commenters suggested that an overly broad application of the Buy America preference for manufactured products could lead to further project delays and cost increases or overruns.

Some commenters supported the use of the FAR for supplemental definitions of the terms ''end product'' and ''component,'' which could be applied to the category of manufactured products. These commenters suggested that the supplemental definitions could provide further clarity for stakeholders. Other commenters questioned the appropriateness of using the FAR definitions in this context. Additionally, some commenters raised concerns about the burden of tracking a wide range of material components in an ''end product,'' which could encompass a range of different manufactured components brought to the site at different times.

Some commenters also requested that OMB clarify the treatment of ''kits'' or systems under the revised guidance. Specifically, one commenter requested confirmation that if a manufactured product is a kit or system consisting of multiple components that are required in order to implement the product solution at a site, the kit or system would be evaluated as a single manufactured product subject to the 55 percent cost component analysis, rather than viewing each of the items in the kit or system as a separate manufactured product each subject to its own separate analysis.

OMB also received one comment from a State department of transportation requesting clarification on classifications for topsoil, compost, and seed. Another commenter provided more detail on seeds, explaining that they are often used on infrastructure projects to prevent soil erosion, protect water quality, and comply with environmental requirements, such as those under the Clean Water Act.

OMB Response: OMB recognizes concerns expressed by commenters on the need to provide further clarity on the meaning and classification of manufactured products. To address these concerns, OMB has added an affirmative definition of the term ''manufactured products,'' which now comes before the limiting definition explaining what manufactured products are not. The affirmative definition is based largely on the elements for an affirmative definition proposed by OMB in the preamble to the proposed guidance. In the final guidance, the first paragraph of the definition of ''manufactured products'' defines the term to mean articles, materials, or supplies that have been: (i) processed into a specific form and shape; or (ii) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

Paragraph (1)(i) of the definition remains unchanged relative to the language included in the preamble of OMB's proposed guidance based on the definition of ''manufactured good'' at 2 CFR 176.140(a)(1). The second element of the affirmative definition of ''manufactured products'' in paragraph (1)(ii) was modified in the revised guidance relative to 2 CFR 176.140(a)(1). OMB dropped the reference to raw materials to clarify that a manufactured product may also be created by combining manufactured components, which are not raw materials. However, OMB retained the language specifying that the combination of materials would create a product with ''different properties'' than the individual articles, materials, or supplies. By retaining the language on ''different properties,'' OMB acknowledges that not just any combination of materials produces a manufactured product. For example, a mixture of raw materials in an unprocessed or minimally processed state, such as minimally-processed fill dirt, should not be classified as a manufactured product.

One important purpose of both elements of the affirmative definition of ''manufactured products'' in paragraph (1) is to recognize that some items, like certain raw materials, are not meaningfully ''manufactured'' before they are brought to the work site. Raw materials may include unprocessed or minimally-processed materials such as natural resources, which serve as the basic materials used in manufacturing processes for other finished products and components of finished products. OMB does not believe that Congress intended to apply the Buy America preference for manufactured products to non-manufactured or raw materials if they are brought to the work site in an unprocessed or minimally-processed state (such as topsoil, compost, and seed). Thus, OMB agreed with commenters that it was important to provide affirmative content and meaning for the definition to provide further clarity. If non-manufactured or raw materials are brought to the work site in an unprocessed or minimally processed state, Federal agencies should not classify these items as manufactured products in their implementation of BABA preferences.

OMB further clarifies that non-manufactured or raw materials mixed off-site with other non-manufactured or raw materials of similar types, or with similar but not identical properties, would not necessarily result in classifying the mixed material brought to the work site as a manufactured product if it remains in an unprocessed or minimally processed state. OMB recognizes that an overly strict application of the revised definition of ''manufactured products'' could potentially result in classifying certain technically composite or compound raw materials, such as fill dirt, as manufactured products, which is not OMB's intent. Even if there are some limited or marginal changes to the properties of the combined material, it may be reasonable to continue to classifying the combined material as a non-manufactured or raw material in at least the circumstances described above.

OMB also notes that certain waste or recycled materials, as discussed by some commenters, may also potentially be classified as non-manufactured raw materials if they remain in an unprocessed or minimally-processed state—or the equivalent of such a state for waste and recycled materials. OMB does not issue specific guidance to Federal agencies on the topic of waste or recycled materials through this document.

Paragraph (2) of OMB's revised definition of ''manufactured products'' again clarifies that if an item is classified as an iron or steel product, a construction material, or a section 70917(c) material, then it is not a manufactured product. OMB's responses to comments about treatment of combinations of different construction materials are addressed in the response to comments on the general construction material definition above. As explained under that section of the preamble, OMB has returned to an approach more consistent with Memorandum M–22–11 on that topic than was reflected in the proposed guidance. OMB returns to classifying items that consist of two or more of the construction materials listed in the definition at § 184.3, or that combine a listed construction material with non-minor additions of other non-listed items, as manufactured products, rather than as construction materials.

It was necessary to maintain what is now the first sentence of paragraph (2) of the definition of ''manufactured products'' to continue allow for distinguishing between product categories, which have different domestic content requirements applicable to each of them. Section 184.4(e) of the revised guidance explains that products only fall in a single category, but does not explain how to decide which category a product falls in. The definitions in § 184.3 provide that information. The first sentence of paragraph (2) of the ''manufactured products'' definition ensures that this definition does not conflict or overlap with other product category definitions in § 184.3. For example, many construction materials are also processed into a specific form and shape. Moreover, listed construction materials such as fiber optic cable and engineered wood are also produced by combining different materials through manufacturing processes. Paragraph (2) explains that the other definitions continue to take priority.

Paragraph (2) of OMB's revised definition also now clarifies that an item classified as a manufactured product may include components that are construction materials, iron or steel products, or section 70917(c) materials. In addition to the listed items, the components of a manufactured product may also include components that are non-listed raw materials or other types of articles, materials, or supplies.

Although not addressed directly in the part 184 text, OMB recognizes that some items may be acquired from a manufacturer or supplier as a kit intended for final assembly or installation on the work site. In such cases, the items comprising the kit should be treated the same with regard to the cost of components test. Even in the case of a kit, for the purposes of applying the cost of components test at § 184.5, the manufacturer should be considered the entity that manufactured the elements of the kit, not the recipient or contractor that acquires the kit or the contractor that assembles or installs the kit on the work site. The kit concept is discussed in further detail under § 184.4(e) below.

OMB believes the definition provided in the revised guidance on the meaning of manufactured products will provide needed clarity to stakeholders for the vast majority of product classifications. OMB also believes its approach in the revised guidance will provide continuity with certain key elements of its initial guidance in Memorandum M–22–11 on how to distinguish between manufactured products and construction materials. Where fringe or marginal cases arise, further guidance may be needed in the future.

Section 184.3—Definition of Manufactured Product—Relationship to Section 70917(c) Materials

Numerous commenters maintained that the revised guidance should clarify that section 70917(c) materials are entirely excluded from coverage under BABA. In the preamble to the proposed guidance, at question 9 labeled ''Aggregates,'' OMB indicated that section 70917(c) materials were only excluded by statute under the category of ''construction materials'' and sought comments on how they should be treated under the category of ''manufactured products'' in the revised guidance. The section 70917(c) materials include: (i) cement and cementitious materials; (ii) aggregates such as stone, sand, or gravel; and (iii) aggregate binding agents or additives. Section 70917(c)(1) of BABA states that ''the term 'construction materials' shall not include'' the section 70917(c) materials. Section 70917(c)(2) of BABA states the ''standards developed under section 70915(b)(1) shall not include'' the section 70917(c) materials as ''inputs of the construction material.'' These materials were referred to as ''excluded materials'' in the preamble to the proposed guidance based on their exclusion from the ''construction materials'' category.

Commenters offered many arguments and reasons why the section 70917(c) materials should be entirely excluded from all categories under BABA, including manufactured products. Some commenters noted that the adoption of the proposed guidance would have a negative impact on industry, such as narrowing the sources for aggregates that could be used in infrastructure projects. Some commenters also noted that local aggregates may not meet quality standards, which could limit the life of projects. Further, some commenters noted that alternative sources for aggregates are often more costly than current (foreign) sources. One commenter also noted that the domestic supply of aggregates is limited by environmental and land use regulations (many of them localized in scope), and subject to week-to-week fluctuations in availability. This commenter explained that supplies are not flexible in times of rising demand.

Some commenters believed that OMB failed to consider the provision at section 70917(c)(2), which prohibits the section 70917(c) materials from being considered inputs of a construction material under the standards called for under 70915(b)(1). These commenters argued that section 70917(c) materials, such as aggregates, should be fully excluded from BABA domestic content preferences, whether as standalone materials or as components in other materials such as precast concrete. These commenters also noted the close link between cement and concrete, observing that concrete cannot be produced without cement and that cement has no function other than to produce concrete. Some commenters maintained that Congress established the exclusion at section 70917(c) to acknowledge fluctuations in the availability of section 70917(c) materials, particularly cement. Some commenters also suggested that that if a Buy America preference were applied to section 70917(c) materials, the cost of the materials may significantly increase. Thus, these commenters argued that both cement and concrete products should be entirely exempt from BABA coverage.

Some commenters also stressed the importance of excluding asphaltic concrete from Buy America coverage for similar reasons to the comments stressing the importance of excluding

Portland cement concrete. These commenters explained that asphaltic concrete is made of aggregates and aggregate binding agents and additives (including asphalt), which are all section 70917(c) materials. Some comments also focused specifically on Portland cement concrete, which is made of aggregates, Portland cement (a form of cement and aggregate binding agent), and other additives.

Other commenters questioned why a combination of section 70917(c) materials with other section 70917(c) materials would create a new form of product that is not excluded. They observed that there is nothing in the statute to suggest that OMB should treat a product made of a combination of section 70917(c) materials differently than it treats the individual materials. One commenter noted that the listing of the section 70917(c) in a single list indicates that Congress intended to exclude not just single materials from BABA coverage, but also combinations of the listed materials when they are bound together. This commenter maintained that, under the statute, combinations of the section 70197(c) materials are excluded from BABA requirements in the same way as any individual material.

Many commenters questioned OMB's statement in the preamble to the proposed guidance that section 70917(c) materials could be treated as ''manufactured products'' subject to the Buy America preference at section 70914(a) of BABA. Some commenters indicated that only a combination of non-excluded construction materials can properly constitute a manufactured product under the statutory framework.

A few commenters also noted their agreement with OMB's observation that BABA did not specifically exclude section 70917(c) materials from the category of manufactured products. These commenters agreed that section 70917(c) should be subject to the relevant domestic content requirements for the category of manufactured products but not for the category of construction materials. For example, one commenter indicated that items made with inputs of section 70917(c) materials, such as precast concrete shapes and reinforced precast concrete structures, should be subject to the domestic content requirements for the manufactured product category established under BABA.

OMB Response: After careful consideration of the comments received on this topic and the statutory text of BABA, OMB clarifies that section 70917(c) materials, on their own, are not manufactured products. Further, section 70917(c) materials should not be considered manufactured products when they are used at or combined proximate to the work site—such as is the case with wet concrete or hot mix asphalt brought to the work site for incorporation. However, certain section 70917(c) materials (such as stone, sand, and gravel) may be used to produce a manufactured product, such as is precast concrete. Precast concrete is made of components, is processed into a specific shape or form, and is in such state when brought to the work site.

The revised guidance clarifies the circumstances under which the section 70917(c) materials should be treated as components of a manufactured product. That determination will be made based on consideration of: (i) the revised definition of the ''manufactured products'' at § 184.3; (ii) a new definition of ''section 70917(c) materials'' at § 184.3; (iii) new instructions at § 184.4(e) on how and when to categorize articles, materials, and supplies; (iv) new instructions at § 184.4(f) on how to apply the Buy America preference by category; and (v) additional discussion in this preamble clarifying that wet concrete should not be considered a manufactured product if not dried or set prior to reaching the work site.

Based on these provisions, the revised guidance clarifies that a manufactured product may include components that are section 70917(c) materials, construction materials, iron or steel products, manufactured products, raw materials, or any other articles, materials, or supplies.

As explained below, an item should be distinguished from its components for the purposes of BABA categorization based on the status of the product when brought to the work site. When brought to the work site, an article, material, or supply should only be classified into one of the following categories: (1) iron or steel products; (2) manufactured products; (3) construction materials; or (4) section 70917(c) materials. *See* 2 CFR 184.4(e) (as revised). Examples of how the revised provisions should be applied in practice to section 70917(c) materials are provided below.

Before discussing specific examples applying the revised provisions, OMB first explains its analysis of the statutory text on which the revised provisions are based. OMB agrees with commenters that the category of construction materials must not include section 70917(c) materials. The statute clearly excludes the section 70917(c) materials from categorization as construction materials and as components or inputs in the associated standards for these materials. The revised guidance recognizes these limitations. It does not include section 70917(c) materials in the list of construction materials at § 184.3 or in the standards at § 184.6. However, as explained in the preamble to the proposed guidance, the statutory text does not explain how section 70917(c) materials should be treated relative to the manufactured product category.

The section of BABA addressing the section 70917(c) materials applies only to the category of construction materials, not manufactured products. Section 70917(c) provides that ''the term *construction materials* shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.'' BABA 70917(c)(1) (emphasis added). The same section also provides that ''the standards developed under section 70915(b)(1)''—entitled ''standards for *construction materials*''—shall not include ''cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction material.'' BABA 70915(b)(1) (emphasis added) and 70917(c)(2). Notably, the standards developed under section 70915(b)(1) apply only to construction materials and not iron or steel or manufactured products.

The separate categories for ''construction materials,'' ''iron or steel'' products, and ''manufactured products'' are required by the plain text of BABA sections 70912(2), 70912(6), and 70914(a)—and were also applied under OMB's initial guidance in Memorandum M–22–11. Under the definition at section 70912(2), the statute recognizes that Federal agencies should apply three separate ''domestic content procurement preference[s]'' for: (i) iron and steel products; (ii) manufactured products; and (iii) construction materials. Under the definition for ''produced in the [U.S.]'' at section 70912(6), the statute also recognizes these categories. The three top-level categories mandated by Congress are again reiterated at section 70914.

Relative to the ''manufactured products'' category, a more stringent standard applies to the ''construction materials'' category, for which ''all manufacturing processes'' are required to occur in the U.S. *See* section 70912(6)(C) of BABA, with standards to define ''all manufacturing processes'' to be developed by OMB under section 70915(b)(1). Based on these provisions, the section 70917(c) materials should be excluded under the more stringent standard for ''construction materials.''

No exclusion, however, is provided under the category for ''manufactured products'' on which BABA is silent relative to these materials.

OMB's revised guidance in part 184 is consistent with the statutory framework of BABA, establishing three separate categories for Buy America preferences. Consistent with section 70917(c), OMB does not include the section 70917(c) materials under its proposed definition for ''construction materials'' at § 184.3, or as inputs for ''construction materials'' in the manufacturing standards at § 184.6.

OMB also properly recognized that the statute did not exclude the section 70917(c) materials from the ''manufactured products'' category, to which an alternative domestic content standard applies. BABA only excluded the section 70917(c) materials from the more stringent domestic content preference for ''construction materials,'' which requires ''all manufacturing processes'' for the material to occur in the U.S., but not from the alternative domestic content preference for manufactured products, which requires application of the 55 percent ''cost of components'' test.

The preamble to the proposed OMB guidance sought public comment on how the section 70917(c) materials should be treated in the context of the ''manufactured products'' Buy America preference category. OMB now provides guidance on that topic in part 184. In doing so, OMB aims for a harmonious interpretation of section 70917(c) of BABA, which bars classification of section 70917(c) materials as construction materials, and other sections of BABA, including sections 70912 and 70914, which require Federal agencies to apply a Buy America preference for manufactured products. Based on thorough review and consideration of all comments received, and careful consideration of congressional intent reflected in the statutory text, OMB's guidance gives effect to all of these provisions and renders them compatible.

OMB agreed with commenters that it should not apply the ''manufactured products'' Buy America preference to standalone section 70917(c) materials if they have not been combined with different section 70917(c) materials, or other materials, to create a manufactured product. An item can be classified as only one of the following: an iron or steel product, a construction material, a manufactured product, a section 70917(c) material, or none of the above. Thus, no individual item on the list of section 70917(c) materials should be treated, in isolation, as a manufactured product. OMB further clarifies in this preamble that wet concrete should not be considered a manufactured product if not dried or set prior to reaching the work site. The setting or drying of a combination of section 70917(c) materials into a finished product prior to reaching the work site is generally the circumstance in which a combination of only section 70917(c) materials would be considered a manufactured product.

OMB's approach for distinguishing a single section 70917(c) material from a manufactured product is functionally similar—but not identical—to its approach for distinguishing a single construction material from a manufactured product. First, like the construction material definition, ''articles, materials, or supplies that consist of *only one* of the items listed'' in the definition of ''section 70917(c) materials'' should be classified as section 70917(c) materials. 2 CFR 184.3 (as revised) (emphasis added). Just like a plastic item by itself cannot be a manufactured product, stone by itself also cannot be a manufactured product. Second, to the extent one of the listed section 70917(c) materials contains, as inputs, other items listed in the definition—such as cement that requires aggregate binding agents as inputs—the listed item is still considered a section 70917(c) material. Third, when two or more section 70917(c) materials are combined together at or proximate to the work site to make an item that is not specifically listed—such as asphaltic or Portland cement concrete—agencies should rely on how such items were classified at the time they reached the work site.

In the case of section 70917(c) materials, OMB clarifies in this preamble that, to the extent the section 70917(c) materials were only combined as an unsettled mixture without final form when reaching the work site, such as in the case of wet concrete or hot mix asphalt, the unsettled mixture should not be considered a manufactured product to which a Buy America preference applies. Wet concrete is not yet ''processed into a specific shape or form.'' Although it may have ''different properties'' than individual section 70917(c) materials, OMB finds that it is more consistent with the intent of BABA to only treat section 70917(c) materials that have set or dried into a particular shape or form prior to reaching the work site, such as precast concrete, as manufactured products. OMB recognizes that certain section 70917(c) materials (such as stone, sand and gravel) may be used to produce a manufactured product such as is the case with precast concrete. Precast concrete consists of components processed into a specific shape or form and is in such state when brought to the work site, making it a manufactured product.

A key difference between the categories of construction material and section 70917(c) materials is that, unlike construction materials, no Buy America preference is applied directly to individual section 70917(c) materials. The parallels or similarities above relate only to how materials are classified as falling within one of those categories.

To illustrate this approach, if an individual item included in the list of section 70917(c) materials is brought to the work site for incorporation into an infrastructure project, then that item is still a section 70917(c) material and not a manufactured product. Agencies should not apply the Buy America preference under BABA to an individual section 70917(c) material that is not a component of a manufactured product.

There may be circumstances, however, when section 70917(c) materials will be treated as components of manufactured products to which a Buy America preference will apply. If the individual section 70917(c) material is combined with other section 70917(c) materials and non-minor additions of other materials before it is brought to the work site, then the new product should be classified as a manufactured product and the section 70917(c) materials should be treated as components in the circumstances described in this preamble. For the reasons explained above, including the value of section 70917(c) materials in the 55 percent cost of components requirement is consistent with BABA, which requires a Buy America preference to be applied to all manufactured products. Examples of minor additions that would not change the categorization of a section 70917(c) material are provided under the discussion of aggregates below.

Based on the revised guidance, products like precast concrete should be treated as manufactured products—or when applicable, iron and steel products—with components including but not limited to aggregates, cement, and aggregate binding agents, as well as, where applicable, reinforcing iron or steel. OMB recognizes that in some circumstances a precast concrete product may instead be classified as an iron or steel product, such as when the product is predominantly of iron or steel or a combination of both. OMB also recognizes that BABA's savings provision, which is discussed above in this preamble, may affect product

classification in some circumstances. Federal agencies are in the best position to provide specific guidance on the application of BABA's savings provision to their awards. Specific examples of how the provisions of the revised guidance should be applied to section 70917(c) materials are provided below.

Aggregates should be classified as a section 70917(c) materials. The fact that an aggregate is processed into a specific form or shape—for example, to meet certain construction specifications—would not affect its classification. The aggregate would still be classified as a section 70917(c) material. Similarly, aggregates combined with minor additions of other materials that do not impact the commonsense identification of the material as an aggregate—for example, gravel combined with additives to increase traction or resilience or for some other purpose—would also not impact the classification of the aggregate as a section 70917(c) material. In addition, aggregates mixed only with other aggregates—such as sand mixed with gravel—remain aggregates and section 70917(c) materials.

In classifying aggregates this way, OMB recognizes that many aggregates are not ''manufactured'' in the ordinary sense of the term. For example, rocks and stone are not manufactured. Even in cases in which an aggregate is processed or altered in some way—for example, to meet construction specifications—provided that the product brought to the work site remains best classified as an aggregate, its categorization as a section 70917(c) material would not change.

As commenters observed, OMB acknowledges that cement is an input of concrete. Thus, in some cases, as specified in this preamble, a Buy America preference will apply to cement and cementitious materials as components of precast concrete. A precast concrete product, which contains cement as an input, should be classified as a manufactured product, not a section 70917(c) material. Circumstances when a Buy America preference does not apply include when cement and cementitious materials are brought to the work site as standalone products (to be mixed on site) or in combination with other section 70917(c) materials, such as in the case of wet concrete mix, which has not yet settled into a specific form or shape before reaching the work site. As with cement, in some cases, aggregate binding agents and additives will ultimately be treated as components of a manufactured product. The circumstances are similar to those described for cement and are therefore not repeated here.

Section 184.3—Definition of Manufacturer

OMB added this definition in the revised guidance to address comments received on the cost of component test for manufactured products at § 184.5. OMB addresses those comments under § 184.5. In the revised guidance, manufacturer is defined to mean the entity that performs the final manufacturing process that produces a manufactured product.

Section 184.3—Definition of Produced in the U.S.

OMB received a range of comments on its definition of produced in the U.S. As this definition is closely related to the manufacturing standards for construction materials at § 184.6, and the cost of components test for manufactured products, many of the comments are addressed under those sections.

Regarding the definition of ''produced in the [U.S.]'' for iron and steel products, some commenters suggested adding language to clarify that the standard does not require that other non-iron or -steel components must be produced in the U.S. One commenter suggested relocating § 184.6 of the revised guidance to the definition of ''produced in the [U.S.]'' in § 184.3. One commenter suggested moving language about ''binding agents'' into the definition of ''construction materials'' to the definition of ''produced in the [U.S.].'' Another commenter suggested revising the definition of ''produced in the U.S.'' for manufactured products to clearly differentiate between products that have all components manufactured in the U.S. and those with components manufactured in other countries.

OMB Response: OMB has adhered closely to the statutory definition for this term at BABA section 70912(6). OMB made minor clarifying edits, such as adding ''see also'' signals to other sections of the guidance with relevant information, such as a reference to § 184.5 in the case of manufactured products and § 184.6 in the case of construction materials.

On the definition applicable to iron or steel products, § 184.4(e) clarifies than an article, material, or supply incorporated into an infrastructure project must meet the Buy America preference for only the single category in which it is classified. Thus, in the case of iron or steel products, the Buy America preference does not apply directly to non-iron or -steel components. In addition, consistent with existing practice, the requirement for iron or steel does not restrict the origin of the raw materials used in production of the iron or steel, but requires that all manufacturing processes of the iron or steel product occurred in the U.S.

Comments on the definition as applied to manufactured products are addressed under § 184.5. Comments on the definition as applied to construction materials are addressed under § 184.6.

Section 184.3—Definition of Section 70917(c) Materials

OMB has summarized comments related to section 70917(c) materials under its discussion of the relationship of section 70917(c) materials to manufactured products.

OMB Response: OMB has defined section 70917(c) materials to mean only one of the following categories of items: (i) cement and cementitious materials; (ii) aggregates such as stone, sand, or gravel; or (iii) aggregate binding agents or additives. As discussed above on the relationship of section 70917(c) materials to manufactured products, OMB has incorporated a definition of ''section 70917(c) materials'' based on the materials listed in that section of BABA. OMB also added clarifying language to the definition, which is consistent with the policy explained above, which OMB uses to distinguish between section 70917(c) materials and manufactured products. OMB interprets section 70917(c) of BABA harmoniously with the Buy America preference for manufactured products, giving effect to both provisions.

OMB agrees with commenters that section 70917(c) materials are excluded from the category of construction materials and from being considered inputs to listed construction materials. OMB also agrees with commenters that the Buy America preference for manufactured products should not apply directly to section 70917(c) materials, such as aggregates, which are not meaningfully manufactured in the ordinary sense. In its discussion above, however, OMB also recognizes the statutory mandate to apply a Buy America preference to manufactured products, and explains the circumstances under which section 70917(c) materials should be considered components of manufactured products.

OMB notes that the statutory text of BABA is generally silent on the interaction between the two categories. OMB defines that relationship in this revised guidance in a way that is consistent with the statute reflected in both section 70917(c) of BABA, which excludes section 70917(c) materials from the category of construction materials, and sections 70912 and

70914(a) of BABA, which require application of a Buy America preference to manufactured products. The text of BABA does not indicate that Congress intended to exclude section 70917(c) materials from the latter category. OMB's revised approach interprets the statutory provisions on section 70917(c) materials and manufactured products in a way that renders the provisions compatible. Based on thorough review and consideration of all comments received, and careful consideration of congressional intent reflected in the statutory text, the policy of the Made in America Office in OMB on defining the interrelationship of the categories is set forth above in this preamble and in the part 184 text.

Section 184.4: Applying the Buy America Preference to a Federal Award

Section 184.4(a) and (b)—Applicability of Buy America Preference to Infrastructure Projects and Including the Buy America Preference in Federal Awards

Some commenters questioned the earlier guidance in Memorandum M–22–11, which only applied BABA to non-Federal entities as defined at 2 CFR 200.1. These commenters questioned the rationale for the non-applicability of BABA to for-profit entities and explained certain practical consequences of this policy. For example, non-Federal entities, such as nonprofit organizations, may compete against for-profit entities in applying for discretionary grants for infrastructure. Thus, they feared this policy in Memorandum M–22–11 could create an unlevel playing field for grant applicants. These commenters asked OMB to clarify that for-profit entities are also subject to BABA.

One commenter maintained that the guidance exempting for-profit entities from BABA has already created confusion and added ambiguity into the grant application process. This commenter explained that not-for-profit electric cooperatives are put on unequal footing with for-profit entities when applying for competitive Federal grant programs and faced with a barrier to entry in pursuing Federal funding opportunities. The commenter believed that it was not congressional intent to see America's nonprofit organizations be disadvantaged as the Federal Government makes generational investments in infrastructure such as broadband.

Alternatively, another commenter urged OMB to add language directly in part 184 expressly stating that the BABA preference does not apply to for-profit entities.

OMB Response: Except for minor editorial changes, OMB did not change the text of these provisions in § 184.4. Paragraph (a) explains that BABA applies to Federal awards where funds are appropriated or otherwise made available for infrastructure projects in the U.S., regardless of whether infrastructure is the primary purpose of the Federal award. Paragraph (b) provides information on including the Buy America preference in Federal awards.

The guidance in Memorandum M–22–11 was based on the definition of Federal financial assistance at section 70912(4)(A) of BABA, providing that the term Federal financial assistance has the meaning given the term in ''section 200.1 of title 2, Code of Federal Regulations (or successor regulations).'' Memorandum M–22–11 explained that Federal financial assistance means ''assistance that non-Federal entities receive or administer in the form of grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees, and other types of financial assistance.'' Section 70912(4)(B) of BABA also explains that the term Federal financial assistance includes all expenditures ''by a Federal agency to a non-Federal entity for an infrastructure project.''

In OMB Guidance for Grants and Agreements at 2 CFR 200.1, Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, cooperative agreements, and several other forms of assistance. Memorandum M–22–11 clarified how the term should be applied to BABA. OMB does not modify that guidance through this document. In the same section of part 200, non-Federal entity means ''a State, local government, Indian tribe, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.'' In § 184.4, OMB uses the term Federal awards, the meaning of which includes ''Federal financial assistance that a recipient receives directly from a Federal awarding agency or indirectly from a pass-through entity.'' 2 CFR 200.1.

Based on the direction in the statute and the definitions at 2 CFR 200.1, Memorandum M–22–11 explained that for-profit organizations are not considered non-Federal entities. However, Memorandum M–22–11 also explained that the initial guidance it contained did not alter independent statutory authorities that agencies may have to include domestic content requirements in awards of Federal financial assistance issued to for-profit organizations.

In response to comments on applicability of BABA to for-profits, OMB further clarifies that 2 CFR 200.101(a)(2) allows Federal agencies to apply subparts A through E of the OMB Guidance for Grants and Agreements in 2 CFR part 200 to for-profit entities. Thus—although OMB does not require them to do so—Federal agencies are allowed, under the existing structure of part 200, to apply part 200, including the domestic preferences at § 200.322, to for-profit entities. Federal agencies may consider applying the revised guidance in this way, at their discretion, to create a level-playing field, with respect to application of BABA, for discretionary grant programs or other reasons. OMB also notes that, through a separate process, OMB will be proposing revisions later in 2023 to the OMB Guidance for Grants and Agreements in 2 CFR part 200, and other parts of 2 CFR. *See* 88 FR 8480 (Feb. 9, 2023).

Section 184.4(c) and (d)—Infrastructure in General and Interpretation of Infrastructure

OMB received several comments on the meaning and interpretation of infrastructure. Many of these comments are discussed above under the definition of ''infrastructure project'' in § 184.3. Other comments are addressed here.

Some commenters asked OMB to clarify that infrastructure built solely to support affordable housing should not be covered by BABA. One commenter asked OMB to clarify that ''buildings and real property'' do not include single family and multifamily residential properties. This commenter believed that paragraph (d) and language in Memorandum M–22–11 supported its request. The commenter was particularly interested in privately-owed multifamily housing assisted by the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Agriculture (USDA). The commenter requested a broad exemption for Federal financial assistance used to construct or rehabilitate single-family and multifamily residential housing projects. Another commenter noted a major bottleneck in housing deliveries and that applying BABA to building and real property could be a major headwind into efforts to close the minority homeownership gap.

Another commenter observed that because the proposal references ''public transportation'' broadly, it is not entirely clear whether OMB intends to

include rolling stock such as buses, subway cars, and commuter rail cars, in the definition of ''infrastructure project.'' This commenter believed that because rolling stock was not specifically listed in § 184.4 of the proposed guidance, OMB did not consider rolling stock to be an infrastructure project, and FTA's rolling stock regulation at 49 CFR 661.11 would continue to stand. The commenter asked OMB or U.S. DOT to clarify. The commenter believed that FTA's current regulation pertaining to rolling stock (49 CFR 661.11, discussed above) should continue to survive. The commenter noted that certain FTA rolling stock provisions may conflict with part 184.

OMB Response: Except for minor editorial changes, OMB did not change the text of these provisions in the revised guidance. OMB reminds commenters that additional guidance on the interpretation of infrastructure is available in Memorandum M–22–11. Given the guidance already provided on this topic in Memorandum M–22–11, and in other provisions of the revised guidance in part 184, OMB did not find it necessary to make additional changes to these provisions.

On the comments regarding infrastructure built to support affordable housing, OMB notes that Memorandum M–22–11 instructed Federal agencies to consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer. Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project. Federal agencies will have more specific information on how BABA applies to their specific programs. OMB also notes that HUD and USDA have issued certain general applicability waivers, which may apply to some of the relevant housing projects. Recipients may consider requesting waivers from Federal agencies for evaluation by the relevant Federal agency under the waiver process in § 184.7 of the guidance.

On comments and questions related to FTA regulations and rolling stock, FTA and U.S. DOT are in the best position to provide specific responses on how FTA's regulations apply today and interact with BABA and part 184. OMB notes that § 184.2(a) allows a Buy America Preference meeting or exceeding the requirements of section 70914 of BABA to remain in effect if applied by the agency to Federal awards before November 15, 2021.

Section 184.4(e)—Categorization of Articles, Materials, and Supplies

OMB received many comments related to the categorization of articles, materials, and supplies. For example, some commenters observed that Memorandum M–22–11 provided that an ''article, material, or supply should only be classified into one of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material.'' Other commenters noted that the proposed guidance did not provide sufficient clarity on how to treat products that are a combination of multiple construction materials. Many of these commenters strongly felt that OMB should not deviate from the initial guidance found in Memorandum M–22–11. Specifically, Memorandum M–22–11 explained that for ''ease of administration, an article, material, or supply should not be considered to fall into multiple categories.'' These commenters questioned why this guidance was not carried over into part 184 and wondered about practical consequences of a product falling into multiple categories.

In the proposed guidance, OMB also asked if it should use the definition of the term ''end product'' at FAR 25.003, which prompted many comments on how to identify and differentiate the end products to which the Buy America preference applies, which would be separated by category. ''End product'' is defined in the FAR to mean ''those articles, materials, and supplies to be acquired for public use.'' FAR 25.003.

Some commenters supported using the FAR definition of ''end product'' to provide further clarity for stakeholders. Other commenters questioned the usefulness, suitability, or both, of using the FAR definition in the revised guidance. For example, some commenters raised concerns over the reasonableness and burden of tracking the material components in a vaguely defined ''end product.'' Many commenters sought clarity on how to specifically identify the end products to which the Buy America preference applies and how to distinguish the end product from its components. In other words, some comments sought clarity, or noted confusion, on how to distinguish between: (i) categorized end products to which the Buy America preference directly applies; and (ii) the components of categorized end products.

To the extent an item may be classified as a manufactured product, but also includes components made of iron, steel, or construction materials, where to draw the line around the end product relative to its components makes a significant difference on how to apply the Buy America preference. This is one reason why this topic was of special concern to commenters. A broad end product with many disparate components may be subject to only the 55 percent cost of components test for a manufactured product. Alternatively, if each component of that product were identified as a separate end product, they could each be subject to the more stringent domestic content preferences applicable to iron, steel, and construction materials. Many commenters sought further clarity on this topic.

OMB Response: In the revised guidance, OMB agreed with commenters that it should further clarify that items should only be classified as falling into a single category or bucket. The revised guidance explains that an article, material, or supply should only be classified into one of the following categories: (1) iron or steel products; (2) manufactured products; (3) construction materials; or (4) section 70917(c) materials. The fourth category was added in the revised guidance for consistency with OMB's approach on distinguishing between manufactured products and section 70917(c) materials discussed above. The revised guidance further explains that an ''article, material, or supply should not be considered to fall into multiple categories.'' The guidance also notes that, in ''some cases, an article, material, or supply may not fall under any of the categories listed in paragraph (e)(1).'' For example, see the discussion above on temporary items brough to a work site, which are not permanently incorporated into an infrastructure project, and on non-manufactured raw materials that do not meet the newly added affirmative definition of ''manufactured products.''

The revised guidance also explains that the ''classification of an article, material, or supply as falling into one of the categories listed in paragraph (e)(1) must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project.'' Although OMB did not choose to define the term ''end product'' in the revised guidance, through this sentence OMB has aimed to provide clarity for stakeholders on how to identify the articles, materials, and supplies to which the Buy America preference applies. The part 184 text now explains

that items are generally categorized when they are ''brought to the work site.''

The sentence is based in part on language from part 25 of the FAR, which defines a construction material, in relevant part, as ''an article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work.'' FAR 25.003. Although the term construction material under the FAR has a different meaning, OMB found this language useful to identify the time at which articles, materials, and supplies are classified as falling into one category or another. OMB does not incorporate the language in the FAR definition on ''emergency life safety systems'' but separately addresses the concept of a ''kit'' below.

By using the term ''work site,'' OMB generally refers to the location of the infrastructure project at which the iron, steel, manufactured products, and construction materials will be incorporated. Federal agencies should use reasonable discretion on how to apply this term. For example, for projects in environmentally sensitive areas, products may not initially be delivered directly to the location at which they will be incorporated. In other scenarios, components may be assembled at off-site locations and delivered to the work site after assembly. Not knowing all the potential variations on this topic, OMB leaves Federal agencies with a reasonable degree of flexibility on how the term should be applied. Federal agencies may consider providing guidance to their recipients on the meaning or scope of the work site. OMB may also consider providing further guidance on this topic in the future.

OMB cautions stakeholders that the ''brought to the work site'' language does not mean that Federal agencies will now require the Buy America preference to be applied directly at the time a product is brought to a work site. OMB has not changed its initial guidance in Memorandum M–22–11 that a Buy America preference ''only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project.'' Thus, this new language does not mean that Federal agencies will require compliance checks for all products brought to the work site, which may include temporary items that will never be incorporated into the project, excess supplies, or incorrect deliveries. The purpose of the language is to clarify when *categorization* occurs—not when Buy America compliance is required. If a product is brought to the work site but never incorporated into the infrastructure project, the BABA preference would never apply to it. BABA applies only to products ''incorporated into an infrastructure project.'' *See* 2 CFR 184.1(b) and the definition of ''Buy America Preference'' at § 184.3 (as revised). The language also does not necessarily require actual classification to occur at the time that products are brought to the work site, but only that, in general, classification is based on the ''status'' of a product at the time it was brought to the work site.

If categorization occurred instead at the time of ''incorporation'' into the project, after products are further combined through various assembly and manufacturing processes on the work site, the resulting ''end products'' and their ''components'' would often look very different and lead to different outcomes on product classification and the applicable domestic content preference. The same would be true if categorization occurred based on assessment of the status of products in a finished infrastructure project. Categorization at the time of ''incorporation'' or project completion could result in wide-ranging systems assembled on the site, which include many different products from different manufacturers, being categorized as a one large manufactured product. The resulting system could include many separate iron or steel products or construction materials from different manufacturers and suppliers. Shifting the level of analysis in this way could result in only applying the domestic content preference for manufactured products to the system as a whole. In the absence of any guidance on this topic, it is conceivable that some recipients or contractors may even seek to classify an entire infrastructure project as one manufactured product. OMB's revised guidance avoids these results by specifying that classification occurs based on the status of products brought to the work site.

Another consequence of classifying at the time of ''incorporation'' or project completion could be eliminating almost all circumstances in which the affirmative standard in paragraph (1) of the definition of ''manufactured products'' would not apply to an article, material, or supply. While certain unmanufactured or raw materials brought to a work site may not meet the definition, following ''incorporation'' or project completion, the permanently incorporated materials would generally have a specific form or shape, or have been combined with other materials through manufacturing processes. Classifying materials based on their status at the time they are brought to the work site is more likely to result in at least some articles, materials, or supplies not falling under any of the listed categories, which OMB recognizes as a possibility.

OMB also clarifies here in the preamble that in certain cases a manufactured product purchased from a single manufacturer or supplier as a ''kit'' may be classified as a manufactured product even if its components are brought to the site separately or at different times. OMB does not define the term kit in the text of the revised guidance, but leaves Federal agencies with reasonable discretion on how this concept should be applied in practice when classifying products under § 184.4(e).

In general, by the term kit OMB means a product that is acquired for incorporation into an infrastructure project from a single manufacturer or supplier that is manufactured or assembled from constituent components on the work site by a contractor. A kit may be treated and evaluated as a single and distinct manufactured product regardless of when or how its individual components are brought to the work site. In contrast to a kit, other manufactured products are manufactured or preassembled before they are brought to a work site. When determining if products brought to a work site constitute a kit or separate end products, Federal agencies should generally interpret the term kit as limited to discrete products, machines, or devices performing a unified function. A more wide-ranging system of interconnected products, machines, or devices (such as a heating, ventilation, and air conditioning system for an entire building) should not be considered a kit. OMB also instructs agencies that a kit should not include an entire infrastructure project.

On kits, OMB also clarifies that for the purposes of applying the cost of components test at § 184.5, the manufacturer should be considered the entity that performs the final manufacturing process that produces the kit, not the contractor that manufactures or assembles it on the work site. Thus, transportation costs to the work site should not be considered. In this context, the place of incorporation does not mean the place of incorporation into the infrastructure project, but the place at which the manufacturer established the elements of the kit to be acquired for the infrastructure project.

Section 184.4(f)—Application of the Buy America Preference by Category

Some commenters urged OMB to apply the standard for iron and steel products to the components and subcomponents of other product categories. For example, one commenter suggested that the iron and steel standard should be applied directly to components and subcomponents of manufactured products and construction materials. The commenter noted that BABA explicitly states, under one of the prongs for the term ''domestic content procurement preference,'' that no Federal financial assistance may be obligated for a project unless ''all iron and steel used in the project are produced in the United States.'' Based on this language, the commenter believed that BABA requirements should apply directly to iron and steel components and subcomponents of other product categories.

Some commenters also had questions and comments regarding what domestic content preference should apply to coatings. Some of these commenters observed that if galvanized coatings were to require domestic sources of zinc ingots, there could be substantial problems with sourcing.

OMB Response: In § 184.4(f), OMB explains that an article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified. This provision was added to address concerns from commenters that it was unclear which standard, if any, should be applied to components of items that do not match the product category that the item is classified in.

For example, in the case of iron and steel products, there is no restriction on the place of production or manufacture of components or subcomponents that do not consist of iron or steel. In the case of construction materials, there is no restriction on the place of production or manufacture of minor additions, or the materials used for additions specifically described in the standards at § 184.6, such as coatings for non-ferrous metals.

An additional example could be a steel guardrail consisting predominantly of steel, but coated with aluminum. In this case, the steel must be produced in the U.S., consistent with the requirements of BABA, but there would be no restrictions on the other components of the guardrail.

Section 184.5: Determining the Cost of Components for Manufactured Products

Many commenters provided opinions on the definition of ''cost of components'' in § 184.5. Some commenters suggested continuing to use the definition as provided under the FAR. Some of those commenters indicated that the definition should include a statement that the costs are based on a good faith estimate of the cost, as provided in the FAR in the context of ''predominantly iron and steel'' products.

Many commenters recommended adjusting the FAR definition, but removing the term ''contractor'' and replacing it with the term ''manufacturer.'' They noted that, in the case of Federal financial assistance, it is generally the manufacturer that would be in the best position to certify whether a product is manufactured in the U.S. One commenter explained that contractors are the entities that build the infrastructure facilities in the field with materials and products that have been manufactured or produced elsewhere. Even with job-produced materials such as Portland cement concrete, this commenter indicated that there are most often separate material producers. This commenter recommended using the term manufacturer with a definition that includes material producers.

Some commenters also expressed support for retaining use of the term ''contractor.'' For example, one commenter explained that many products are altered from their manufactured state before installation on an infrastructure project. Using an alternate subject like ''manufacturer'' could require additional definitions on what separates field alterations like cutting to size or drilling holes from more extensive modifications that would fall into the category of being manufactured.

At least one commenter recommend that OMB use both ''contractor or manufacturer'' as the appropriate subject. This commenter explained that circumstances exist in which equipment arrives to the work site as one piece and does not involve any work by the contractor other than installation. Other times, equipment may arrive in pieces that require assembly by the contractor. This commenter also recommended that the labor and overhead required for a contractor to assemble the equipment or system on the site be considered a part of the calculation of ''cost of components.''

Other commenters suggested replacing the term ''contractor'' with the term ''assistance recipient'' or ''vendor.'' In addition, some commenters suggested simply removing the term ''by the contractor'' from the definition.

Other commenters advocated for various other revisions to the ''cost of components'' test to include other costs, such as those associated with the manufacture or assembly (including machining and tooling) of the end product, research and development, intellectual property, freight and overhead, acquisition costs, and labor. Other commenters suggested that OMB should more clearly define the term ''overhead'' to avoid ambiguity.

Some commenters also suggested further adjustments to the definition in the proposed guidance. For example, some advocated removing the term ''construction materials'' from the definition. Other commenters objected to removing this term.

Some commenters also recommended that OMB incorporate the definitions for ''end product,'' ''component,'' and ''system'' from the FTA's Buy America regulations at 49 CFR 661.3. Alternatively, some commenters suggested that incorporating those definitions, and particularly the definition for ''end product,'' could cause further confusion for stakeholders.

Some commenters also question whether OMB should use the FAR definition at all. These commenters suggested considering other standards for the cost of components test, such as the standard used for ARRA implementation. Finally, some commenters requested that OMB clarify the treatment of ''kits'' or similar concepts under the revised guidance.

OMB Response: OMB agrees with commenters who recommended using the term ''manufacturer'' in this context. OMB separately defines that term in § 184.3 of the guidance to mean the entity that completes the final manufacturing process that produces a manufactured product. As products are classified based on their status when brought to the work site, this refers to the final manufacturing process that occurred before that point in time. How this term should be applied in the case of ''kits'' is described above under § 184.4(e).

With the exception of replacing the term ''contractor'' with ''manufacturer'' and the term ''end product'' with ''manufactured product,'' OMB adheres closely to the FAR definition. OMB believes this choice will promote uniformity and predictability for stakeholders and ensure that similar provisions are applied for both Federal procurement contracts under the FAR and Federal financial assistance under part 184.

OMB also notes that labor costs associated with the manufacturing of the manufactured product are not included in the costs of components

test, which is consistent with the approach under the FAR. For components manufactured by the contractor, the FAR standard specifically excludes ''any costs associated with the manufacture of the end product.'' OMB follows this approach in the case of components manufactured by the ''manufacturer.''

Section 184.6: Construction Material Standards

Section 184.6(a)(1)—Standard for Non-Ferrous Metals

Several commenters emphasized that OMB should not modify the definition of ''produced in the United States'' that OMB provided in § 184.6 of the preliminary guidance for non-ferrous metals. One commenter emphasized that ''all manufacturing processes'' for non-ferrous metals, in the context of aluminum, should capture the smelting and casting process. Several other commenters emphasized that OMB should consider ''final assembly'' to be a part of the manufacturing process as manufacturers add ''real-world value'' at that stage of production.

However, several other commenters suggested revisions to the proposed standard. Some commenters sought more clarity without providing specific feedback or suggestions. Other commenters focused on specific parts of the production process. One commenter noted that the phrase ''initial smelting or melting'' could cause confusion if not explained further. In particular, that commenter sought feedback on whether this provision covered the rolling process. Another commenter suggested that OMB replace the ''initial smelting'' requirement with a ''last melting'' requirement.

One commenter suggested that OMB adopt a completely different framework for determining the ''manufacturing process.'' That commenter suggested that OMB determine the manufacturing process based on the existing United States-Mexico-Canada Agreement (USMCA) Rules of Origin criteria of ''substantial transformation'' for assessing qualification for domestic preference procurement. According to this commenter, OMB should consider a non-ferrous metal to be ''produced in the United States'' if the process that causes a corresponding shift in a material's 4-digit Harmonized Tariff Schedule (HTS) code classification occurs in the U.S.

Several commenters suggested that the definition of ''produced in the United States'' for non-ferrous metals should be expanded to include any manufacturing processes that occur ''in the United States and/or Canada.'' To justify this decision, one commenter cited the statutory language in the 1950 U.S. Defense Production Act, which considers both the U.S. and Canada to be a ''domestic source.'' This commenter noted that Canada and the U.S. share a highly integrated aluminum market. Domestic aluminum producers rely on a mix of domestic, Canadian, and globally sourced primary aluminum, of which 75 percent represents U.S. imports. Another commenter cited logistical concerns, noting that many companies that supply non-ferrous metals to the U.S. operate on both sides of the border between the U.S. and Canada. This commenter warned that manufacturers may have a hard time accounting for where the production has occurred and flagged that manufacturers often comingle inventory, making it difficult to trace the origin of specific products.

Some commenters noted that ''non-ferrous metals'' is a broad category. Consequently, as written, it may capture non-ferrous metals whose components are not produced domestically, such as zinc. OMB did not receive specific significant comments on other types of non-ferrous metals, such as nickel, tin, or titanium.

OMB Response: OMB notes that it has not made any revisions to § 184.6 for ''non-ferrous metals'' compared to the preliminary guidance. The definition of ''produced in the United States'' for non-ferrous metals is: ''All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.''

OMB believes that this standard accurately reflects the discrete manufacturing processes used in the production of non-ferrous metals. In general, commenters agreed that ''melting,'' where the ore of a non-ferrous metal is converted into a liquid, and ''smelting,'' where the ore is converted into its purest form, are the beginning of the manufacturing process. Similarly, commenters who addressed it agreed that ''assembly'' represented the end point of the manufacturing process. However, OMB has chosen to not offer additional granularity. As one commenter noted, non-ferrous metals is a broad category. Non-ferrous metals can be produced in many forms across residential, commercial, and industrial applications, ranging from wires to piping to roofing.

As written, § 184.6(a)(1) already covers any manufacturing processes involved in the manufacturing of non-ferrous metals that occur between the initial smelting or melting and final assembly. OMB believes that this would logically cover rolling—the process in which a non-ferrous metal is passed through one or more pairs of rolls to reduce the thickness or to achieve uniform thickness. OMB is concerned that expressing more specific processes would imply that those not provided are by default excluded from the manufacturing process, and thus the requirement to be ''produced in the United States.''

In terms of where the manufacturing process begins and ends, OMB notes that the statutory text of section 70912(6)(C) states that ''in the case of construction materials, that *all* manufacturing processes for the construction material occurred in the United States'' (emphasis added). While OMB recognizes that several commenters had noted separate stages of the process where the ''manufacturing process'' could begin or end, OMB believes it does not have flexibility to distinguish between ''initial'' and ''final'' stages of the same process, as with melting/smelting. Given the explicit statutory requirement that all manufacturing processes occur in the U.S., OMB believes that it must include all processes that industry has recognized.

One commenter expressed a concern that a lack of existing domestic capacity would make it difficult to produce certain types of non-ferrous metals, such as zinc, in the United States. In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Non-ferrous metals are included on that list and OMB includes that term in the revised guidance without modification. However, OMB also notes that Congress also provided an established waiver process to address concerns, including those related to supply chain availability.

Section 184.6(a)(2)—Standard for Plastic and Polymer-Based Products

One commenter suggested modifications to the definition of ''plastic and polymer-based products.'' Specifically, the commenter suggested adjusting the definition to include all manufacturing processes, including a reference to ''plastic or polymer-based fibers or filaments.'' Another commenter argued that the definition of ''plastic and resin'' is sufficient, noting that as long as the composite material is made up of all plastic or resin, then creating a separate category for ''composite building materials'' was not needed.

This commenter added that the term ''composite material'' is vague and could be interpreted differently by stakeholders. Further comments on the standard for the proposed category of composite building materials, which is eliminated in the final guidance, are addressed below.

OMB Response: OMB notes that it has made minor revisions to the standard in § 184.6(a)(2) for ''plastic and polymer-based products.'' The definition of ''produced in the United States'' for plastic and polymer-based products is: ''All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.'' OMB believes that this standard accurately reflects the discrete manufacturing processes used in the production of plastic.

The statute requires ''all manufacturing processes'' to occur in the U.S. and directs OMB to define all manufacturing processes. OMB requested comment on the definition in its proposed guidance, which aimed to ensure all manufacturing processes were captured in a manner consistent with the statute and that would be administrable and well understood by manufacturers and industry participants. Based on review of comments, OMB believes the standard laid out in the final guidance follows this statutory requirement.

OMB recognizes that many commenters were confused by the reference to ''composite building materials.'' As discussed below, that category of construction material has now been reintegrated into the broader category of plastic and polymer-based products. Although the broader plastic and polymer category incorporates an element of the standard for composite building materials—referring to ''constituent composite materials''—into the standard for plastic and polymer-based products, OMB notes that the category itself remains limited to plastic and polymer-based products. As discussed in § 184.3 above, the standard should only be applied to a product comprised primarily of inputs of plastics and polymers, although such a product may also include minor additions of other materials.

Section 184.6(a)—Standard for Composite Building Materials (Eliminated as Standalone Material)

Many commenters indicated that additional guidance was needed on ''composite building materials'' and how OMB intended to distinguish them from ''plastic and polymer-based products'' in general. Some commenters suggested that providing examples of composite building materials would also be useful. One commenter noted that these terms do not have standard industry meanings and vary between manufacturers and States. Several commenters recommended that OMB treat composite building materials as a subset of plastic and polymer-based products rather than defining it separately and providing a separate manufacturing standard. If treated as its own stand-alone category, commenters feared that the term could inadvertently incorporate a wider range of products than what was intended by law.

Other commenters supported the definition of composite building materials, as provided in the proposed guidance. These commenters believed that the production process for such products includes the combination of raw material inputs and the molding of the composite product, which is analogous to the ''all manufacturing processes'' origin standard applied to iron and steel under certain existing Buy America laws.

OMB Response: OMB has deleted the standard for composite building materials from the revised guidance. As recommended by numerous commenters, plastic or polymer-based composite building materials are instead treated as a subset of plastic or polymer-based products. OMB recognizes that without further guidance it may have been difficult to distinguish between these items. Thus, the standard in § 184.6 for plastic or polymer-based products applies to plastic or polymer-based composite building materials under the revised guidance.

Section 184.6(a)(3)—Standard for Glass

In general, most commenters did not suggest any revisions to OMB's proposed definition of ''produced in the United States'' for glass. However, one commenter warned that it believed that domestic industry for glass beads could not currently meet the proposed definition of ''produced in the United States'' for glass. In particular, that commenter focused on the fact that the process, as proposed, would include ''the batching and melting of raw materials.'' This commenter noted that existing firms cannot quickly move their entire manufacturing process to the U.S. Because the production process involves proprietary and unique manufacturing processes—which no domestic firm currently conducts in the U.S.—this commenter warned that the proposed standards would hamper the production process for certain glass products. Another commenter noted that all glass ceramics, which it considered to be a superior material compared to tempered glass for certain types of products like fire exits, doors, and windows, are processed and produced internationally.

OMB Response: OMB notes that it has not made any revisions to § 184.6 for ''glass.'' The definition of ''produced in the United States'' for glass is: ''All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.'' OMB believes that these standards accurately reflect the discrete manufacturing processes used in the production of glass.

One commenter expressed a concern that a lack of existing domestic capacity would make it difficult to produce certain types of glass products, such as glass beads, in the U.S. In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Glass is included on that list and OMB includes that term in the revised guidance without modification. However, OMB also notes that Congress also provided an established waiver process to address any concerns, including those related to supply chain availability. Specifically, in the event that a Federal agency believes that (i) applying the domestic content procurement preference would be inconsistent with the public interest, (ii) construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality, or (iii) the inclusion of construction materials produced in the U.S. will increase the cost of the overall project by more than 25 percent, OMB notes that the head of that agency, under section 70914, can waive the BABA preference requirements.

Section 184.6(a)(4) and (5)—Construction Material Standards—Fiber Optic Cable and Optical Fiber

Commenters requested OMB to clarify the proposed standards for determining whether optical fiber and fiber optic cable are ''produced in the United States.'' In particular, commenters suggested that the standards should more accurately reflect industry standards and terminology. Other commenters noted that the OMB's ultimate standards must meet the statutory directives pertaining to the ''all manufacturing processes'' requirement, including that OMB provide ''clear and consistent market

requirements.'' Commenters thought it was important for OMB to eliminate ambiguity, where possible, so OMB could communicate clear signals to the market and to grantees in a way that supports investment in U.S. jobs and effective implementation of broadband infrastructure programs.

To better facilitate that process, several commenters detailed their understanding of the various steps of the production process for optical fiber and fiber optic cable that reflect industry standards and terminology. For the optical fiber, these steps include: (1) the making of the ''core'' or core rods, (2) the preform to provide various optical properties, and (3) the draw where the preform is heated, cooled, and then pulled through a draw tower to create a single strand of optical fiber. For fiber optic cable, these steps include: (1) the application of the buffer tube, (2) the stranding to reinforce and protect the cable, and (3) the jacketing to encase the stranded buffer tubes with a protective sheath or jacketing material.

Some commenters requested that OMB provide specific definitions of each step in the process to the extent that OMB updated its definitions in § 184.6 to reflect them.

Several commenters discussed in detail which steps of the manufactured process they thought should be included in § 184.6. In general, all commenters who proposed amendments to § 184.6 agreed that the manufacturing process for optical fiber should be through the ''completion of the draw,'' rather than ''stranding,'' which is a process that occurs later in the creation of the fiber optic cable. One commenter additionally suggested that OMB clarify that the drawing process involved soaking the fiber ''in deuterium gas.'' Separately, another commenter suggested defining the preform fabrication stage as fiber preform to reduce confusion and assist with the category determination of the construction material. While commenters were thus in general agreement about the manufacturing steps for optical fiber, commenters expressed different views on the appropriate manufacturing process for fiber optic cable.

At least two commenters generally agreed with OMB's proposed standards for fiber optic cable but recommended also including the making of the ''core.'' Other commenters noted that all the manufacturing processes for both optical fiber and fiber optic cable are currently performed in the U.S. Consequently, they argued that OMB must define ''all manufacturing processes'' to include each step because any narrower definition would deviate from the clear statutory requirement of BABA. Another commenter expressed a similar perspective, stating that the use of the word ''all'' to establish a 100 percent domestic content requirement at the outset of statutory implementation removes any discretion except through the waiver process.

In contrast, another commenter suggested that OMB revise the definition to include ''from and between the buffer tube extrusion to outer jacketing.'' This commenter noted that the manufacturing of optical preform, optical fiber (*e.g.,* draw), and optical cable are distinct, separate, and generally unrelated manufacturing processes. Each process generally occurs at different facilities and at different times. As such, optical preform and optical fiber manufacturing are each an input to the optical cable manufacturing process.

In addition, this commenter noted that—it believes—the industry as a whole would be unable to meet the Buy America preference and provide fiber optical cable to federally funded infrastructure projects based on the standards proposed in the preliminary guidance.

Two commenters suggested that OMB revise the definition for fiber optic cable to be based on the drawing of the optical fiber from the preform through jacketing. With this adjustment, the 2 CFR definition would specify that the manufacturing process, in which the polymer-based jacket is combined with binder yarns and other materials to form the cabled core, occur in the U.S., but the production of the polymers or yarns would not. In addition, the manufacturing process for the outer jacketing would occur in the U.S., but the production of other inputs, such as the aramid yarns, polymer-based tapes, and ripcords, would not.

Another commenter emphasized that no domestic manufacturer will be able to manufacture all the inputs at the more granular levels domestically based on OMB's proposed guidance. In addition, this commenter thought that competent and experienced broadband providers would be less likely to participate in Federal funding programs under the preliminary guidance, which will lead to more expensive builds with infrastructure that may be less capable and reliable. Another commenter also expressed concern that no manufacturer would likely invest the significant amount of capital over the course of several years to build complete preform making facilities because they would not produce fiber in time to supply fiber optic cable meeting the proposed guidance.

Another commenter that manufactures fused silica cylinders (or tubes) for fiber optic cables noted that it provides glass core rods to fabricate fiber optic ''preforms'' in the U.S. This commenter noted that the manufacture of fused silica cylinders, which is an input into optical fiber, should not be considered part of the ''manufacturing process'' under § 184.6.

Related to the above suggestions about existing domestic capacity, several commenters raised potential antitrust issues—which they argued would undermine Congress' goals of expansive broadband connectivity and job growth. One commenter stated that only a few companies can produce optical fibers and preforms in the U.S. and only a single manufacturer currently vertically integrates the cable production with complete preform fabrication in the U.S. that produces the type of optical fiber used in broadband and other infrastructure projects. According to this commenter, this would lead to increased prices due to this firm's market power and create a single point of failure—where disruptions could impede broadband installations.

Several commenters also asked for clarification on how the various manufacturing processes for construction materials interacted with each other.

A State department of transportation suggested that the manufacturing processes for optical fiber should reflect the reference to ''optic glass'' in section 70911(5). This commenter noted that only one set of manufacturing standards should apply to a particular product. For instance, standards applied to fiber optic cable and optical fiber should be separate from the standards applied to plastic and polymer-based products.

Another commenter stated that there is a fundamental disconnect between the rigid qualifying product definitions applying to ''glass,'' ''fiber optic cable,'' and ''optical fiber'' and the current realities of the marketplace for these critical broadband infrastructure inputs.

Another State department of transportation suggested that § 184.3 be revised to remove optical fiber as a separate construction material because the standards that OMB proposed for fiber optic cables in § 184.6 contained all the standards that OMB proposed for optical fiber in § 184.6.

Another commenter requested that OMB revise § 184.6 to clarify that the reference to ''all manufacturing processes'' in each construction material standard is intended to encompass only the manufacturing and assembly

processes to produce the relevant construction material and not any processes related to the production of, for example, constituent inputs or raw materials that may be used in the manufacturing and assembly of that construction material.

Another commenter expressed concern that BABA compliance could be prohibitively difficult and expensive to implement because some construction materials, such as fiber optic cable, may be comprised of multiple sub-components, each with its own distinct manufacturing and production processes, which could entail multiple supply chain layers.

A municipality suggested that the ''manufacturing processes'' standards should be consistent across polymer-based and glass components to avoid increased compliance costs and potential confusion. This commenter suggested that compliance will be easier if all ''fiber optic cabling'' is covered by a single rule.

Several commenters noted that the standards in § 184.6 for ''all manufacturing processes'' should not include simple assembly operations performed after the jacketing stage, including the process of cutting U.S.-made fiber optic cable to length and attaching *de minimis* parts such as connectors, which do not add significant value. One commenter pointed out that not including such operations would be consistent with customs rulings regarding fiber optic cable, which recognize that U.S.-made optical fibers are the ''essence'' of a fiber optic cable, and that ''simple assembly'' operations such as cutting fibers to length and adding connectors does not result in the substantial transformation of U.S.-made fiber optic cables.

OMB Response: After reviewing the record, OMB has refined the standards by which optical fiber and fiber optic cable will be considered ''produced in the United States'' under § 184.6. OMB has updated the definitions for both items. The definition of ''produced in the United States'' for fiber optic cable (including drop cable) is: ''All manufacturing processes, from the ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the U.S. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.'' The definition of ''produced in the United States'' for optical fiber is: ''All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the U.S.''

Based on careful consideration of comments, OMB believes that the revised standards more accurately reflect the discrete manufacturing processes used in the production of (a) optical fiber and (b) fiber optic cable, which uses finished optical fiber as an input. OMB has also defined fiber optic cable in a manner that avoids repeating the same steps involved in optical fiber, changing the beginning of the process from ''the initial preform fabrication stage'' to ''ribboning (if applicable).'' By modifying the standards to be consistent with current industry practice, OMB seeks to reduce confusion for stakeholders moving forward. For ''fiber optic cable'' in § 184.6(a)(4), OMB has not substantively modified the standard from the preliminary guidance. The text of the standard, however, now incorporates ''the standards for glass and optical fiber'' instead of trying to fit each individual standard into ''fiber optic cable.'' Based on industry feedback, OMB believes that the range of processes listed in the preliminary guidance is consistent with industry practice. However, for ''optical fiber'' in § 184.6(a)(5), OMB has replaced ''fiber stranding'' with ''the completion of the draw'' in the revised guidance to conform with industry understanding of the relevant manufacturing processes.

In terms of offering specific definitions for each specific step within § 184.6(a)(4) and (5), OMB defers to the awarding Federal agency if it believes that additional clarification is more appropriate. However, based on public comments that OMB received, OMB believes that there is a consistent, straightforward understanding among the industry of the definitions of the relevant terms that does not require further clarification by OMB.

OMB notes that the statutory text of section 70912(6)(C) states that ''in the case of construction materials, that *all* manufacturing processes for the construction material occurred in the United States'' (emphasis added). While OMB recognizes that several commenters had noted separate stages of the process where the ''manufacturing process'' could begin or end, OMB believes it does not have flexibility to set these terms. Given the explicit statutory requirement that *all* manufacturing processes occur in the U.S. and rough industry consensus from several of the largest domestic manufacturers on what those processes are, OMB believes that it must include all processes that industry has recognized, from the manufacturing process for ''glass'' and ''initial preform'' through ''stranding and jacketing.''

Where relevant, OMB notes that a Federal agency also has the waiver process to address concerns, including with respect to product availability.

To provide further guidance on which standards in § 184.6 apply to a particular material, OMB has added the following language as paragraph (b), which is discussed further below: ''Except as specifically provided, only a single standard under paragraph (a) of this section should be applied to a single construction material.'' OMB notes that, in its articulation of ''all manufacturing processes'' for fiber optic cable that it has also included ''the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.'' OMB believes that the additional language provides the level of clarity requested by the relevant commenters.

In terms of minor additions, OMB notes that it has amended the definition of ''construction material'' in § 184.3 to read: ''Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.'' OMB discusses this provision in the preamble above. Federal agencies may also provide further guidance on this topic. This may afford Federal agencies the opportunity to address at least some of the specific concerns raised above, such as regarding simple assembly operations that may be seen as being outside of the ''manufacturing process'' because they are considered minor additions.

Section 184.6(a)(6)—Standard for Lumber

One commenter noted that the lumber referenced in part 184 should include dimensional lumber only and not a combination of materials. The commenter requested additional clarification on this topic and to better define the originally-proposed construction material groupings. Similarly, another commenter suggested that instead of creating a separate category for engineered wood products, OMB may consider defining within the lumber definition or standard what materials are intended to be included.

Other commenters requested additional clarity on what is meant by ''lumber.'' For example, one commenter noted that lumber is a narrowly defined construction material and does not generally include engineered wood products, such as plywood, glulam, trusses, composite beams, and other engineered products, which some could interpret to be ''manufactured products,'' and not construction materials. Other commenters noted that

lumber should include ''dimensional lumber only'' and not a combination of materials.

OMB Response: OMB notes that it has not made revisions to the standard in § 184.6 for ''lumber.'' The definition of ''produced in the United States'' for lumber is: ''All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.'' Based on review of comments received, OMB continues to believe that this standard accurately reflects the discrete manufacturing processes used in the production of lumber. OMB notes that lumber is narrowly interpreted and does not generally include engineered wood products, such as plywood, glulam, trusses, or composite beams.

The statute requires ''all manufacturing processes'' to occur in the U.S. and directs OMB to define all manufacturing processes. OMB requested comment on the definition in its proposed guidance, which aimed to ensure all manufacturing processes were captured in a manner consistent with the statute and that would be administrable and well understood by manufacturers and industry participants. Based on review of comments, OMB believes the standard laid out in the final guidance follows this statutory requirement.

The approach taken is similar to the standard applied to the ''melted and poured'' manufacturing standard applied to iron or steel products. The standard recognizes the distinction between the original raw material input—such as ore or logs, which may be mined, grown or extracted elsewhere—and the beginning of a manufacturing process, which initiates the beginning of the process where constituent components are combined to produce the lumber brought to the work site and used on the infrastructure product.

Section 184.6(a)(7)—Standard for Drywall

One commenter expressed concerns about including lumber and drywall on the list of construction materials due to existing supply constraints for each of these materials. This commenter observed that drywall is a key component in residential construction. The commenter indicated that including drywall on the list could have deleterious effects on builders, contractors, housing providers, and others. The commenter suggested that the unintended consequences of adding products like drywall to the list were not well thought out. The commenter suggested that the implications could be far-reaching and negatively affect the housing industry. The commenter suggested that OMB should strongly encourage Federal agencies to propose BABA waivers for drywall.

Another commenter noted that drywall combines multiple materials into a final product, and thus could be considered a manufactured product.

OMB Response: OMB notes that it has not made revisions to the standard in § 184.6 for ''drywall.'' The definition of ''produced in the United States'' for drywall is: ''All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.''

BABA requires ''all manufacturing processes'' to occur in the U.S. and directs OMB to define all manufacturing processes. OMB requested comment on the definition in its proposed guidance, which aimed to ensure all manufacturing processes were captured in a manner consistent with the statute and that would be administrable and well understood by manufacturers and industry participants. Based on review of comments, OMB believes the standard laid out in the final guidance follows this statutory requirement.

Section 184.6(a)(8)—Standard for Engineered Wood

Several commenters, including several State and municipal entities agreed with OMB's proposed guidance that the standard for ''engineered wood products'' should be defined as: ''All manufacturing processes, from initial debarking through pressing, trimming, and sanding of glued sheets or boards, occurred in the United States.'' These commenters thought that no additional changes were needed.

However, two manufacturers in the industry sought more specific definitions for the manufacturing process of this category. To clarify this point, one of these commenters provided a summary description of the manufacturing of various engineered wood products including: (1) plywood, which is manufactured from sheets of cross-laminated veneer and bonded under heat and pressure with durable, moisture-resistant adhesives; (2) Oriented Strand Board, or OSB, which is manufactured from rectangular-shaped strands of wood that are oriented lengthwise and then arranged in layers at right angles to one another, laid up into mats, and bonded together with moisture-resistant, heat-cured adhesives; (3) I-joists, which is manufactured using sawn (wood that has been produced either by sawing lengthways or by a profile chipping process) or structural composite lumber flanges (laminated veneer lumber) and OSB webs, bonded together with exterior-type adhesives; (4) glued laminated timber, or glulam, which is composed of individual wood laminations, specifically selected and positioned in the timber based on performance characteristics and bonded together with durable, moisture-resistant adhesives; (5) cross-laminated timber, which is a panel consisting of several layers of lumber or structural composite lumber stacked in alternating directions, bonded with structural adhesives, and pressed to form a solid, straight, rectangular panel and may be sanded or prefinished before shipping; and (6) structural composite lumber, which is created by bonding layers of dried and graded wood veneers or strands with moisture-resistant adhesive into blocks of material known as billets that are cured in a heated press and comes in many varieties.

Based on these descriptions, they argued that the proposed standard does not adequately address the manufacturing processes specific to structural engineered wood. These two commenters suggested that standard could instead be: ''All manufacturing processes that take place in facilities designated as SIC 2436 (Softwood Veneer and Plywood), SIC 2439 (Structural Wood Members, Not Elsewhere Classified), and/or SIC 2493 (Reconstituted Wood Products), from the initial combination of constituent materials until the wood product is in a form in which it is delivered to the work site and incorporated into the project, occurred in the United States.''

These commenters thought that the established Standard Industrial Classification (SIC) codes for these distinct subcategories of construction materials would ensure uniformity and consistency in the implementation of the Buy America preference. Additionally, one of the commenters thought that this definition would allow relevant combinatory processes for engineered wood including structural engineered wood to occur domestically, while also acknowledging that constituent materials such as fillers, adhesives, foil, laminates, web, and glues could be sourced, as needed, from outside the U.S.

OMB Response: OMB notes that it has added a new standard in § 184.6 for ''engineered wood.'' It has modified the standard based on provided feedback to address some of concerns raised by commenters. In the preamble of the proposed guidance, OMB proposed to define ''produced in the United States''

for engineered wood products as: ''All manufacturing processes, from initial debarking through pressing, trimming, and sanding of glued sheets or boards, occurred in the United States.'' In the revised guidance in § 184.6, OMB offers a new, and now modified, definition of ''produced in the United States'' for engineered wood to be: ''All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.''

OMB believes that this revised standard accurately reflects the discrete manufacturing processes used in the production of engineered wood. This definition was adjusted based on industry feedback, provided in public comments, and is derived from industry definitions (from SIC codes), which will help eliminate confusion and create consistency for stakeholders. However, OMB emphasizes that, because OMB added engineered wood as a logical extension of lumber, it only applies the construction material classification—and the requirement for the associated manufacturing processes to occur in the U.S.—on products that have lumber as an input. OMB also did not want to tie the definition to external metrics, such as SIC codes, which may change over time and require updated guidance from OMB.

Further, the revised standard is consistent with the statute, which requires ''all manufacturing processes be conducted in the United States'' and directs OMB to define all manufacturing processes. The final definition will ensure all manufacturing processes are captured in a manner consistent with the statute as well as in a manner that would be administrable and well understood by manufacturers and industry participants. The approach taken is similar to the ''melted and poured'' manufacturing standard applied to iron or steel products. The standard recognizes the distinction between the original raw material input—such as ore or logs, which may be mined, grown or extracted elsewhere—and the beginning of a manufacturing process, which initiates the beginning of the process where constituent components are combined to produce the end product brought to the work site and used on the infrastructure product.

Section 184.6(b)—Application of Standards by Listed Material

Some commenters raised concerns that BABA compliance could be prohibitively difficult and expensive to implement as some construction materials may comprise multiple sub-components, each with its own distinct manufacturing and production processes, which could entail multiple supply chain layers. These commenters suggested revising § 184.6 to clarify that the reference to ''all manufacturing processes'' in each construction material standard is intended to encompass only the manufacturing and/or assembly processes to produce the relevant construction material and not any processes related to the production of, for example, constituent inputs or raw materials that may be used in the manufacturing and/or assembly of that construction material.

OMB Response: In the revised guidance, § 184.6(b) explains that, except ''as specifically provided, only a single standard under paragraph (a) of this section should be applied to a single construction material.'' Without this language it could be unclear in some cases what standard, or how many standards, could apply to a single item.

To provide clarity and reduce burden for stakeholders, OMB believed it was important to explain through this paragraph specifically which of the eight standards listed in paragraph (a), or how many standards, may apply to a single construction material. The answer provided by this paragraph is that only one standard should apply, which best fits the item under consideration.

By adding this paragraph, OMB sought to avoid a situation in which it would be unclear which standards, or how many standards, apply to a single item with multiple construction materials as inputs. Composite items on the list—with inputs of other items—include at least fiber optic cable, optical fiber, engineered wood, and drywall. A logical way was needed to identify what standard applies to a single item. For cases in which more than one standard may apply to a single construction material, only the standard from the list in paragraph (a) that best fits the relevant article, material, or supply should be applied.

For example, in the case of fiber optic cable, the standards for non-ferrous metals, plastic and polymer-based products, glass, fiber optic cable, and optical fiber could all apply to a single item. Instead, under this approach, OMB now clarifies that, in the case of fiber optic cable, the standards for glass and optical fiber also apply, but not the standards for non-ferrous metals, plastic and polymer-based products, or any others. Fiber optic cable is the only standard that incorporates other standards.

Engineered wood is another example. Without this paragraph, the standards for plastic and polymer-based products, lumber, and engineered wood could all simultaneously apply to a single item. Paragraph (b) clarifies that only the single standard for engineered wood applies to a product falling in that category.

Section 184.7: Federal Awarding Agency's Issuance of a Buy America Preference Waiver—Waiver Process in General

Many commenters advocated for changes that would reduce the burden on industry to comply with BABA requirements, particularly for small and medium sized businesses. For example, some commenters noted that OMB should avoid creating new or different definitions that might create confusion, project delays, and increase project costs. Some commenters urged OMB to provide clarity in the guidance to ensure consistency among agencies in applying rules and implementing the guidance, particularly with regard to certifying the origin of certain products as well as the waiver process—including, for example streamlining and expediting the waiver process. Other commenters had more specific suggestions in this area, such as creating a website or database of BABA approved materials or manufacturers, as well as the granting of broad waivers for certain types of projects (for example, water projects), programs (for example, the BEAD program), or products (for example, COTS items).

Alternatively, several responses stated that the best way to reduce the burden on the industry is to preserve the existing body of regulations, interpretations, and determinations as much as possible, such as by using definitions already in use under the FAR or existing standards under Buy America.

OMB Response: OMB made some editorial changes, but has not otherwise made material changes to § 184.7. In § 184.7(d)(3), OMB notes that it revised the legal authorities it references to only include E.O. 14005 and section 70923(b) of BABA, which OMB considered sufficient for the purposes of this provision. OMB provides additional guidance on the waiver process in Memorandum M–22–11. OMB may consider offering additional guidance on this topic in the future. OMB also notes that Federal agencies have direct statutory authority to propose and issue waivers under section 70914(b) of BABA. Federal agencies may also offer further guidance on this topic in the future for their specific programs. Section 184.7(b) continues to instruct Federal agencies to provide waiver request submission instructions and

guidance on the format, contents, and supporting materials required for waiver requests from recipients.

Section 184.7(e)—Waivers of General Applicability

With regard to general applicability public interest waivers, one commenter supported the language in the guidance that provides the flexibility for agencies, such as NTIA, to waive BABA restrictions for projects of less than $250,000.

Other commenters raised concerns about the breadth and frequency of public interest waivers issued by various agencies since BABA took effect, noting that these waivers are unnecessary and inconsistent with the objectives of Congress and the Administration for BABA implementation. These commenters noted that these types of waivers should only be issued sparingly.

OMB Response: OMB agrees that, under certain circumstances, general applicability waivers may be found by Federal agencies to be in the public interest. For example, they may create efficiencies or ease burdens for recipients. The purpose of this paragraph of part 184 is to recognize the longer comment period set forth at section 70914(d) for review of waivers of general applicability. OMB has not made any changes to this section of the guidance, which continues to remind Federal agencies of the need to provide a comment period of not less than 30 days on a proposal to modify or renew a waiver of general applicability.

Section 184.8: Exemptions to the Buy America Preference

Some commenters suggested including an exemption in § 184.8 for commercially available off-the-shelf (COTS) products. One commenter suggested that the exemption could cover COTS items costing in the aggregate up to 5 percent of total project costs used under the Federal award.

Another commenter suggested that § 184.5 or § 184.8 should include an exemption for materials, tools, or other items that are not permanently incorporated into the infrastructure project.

Other commenters suggested adding a new paragraph to § 184.8 stating that section 70917(c) materials, and any combination of these materials, such as concrete or asphalt mix, are excluded from BABA coverage.

Another commenter urged OMB to include a new paragraph in § 184.8 stating that the Buy America Preference does not apply to for-profit organizations as defined in 2 CFR 25.425.

OMB Response: OMB has retained the proposed language in § 184.8.

Regarding the comment requesting a COTS exemption, OMB notes that the waiver process, not part 184, would be the appropriate mechanism to address concerns on this topic. OMB observes that Federal agencies have not previously found such a waiver to be in the public interest, but COTS items may potentially fall under other public interest waivers that agencies have issued, such as *de minimis* or minor component waivers as described in Memorandum M–22–11.

Regarding the distinction between temporary use and permanent incorporation, OMB has addressed that topic in other sections of the preamble. OMB's existing guidance on that topic is available in Memorandum M–22–11. OMB also addresses the topic of the application of BABA to for-profit entities above in this preamble.

Section 200.322: Domestic Preferences for Procurements

One commenter indicated that 2 CFR 200.322 should be updated to reflect uniform language across the government referring to all efforts as Buy America or Buy American. The commenter suggested that even the terms Buy American or Buy America should be uniform. The commenter preferred the term Buy America because of its use in BABA. Therefore, the commenter stated that 2 CFR 200.322 should be retitled as ''Buy America Preference.''

Another commenter stated that the **Federal Register** document dated March 9, 2023 (88 FR 14514), correcting the **ACTION** line or caption of the proposed guidance to clarify its nature as ''guidance,'' calls into question the validity of the proposed addition of 2 CFR 200.322(c). The commenter observed that use of the term ''must'' as part of a 2 CFR part 200 indicates this is a rule, particularly in light of the fact that 2 CFR part 200 has been adopted as a rule by the individual Federal agencies. The commenter noted that U.S. DOT has adopted 2 CFR part 200 in 2 CFR part 1201. On the theory that this is a rule, the commenter stated that the revision of 2 CFR 200.322(c) failed to meet procedural requirements for notice and comment before adoption.

OMB Response: OMB has explained the distinction between the BAA and BABA in this document above. OMB does not believe that additional revisions to 2 CFR 200.322 are needed on this topic.

Regardless of the label provided in the **ACTION** line by the Office of the Federal Register, the OMB guidance ''published in subtitle A [of 2 CFR],'' which OMB modifies here, ''is guidance and not regulation.'' 2 CFR 1.105(b). ''Publication of the OMB guidance in the CFR does not change its nature—it is guidance and not regulation.'' *Id.* This is consistent in this instance with the text of BABA, which instructs OMB to issue guidance and standards, which may include amending ''subtitle A of title 2, Code of Federal Regulations (or successor regulations).'' BABA 70915(a)(2). In addition, OMB notes that the rulemaking requirements at 5 U.S.C. 553 do not apply to guidance on grants. *See* 5 U.S.C. 553(a)(2). In all events, OMB has followed notice and comment procedures with respect to this guidance that are consistent with the procedures that would be required were this a rule subject to 5 U.S.C. 553.

OMB notes that the revised text in 2 CFR 200.322 includes a revision from the proposed version. Instead of stating that ''Federal agencies providing Federal financial assistance for infrastructure projects must comply with the Buy America preferences set forth in 2 CFR part 184,'' the revised text now states that Federal agencies must ''implement'' such provisions.

Other Comments—Waivers or Exemptions for International Trade Obligations

Several commenters asked how the implementation of BABA would interact with the various trade obligations of the U.S. through the Trade Agreements Act (TAA), such as the World Trade Organization Agreement on Government Procurement (WTO–GPA). One commenter noted that BABA implementation should consider the international obligations of the U.S. and trade agreements and not undermine U.S. competitiveness in global markets. Several commenters noted the benefits of these international and trade obligations, including the governments of Korea and British Columbia. Several commenters raised concerns that the proposed guidance, as written, could lead to confusion and barriers to trade that would lead to delays and product shortages for American importers, including the United Kingdom of Great Britain and Northern Ireland (UK). These commenters also feared that any failure to comply with free trade agreements could initiate dispute settlement proceedings or other corresponding action to limit U.S. access to foreign government procurement. Several commenters inquired whether the proposed guidance differs from specific parts of the FAR, such as FAR 52.225–11, in

terms of requiring a cost component test, because the proposed guidance does not have comprehensive exemptions and flexibility. One commenter noted that agricultural products are subject to unique trade requirements.

Several commenters noted that certain components critical to infrastructure projects are still not produced in the U.S., but are available from suppliers in TAA countries. In particular, commenters noted that insufficient domestic labor supply may make it difficult to fill manufacturing jobs without relying on TAA countries.

Several commenters, including from the European Union (EU), UK, and the Government of Quebec, requested that the guidance explicitly state that BABA preferences will be ''applied in a manner consistent with United States obligations under international agreements,'' repeating the language found in section 70925 of BABA and Memorandum M–22–11. The Governments of the UK and Quebec, for example, suggested that lack of clarity may discourage foreign suppliers from bidding for opportunities in the U.S. without explicit reassurances.

These commenters noted several other areas where the U.S. has previously iterated its intentions to comply with international agreements. One commenter stated that, because Memorandum M–22–11 had reiterated this statutory directive, the proposed rules should do the same. The EU and UK Governments noted that the ARRA provision included similar language, citing 2 CFR 176.70 and 176.90 (''[ARRA] shall not be applied where the iron, steel, or manufactured goods used in the project are from a Party to an international agreement'').

Another commenter stated that the Office of the U.S. Trade Representative had, with respect to government procurement, waived Buy America requirements for eligible products from numerous designated countries where it would serve the interests of the U.S., including those from parties to the WTO–GPA, parties to most U.S. free trade agreements, certain least-developed countries, and certain Caribbean Basin countries. A separate commenter noted that the U.S. Department of Commerce's and the U.S. Department of Homeland Security's ''Assessment of the Critical Supply Chains Supporting the U.S. Information and Communications Technology Industry'' recommended that all Buy America programs be ''consistent with U.S. international trade obligations'' and include ''tolerances for assembly in allied or partner nations.'' Commenters from the broadband industry specifically cited that the Rural Utilities Service (RUS) ReConnect Program and other existing programs have included exceptions for U.S. global partners and allies. One commenter noted that its experience with prior Buy America clauses and preferences had also not been straightforward.

While some commenters wanted OMB to just add the ''applied in a manner consistent with U.S. obligations under international agreements'' language explicitly in BABA and M–22–11, other commenters thought that would be insufficient and wanted OMB to add additional language to address these concerns. Several commenters asked OMB to clarify that ''designated countries'' under the TAA are deemed to satisfy the BABA requirements and products manufactured in those countries would be treated as if they are manufactured in the U.S. The National Electrical Manufacturers Association (NEMA) suggested that this list include USMCA countries, EU member states, the UK, and Indo-Pacific Economic Framework partners. Alternative proposals included that OMB either (1) apply the existing USMCA Rules of Origin criteria for assessing qualification for domestic preference procurement or (2) treat Canada as a domestic source, similar to the Defense Production Act.

Other commenters alternatively advocated for granting waivers for components produced in such TAA countries. For instance, the Conseil de l'industrie forestière du Québec (CIFQ) and the Ontario Forest Industries Association (OFIA)—trade associations representing Canadian lumber mills in the provinces of Quebec and Ontario, respectively—argued that Canadian lumber should be subject to a ''public interest'' waiver because of several trade agreements between the U.S. and Canada, history, economic necessity for the availability of construction materials, and the broad public interest. The EU suggested that the final guidance clarify that BABA requirements do not apply to government procurement covered by the obligations of the U.S. under international agreements.

Several commenters noted that many states are members of the WTO–GPA and, as a result, have independent trade obligations, which may prohibit those states from discriminating against manufactured products and components from designated countries in conducting their own procurements. Some of these commenters suggested that OMB should require provision of a waiver for products from countries that have signed an international trade agreement with the U.S. Others noted that the waiver process is too onerous and requested that OMB should instead clarify in its final guidance that a recipient of Federal financial assistance can comply with domestic content requirements if they incorporate such products in an infrastructure project in accordance with the BABA without the need for a waiver.

Separately, some commenters noted that OMB has generated confusion because of the varying terms, acronyms, and common names that have been implemented across the Federal agencies and within funding agencies. For example, it listed that there is the ''Build America, Buy America Act'' (BABA), ''Buy America Act'' (BAA), ''Buy America Act with Trade Agreements Act (BAA/TAA), ''American Iron and Steel'' (AIS), and ''Buy America Requirements'' (BAR).

OMB Response: Several commenters expressed concern that OMB did not explicitly include in its part 184 guidance that the Buy America preference ''shall be applied in a manner consistent with United States obligations under international agreements.'' OMB notes that BABA provisions will be applied in a manner consistent with U.S. obligations under international agreements, as provided in section 70914(e) of BABA. OMB has not modified its existing guidance on this topic.

As explained above—and to avoid confusion and remove ambiguity on this topic—OMB reiterates that it is not rescinding its initial guidance to Federal agencies under Memorandum M–22–11. The provisions in OMB's initial guidance on this topic remain in effect. OMB explains in Memorandum M–22–11 that, pursuant ''to section 70914(e) of [BABA], [OMB's] guidance [on BABA] must be applied in a manner consistent with the obligations of the United States under international agreements.'' Memorandum M–22–11 also explains that if ''a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest.'' Memorandum M–22–11 also explains that all proposed waivers citing the public interest as the statutory basis must include a detailed written statement, which shall address all appropriate factors, ''such as potential obligations under international agreements.''

By not including those provisions in part 184, OMB did not rescind its initial guidance to Federal agencies on this

topic. The language in Memorandum M–22–11 remains effective guidance from OMB to Federal agencies. The language does not conflict with the text of part 184, but supplements it, providing further context on waivers that Federal agencies may propose.

OMB intends to include similar language on this topic in the next iteration of Memorandum M–22–11, which will be issued to update other areas that directly conflict with part 184. Part 184 does not conflict with language in Memorandum M–22–11 on international agreements. As OMB also explains above, its guidance to Federal agencies in part 184 is not intended as comprehensive guidance on all topics, but high-level coordinating guidance to be used by Federal agencies in their own direct implementation of BABA. At this time, OMB has not included that language directly in part 184, but has not modified its initial policy.

The Made in America Office also issued a separate fact sheet within the last year that discusses how the TAA applies to both direct Federal procurement under the FAR and domestic content preferences for Federal financial assistance. *See* ''Fact Sheet on Buy American (BAA) or Buy America,'' Made in America Office (2022) (Fact Sheet).[1] The Fact Sheet recognizes that the ''BABA provisions apply in a manner consistent with United States obligations under international agreements.'' It further explains, however, that ''*Federal financial assistance* awards are generally not subject to international trade agreements because these international obligations only apply to direct federal *procurement* activities by signatories to such agreements'' (emphasis added). The FAR addresses how international trade agreements implemented by the TAA apply to direct Federal procurement activities of the U.S. at FAR subpart 25.4. *See also* FAR 25.1101, 25.1103, and 52.225–5. The Fact Sheet also provides general information on how the TAA applies to direct Federal procurement activities.

In the case of Federal financial assistance, the Fact Sheet also recognizes that ''a number of [U.S.] States have opted to obligate their procurement activities to the terms of one or more international trade agreements, and as such, are included in schedules to the international trade agreements.'' The Made in America Office explains in the Fact Sheet that Federal ''agencies may propose waivers in the public interest to allow State entities to comply with their international trade obligations.'' For additional information, the Fact Sheet also suggests consulting with ''the State in question or the [Federal] agency providing the funds.''

For States with international trade obligations, which are the recipients of Federal funds, OMB notes that the head of a Federal agency that applies a BABA preference to Federal awards may propose to waive BABA requirements by following the procedures in § 184.7 of the revised guidance in part 184. *See also* BABA 70914(b) (authorizing ''the head of a Federal agency that applies a domestic content procurement preference'' to issues waivers). The initial guidance in Memorandum M–22–11 provides additional information on this topic. Waivers may also be proposed in other circumstances, such as if items critical to infrastructure projects are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality.

The IIJA recognizes that public interest waivers are an appropriate mechanism to allow Federal financial assistance recipients to meet obligations under international agreements. Section 70937(c)(2)(C) of IIJA recognizes that public interest waivers may be justified to allow recipients to satisfy ''potential obligations under international agreements.'' That section applies to ''a request to waive a Buy American law,'' which is defined broadly at section 70932(1) of IIJA to include ''any law . . . relating to Federal contracts, grants, or financial assistance that requires or provides a preference for the purchase or use of goods, products, or materials mined, produced, or manufactured in the United States,'' which includes the BABA preference.

OMB also observes that, in the case of Federal financial assistance under BABA, only Federal agencies that directly apply the BABA preference to Federal awards are authorized to issue waivers—not OMB directly on behalf of those agencies. BABA 70914(b). This waiver authority differs from the waiver authority under the TAA, which authorizes the ''President [to] waive, in whole or in part, . . . the application of any law, regulation, procedure, or practice regarding Government procurement.'' 19 U.S.C. 2511(a). The FAR explains that the President has delegated this waiver authority for direct Federal procurement activities to the U.S. Trade Representative, which has waived the BAA statute for eligible products. *See* FAR 25.402. By contrast, in the context of Federal financial assistance under BABA, it is the responsibility of the head of a Federal agency that directly applies the BABA preference to Federal awards to provide waivers. BABA 70914(b).

OMB may consider issuing further guidance on this topic in the future, but for now believes that the waiver process remains an appropriate mechanism—which is consistent with congressional intent in BABA and related sections of the IIJA—to allow recipients to satisfy international trade obligations, where applicable.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)

Executive Orders (E.O.s) 12866, 13563, and 14094 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The OMB Guidance for Grants and Agreements published in subtitle A of 2 CFR is guidance to Federal agencies and not regulation. 2 CFR 1.100(b). OMB has thus determined that the revision of 2 CFR is not a significant regulatory action under E.O. 12866, as amended.

Regulatory Flexibility Act

This revised guidance has been reviewed with regard to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) (RFA). The RFA only applies to a final rule promulgated under 5 U.S.C. 553, after being required by that section or any other law to publish a general notice of proposed rulemaking. The rulemaking requirements at 5 U.S.C. 553 do not apply to guidance on grants.

Even if this guidance were subject to the RFA, courts have explained that the requirement under the RFA to analyze effects on small entities only applies to direct effects. Small entities that may be impacted indirectly, but not directly, are not subject to analysis under the RFA. *See Nat'l Women, Infants, & Child. Grocers Ass'n* v. *Food & Nutrition Serv.,* 416 F. Supp. 2d 92, 109–10 (D.D.C. 2006). The revised guidance does not, in and of itself, directly impact small entities. Rather, as explained throughout this document, the new part 184 is directed toward Federal agencies, providing them with coordinating guidance on implementing BABA when obligating Federal awards for

[1] *https://www.madeinamerica.gov/media/documents/buy-american-vs-buy-america-fact-sheet.pdf.*

infrastructure. Under BABA, individual Federal agencies are directly responsible for implementing the statutory Buy America preference. *See* BABA 70914(a). Individual Federal agencies are also authorized to issues waivers of the Buy America preference. *See* BABA 70914(b). OMB does not have direct authority to do either under BABA. In this case, small entities that could be impacted by OMB's revised guidance will only be impacted indirectly by agency-specific implementation of the requirement under BABA 70914(a). Federal agencies retain considerable flexibility regarding the manner of implementing BABA section 70914(a), including the authority to issue public interest waivers under section 70914(b). Therefore, although this guidance is exempt from the requirements of the RFA, OMB certifies that it will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This revised guidance would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This revised guidance would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $168 million or more in any one year (2 U.S.C. 1532). In addition, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. Federal financial assistance programs for infrastructure generally permit this type of flexibility.

Executive Order 13132 (Federalism Assessment)

This revised guidance has been analyzed in accordance with the principles and criteria contained in E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999). OMB has determined that this revised guidance would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Buy America preference established in BABA is inherently national in scope and significance. Regardless, in accordance with section 4(d) of E.O. 13132, OMB, through the Made in America Office, has, to the extent practicable, consulted with appropriate State and local officials that may be affected by Federal agencies' implementation of OMB's revised guidance. OMB weighed those interests carefully in finalizing its revisions to the guidance, which balance the State interests with the need to provide Federal agencies with consistent, uniform, efficient, and transparent guidance on the Buy America preference in BABA.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. This guidance does not contain a requirement for information collection and thus the Paperwork Reduction Act does not apply.

Executive Order 13175 (Tribal Consultation)

OMB has analyzed this revised guidance in accordance with the principles and criteria contained in E.O. 13175, ''Consultation and Coordination with Indian Tribal Governments,'' 65 FR 67249 (Nov. 9, 2000). The new part 184 provides revised guidance to Federal agencies on applying the Buy America preference required under section 70914 of BABA to Federal awards for infrastructure. Through Memorandum M–22–11, OMB explained that, before applying a Buy America preference to a covered program that will affect Tribal communities, Federal agencies should follow the consultation policies established through E.O. 13175, and consistent with policies set forth in the Presidential Memorandum of January 26, 2021, on Tribal Consultation and Strengthening Nation-Nation Relationships. Several agencies have also proposed and issued Tribal adjustment period waivers to ease transition for Tribal communities to the new rules and processes under BABA when receiving Federal awards. To the extent that the Buy America preference established under section 70914 of BABA is determined to preempt Tribal law, the statutory preemption issue should have been a subject of the consultations required under Memorandum M–22–11. To the extent that any such consultations have not yet occurred, Federal agencies should commence consultations without delay. Federal agencies may again consider proposing brief, time limited waivers to allow Tribal communities to transition to the revised guidance reflected in the new part 184 provisions.

Congressional Notification

OMB has concluded that the final guidance is not a ''rule'' within the meaning of 5 U.S.C. 804(3). Nevertheless, out of an abundance of caution, OMB is submitting it to each House of the Congress and to the Comptroller General consistent with the procedures set forth in 5 U.S.C. 801(a).

List of Subjects in 2 CFR Parts 184 and 200

Administration of Federal financial assistance, Administrative practice and procedure, Federal financial assistance programs.

For the reasons stated in the preamble, the Office of Management and Budget amends 2 CFR subtitle A as follows:

■ 1. Add part 184, consisting of §§ 184.1 through 184.8, to read as follows:

PART 184—BUY AMERICA PREFERENCES FOR INFRASTRUCTURE PROJECTS

Sec.

Authority: Pub. L. 117–58, 135 Stat. 429.

§ 184.1 Purpose and policy.

(a) *Purpose.* This part provides guidance to Federal awarding agencies on the implementation of the Buy America Preference applicable to Federal financial assistance set forth in part I of subtitle A, Buy America Sourcing Preferences, of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act (Pub. L. 117–58) at division G, title IX, subtitle A, part I, sections 70911 through 70917.

(b) *Policy.* The head of each Federal agency must ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the United States. *See* section 70914(a) of the Build America Buy America Act.

§ 184.2 Applicability, effective date, and severability.

(a) *Non-applicability of this part to existing Buy America Preferences.* This part does not apply to a Buy America Preference meeting or exceeding the requirements of section 70914 of the

Build America, Buy America Act applied by a Federal Awarding Agency to Federal awards for infrastructure projects before November 15, 2021.

(b) *Effective date of this part.* The effective date of this part is October 23, 2023. Except as provided in paragraph (c) of this section, this part applies to Federal awards obligated on or after its effective date. Awards obligated on or after May 14, 2022, the effective date of the Build America, Buy America Act, and before the effective date of this part, are instead subject to OMB Memorandum M–22–11.

(c) *Modified effective date of this part for certain infrastructure projects.* If an infrastructure project that has previously received a Federal award obligated on or after May 14, 2022, but before the effective date of this part receives an additional Federal award obligated within one year of the effective date of this part, the additional Federal award is subject to OMB Memorandum M–22–11. However, if significant design or planning changes are made to the infrastructure project, the Federal awarding agency may apply this part to the additional Federal award. Federal awards for an infrastructure project obligated after one year from the effective date of this part are subject to this part, regardless of whether this part applied to previous awards for the project.

(d) *Severability.* The provisions of this part are separate and severable from one another. OMB intends that if a provision of this part is held to be invalid or unenforceable as applied to a particular person or circumstance, the provision should be construed so as to continue to give the maximum effect permitted by law as applied to other persons not similarly situated or to dissimilar circumstances. If any provision is determined to be wholly invalid and unenforceable, it should be severed from the remaining provisions of this part, which should remain in effect.

§ 184.3 Definitions.

Acronyms used in this part have the same meaning as provided in 2 CFR 200.0. Terms not defined in this part have the same meaning as provided in 2 CFR 200.1. As used in this part:

Build America, Buy America Act means division G, title IX, subtitle A, parts I–II, sections 70901 through 70927 of the Infrastructure Investment and Jobs Act (Pub. L. 117–58).

Buy America Preference means the ''domestic content procurement preference'' set forth in section 70914 of the Build America, Buy America Act, which requires the head of each Federal agency to ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the United States.

Component means an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: a manufactured product; or, where applicable, an iron or steel product.

Construction materials means articles, materials, or supplies that consist of only one of the items listed in paragraph (1) of this definition, except as provided in paragraph (2) of this definition. To the extent one of the items listed in paragraph (1) contains as inputs other items listed in paragraph (1), it is nonetheless a construction material.

(1) The listed items are:

(i) Non-ferrous metals;

(ii) Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);

(iii) Glass (including optic glass);

(iv) Fiber optic cable (including drop cable);

(v) Optical fiber;

(vi) Lumber;

(vii) Engineered wood; and

(viii) Drywall.

(2) Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

Infrastructure project means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project. *See also* paragraphs (c) and (d) of § 184.4.

Iron or steel products means articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both.

Manufactured products means:

(1) Articles, materials, or supplies that have been:

(i) Processed into a specific form and shape; or

(ii) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

(2) If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material under § 184.4(e) and the definitions set forth in this section, then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product under § 184.4(e) and paragraph (1) of this definition may include components that are construction materials, iron or steel products, or section 70917(c) materials.

Manufacturer means the entity that performs the final manufacturing process that produces a manufactured product.

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.

Produced in the United States means:

(1) In the case of iron or steel products, all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) In the case of manufactured products:

(i) The product was manufactured in the United States; and

(ii) The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product. *See* § 184.2(a). The costs of components of a manufactured product are determined according to § 184.5.

(3) In the case of construction materials, all manufacturing processes for the construction material occurred in the United States. *See* § 184.6 for more information on the meaning of ''all manufacturing processes'' for specific construction materials.

Section 70917(c) materials means cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. *See* section 70917(c) of the Build America, Buy America Act.

§ 184.4 Applying the Buy America Preference to a Federal award.

(a) *Applicability of Buy America Preference to infrastructure projects.* The Buy America Preference applies to Federal awards where funds are appropriated or otherwise made available for infrastructure projects in the United States, regardless of whether infrastructure is the primary purpose of the Federal award.

(b) *Including the Buy America Preference in Federal awards.* All Federal awards with infrastructure projects must include the Buy America Preference in the terms and conditions. The Buy America Preference must be included in all subawards, contracts, and purchase orders for the work performed, or products supplied under the Federal award. The terms and conditions of a Federal award flow down to subawards to subrecipients unless a particular section of the terms and conditions of the Federal award specifically indicate otherwise.

(c) *Infrastructure in general.* Infrastructure encompasses public infrastructure projects in the United States, which includes, at a minimum, the structures, facilities, and equipment for roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.

(d) *Interpretation of infrastructure.* The Federal awarding agency should interpret the term ''infrastructure'' broadly and consider the description provided in paragraph (c) of this section as illustrative and not exhaustive. When determining if a particular project of a type not listed in the description in paragraph (c) constitutes ''infrastructure,'' the Federal awarding agency should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public.

(e) *Categorization of articles, materials, and supplies.* (1) An article, material, or supply should only be classified into one of the following categories:

(i) Iron or steel products;

(ii) Manufactured products;

(iii) Construction materials; or

(iv) Section 70917(c) materials.

(2) An article, material, or supply should not be considered to fall into multiple categories. In some cases, an article, material, or supply may not fall under any of the categories listed in paragraph (e)(1) of this section. The classification of an article, material, or supply as falling into one of the categories listed in paragraph (e)(1) must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project. In general, the work site is the location of the infrastructure project at which the iron, steel, manufactured products, and construction materials will be incorporated.

(f) *Application of the Buy America Preference by category.* An article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified.

§ 184.5 Determining the cost of components for manufactured products.

In determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, use the following instructions:

(a) For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(b) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the manufactured product.

§184.6 Construction material standards.

(a) The Buy America Preference applies to the following construction materials incorporated into infrastructure projects. Each construction material is followed by a standard for the material to be considered ''produced in the United States.''

(1) *Non-ferrous metals.* All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.

(2) *Plastic and polymer-based products.* All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.

(3) *Glass.* All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.

(4) *Fiber optic cable (including drop cable).* All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.

(5) *Optical fiber.* All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.

(6) *Lumber.* All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.

(7) *Drywall.* All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.

(8) *Engineered wood.* All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.

(b) Except as specifically provided, only a single standard under paragraph (a) of this section should be applied to a single construction material.

§184.7 Federal awarding agency's issuance of a Buy America Preference waiver.

(a) *Justification of waivers.* A Federal awarding agency may waive the application of the Buy America Preference in any case in which it finds that:

(1) Applying the Buy America Preference would be inconsistent with the public interest (a ''public interest waiver'');

(2) Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a ''nonavailability waiver''); or

(3) The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall infrastructure project by more than 25 percent (an ''unreasonable cost waiver'').

(b) *Requesting a waiver.* Recipients may request waivers from a Federal awarding agency if the recipient reasonably believes a waiver is justified under paragraph (a) of this section. A request from a recipient to waive the application of the Buy America Preference must be provided to the Federal awarding agency in writing. Federal awarding agencies must provide waiver request submission instructions

and guidance on the format, contents, and supporting materials required for waiver requests from recipients.

(c) *Before issuing a proposed waiver.* Before issuing a proposed waiver, the Federal awarding agency must prepare a detailed written explanation for the proposed determination to issue the waiver based on a justification listed under paragraph (a) of this section, including for waivers requested by a recipient.

(d) *Before issuing a final waiver.* Before issuing a final waiver, the Federal awarding agency must:

(1) Make the proposed waiver and the detailed written explanation publicly available in an easily accessible location on a website designated by the Federal awarding agency and the Office of Management and Budget;

(2) Except as provided in paragraph (e) of this section, provide a period of not less than 15 calendar days for public comment on the proposed waiver; and

(3) Unless the Director of OMB provides otherwise, submit the waiver determination to the Made in America Office in OMB for final review pursuant to Executive Order 14005 and section 70923(b) of the Build America, Buy America Act.

(e) *Waivers of general applicability.* Waivers of general applicability mean waivers that apply generally across multiple Federal awards. A Federal agency must provide a period of not less than 30 days for public comment on a proposal to modify or renew a waiver of general applicability.

§184.8 Exemptions to the Buy America Preference.

(a) The Buy America Preference does not apply to expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 16 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.

(b) ''Pre and post disaster or emergency response expenditures'' consist of expenditures for financial assistance that are:

(1) Authorized by statutes other than the Stafford Act, 42 U.S.C. 5121 *et seq.;* and

(2) Made in anticipation of or response to an event or events that qualify as an ''emergency'' or ''major disaster'' within the meaning of the Stafford Act, 42 U.S.C. 5122(1), (2).

PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 2. The authority citation for part 200 continues to read as follows:

Authority: 31 U.S.C. 503.

■ 3. Amend § 200.322 by adding paragraph (c) to read as follows:

§ 200.322 Domestic preferences for procurements.

* * * * *

(c) Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184.

Deidre A. Harrison,

Deputy Controller, performing the delegated duties of the Controller Office of Federal Financial Management.

[FR Doc. 2023–17724 Filed 8–22–23; 8:45 am]

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Part IV

Department of Agriculture

Food and Nutrition Service

7 CFR Parts 210, 215, 220, et al.
Child Nutrition Program Integrity; Final Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210, 215, 220, 225, 226, and 235

[FNS–2016–0040]

RIN 0584–AE08

Child Nutrition Program Integrity

AGENCY: Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: This action implements statutory requirements and policy improvements to strengthen administrative oversight and operational performance of the Child Nutrition Programs.

DATES:

Effective date: The provisions of this rulemaking are effective September 22, 2023.

Compliance dates: This rulemaking consists of multiple provisions. Compliance for each provision is referenced in the **SUPPLEMENTARY INFORMATION** section of this final rule and detailed in the section-by-section analysis.

FOR FURTHER INFORMATION CONTACT: Megan Geiger, Senior Technical Advisor, Program Monitoring and Operational Support Division—4th floor, USDA Food and Nutrition Service, 1320 Braddock Place, Alexandria, VA 22314 or at *megan.geiger@usda.gov.*

SUPPLEMENTARY INFORMATION:

Outline:

I. Child Nutrition Program Integrity Proposed Rule

A. Background

FNS cannot accomplish its mission to provide access to food, a healthful diet, and nutrition education in ways that inspire public confidence without a strong and sustained effort to ensure that integrity is always a priority in the administration of the Child Nutrition Programs. On March 29, 2016, FNS published a proposed rule, *Child Nutrition Program Integrity,* 81 FR 17564, *https://www.fns.usda.gov/cn/fr-032916,* to address criteria and procedures to strengthen administrative oversight and operational performance of the National School Lunch Program (NSLP), School Breakfast Program (SBP), Special Milk Program (SMP), Summer Food Service Program (SFSP), Child and Adult Care Food Program (CACFP), and State Administrative Expense Funds (SAE).

Many of the modifications proposed by FNS were based on amendments to the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1751 *et seq., https://www.fns.usda.gov/nsla-amended-pl-117-328,* mandated by the Healthy, Hunger-Free Kids Act of 2010, Public Law 111–296, *https://www.fns.usda.gov/pl-111-296,* including:

- Implementation of fines;
- Prohibition of participation of any terminated entity or terminated individual in any Child Nutrition Program;
- Termination and disqualification of SFSP sponsors and unaffiliated CACFP centers through extension of the serious deficiency process;
- Termination of permanent agreements of SFSP sponsors and CACFP institutions and facilities;
- More frequent reviews of CACFP institutions that are at risk of having serious management problems;
- State agency liability for payments when hearings for CACFP institutions are delayed; and
- Additional State agency funding for audits of CACFP institutions.

These provisions were added to the NSLA to strengthen the administration of Child Nutrition Programs, at all levels, through enhanced oversight and enforcement tools. They were designed to help FNS and State administering agencies reduce program error of all types, resulting in more efficient operations and improved compliance with program requirements.

The proposed rule also incorporated recommendations from the USDA Office of Inspector General (OIG), including management decisions from audits—*National School Lunch Program—Food Service Management Company Contracts,* published January 2013, *https://usdaoig.oversight.gov/reports/audit/national-school-lunch-program-food-service-management-company-contracts,* and *Review of Management Controls for the Child and Adult Care Food Program,* published November 2011—and FNS management evaluations of State agency administration of NSLP, SBP, SFSP, and CACFP. The recommendations address improvements to contract management, adherence to Federal procurement standards, and financial oversight to further enhance program integrity.

This final rule adds strong integrity safeguards to a variety of aspects of the Child Nutrition Programs. The provisions codified in this rulemaking are designed to increase program operators' accountability and operational efficiency, while improving the ability of FNS and State agencies to address severe or repeated violations of program requirements. This rulemaking also provides States and program operators with targeted flexibilities which allow oversight efforts to be tailored to specific program circumstances. These provisions will be effective on September 22, 2023. However, each provision has a separate compliance date for implementation, which is explained in the section-by-section analysis. Although the proposed rule required implementation for most

provisions 90 days after publication of the final rule, numerous respondents requested a 1-year delay in implementation, and FNS agrees that additional time is needed to implement this rulemaking. The extended implementation period gives State agencies time to make necessary systems changes, and gives FNS time to provide technical assistance and develop resources to support successful implementation.

FNS intends each of the provisions of this rule to be severable. Were a court to stay or invalidate any provision of this rule, or to hold a provision unlawful as applied in certain factual circumstances, FNS would intend that all other provisions set forth in this rule remain in effect to the maximum possible extent.

B. Public Comments

FNS received 5,659 comments from a cross section of stakeholders during a 90-day comment period, which was extended to July 7, 2016. Of these, 3,261 responses were from 11 form letter campaigns, 2,266 responses were unique, and an additional 108 were unique responses that contained particularly substantive comments on specific aspects of FNS' proposed implementation of the statutory and discretionary requirements. The letter campaigns were organized primarily by the Freedom Works Foundation (2,652), the Food Research and Action Center (377), and the National CACFP Sponsors Association (147). Many of the comments expressed general opposition to Federal oversight policies, citing issues of government overreach. FNS is not responding to those comments, because they did not provide feedback on provisions that were specifically proposed for revisions as part of this rulemaking. Moreover, many of the requirements addressed in the proposed rule are based on statutory provisions in the NSLA and, therefore, cannot be removed through the rulemaking process.

Responses were generated from State administering agencies (21) and a wide variety of child nutrition program stakeholders, including those who identified as parents and private citizens (5,472), school food authorities (37), advocates (34), schools and educational institutions (9), community and faith-based organizations (7), food service management companies (7), health and child care professional associations (6), food banks (4), and students (2). Only 15 respondents unconditionally favored the proposed rule. Respondents expressed wide support for implementing robust integrity practices and valuable suggestions for improvement. However, the vast majority of respondents (4,769) expressed general opposition to the penalties that FNS proposed. Of the remaining 875 comments, 687 were mixed and 188 were either out of scope (164) or duplicative (24). The comments (5,599) are posted at *http://www.regulations.gov* under docket ID FNS–2016–0040, *Child Nutrition Program Integrity.*

C. Section-by-Section Discussion of the Regulatory Provisions

1. Fines for Violating Program Requirements

Section 22(e)(1)(A) of the NSLA, 42 U.S.C. 1769c(e), requires the Secretary to establish criteria by which a State agency or the Secretary may impose a fine against any school food authority (SFA) or school administering a Child Nutrition Program. Section 22(e)(2)(A) requires the Secretary to establish criteria by which the Secretary may impose a fine against any State agency administering a Child Nutrition Program. In both cases, the statute states that a fine may be imposed if it is determined that the SFA, school, or State agency has:

- Failed to correct severe mismanagement of the program;
- Disregarded a program requirement of which the SFA, school, or State has been informed; or
- Failed to correct repeated program violations.

Current regulations require State agency and FNS oversight to ensure program compliance, improve management, and promote integrity. The regulations at 7 CFR 210.26 provide FNS the authority to penalize individuals or entities for criminal violations, such as theft or fraud. However, existing regulations do not include a strong enforcement mechanism to protect Federal funds and maintain program integrity when an exceptional, non-criminal circumstance arises.

FNS proposed a process to implement the statutory authority to establish fines, referred to as ''assessments'' in the proposed rule. FNS expected assessments to serve as a new accountability measure to address severe or repeated program violations that seriously threaten the integrity of Child Nutrition Programs, but do not meet the threshold for criminal action. The proposed rule:

- Identifies violations that warrant assessments, as specified in statute;
- Allows FNS to establish assessments against State agencies and to direct State agencies to establish assessments against SFAs, sponsors, or institutions;
- Allows State agencies to establish assessments against SFAs, schools, sponsors, or institutions;
- Identifies the calculations used to determine the first, second, and subsequent assessments;
- Requires assessments to be paid from non-Federal funds;
- Requires the State agency to notify FNS at least 30 days prior to establishing an assessment;
- Provides the ability to appeal any assessment through existing processes;
- Provides FNS and State agencies the authority to suspend or terminate for cause the participation of an entity, if the established assessment is not paid; and
- Requires implementation one school year after the publication of the final rule.

Public Comments

Of the comments that discussed assessments or fines, 6 were supportive, 3,955 were opposed, and 23 were mixed. Of the 3,955 responses in opposition, 3,132 were form letters. Many were opposed to the idea of government fines in general, citing issues of government overreach.

Proponents noted this provision would give State agencies an additional mechanism to address program violations and strengthen accountability. One stated that fines would be a useful compliance tool in exceptional situations and supported extending this provision to all Child Nutrition Programs.

Opponents argued that fines are unnecessary and punitive, and voiced concern that the risk of fines would discourage Child Nutrition Program operators from seeking technical assistance. They cited the potential for inconsistent application of fines across States, and expressed concern about bribery, collusion, and abuse. Opponents also disputed FNS authority to establish fines against non-school operators, and suggested State agencies have adequate accountability tools in SFSP and CACFP.

FNS Response

As required by statute, this final rule codifies the criteria and procedures that FNS has developed for State agencies to use to establish fines for program violations. Although the proposed rule used the term ''assessment,'' FNS has opted to use the term ''fine'' in this final rule for clarity and for consistency with statute. A fine is commonly known to be a monetary penalty for a prohibited act.

This change responds to concerns that terms used in the proposed rule created confusion. Consistent with the statute and the proposed rule, the criteria that warrant fines include:

- Failure to correct severe program mismanagement;
- Disregard of a program requirement of which an SFA or State agency has been informed; or
- Failure to correct repeated violations of program requirements.

FNS stresses that fines will be applied under exceptional, not routine, circumstances. For example, fines may be warranted to address a serious violation, such as the intentional destruction of records or the intentional misappropriation of program funds. Fines would not be warranted for routine problems, such as a menu planning or meal pattern violation or a recordkeeping or resource management error, which can be corrected with State agency oversight and technical assistance.

A fine would never replace established technical assistance, corrective action, or fiscal action measures to solve commonplace or unintentional problems. Rather, the assessment of fines provides a new accountability tool for FNS and State agencies to use when there are severe or repeated non-criminal violations—the types of programs abuses that seriously threaten the integrity of Federal funds or significantly impair the delivery of service to eligible students. Each situation is different, and FNS and State agencies, in consultation with their legal counsel, will carefully consider whether a fine is the appropriate response.

As required by statute, this final rule allows fines to be established against SFAs and State agencies in the operation of any Child Nutrition Program, including the issuance of fines against SFA sponsors in SFSP and SFA institutions in CACFP. This is a change from the proposed rule, which would have extended fines to all types of SFSP sponsors and CACFP institutions. FNS has decided to pursue a separate rulemaking to propose amendments to SFSP and CACFP regulations that would strengthen the serious deficiency processes to safeguard Federal funds and program integrity against mismanagement, abuse, and fraud.

This final rule allows State agencies to suspend or terminate the participation of an SFA, if the established fine is not paid, and provides the ability to appeal any fine through existing processes at 7 CFR 210.18(p), 225.13, 226.6(k), and 235.11(f). Fines must be paid using non-Federal funds, as required by statute, which may include State revenue funds in excess of the 30 percent required match for NSLP, other State appropriated funds, and local contributions to support the programs. All fines, and any interest charged, must be remitted to FNS and then transmitted to the United States Treasury. These funds cannot be used by FNS.

This final rule clarifies FNS expectations regarding the calculation and timeframe for the payment of fines. As required by section 22(e)(1)(A) of the NSLA, 42 U.S.C. 1769c(e), this rulemaking adds new paragraphs to identify maximum thresholds for first, second, and subsequent fines at 7 CFR 210.26(b)(3), 215.15(b)(3), 220.18(b)(3), 225.18(k)(3), 226.25(j)(3), and 235.11(c)(2). For State agency fines, FNS will calculate the maximum thresholds using all SAE allocations made available to the State agency in the most recent fiscal year for which full year data is available. For SFA fines, the State agency will calculate the maximum thresholds using program meal reimbursements from the most recent fiscal year for which full year data (*i.e.,* closeout data) is available.

FNS and State agencies may calculate a fine below the maximum thresholds. For example, a State agency may target a fine only to certain school sites, or only to meal reimbursements earned by an SFA during a certain timeframe. Consistent with the proposed rule, State agencies must notify FNS at least 30 days prior to fining an SFA. FNS approval of the State agency's action is not required. States agencies have discretion to determine the due date for a fine, and may consult with FNS to determine an appropriate due date. FNS strongly recommends State agencies also consult with their legal counsel prior to fining an SFA.

FNS is mindful of respondents' concerns about the potential for fines to be established against State agencies for local program violations. This final rule clarifies that State agencies may only be fined for severe or repeated program violations at the State level, including lack of proper oversight, but not for singular, specific program violations that occur at the local level. This final rule maintains FNS authority to direct the State agency to establish a fine against an SFA.

In most cases, Child Nutrition Program operators work together to build a culture of compliance. State agencies and SFAs that follow fundamental program requirements, and those that work to resolve compliance issues, will not be impacted by this provision, as fines will only be levied in cases of severe or repeated program violations. FNS expects fines to be imposed only after State agencies and SFAs have been informed of program violations—and provided opportunity to correct them—through existing processes, such as direct technical assistance, corrective action, or fiscal action.

For less severe violations, for single violations, and for unintentional violations, technical assistance, corrective action, and, if necessary, fiscal action will remain appropriate courses of action. However, when existing processes do not adequately address program violations, the assessment of a fine will support efforts to ensure State agencies and SFAs comply with program regulations and use Federal funds for their intended purposes. FNS recognizes the importance of preserving public trust in the Child Nutrition Programs by holding State agencies and SFAs accountable for severe or repeated violations. In those exceptional circumstances, fines will be an important tool to bring State agencies and SFAs into compliance with Federal regulations and protect the integrity of the Child Nutrition Programs.

Accordingly, this final rule amends 7 CFR 210.18(p) and 235.11(c) and adds new paragraphs to 210.26(b), 215.15(b), 220.18(b), 225.18(k), and 226.25(j) to provide authority to FNS and to State agencies to establish fines in cases of severe or repeated program violations. The compliance date is August 23, 2024.

2. Reciprocal Disqualification in All Child Nutrition Programs

Section 12(r) of the NSLA, 42 U.S.C. 1760(r), states that any school, institution, service institution, facility, or individual that is terminated from any Child Nutrition Program and that is on a list of institutions and individuals disqualified from participation in SFSP or CACFP may not be approved to participate in or administer any Child Nutrition Program. Current CACFP regulations include procedures for disqualification of institutions and day care homes. An institution or individual remains on the National disqualified list (NDL) until each serious deficiency is corrected, or until 7 years have passed.

In all cases, all debts owed must be repaid prior to removal from the NDL. State agencies are required to consult the NDL when reviewing any program application, and must deny the application if the institution, or any of its responsible principals, is on the NDL. Although the statute authorizes an NDL for SFSP, currently, CACFP is the only Child Nutrition Program with an NDL.

FNS proposed requiring State agencies to deny the application for any Child Nutrition Program if the applicant has been terminated for cause from any Child Nutrition Program or the applicant is on the NDL for CACFP or SFSP. This process is called ''reciprocal disqualification.'' The proposed rule:

- Applies reciprocal disqualification to all applicants in any Child Nutrition Program;
- Specifies that either termination for cause or placement on an NDL would be the basis for reciprocal disqualification;
- Identifies an entity as any school, SFA, institution, service institution, facility, sponsoring organization, site, child care institution, day care center, day care home, responsible principal, or responsible individual;
- Applies suspension or termination procedures when it is determined that an entity currently participating in a Child Nutrition Program is terminated for cause from another Child Nutrition Program;
- Requires each State agency to develop a process to share information about disqualified entities within the State with other agencies administering Child Nutrition Programs or the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), which must be approved by FNS;
- Maintains disqualification until deficiencies are corrected, or until 7 years have passed, so that an entity will remain ineligible until all debts owed under the program are repaid;
- Establishes that the decision to deny an application is final and not subject to further administrative or judicial review; and
- Requires implementation 90 days after the publication of the final rule.

Public Comments

FNS received 127 comments about reciprocal disqualification. Of these, 7 were supportive, 105 were opposed, and 15 were mixed. Proponents stated that this provision promotes integrity across all Child Nutrition Programs. They agreed that if an entity is disqualified from one Child Nutrition Program, it should not be permitted to participate in another. Some responses supported the proposal but requested more guidance for successful implementation. Opponents were primarily concerned about the impact this provision could have on SFSP and CACFP participation. They asserted that SFAs may be reluctant to sponsor SFSP or CACFP if it puts their NSLP participation at risk and suggested limiting this provision to entities that are terminated for cause and placed on an NDL.

FNS Response

This provision supports integrity when it is determined that an entity currently participating in a Child Nutrition Program is terminated for cause from another Child Nutrition Program and placed on an NDL, as required by statute. It aligns with FNS' efforts to preserve public trust in the programs by preventing further abuse and severe mismanagement. However, before the reciprocal disqualification process may be applied to program regulations, FNS recognizes that additional attention needs to be given to the NDL before it is expanded to SFSP.

FNS intends to publish a separate rulemaking to propose improvements to the serious deficiency process that will also address the legal requirements for records maintained on individuals in the NDL, including independent verification and the opportunity to contest matches on the list. This separate rulemaking will allow FNS to address additional requirements, further consider respondents' concerns about termination for cause and disqualification and provide an opportunity for the public to comment on the changes. FNS is committed to publishing new regulations. Accordingly, this final rule will not codify any regulatory amendments related to the reciprocal disqualification process at this time.

3. Serious Deficiency Process and Disqualification in SFSP and CACFP

Section 13(q) of the NSLA, 42 U.S.C. 1761(q), requires the Secretary to establish procedures for the termination of SFSP sponsors for each State agency to follow. The procedures must include a fair hearing and prompt determination for any sponsor aggrieved by any action of the State agency that affects its participation or claim for reimbursement. The Secretary is also required to maintain a list of disqualified sponsors and individuals that will be available to State agencies to use in approving or renewing sponsor applications.

In order to implement section 13(q), along with the reciprocal disqualification requirement under section 12(r) of the NSLA, 42 U.S.C. 1760(r), the proposed rule included amendments expanding the serious deficiency process in CACFP and extending it to SFSP. This integrity-focused process has provided a systematic way for CACFP State agencies and sponsoring organizations to correct serious management problems, and when that effort fails, protect the program through due process.

Current SFSP regulations include provisions addressing corrective action, termination, and appeals. The regulations under 7 CFR part 225:

- Specify criteria State agencies must consider when approving sites for participation;
- Provide authority for the State agency to terminate sponsor participation;
- List the types of program violations that would be grounds for application denial or termination;
- Require State agencies to terminate participation of sites or sponsors for failure to correct program violations within timeframes specified in a corrective action plan; and
- Establish procedures for sponsors to appeal adverse actions, including termination of a sponsor or site and denial of an application for participation.

However, SFSP current regulations do not provide authority to FNS or State agencies to disqualify sponsors.

Serious deficiency, termination, and disqualification procedures already exist for institutions, day care homes, responsible principals, and responsible individuals in CACFP under section 17(d)(5) of the NSLA, 42 U.S.C. 1766(d)(5), and codified in regulations at 7 CFR 226.6(c) and 226.16(l). These procedures provide seriously deficient institutions and facilities with the opportunity to correct the serious deficiency. They are intended to ensure that institutions and day care homes that had failed to take satisfactory corrective action, within the allotted period of time, have had their program agreement terminated, been disqualified, and placed on the NDL. FNS proposed applying these existing requirements to establish a serious deficiency process for sponsors and sites in SFSP and unaffiliated centers in CACFP, which is essential to fulfilling the intent of section 12(r) of the NSLA. The proposed rule includes amendments to:

- Establish a serious deficiency process for unaffiliated child care centers and unaffiliated adult day care centers in CACFP;
- Modify termination procedures and establish a serious deficiency process in SFSP;
- Establish an NDL for SFSP that FNS would maintain and make available to all State agencies;
- Require each SFSP State agency to establish a list of sponsors, responsible principals, and responsible individuals declared seriously deficient;

- Require each SFSP State agency to provide appeal procedures to sponsors, annually and upon request; and
- Specify the types of adverse actions that cannot be appealed in SFSP.

Public Comments

FNS received 236 comments addressing application of the serious deficiency process in SFSP—104 (including a form letter campaign) were supportive, 8 were opposed, and 124 were mixed. Several respondents requested additional definitions and clarification of the terms that are used to describe the serious deficiency process. Multiple respondents suggested alternatives that would extend the timeframe for corrective action, adapt the amount of time for corrective action to specific types of serious deficiencies, and allow State agencies to approve long-term corrective action plans. They also asked FNS to consider delaying implementation to allow time for updating automated systems.

Out of 532 comments regarding amendments to the serious deficiency process in CACFP, 11 were supportive, 47 (including 38 form letters) were in opposition, and 474 (including 462 form letters) were mixed. Many of the respondents voiced general concern about using the current CACFP serious deficiency process as a model for establishing procedures in other Child Nutrition Programs. They suggested that FNS further investigate and attempt to address potential inconsistencies in implementation among States.

FNS Response

FNS agrees that modifications are needed to improve the serious deficiency process to ensure its application is fair and fully implemented. Consequently, FNS published a notice, *Request for Information: The Serious Deficiency Process in the Child and Adult Care Food Program*, in the **Federal Register**, at 84 FR 22431, on May 17, 2019, *https://www.fns.usda.gov/cacfp/fr-051719*, to gather information to help FNS understand the firsthand experiences of State agencies and program operators. FNS received 580 comments in response to this request for information. An analysis of the responses has convinced FNS to delay the expansion of the serious deficiency process and related changes. To better serve State agencies and program operators, important modifications are needed to make the application of the serious deficiency process consistent and effective, in line with current statutory requirements.

To allow FNS to respond to the concerns and challenges that resonated in the public comments, FNS intends to publish a separate rulemaking to propose improvements to the serious deficiency process and provide an opportunity for the public to comment on the changes. FNS is committed to publishing new regulations to address a serious deficiency determination, corrective action, termination for cause, and disqualification, prior to extending these requirements to unaffiliated centers in CACFP and SFSP sponsors. This separate rulemaking will establish a serious deficiency process for SFSP, with provisions for disqualification and placement on the NDL. It will also address the legal requirements for records maintained on individuals on the NDL.

State agencies will continue to have discretion to apply their own processes for addressing seriously deficient performance by unaffiliated centers in CACFP and sponsors in SFSP, during this period of rulemaking development. Implementation of State agency processes does not require a State agency request for FNS approval of additional requirements. FNS will continue to provide technical assistance as needed to support such implementation.

To eliminate ambiguity, this rulemaking also includes a definition of ''Termination for convenience'' to clarify that an agreement may be terminated for convenience when a sponsor, institution, facility, or State agency chooses to permanently end program participation, due to considerations unrelated to its performance of program responsibilities. If an entity decides to apply to participate in SFSP or CACFP, at a future date, a new agreement is required. However, if the service of meals is temporarily interrupted, due to considerations unrelated to program performance, the State agency or sponsoring organization, as applicable, must be notified in writing that meals will not be claimed for that period of time. The agreement remains in effect.

Termination for convenience, particularly by the State agency, may be an infrequent occurrence. The regulations maintain that the State agency, sponsor, institution, or facility cannot terminate for convenience to avoid implementing the serious deficiency process. Any entity that voluntarily terminates its agreement after receiving a notice of intent to terminate will be terminated for cause and disqualified.

Accordingly, this final rule amends 7 CFR 225.2, 225.6(i), 226.2, and 226.6(b)(4) to define ''Termination for convenience'' and address the cessation of program activities in SFSP and CACFP for reasons that are unrelated to performance. The compliance date is August 23, 2024. FNS will propose additional State agency provisions for establishing a serious deficiency process to address termination for cause, disqualification, and other administrative actions for program violations in a separate rulemaking.

4. State Agency Review Requirements in CACFP

Monitoring is an essential tool for ensuring integrity and reducing program abuse. Section 17(d)(2)(C) of the NSLA, 42 U.S.C. 1766(d)(2)(C), directs the Secretary to develop policies under which each State agency must conduct at least one scheduled site visit, at not less than 3-year intervals, to identify and prevent management deficiencies, fraud, and abuse, and to improve CACFP operations. The statute mandates more frequent reviews of any institution that:

- Sponsors a significant share of the facilities participating in CACFP;
- Conducts activities other than those expressly related to the administration and delivery of CACFP;
- Has had prior reviews that detected serious management problems;
- Is at risk of serious management problems; or
- Meets other criteria as defined by the Secretary.

Current regulations require State agencies to annually review at least a third (33.3 percent) of all institutions participating in the CACFP in each State. Independent centers must be reviewed at least once every 3 years. Sponsoring organizations with up to 100 facilities must also be reviewed at least once every 3 years. Sponsoring organizations with more than 100 facilities must be reviewed at least once every 2 years. New sponsoring organizations with five or more facilities must be reviewed within the first 90 days of operation.

As part of each required review of a sponsoring organization, the State agency must select a sample of facilities. For sponsoring organizations of less than 100 facilities, the State agency must review 10 percent of the facilities. For sponsoring organizations of more than 100 facilities, the State agency must review 5 percent of the first 1,000 facilities, and 2.5 percent of the facilities in excess of 1,000.

Consistent with the statutory mandate under section 17(d)(2)(C) of the NSLA, FNS proposed criteria for State agencies to use in selecting institutions for more

frequent reviews. Under the proposed rule, selected institutions must be reviewed at least once every 2 years. FNS did not propose any changes to the requirements for reviews of sponsored facilities.

Public Comments

FNS received 137 comments, of which 4 responses were supportive, 10 were opposed, and 123 were mixed. A large form letter campaign requested FNS to provide additional criteria to describe institutions that are at risk of having serious management problems. Multiple State agencies did not agree that conducting activities other than those related to CACFP would increase the risk of abuse, citing the participation of numerous types of child care, social service, tribal, and other multi-purpose organizations that engage in activities outside of CACFP. They observed that virtually all sponsoring organizations conduct activities other than those related to CACFP and that there is greater risk for abuse by institutions that have little outside funding and rely almost exclusively on CACFP funds. They also asked FNS to clarify how State agencies should incorporate additional reviews into the current 3-year review cycle.

Respondents expressed concern that compliance with the proposed rule would require additional State agency funding and staffing to address the substantial increase in burden. They recommended alternatives, such as requiring in depth financial reviews of all institutions; applying this requirement only to sponsoring organizations that do not provide child or adult care services, beyond CACFP; or excluding institutions that receive monitoring through their participation in other Federal programs, such as SFAs in NSLP.

FNS requested specific comments addressing the frequency and number of reviews State agencies would be required to perform under the provisions of the proposed rule. Four State agencies responded. They projected that 26 to 64 percent of sponsoring organizations would require additional reviews. They voiced concern that the additional audit funds now available to State agencies would not sufficiently cover the increased costs of monitoring.

FNS Response

This final rule establishes additional priorities and criteria for State agencies to use in selecting institutions for review. As required by statute, it requires State agencies to conduct at least one review every 2 years of institutions that:

- Sponsor more than 100 facilities, as currently required;
- Engage in any activities other than those related to CACFP;
- Have received findings from a recent review that detected serious management problems; or
- Are at risk of having serious management problems.

In developing this rulemaking, FNS recognizes that a more frequent schedule of reviews will require State agencies to also prioritize funding and staffing resources. Comments from State agencies and other respondents stress this point. However, FNS has found that some States are not making full use of SAE and CACFP audit funds that are available to support the performance of reviews, audits, and other oversight activities. That is why FNS continues to encourage all State agencies to make wider use of these funds. Full use of these funds will help ease any potential burden.

SAE and CACFP audit funds are available to State agencies for specific purposes. SAE supports allowable expenses associated with the administration of the Child Nutrition Programs and related Food Distribution Programs; the employment of additional personnel to supervise, improve management, and give technical assistance to institutions; and other allowable uses described under 7 CFR 235.6. When some State agencies cannot fully use their allotment of SAE funds, FNS reallocates them to other States that can ensure they are used.

CACFP audit funds may be used to pay for the CACFP portion of institution audits and for conducting program-specific audits of institutions. The State agency may use these funds to support CACFP-related audits and subsequent audit resolution activities. The funds may also be used for reviews of CACFP institutions, provided that all required program-specific audits have been performed. The State agency may choose to retain all of its allocation, provide some of its audit funds to institutions, or use any remaining audit funds for other monitoring activities purposes. Section I–C–6 of this preamble provides additional information about the allocation and usage of audit funds for State agencies.

The comments also point out concerns about the criteria State agencies must use in selecting institutions for review. As required by statute, institutions must receive more frequent monitoring if they sponsor more than 100 facilities, engage in any activities other than those related to CACFP, have had serious management problems, or are at risk of having serious management problems. These criteria are specified under section 17(d)(2)(C) of the NSLA. They underscore the importance of prioritizing State monitoring resources to achieve the most effective program oversight.

FNS characterizes serious management problems as the types of administrative weaknesses that affect an institution's ability to meet CACFP performance standards—financial viability, administrative capability, and accountability. A sponsoring organization that operates a variety of community programs may be prone to serious management problems if it has inadequate staffing to support CACFP operations or may be devoting too small of a share of administrative resources to CACFP. Routine allocation of a disproportional amount of a sponsoring organization's budget to its other activities should raise a red flag about its ability to properly manage CACFP. More frequent monitoring by the State agency would help improve CACFP operations by identifying and addressing these weaknesses. Excluding Head Start centers, SFAs, and other types of institutions that receive monitoring through their participation in other Federal programs from this requirement would be inconsistent with the statutory requirement and would not support efforts to identify and correct serious management problems in CACFP.

FNS expects State agencies to prioritize reviews to ensure that institutions do not divert CACFP resources to other activities. However, FNS is open to considering alternative approaches for determining review priorities, identifying institutions with a high number of risk factors, and ensuring effective monitoring on a case-by-case basis. State agencies should work with FNS to determine how they can design their monitoring policies to comply with statutory requirements. A State agency with a proposed alternative approach should consult with FNS.

The proposed rule cites examples of factors that may expose an institution's risk, including changes in ownership, significant staff turnover, new licensing status, complaints about a sponsoring organization, sizable differences in the number of claims or the amount of claims submitted by an institution, or large increases in the number of sponsored centers or day care homes. The State agency should also consider its ongoing evaluation of the performance standards that demonstrate the institution's ability to effectively operate the program. For example,

institutions that have lost other sources of funding are at risk, as they may be incapable of meeting their financial obligations if there were an interruption in CACFP payments.

Accordingly, as required by statute, this final rule amends 7 CFR 226.6(m)(6) to require the State agency to schedule reviews at least once every 2 years of institutions that sponsor more than 100 facilities, engage in activities other than CACFP, have had serious management problems in previous reviews, or are at risk of having serious management problems. The compliance date is August 23, 2024.

5. State Liability for Payments to Aggrieved Child Care Institutions

Section 17(e) of the NSLA, 42 U.S.C. 1766(e), directs the Secretary to promulgate CACFP regulations to ensure that State agencies use a fair and timely hearing process to reduce the amount of time between a State agency's action and the child care institution's hearing. This provision only applies to payments to child care institutions. It shifts the responsibility for payments from aggrieved child care institutions to State agencies and works as a deterrent to prevent State agencies from failing to issue administrative review decisions within the required timeframe. It requires State agencies to pay, from non-Federal sources, all valid claims for reimbursement, from the end of the regulatory deadline for providing the hearing to the date a decision is made.

Under current regulations at 7 CFR 226.6(k), the State agency must acknowledge an institution's request for an administrative review within 10 days of its receipt of the request. Within 60 days of the State agency's receipt of the request, the administrative review official must inform the State agency, the institution's executive director, chair of the board of directors, responsible principals, and responsible individuals of the administrative review's outcome. During this period, all valid claims for reimbursement must be paid to the institution and the facilities of the institution, unless there is an allegation of fraud or a serious health or safety violation against the institution. The claims are paid from Federal funds.

FNS proposed amending the regulations to establish the State agency's liability to pay all valid claims if the State agency fails to meet the required timeframe for providing a fair hearing and a prompt decision. A State agency that fails to issue administrative review decisions within 60 days must pay, from non-Federal sources, all valid claims for reimbursement to the aggrieved institution, beginning on the 61st day and ending on the date on which the decision is made.

Public Comments

FNS asked respondents to the proposed rule to address the financial implications of this provision, and suggest appropriate milestones that FNS could require of State agencies during implementation. FNS specifically requested comments to consider alternatives to the 60-day timeframe and any modifications which would meet State needs, without compromising integrity or the demand for a timely decision for the aggrieved institution. Out of 132 comments, 10 responses were supportive, 10 responses (including 2 form letters) were opposed, and 112 responses (including 99 form letters) were mixed.

Although the comments did not highlight any financial impacts, multiple respondents offered alternatives or improvements to the 60-day timeframe. They cited numerous factors outside of the State agency's control that may delay the State agency's ability to issue administrative review decisions within a 60-day deadline, including:

- Delays caused by the hearing official's schedule;
- Voluminous stacks of paperwork requiring the hearing official to take additional time for review;
- Additional time needed by the hearing official to render and fully document the legal basis for the decision;
- Continuances requested by the State agency to gather evidence; and
- The aggrieved institutions' needs for additional time to secure counsel, build their cases, or schedule hearings.

Thirteen of the comments were from State agencies administering CACFP that are directly responsible for adhering to the timeframe for issuing an administrative review decision under 7 CFR 226.6(k)(5)(ix). One State agency proposed changing the deadline for completion of the administrative review to 90 days, citing the results of Targeted Management Evaluations. During Fiscal Years 2010 and 2011, FNS conducted in-depth reviews of compliance with serious deficiency requirements and found that more than half of State agencies in the Targeted Management Evaluation sample needed up to 90 days to complete the administrative review process. Another State agency proposed changing the deadline to 120 days, which would conform with NSLP appeal procedures for SFAs under 7 CFR 210.18(p).

A form letter campaign proposed extending the appeals timeline from 60 to 90 days and extending the timeframe from 60 to 120 days before the State agency is responsible for paying valid claims from non-Federal sources. The respondents asked FNS not to hold the State agency accountable for delays due to an institution's actions or, alternatively, they asked FNS to allow an exemption from liability when the delays are outside the State agency's control. They also requested that FNS include a step in the process that would elevate appeals of State agency review findings for FNS mediation, as recommended in the August 2015 Report to Congress, *Reducing Paperwork in the Child and Adult Care Food Program, https://fns.usda.gov/sites/default/files/cacfp/CACFP_Paperwork_Report.pdf.*

FNS Response

Consistent with statute, this final rule requires State agencies to provide fair and timely hearings through the serious deficiency process. It also requires a State agency to pay all valid claims for reimbursement, from non-Federal sources, if the 60-day timeframe for the fair hearing is not met. Historically, some CACFP operators have come under scrutiny for a lack of program integrity in affording due process and ensuring payment accuracy, resulting in the need for the current regulatory framework featuring tighter regulations and deadlines. In order to minimize the exposure of program funds to waste or abuse, State agencies must be able to resolve problems quickly and train hearing officials to meet the FNS deadline to promptly complete the appeals process.

In developing this rulemaking, FNS recognizes the concerns of State agencies and other respondents about exceptional circumstances that may require additional time and flexibility. They argued that, despite all reasonable efforts to keep administrative processes moving quickly and to overcome administrative law procedures that challenge the CACFP timelines, delays may arise from any number of exceptional circumstances. In response to these comments, this final rule allows FNS to approve, on a case-by case basis, a written request for an exception to the 60-day deadline.

FNS is committed to working with individual State agencies to establish milestones to implement this provision and minimize potential financial burdens. Suppose a State agency is unable to meet the deadline due to an isolated administrative issue at the State level. The State agency may seek a

reduction in its liability, a reconsideration of its liability, or an exception to the 60-day deadline in this specific case by submitting a request to FNS that includes information regarding any mitigating circumstances. In this example, the State agency would explain the specific administrative issue it is facing, why the issue prevents the State agency from meeting the deadline, and how the issue will be remedied to ensure that it does not continue in the future. To determine if the request should be approved, FNS would review the State agency's information and consider the mitigating circumstances. For approval, FNS would also have to weigh factors, such as how many times the State agency has failed to meet the deadline, or how much of a risk to the integrity of Federal funds would the delay or inaction by the State agency cause.

Accordingly, as required by statute, this final rule amends 7 CFR 226.6(k) to establish State liability for payments to aggrieved child care institutions. It requires the State agency to pay all valid claims with non-Federal funds if the State agency fails to meet the required timeframe for providing a fair hearing and a prompt determination, unless FNS grants an exception. To further support the State agency's ability to ensure timely resolution of administrative reviews, FNS intends to provide technical assistance materials on developing processes for tracking and notifying State agencies when they would become liable for payments and best practices for working with hearing officials to emphasize the importance of adhering to a timeline in rendering their decisions. The compliance date is August 23, 2024.

6. CACFP Audit Funding

Program audits are an integral component of CACFP, allowing State agencies to monitor funding and operations to ensure that sponsoring organizations and centers operate CACFP as required by law. Section 17(i)(2)(B) of the NSLA, 42 U.S.C. 1766(i)(2)(B), allows additional funding to State agencies to conduct audits. The Secretary may increase the amount of funds to any State agency that demonstrates that it can effectively use the funds to improve program management, under criteria established by the Secretary.

In previous fiscal years, each State agency has received up to 1.5 percent of the program funds used by the State during the second preceding fiscal year for the purpose of conducting CACFP audits. Beginning in Fiscal Year 2016, and each fiscal year thereafter, FNS began accepting requests from State agencies to increase their audit funding from 1.5 percent to a maximum of 2 percent of the CACFP funds used by each State.

Public Comments

Out of 381 comments, 10 were supportive and 371 (including 354 from 2 form letter campaigns) were mixed. The majority of responses supported increasing the amounts of audit funds available to State agencies, just not the need to have to apply for them. Multiple respondents requested greater flexibility to use audit funds to support integrity-related expenses, such as purchases of improved technology or travel for training purposes. They also recommended that FNS:

- Make it easier for State agencies to use additional audit funds to support the permanent or ongoing costs that are necessary for completing audits and maintaining program integrity;
- Ensure that State agencies can still pass through audit funds to institutions if they have audit funds available to do so; and
- Allow unspent audits funds to be used to improve CACFP, instead of returning them to the United States Treasury.

FNS Response

This final rule allows FNS to increase the amount of State audit funds if a State agency demonstrates that it can effectively use the funds to improve program management. This rulemaking codifies into CACFP regulations the procedures FNS has established for State agencies to apply for a higher allocation of audit funds. It also provides criteria for FNS to approve these requests.

Additional CACFP audit funds are available to State agencies that demonstrate the need for an increase in resources to meet audit requirements under 7 CFR 226.8, fulfill monitoring requirements under 7 CFR 226.6(m), or effectively improve program management, under criteria established by the Secretary. FNS recognizes that the additional funds will be an incentive for State agencies to improve the effectiveness of their oversight activities and strengthen program integrity. FNS has established an equitable process, outlined below, to authorize these funds to those State agencies that submit a written request justifying the need for an increase in CACFP audit funds.

Prior to the beginning of each new fiscal year, FNS announces the opportunity to increase CACFP audit funding levels from 1.5 to 2 percent. The announcement includes a spreadsheet calculating the State agency-by-State agency funding levels at the 1.5 and 2 percent levels to illustrate the maximum amounts available. Each State agency may request any amount within the 1.5 to 2 percent range of funds. Funding above 1.5 percent will be available only if the State agency can demonstrate it will effectively use the funds to improve program management.

This action does not change the formula used to calculate CACFP audit funds. It only changes the maximum amount of assistance available for some State agencies. The amount of assistance provided to a State agency for this purpose, in any fiscal year, may not exceed the State's expenditures for conducting audits as permitted under 7 CFR 226.4 and 226.8. CACFP audit funds are not reallocated and may not be carried over into another fiscal year. The funds must be used for:

- Funding of the CACFP portion of organization-wide audits and the resulting audit resolution activities;
- Conducting, handling, and processing CACFP-related audits and performing the resulting audit resolution activities; and
- Conducting monitoring of CACFP institutions, provided that all required program-specific audits have been performed.

FNS approval of requests for additional CACFP audit funds is based on the State agency's demonstrated need for additional funds to meet audit or monitoring requirements or effectively improve program management. To be funded, costs must be incurred strictly to meet the audit requirements under 7 CFR 226.8 and the monitoring requirements under 7 CFR 226.6(m). Allowable costs include, but are not limited to, salaries of auditors and monitors and travel expenses incurred to conduct audits and monitoring.

State agencies may use their allocation of CACFP audit funds to pay for the CACFP portion of institution audits or conduct program-specific audits of institutions, as specified under 7 CFR 226.8(b) and (c), respectively. The State agency may choose to retain all of its allocation, provide some of its audit funds to institutions, or use any remaining audit funds for other monitoring activities. For example, after the completion of program-specific audits, the State agency may use the remaining funds to cover costs incurred in evaluating financial viability, administrative capability, and accountability at the time of application. The review of budgets to ensure that costs are allowable and the purchase of mapping software for determining the

accuracy of area eligibility determinations for day care homes are also examples of allowable uses of remaining funds.

Accordingly, this final rule amends 7 CFR 226.4(j) to allow additional CACFP audit funds for State agencies. FNS now considers requests to increase audit funding from 1.5 percent to a cumulative maximum of 2 percent of CACFP funds used by the State agency during the second preceding fiscal year for the purpose of conducting program audits. The additional funds must be used to meet program oversight and audit requirements under 7 CFR 226.6(m) and 226.8, respectively, or to improve program management under criteria established by the Secretary. The compliance date is September 22, 2023.

7. Financial Review of Sponsoring Organizations in CACFP

The proposed rule includes modifications in program policy resulting from the reports of findings from OIG's audit, *Review of Management Controls for the Child and Adult Care Food Program,* issued in November 2011, and FNS management evaluations of State agency administration of CACFP. These inquiries found that the misuse of funds was often an indicator of a sponsoring organization's systemic program abuse that State agency financial reviews were unable to detect. The reports recommended improvements that would be effective at uncovering and preventing the misuse of funds, including the following requirements for State agencies to review:

- CACFP bank account activity to verify that sponsoring organization transactions meet program requirements; and
- Program expenditures and the amount of meal reimbursement funds sponsoring organizations retain from unaffiliated centers for administrative costs.

Current regulations require State agencies to review and approve budgets for sponsoring organizations of centers to ensure that CACFP funds are used only for allowable expenses. The portion of the administrative costs to be charged to CACFP must not exceed 15 percent of the meal reimbursements estimated to be earned during the budget year unless a waiver is granted. All administrative costs, whether incurred by the sponsoring organization or by its sponsored centers, must be taken into account.

If a sponsoring organization intends to use any non-program resources to meet CACFP requirements, its budget must identify a source of non-program funds that could be used to pay overclaims or other unallowable costs. To determine if CACFP funds are solely used for the operation or improvement of the nonprofit food service, an evaluation of the financial trail of source documents, ledgers, bank account statements, canceled checks, electronic deductions and transfers, and other financial records is required.

A thorough review of the sponsoring organization's financial records is vital in ensuring program integrity. The sponsoring organization must produce accurate, current, and complete disclosure of the financial results of each Federal award or program. Additionally, the records must identify the source and application of funds for federally-funded activities. However, the State agency's ability to monitor a sponsoring organization's use of CACFP funds is limited. While sponsoring organizations must submit annual budgets, which detail expenditures by cost category, they are not currently required to report actual expenses or fully account for their disbursement of CACFP funds.

To rectify these weaknesses, FNS proposed requiring State agencies to establish processes to verify that sponsoring organizations' financial transactions comply with CACFP regulations by requiring sponsoring organizations to report program expenditures. The proposed rule would require the State agency to annually review and compare at least 1 month of a sponsoring organization's bank account activity with documents to demonstrate that the transactions meet program requirements. The State agency must reconcile reported expenditures with CACFP payments to ensure that funds are accounted for fully.

The proposed rule would also require the State agency to annually review sponsoring organization reports of actual expenditures of program funds and the amount of meal reimbursement funds retained from their unaffiliated centers for administrative costs. If the State agency identifies any expenditures that have the appearance of violating program requirements, the State agency must refer the sponsoring organization's bank account activity to an auditor or other appropriate State authority for verification.

Public Comments

Out of 589 comments, 4 were supportive, 67 (including 53 form letters) were opposed, and 518 (including 486 from 3 form letter campaigns) were mixed. Many respondents argued that completing annual financial reviews, particularly annual bank account reviews, would create an administrative burden for State agencies. Respondents were concerned that a review of a single month of bank account activity would not be an effective use of program resources. They asserted that bank account statements would not provide useful information because there is no requirement for sponsoring organizations to have separate bank accounts for Federal funds.

Multiple responses suggested that State agencies change review priorities to tie invoices to bank account statements in a targeted edit check of bank, invoice, and accounting records during the review process. The responses also included recommendations for adopting a risk-based approach to ensure that organizations at risk of misusing Federal funds are reviewed annually; coordinating the financial review with the review cycle; or adding a requirement that sponsoring organizations maintain timely financial reports onsite so that these reports would be available for review at any time.

FNS Response

This final rule requires State agencies to annually verify bank account activity and actual expenditures by sponsoring organizations in CACFP. The State agency must select and compare 1 month of a sponsoring organization's CACFP bank account activity with other documents that are adequate to support that the financial transactions meet program requirements. This rulemaking also requires State agencies to annually review CACFP expenditures reported by sponsoring organizations of unaffiliated centers. Sponsoring organizations must annually report the amount of program expenditures of program funds and the amount of meal reimbursement funds retained from their unaffiliated centers for administrative costs.

While comments to the proposed rule included a number of alternatives that may offer a small reduction in burden, FNS believes that an annual review of bank account activity will more effectively uncover and prevent the misuse of funds than a less frequent review cycle. The review of bank account activity provides the most reliable and effective means to verify and document costs. Unlike receipts that show the reviewer who is owed the payments, statements of bank account activity inform the reviewer of who actually received the payments.

Bank account statements and supporting documents are utilized as

tools to conduct edit checks on compliance requirements associated with the receipt and use of CACFP reimbursement. Edit checks can be conducted electronically and remotely, once the necessary supporting financial documentation is received by the State agency reviewer.

For example, to confirm that a sponsoring organization's invoices for CACFP expenses are legitimate and correctly paid, the State agency reviewer would compare the invoices to the actual bank statement. If discrepancies were found, the sponsoring organization would have the opportunity to present documentation to resolve them. The State agency reviewer would expand the review to examine additional months of bank statements, as warranted, to determine if the discrepancies are part of a systemic problem. If any expenditures have the appearance of violating program requirements, the State agency reviewer must attempt to verify the bank account activity. If the discrepancies cannot be verified, or if they are significant, the State agency reviewer must refer the sponsoring organization's bank account activity to appropriate State authorities, such as the State auditing division or the State Bureau of Investigation.

The State agency has discretion to obtain statements of bank account activity with the annual budget submission, as part of the application renewal, or through a monitoring review. No changes were made to the review content, application procedures, or budget approval requirements at 7 CFR 226.6. The review of bank account activity is easier if funds are not comingled. Although FNS does not require it in CACFP, maintaining a separate bank account for Child Nutrition Program funds is a recommended practice. Personal or non-Child Nutrition Program funds should be held in a separate bank account.

Accordingly, this final rule amends 7 CFR 226.7(b) to require the State agency to have procedures in place for annually reviewing at least 1 month of the sponsoring organization's bank account activity against other associated records to verify that the financial transactions meet program requirements. The State agency must also have procedures for annually reviewing a sponsoring organization's actual expenditures of CACFP funds and the amount of meal reimbursement funds retained from unaffiliated centers to support the sponsoring organization's administrative costs. The State agency must reconcile reported expenditures with program payments to ensure that funds are accounted for fully. This final rule makes a corresponding change to 7 CFR 226.10(c) to require sponsoring organizations of unaffiliated centers to annually make available to the State agency the amount of program expenditures of program funds and the amount of meal reimbursement funds retained from their centers for administrative costs. FNS will work closely with State agencies to develop resources and provide technical assistance to sponsoring organizations to ensure successful implementation of these requirements. The compliance date is August 23, 2024.

8. Informal Purchase Methods for CACFP

Informal purchase methods (*i.e.,* micro-purchases and small purchases) for procurements under Federal awards are covered in the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,* published by the Office of Management and Budget at 2 CFR part 200 and adopted by USDA at 2 CFR part 400. This guidance sets the dollar threshold and degree of informality that characterizes micro-purchases and small purchases.

Current practices allow CACFP institutions to use the micro-purchase method for transactions in which the aggregate cost of the items purchased does not exceed $10,000, the current Federal threshold. Institutions may use the small purchase method for purchases below the Federal simplified acquisition threshold, currently set at $250,000. States and local agencies may specify lower micro-purchase and simplified acquisition thresholds, and local agencies may set a higher micro-purchase thresholds in line with 2 CFR part 200.320(a)(1)(iv–v). FNS would like to note that when the Child Nutrition Program Integrity rule was initially proposed and open to public comment, the dollar amounts quoted for the micro-purchase threshold and the small purchase threshold aligned with the 2016-time frame. Due to the passage of time and inflationary adjustments the above-mentioned micro-purchase and small purchase thresholds align with the current federal thresholds.

CACFP regulations set out procedures that are intended to prevent fraud, waste, and program abuse in contracts and purchasing. However, operational provisions addressing food service management companies (FSMC) and procurement standards under 7 CFR 226.21 and 226.22, respectively, do not align with existing practices. Current regulations set the Federal threshold for small purchases at $10,000. There is no mention of micro-purchases. FNS proposed amending the regulations to expand the availability of informal purchase methods and align the applicable Federal dollar thresholds with future adjustments that may be made for inflation.

Public Comments and FNS Response

Of the comments addressing changes to informal purchase methods, three were supportive and one was mixed. One respondent requested that FNS define a range for informal purchases.

This final rule updates procurement standards and guidelines and makes the values of the Federal micro-purchase threshold and Federal simplified acquisition threshold consistent with current guidance on informal purchase methods under 2 CFR part 200. This modification eliminates the need to revise CACFP regulations each time the thresholds are adjusted for inflation.

This rulemaking also streamlines CACFP procurement standards and provides clarity by removing outdated or duplicative provisions of the regulations that have been replaced by 2 CFR part 200. For example, institutions must comply with procurement procedures for micro-purchases, small purchases, sealed bids, competitive proposals, and non-competitive proposals. The text at 7 CFR 226.22(i) is replaced with cross-references to the procedures at 2 CFR part 200 and USDA regulations under 2 CFR parts 400 and 415. This modification ensures that CACFP requirements are consistent with the streamlined regulations, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,* that the Office of Management and Budget first published at 78 FR 78589, on December 26, 2013, *https://www.federalregister.gov/documents/2013/12/26/2013-30465/uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-awards,* and USDA-specific requirements published at 79 FR 75871, on December 19, 2014, *https://www.federalregister.gov/documents/2014/12/19/2014-28697/federal-awarding-agency-regulatory-implementation-of-office-of-management-and-budgets-uniform.*

Micro-purchase and small purchase procedures are relatively simple and informal methods that are appropriate for the procurement of goods and services for which the cost is below Federal, State, and local thresholds. Micro-purchase procedures are used when the transaction is below the current Federal threshold of $10,000 and prices are reasonable. Similarly, although State and local agencies may

impose more restrictive procurement procedures, adopting the Federal simplified acquisition threshold for small purchases—up to the threshold set by 2 CFR 200.88, *Simplified acquisition threshold*—would streamline the procurement process for CACFP institutions. The Federal simplified acquisition threshold is currently set at $250,000. All procurement transactions, regardless of the amount, must be conducted in a manner that ensures free and open competition.

To the extent practicable, CACFP institutions must distribute micro-purchases equitably among qualified suppliers. When purchases are below the current Federal simplified acquisition threshold, an institution may use small purchase procedures, sealed bids, or competitive proposals, which require prices to be solicited and documented from an adequate number of qualified sources. Depending on the value of the purchase, many of the required contract provisions in Appendix II to 2 CFR part 200, *Contract Provisions for Non-Federal Entity Contracts Under Federal Awards,* may apply.

Accordingly, this final rule amends 7 CFR 226.21(a) to remove outdated language so that the values of the Federal micro-purchase threshold and Federal simplified acquisition threshold are linked to 2 CFR part 200. This final rule also makes technical changes to remove outdated or duplicative provisions of 7 CFR 226.22 and affirm that procurements by public or private non-profit institutions comply with the appropriate requirements under 2 CFR part 200. The compliance date is August 23, 2024.

9. School Food Authority Contracts With Food Service Management Companies

Any school food authority (SFA) may contract with an FSMC to manage the food service operation at one or more of its schools. SFAs are required to monitor contractor performance to ensure that FSMCs comply with the terms, conditions, and specifications of their contracts. As required by 2 CFR 200.403, all costs must be reasonable, necessary, and allocable. SFAs are currently permitted to use ''fixed-price'' and ''cost-reimbursable'' FSMC contracts:

- Under a fixed-price contract, the FSMC charges the SFA a fixed cost per meal or a fixed cost for a certain time period; and
- Under a cost-reimbursable contract, the FSMC charges the SFA for food service operating costs, and also charges fixed fees for other services, such as labor.

The proposed rule included a provision to eliminate the use of cost-reimbursable contracts for SFAs that contract with a FSMC. FNS proposed limiting FSMC contracts in NSLP and SBP to fixed-price contracts, either with or without economic price adjustments tied to a standard index and eliminating cost-reimbursable FSMC contracts in NSLP and SBP. The proposed rule also included two technical changes to align FSMC requirements under 7 CFR 210.16 with existing regulations under 7 CFR parts 210 and 250. These changes would have required State agencies to annually review and approve all contracts and contract amendments between any SFA and FSMC and require an FSMC to credit the value of USDA Foods to the respective SFA.

Public Comments

FNS received 107 comments about the proposed elimination of cost-reimbursable contracts. Of these, 15 were supportive, 80 were opposed (including 52 form letters), and 12 were mixed. Proponents agreed that the complexity of rebates, discounts, and credits in cost-reimbursable contracts make the contracts challenging to manage and to monitor. They suggested the elimination of cost-reimbursable contracts would reduce fraud, while creating more straightforward business dealings for SFAs. One food industry representative noted that in order to manage cost-reimbursable contracts effectively, SFAs must devote significant resources to review, monitor, and audit costs and billings. By contrast, another respondent suggested fixed-price contracts allow SFAs to focus on manageable program areas, such as contract compliance. The return of rebates, discounts, and credits is not required under a fixed-price contract, as these factors are considered when submitting the bid. One State agency noted that consistent with its authority in current regulations, all FSMC contracts in that State are already required to be fixed-price.

Opponents were concerned that fixed-price contracts may cause FSMCs to focus on the lowest cost per meal, rather than food quality. They argued that cost-reimbursable contracts offer greater transparency that provides SFAs better management control over the program. For example, a joint comment from four food industry representatives noted that cost-reimbursable contracts allow flexibility for SFAs to incorporate local produce, switch to sustainable paper products, and adjust other associated costs during the contract term.

FNS Response

In this final rule, FNS is not eliminating the availability of cost reimbursable contracts as a type of FSMC contract SFAs may use in the NSLP and SBP. As noted in the proposed rule, audit findings, FNS management evaluations, and stakeholder feedback suggested that some SFAs have not been fully successful in conducting procurements or monitoring of cost-reimbursable contracts in the past. The ability of those SFAs to receive the full benefit of the contract terms and achieve administrative and nutritional compliance in the programs was negatively impacted, however given the mixed comments received on the proposed rule FNS has chosen not to finalize this provision as proposed.

In response to the COVID–19 public health emergency and consistent with legislative directives, FNS, State partners, and SFAs developed new approaches that offered unprecedented flexibilities to school meal service and program management, through nationwide waivers. The fundamental goal for each of the waivers was to provide substantive support promoting access to nutritious meals to all children during the COVID–19 pandemic. In 2020, FNS issued guidance, *Nationwide Waiver of Food Service Management Contract Duration in the National School Lunch Program and Summer Food Service Program, https://www.fns.usda.gov/cn/covid-19-child-nutrition-response-19,* which waived contract duration requirements for all State agencies, SFAs, and SFSP sponsors. SFAs in States opting to use this waiver could extend contracts with FSMCs beyond the fourth extension year, without undertaking new competitive procurements. The waiver relieved SFAs and FSMCs of the burden of competitive procurements and enabled full focus on preparing and providing nutritious school meals.

In 2021, when FSMCs and schools experienced supply chain disruptions that impacted food, packaging components, and transportation demands, FNS offered States and SFAs flexibilities, resources, and support to compensate for the unpredictability of the supply chain and the new uncertainties in accessing foods and supplies essential for school food service. Despite that, stakeholders provided compelling information indicating that even those contracts which included a price adjustment tied to a standard index—such as the Consumer Price Index—were not flexible enough to fully offset the

contract price to adjust during the COVID–19 pandemic supply chain-related market volatility. In a few instances, FSMCs concluded that withdrawal from the SFA market was in their best interest, leaving affected SFAs with few options in providing school meal service.

As a result of the lessons learned during COVID–19 and in response to the negative and mixed comments received during the comment period when this provision was proposed this final rule does not eliminate cost-reimbursable contracts in NSLP and SBP regulations. In responding to the demands of the COVID–19 pandemic, FNS gained deeper insight into the contractual relationships between SFAs and FSMCs, the financial aspects of those contracts, the impact on school food service workers, and the opportunities FNS may have to support and improve school food service. FNS has concluded that the proposed rule's elimination of cost reimbursable contracting would not be in the best interest of the programs at this time. FNS intends to assess the options and resources which may improve administrative and nutritional compliance, through stakeholder outreach, consultation, and analysis of the data reported as part of the COVID–19 waiver process.

As with the proposed rule, this final rule amends NSLP regulations to require each State agency to annually review and approve each contract and contract amendment between any SFA and FSMC. This final rule also amends NSLP and SBP regulations to require the value of USDA Foods to accrue only to the benefit of the SFA's nonprofit school food service. The proposed rule did not extend these provisions to SBP. However, FNS is correcting this oversight in this final rule. FNS recognizes the importance of consistency and administrative streamlining of Child Nutrition Program and USDA Food regulations. Current NSLP and SBP regulations define cost-reimbursable contract. Finally, for clarity, this final rule adds a definition for fixed-price contract to NSLP and SBP regulations. Fixed-price contract means a contract that charges a fixed cost per meal, or a fixed cost for a certain time period. Fixed-price contracts may include an economic price adjustment tied to a standard index. Current NSLP and SBP regulations define cost-reimbursable contract as a contract that provides for payment of incurred costs to the extent prescribed in the contract, with or without a fixed fee.

FNS recognizes that SFAs value flexibility in their contracts. For example, a contract that includes an economic price adjustment tied to a standard index—such as the Consumer Price Index—allows the contract price to adjust during market volatility. The SFA may also include a clause to account for changes in labor cost, such as a minimum wage increase. Additionally, qualitative factors—such as specifications relating to product appeal to students—are allowable evaluation factors that may be published in solicitations, as long as cost is the primary factor. SFAs may also include provisions that penalize an FSMC if meal quality is an issue. FNS recommends that SFAs consult with counsel during the procurement process to ensure that the contract terms are consistent with Federal law and any pertinent State and local laws.

Accordingly, this final rule amends 7 CFR 210.2 and 220.2 to define fixed-price contract in NSLP and SBP. The rulemaking also amends 7 CFR 210.19(a)(5) to require each State agency to annually review—and approve—each contract and contract amendment between any SFA and FSMC, for consistency with 7 CFR 210.16(a)(10). Finally, this rulemaking adds 7 CFR 210.16(c)(4) and 220.7(d)(3)(iv) to require the value of USDA Foods to accrue only to the benefit of the SFA's nonprofit school food service, to align with 7 CFR 210.16(a)(6). The compliance date is August 23, 2024.

10. Annual NSLP Procurement Training

Section 7(g)(2) of the Child Nutrition Act of 1966, 42 U.S.C. 1776(g)(2), requires training for school food service personnel on certain administrative practices and gives USDA discretion to require other appropriate training topics to address critical issues, such as integrity concerns. Current regulations at 7 CFR 210.30(b), (c), and (d) outline the professional standards training requirements for school nutrition program directors, management, and staff, respectively. Current regulations at 7 CFR 235.11(g)(3) outline the training requirements for State directors of school nutrition programs and distributing agencies. The specific annual training requirements vary, but for each position, FNS may identify other training topics, as needed. There are no specific regulatory requirements related to NSLP procurement training.

As discussed in the proposed rule, FNS released a guidance memo strongly encouraging periodic training for State Agency and SFA staff tasked with procurement responsibilities and has taken a number of steps to share information about proper procurement methods. However, State agencies and SFAs continue to face challenges implementing Federal procurement requirements. Helping State agencies and SFAs better understand procurement responsibilities through adequate training is one way to ensure Federal funds are used appropriately in NSLP. To improve compliance of these important requirements, the proposed rule requires annual procurement training for State agency and SFA staff tasked with procurement responsibilities, with an effective date 90 days after publication of the final rule. The proposed rule also requires State agencies and SFAs to retain records to document compliance with this provision.

Public Comments

FNS received 15 comments about NSLP procurement training. Of these, 2 were supportive, 4 were opposed, and 9 were mixed. Proponents described this provision as important and necessary, and stated that annual procurement training would ensure the school nutrition programs use Federal funds efficiently. Some respondents asked for clarification about the implementation of this requirement, including the number of annual training hours required. Regarding the proposal to document training, one respondent noted this would be an important step in assuring accountability. Opponents were concerned that this provision would increase program costs and create burden. They argued that annual procurement training is duplicative or excessive, unless it is necessary to resolve a review finding. One respondent argued that annual trainings in general lose value and become tedious.

FNS Response

This final rule requires State directors of school nutrition programs, State directors of distributing agencies, and school nutrition program directors, management, and staff who work on NSLP procurement activities to complete procurement training annually. FNS modified the language in this final rule to align with the school nutrition professional standards. This final rule also amends 7 CFR 210.30 and 235.11 to clarify that NSLP procurement training is subject to professional standards monitoring and recordkeeping requirements and may count towards the professional standards training requirements. This change from the proposed rule streamlines monitoring, recordkeeping, and training requirements.

FNS is mindful of respondents' concerns that NSLP procurement

training will not be relevant to all program staff. FNS recognizes that school nutrition program personnel have a variety of job responsibilities, which may or may not include procurement. FNS does not intend to require all personnel to complete annual procurement training, nor to take time away from other relevant training topics. This requirement only applies to State directors and school nutrition program directors, management, and staff who work on NSLP procurement activities.

FNS will not require a specific number of annual training hours. For personnel with minimal involvement, a brief refresher course may be sufficient. Personnel who are new to NSLP procurement, who are assigned new procurement tasks, or who use more complex procurement methods, such as sealed bids and competitive proposals, may require a full day of training. FNS encourages the training plan that best supports each staff member's job-specific training needs and experience.

Consistent with the professional standards training requirements, a variety of training formats may be used, such as webinars, classroom training, and seminars. State agencies may use SAE funds to pay for the costs of receiving or delivering annual NSLP procurement training. Generally, training is an allowable use of school food service funds. State agencies and SFAs are encouraged to access the free or low-cost training resources listed online at *https://professionalstandards.fns.usda.gov/.*

Annual training is an important step to ensure personnel who work on NSLP procurement activities have the knowledge they need to successfully implement Federal procurement requirements. Ensuring that responsible personnel annually gain knowledge of Federal procurement standards and contract performance monitoring through this regulatory change is an important step towards improving program integrity.

Accordingly, this final rule adds new paragraphs at 7 CFR 210.21(h), 210.30(g)(3), and 235.11(h)(3) to require State directors of school nutrition programs, State directors of distributing agencies, and school nutrition program directors, management, and staff who work on NSLP procurement activities to complete annual procurement training. The compliance date is August 23, 2024.

II. CACFP Amendments

A. Background

FNS is also using this opportunity to codify statutory requirements that are designed to improve the administration and operational efficiency of CACFP, with less paperwork. FNS published a proposed rule, *Child and Adult Care Food Program: Amendments Related to the Healthy, Hunger-Free Kids Act of 2010,* 77 FR 21018, on April 9, 2012, *https://www.fns.usda.gov/cacfp/fr-040912,* that included amendments that would replace the renewal application with an annual certification process, vary the timing of reviews of day care homes and centers, require permanent operating agreements for sponsored centers, broaden procedures for the collection of meal benefit forms for children enrolled in day care homes, and allow carry over and simplified calculation of administrative payments.

Since these changes in CACFP policy were required by the Healthy, Hunger-Free Kids Act of 2010 (HHFKA), and FNS released the changes in policy memos, they have become standard operating practices for State agencies and sponsoring organizations. In the intervening years since publication of the proposed rule, due to shifting priorities and the COVID–19 pandemic, FNS was unable to publish subsequent rulemaking to incorporate these statutory amendments into CACFP regulations under 7 CFR part 226. Through this final rule, FNS is incorporating only the statutory amendments proposed in the *Child and Adult Care Food Program: Amendments Related to the Healthy, Hunger-Free Kids Act of 2010,* 77 FR 21018, on April 9, 2012, *https://www.fns.usda.gov/cacfp/fr-040912,* into CACFP regulations.

FNS received 27 comments in response to the proposed rule. Many of them pointed out technical errors, questioned potential gaps in implementation, and offered valuable suggestions for improvement, but none of the comments objected to any of the six amendments, which are required by statute. There were no adverse comments challenging the rule's underlying premise or approach or suggesting that the content of the rule would be inappropriate, ineffective, or unacceptable without a change. The comments are posted at *http://www.regulations.gov* under docket ID FNS–2012–0022, *Child and Adult Care Food Program: Amendments Related to the Healthy, Hunger-Free Kids Act of 2010.*

The amendments included in this final rule:

- Require institutions to submit an initial application to the State agency and, in subsequent years, periodically update the information, in lieu of submitting a new application;
- Require sponsoring organizations to vary the timing of reviews of sponsored facilities;
- Require State agencies to develop and provide for the use of a standard permanent agreement between sponsoring organizations and day care centers;
- Allow tier II day care homes to collect household income information and transmit it to the sponsoring organization;
- Modify the method of calculating administrative payments to sponsoring organizations of day care homes; and
- Allow sponsoring organizations of day care homes to carry over up to 10 percent of their administrative funding from the previous Federal fiscal year into the next fiscal year.

B. Codifying the CACFP Amendments

1. Elimination of the Annual Application for Renewing Institutions

Annual certification of an institution's eligibility to continue participating in CACFP has replaced the renewal application process. Section 17(d)(2) of the NSLA, as amended by HHFKA, directs the Secretary to develop a policy to address the initial application requirements for institutions and annual confirmation of compliance with licensing and all other requirements for institutions and facilities to continue to participate in CACFP. These amendments required changes to current regulations, which require institutions to submit an annual application to participate in the program. Renewing institutions must re-apply at intervals of between 12 and 36 months after their initial application was approved by the State agency.

FNS issued CACFP 19–2011, *Child Nutrition Reauthorization 2010: Child and Adult Care Food Program Applications,* on April 8, 2011, *https://www.fns.usda.gov/cacfp/applications,* to provide guidance regarding the HHFKA requirements that renewing institutions must submit an annual certification of information, updated licensing information, and a budget. FNS included the requirements for annual certification in the April 9, 2012, proposed rule for the public to review and comment on. FNS did not receive any substantive comments on this provision.

This final rule adopts these changes, as proposed, by amending 7 CFR 226.6(b) to require an initial application for new institutions and annual confirmation for renewing institutions that they are compliant with program requirements. Renewing sponsoring organizations must submit updated

licensing information for its sponsored facilities, an annual budget, and an annual certification of compliance with all of the requirements under 7 CFR 226.6(b)(2) and 226.6(f)(1). The renewing sponsoring organization must certify that:

- The management plan on file with the State agency is complete and up to date, per 7 CFR 226.6(b)(1)(iv);
- The sponsoring organization and its principals are not currently on the National Disqualified List, per 7 CFR 226.6(b)(1)(xii);
- No sponsored facility or principal of a sponsored facility is currently on the CACFP National Disqualified List, per 7 CFR 226.6(b)(1)(xii);
- A list of any publicly funded programs that the sponsoring organization and its principals have participated in, in the past 7 years, is current, per 7 CFR 226.6(b)(1)(xiii)(B);
- The sponsoring organization and its principals have not been determined ineligible for any other publicly funded programs due to violation of that program's requirements, in the past 7 years, per 7 CFR 226.6(b)(1)(xiii)(B);
- No principals have been convicted of any activity that occurred during the past 7 years and that indicated a lack of business integrity, per 7 CFR 226.6(b)(1)(xiv)(B);
- The names, mailing addresses, and dates of birth of all current principals have been submitted to the State agency per 7 CFR 226.6(b)(1)(xv);
- The outside employment policy most recently submitted to the State agency remains current and in effect, per 7 CFR 226.6(b)(1)(xvi);
- The sponsoring organization is currently compliant with the required performance standards of financial viability and management, administrative capability, and program accountability, per 7 CFR 226.6(b)(1)(xviii);
- Licensing or approval status of each sponsored child care center, adult day care center, or day care home is up-to-date;
- The list of the sponsoring organization's facilities on file with the State agency is up-to-date; and
- All facilities under the sponsoring organization's oversight have adhered to Program training requirements.

Renewing independent centers must submit updated licensing information and an annual certification of compliance with all of the requirements under 7 CFR 226.6(b)(2) and 226.6(f)(1). The renewing independent center must certify that:

- The center and its principals are not currently on the National Disqualified List, per 7 CFR 226.6(b)(1)(xii);
- A list of any publicly funded programs that the center and its principals have participated in the past 7 years is current, per 7 CFR 226.6(b)(1)(xiii)(B);
- The center and its principals have not been determined ineligible for any other publicly funded programs due to violation of that program's requirements in the past 7 years, per 7 CFR 226.6(b)(1)(xiii)(B);
- No principals have been convicted of any activity that occurred during the past 7 years and that indicated a lack of business integrity, per 7 CFR 226.6(b)(1)(xiv)(B);
- The names, mailing addresses, and dates of birth of all current principals have been submitted to the State agency per 7 CFR 226.6(b)(1)(xv);
- The center is currently compliant with the required performance standards of financial viability and management, administrative capability, and program accountability, per 7 CFR 226.6(b)(1)(xviii); and
- Licensing or approval status of each child care center or adult day care center.

State agencies may add to this list other types of information that they require annually for proper administration of the program, such as submission of budgets by independent centers, which is not a Federal requirement. The miscellaneous responsibilities currently listed under 7 CFR 226.6(f)(3)(iv) include additional reporting requirements for CACFP institutions. This final rule makes a corresponding change to remove the reapplication requirements under 7 CFR 226.6(f)(2) and move the responsibilities at other time intervals, listed under paragraph (f)(3), to paragraph (f)(2).

Accordingly, as required by statute, this action amends 7 CFR 226.2, and 226.6(b) to require an initial application for new institutions and annual updates, as needed, for renewing institutions. A corresponding change is made at 7 CFR 226.6(f). This provision has been a standard operating practice for State agencies since 2011. The compliance date is September 22, 2023.

2. Timing of Unannounced Reviews

Reviews are more effective at ensuring program integrity when they are unannounced and unpredictable. Section 17(d)(2)(B)(ii) of the NSLA requires sponsoring organizations to vary the timing of unannounced reviews in a manner that makes the reviews unpredictable to sponsored facilities. Current regulations require sponsoring organizations to conduct three reviews per year at each facility, two of which must be unannounced. One of the unannounced reviews must include observation of a meal service. No more than 6 months may elapse between reviews. However, there is no current regulatory requirement that the timing of those reviews must be varied.

FNS issued CACFP 16–2011, *Child Nutrition Reauthorization 2010: Varied Timing of Unannounced Reviews in the Child and Adult Care Food Program,* on April 7, 2011, *https://www.fns.usda.gov/cacfp/varied-timing-unannounced-reviews-child-and-adult,* to advise State agencies of the new statutory requirement under HHFKA to ensure that the timing of unannounced reviews is varied in a way that would ensure they are unpredictable to the day care home or sponsored center. FNS included the requirements for the timing of unannounced reviews in the CACFP proposed rule for the public to review and comment on. FNS did not receive any substantive comments on this provision.

This final rule adopts these changes by amending 7 CFR 226.16(d)(4)(iii) to require sponsoring organizations to vary both the timing of unannounced reviews and the types of meal service that are subject to review. This rulemaking also amends the review content at 7 CFR 226.6(m)(3) to add a requirement that the State agency assess the frequency, predictability, and type of each sponsoring organization's facility reviews. Effective monitoring of day care homes and sponsored centers will require sponsoring organizations to ensure that:

- At least two of the three annual reviews are unannounced;
- At least one unannounced review includes observation of a meal service;
- At least one review is made during each new facility's first 4 weeks of program operations;
- No more than 6 months elapse between reviews;
- The timing of unannounced reviews is varied so that they are unpredictable to the facility;
- All types of meal service are reviewed; and
- The types of meal service reviewed are varied.

Accordingly, this final rule amends 226.16(d)(4)(iii) to require sponsoring organizations to vary the timing of unannounced reviews and vary the type of meal service subject to review. A corresponding change is made at 7 CFR 226.6(m)(3)(ix) to require the State agency to assess the timing of each sponsoring organization's reviews of day care homes and sponsored centers. This provision has been a standard operating practice for sponsoring organizations and State agencies since

2011. The compliance date is September 22, 2023.

3. Standard Agreements Between Sponsoring Organizations and Sponsored Centers

Section 17(j) of the NSLA requires State agencies to develop and provide for the use of a standard form of agreement between each sponsoring organization and day care home or sponsored center. Current regulations require the sponsoring organization to enter into a written permanent agreement with each sponsored day care home, which specifies the rights and responsibilities of both parties. However, there is no standard form of agreement and no requirement that sponsoring organizations establish agreements with sponsored centers.

FNS included the requirements for standard operating agreements in the CACFP proposed rule for the public to review and comment on. FNS did not receive any substantive comments on this provision. FNS proposed establishing a standard form of agreement between sponsoring organizations and their sponsored centers at 7 CFR 226.16(h) that would specify the rights and responsibilities of each party.

This final rule adopts the proposed terms of a standard agreement between a sponsoring organization and a child care center at 7 CFR 226.17, an at-risk afterschool care center at 7 CFR 226.17a, an outside-school-hours care center at 226.19, and an adult day care center at 226.19a. The standard agreement, described at 7 CFR 226.6(p), requires the center to:

- Allow visits by sponsoring organizations or State agencies to review meal service and records;
- Promptly inform the sponsoring organization about any change in its licensing or approval status;
- Meet any State agency approved time limit for submission of meal records; and
- Distribute to parents a copy of the sponsoring organization's notice to parents if directed to do so by the sponsoring organization.

The standard agreement also establishes the right of centers to receive timely reimbursement from the sponsoring organizations for meals served. Consistent with the requirement under 7 CFR 226.16(h)(2), sponsoring organizations must pay program funds to child care centers, adult day care centers, emergency shelters, at-risk afterschool care centers, or outside-school-hours care centers within 5 working days of receipt from the State agency.

FNS also proposed a corresponding amendment to define ''Facility'' under 7 CFR 226.2. In this final rule, facility means a sponsored center or day care home. FNS is finalizing a new definition of ''Sponsored center'', as proposed, to mean a child care center, an at-risk afterschool care center, an adult day care center, an emergency shelter, or an outside-school-hours care center that operates CACFP under the auspices of a sponsoring organization. A sponsored center may be either affiliated—as part of the same legal entity as the CACFP sponsoring organization—or unaffiliated, which is legally distinct from the sponsoring organization.

Accordingly, this final rule amends 7 CFR 226.6(p) and 226.17a(f) and adds new paragraphs at 226.17(e) and (f), 226.19(d) and (e), and 226.19a(d) and (e) to require sponsoring organizations to enter into permanent agreements with their unaffiliated centers. New definitions of ''Facility'' and ''Sponsored center'' are added under 7 CFR 226.2. This provision is a standard operating practice for sponsoring organizations. The compliance date is September 22, 2023.

4. Collection and Transmission of Household Income Information

Section 17(f)(3)(A)(iii)(III)(dd) of the NSLA allows day care homes to assist in the transmission of necessary household income information to the sponsoring organization. Section 17(f)(3)(A)(iii)(III)(ee) directs the Secretary to develop policy specifying the written consent of parents and other conditions, which would allow day care home providers to assist in transmitting meal benefit forms from parents to the sponsoring organizations.

Current regulations include procedures for families whose children are enrolled in family day care to provide household income information on meal benefit forms that are transmitted directly to the sponsoring organization. The sponsoring organization is responsible for informing tier II day care homes of all of their options for receiving reimbursement for meals served to enrolled children, including electing to have the sponsoring organization attempt to identify all income-eligible children enrolled in the day care home, through collection of meal benefit forms. The sponsoring organization must also ensure that free and reduced-price eligibility information of individual households is not available to day care homes.

FNS issued CACFP 17–2011, *Child Nutrition Reauthorization 2010: Transmission of Household Income Information by Tier II Family Day Care Homes in the Child and Adult Care Food Program,* on April 7, 2011, *https://www.fns.usda.gov/cacfp/transmission-household-income-information-tier-ii.* This guidance describes how tier II family day care home providers may participate in the collection and transmission of household information. The guidance also outlines the options and privacy protections available to households. FNS included these options in the CACFP proposed rule for the public to review and comment on. FNS did not receive any substantive comments on this provision.

This final rule adopts these options by amending the sponsoring organization's responsibility under 7 CFR 226.18(b)(13) to allow tier II day care homes to assist in collecting meal benefit forms from households and transmitting the forms to the sponsoring organization on the household's behalf. It is important to emphasize that this is an option available to day care home providers and households. The State agency or sponsoring organization cannot require day care homes to collect and transmit this information. Households cannot be required to return their meal benefit forms directly to the provider.

The sponsoring organization is also responsible for establishing procedures that prohibit a day care home provider who chooses this option from reviewing or altering the information on the meal benefit form. This rule finalizes a new paragraph at 7 CFR 226.23(e)(2)(vii) as proposed with minor clerical adjustments to further require the sponsoring organizations to protect the privacy of a household's income information. Households of children enrolled in tier II day care homes that elect this option must give their consent for the collection and transmission of their information. The household must be advised that:

- The household is not required to complete the meal benefit form in order for a child to participate in CACFP;
- The household may return the meal benefit form to either the sponsoring organization or the day care home provider;
- By signing the letter and giving it to the day care home provider, the household has given the day care home provider written consent to collect and transmit the household's application to the sponsoring organization; and
- The meal benefit form will not be reviewed by the day care home provider.

Accordingly, this final rule adds a new paragraph at 7 CFR 226.18(b)(13) to add the right of the tier II day care home

to assist in collecting and transmitting applications to the sponsoring organizations and prohibit the provider from reviewing applications from households. This final rule also adds a new paragraph at 7 CFR 226.23(e)(1)(vii) to address household consent and actions to protect the privacy of a household's income information. This provision has been a standard operating practice for sponsoring organizations of day care homes since 2011. The compliance date is September 22, 2023.

5. Calculation of Administrative Funding for Sponsoring Organizations of Day Care Homes

Section 17(f)(3)(B)(i) of the NSLA authorizes reimbursement for administrative expenses of sponsoring organizations of day care homes and applies a formula for calculating the amount of administrative reimbursement a sponsoring organization may receive. As amended by HHFKA, section 17(f)(3) of the NSLA by eliminating the ''lesser of'' cost and budget comparison for calculating administrative payments to sponsoring organizations of day care homes, as defined under current regulations at 7 CFR 226.12(a). Under current regulations, the State agency determines administrative reimbursement by calculating and paying the ''lesser of'' actual administrative costs, budgeted administrative costs, or an amount established by a formula.

FNS issued CACFP 06–2011, *Child Nutrition Reauthorization 2010: Administrative Payments to Family Day Care Home Sponsoring Organizations,* on December 22, 2010, *https://www.fns.usda.gov/cacfp/2010-administrative-payments-family-day-care-home,* to advise State agencies that a simpler method for determining monthly administrative payments had been established by HHFKA. Effective October 1, 2010, the sponsoring organization's monthly payment would be based on the statutory formula that would no longer require a comparison with actual expenditures or budgeted administrative costs. FNS included the requirements for calculating administrative payments in the CACFP proposed rule for the public to review and comment on. FNS did not receive any substantive comments on this provision.

This final rule adopts this change by amending 7 CFR 226.12(a) to establish that administrative costs payments are determined only by multiplying the appropriate administrative reimbursement rate by the number of day care homes submitting claims for reimbursement during the month. Administrative reimbursement rates are announced annually in the **Federal Register**.

Sponsoring organizations are still required to submit annual budgets and remain responsible for correctly accounting for costs and maintaining records and sufficient supporting documentation to demonstrate that the claimed costs were incurred, are allocable to the program, and comply with Federal regulations and policies. State agencies must continue to recover reimbursements that are unallowable or that lack adequate documentation. However, the expenditures for administrative costs, the amount of costs approved in the administrative budget, and the 30 percent restriction on the total amount of administrative payments and food service payments for day care home operations no longer apply in determining the sponsoring organization's monthly payment.

Accordingly, this final rule amends 7 CFR 226.12(a) to simplify the calculation of monthly administrative reimbursement that sponsoring organizations of day care homes are eligible to receive. To determine the amount of payment, the State agency must multiply the appropriate administrative reimbursement rate, which is announced annually in the **Federal Register**, by the number of day care homes submitting claims for reimbursement during the month. This provision has been a standard operating practice for State agencies since 2010. The compliance date is September 22, 2023.

6. Carryover of Administrative Funding for Sponsoring Organizations of Day Care Homes

Section 17(f)(3)(B)(iii) of the NSLA, as amended by HHFKA, directs the Secretary to develop procedures under which up to 10 percent of a sponsoring organization's administrative funds may remain available for obligation or expenditure in the succeeding fiscal year. It allows sponsoring organizations to carry over up to 10 percent of their administrative payments from the previous fiscal year into the next fiscal year. There is no provision for carryover of administrative payments in current regulations.

FNS issued a memorandum, CACFP 18–2011 *Child Nutrition Reauthorization 2010: Carry Over of Unused Child and Adult Care Food Program Administrative Payments,* on April 8, 2011, *https://www.fns.usda.gov/cacfp/carry-over-unused.* FNS advised State agencies of the option available to sponsoring organizations of day care homes to carry over up to 10 percent of unspent administrative reimbursement from the current Federal fiscal year to the next fiscal year.

FNS issued additional guidance, CACFP 11–2012, *Family Day Care Home Administrative Reimbursements: Options and Carryover Reporting Requirements,* on March 19, 2012, *https://www.fns.usda.gov/cacfp/family-day-care-home-administrative-reimbursements-options-and-carryover-reporting,* and CACFP 24–2012: REVISED, *Family Day Care Home Administrative Reimbursements: Carryover Reporting Requirements for Fiscal Year 2012 and All Subsequent Years,* on September 5, 2012, *https://www.fns.usda.gov/cacfp/family-day-care-home-administrative-reimbursements-carryover-reporting-requirements-fy-2012.* These memoranda provided clarification of options regarding administrative reimbursements and the management of unspent funds that may be carried over from the current Federal fiscal year to the next fiscal year. They also described procedures for reporting administrative funds under a 2-year period of performance.

FNS included the requirements allowing sponsoring organizations of day care homes to carry over administrative funding in the CACFP proposed rule for the public to review and comment on. FNS did not receive any substantive comments on this provision. This final rule amends 7 CFR 226.12(a) to allow a sponsoring organization to carry over and obligate a maximum of 10 percent of administrative funds into the succeeding fiscal year, with State agency approval. Corresponding amendments at 7 CFR 226.6(f)(1)(iv), 226.7(g) and 226.7(j), require State agencies to ensure that:

- The annual budget that is submitted for the State agency's review and approval includes an estimate of the sponsoring organization's requested administrative fund carryover amounts and a description of the proposed purpose for obligating or expending those funds;
- An amended budget, which identifies the amount of administrative funds that the sponsoring organization actually carried over and describes the purpose, is submitted for the State agency's review and approval as soon as possible after fiscal year close-out;
- The review of the sponsoring organization's administrative costs includes a review of the documentation supporting carryover requests, obligations, and expenditures; and

• Procedures are established to recover any administrative funds that exceed 10 percent of that fiscal year's administrative payments, and any carryover amount that is not expended or obligated by the end of the fiscal year following the fiscal year in which the funds were earned.

Administrative funds remaining at the end of the fiscal year must be returned to the State agency. If any remaining carryover funds are not obligated or expended by the sponsoring organization in the succeeding fiscal year, the sponsoring organization is required to return the remaining funds to the State agency. A sponsoring organization can avoid that situation by using its payments for administrative costs on a first-in-first-out basis.

Sponsoring organizations are not required to carry over any unspent funds. They may, at their option, return them to the State agency. The sponsoring organization also has the option to request that the State agency base administrative payments on the sponsoring organization's actual expenses. However, sponsoring organizations receiving administrative payments based upon actual expenses are not permitted to carry over funds into the next fiscal year.

Accordingly, this final rule amends 7 CFR 226.6(f)(1)(iv) and adds new paragraphs at 226.7(g)(2) and 226.12(a)(3) to allow carryover of administrative funds with State agency approval. This rulemaking also amends 7 CFR 226.7(j) and adds a new paragraph 226.12(a)(4) to require the State agency to establish procedures to recover administrative funds from sponsoring organizations of day care homes that are not properly payable, are in excess of the 10 percent maximum carryover amount, or any carryover amounts not expended or obligated by the end of the fiscal year following the fiscal year in which they were earned. This provision has been a standard operating practice for sponsoring organizations and State agencies since 2011. The compliance date is September 22, 2023.

III. Simplifying Monitoring in NSLP and SBP

A. Background

State agencies are responsible for regularly monitoring SFA operations in NSLP and SBP, in addition to providing training and technical assistance. Since School Year 2013–2014, the unified administrative review process has provided State agencies with a comprehensive process for evaluating compliance with program requirements. It includes a review of an SFA's financial practices, compliance with nutrition standards, and a review of program operations to ensure compliance with Federal regulations.

This final rule provides a means for FNS to amend the administrative review process. State agencies and SFAs have called on FNS to streamline requirements so that they could more effectively direct their resources to their core mission of serving nutritious meals to children. FNS looked for opportunities to reduce administrative burden addressing findings from USDA's *Child Nutrition Reporting Burden Analysis Study,* released in 2019, *https://www.fns.usda.gov/child-nutrition-reporting-burden-analysis-study,* in a responsible way, while giving consideration to local resource constraints. In a proposed rule, *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs,* 85 FR 4094, on January 23, 2020, *https://www.fns.usda.gov/nslp/fr-012120,* FNS suggested a number of discretionary changes to streamline the administrative review, without compromising State agency and SFA efforts to maintain accountability and integrity.

Through this final rule, FNS is taking action to codify the proposed changes to monitoring. These amendments will give State agencies greater flexibility, eliminate redundancy, and target limited State resources to higher risk SFAs. This rulemaking includes amendments to:

• Allow State agencies to return to a 5-year administrative review cycle and require State agencies that conduct reviews on a longer than 3-year cycle to identify high-risk SFAs for additional oversight at 7 CFR 210.18(c);

• Give State agencies flexibility to substitute information from local-level audits for related parts of the administrative review, at 7 CFR 210.18(f)(3);

• Reduce the performance-based reimbursement reporting requirement, from quarterly to annually, by removing 7 CFR 210.5(d)(2)(ii) and 210.7(d)(1)(vii) and (d)(2), which are obsolete;

• Allow State agencies to omit specific elements of the administrative review, when equivalent oversight activities are conducted outside of the administrative review process, at 7 CFR 210.18(f), (g), and (h);

• Adopt a framework that State agencies may elect to modify the administrative review if the State agency or SFA adopts the specified integrity-focused improvements, at 7 CFR 210.18(f), (g), and (h);

• Give State agencies flexibility to conduct the assessment of an SFA's nonprofit school food service account at any point in the review process, at 7 CFR 210.18(h)(1);

• Include compliance with the Buy American requirement as part of the general areas of the administrative review, at 7 CFR 210.18(b) and (h)(2);

• Removes requirement for required fiscal action against SFAs for repeated violations of meal pattern noncompliance, at 7 CFR 210.18(l)(2); and

• Allow State agencies to conduct the FSMC review on a 5-year cycle, at 7 CFR 210.19(a)(5).

FNS received 57,248 public comments on the proposed rule. Nearly all of the comments were submitted in response to proposed amendments related to school meal nutrition standards, which are not addressed in this final rule but are instead addressed in a separate rulemaking. The comments are posted at *http://www.regulations.gov* under docket ID FNS–2019–0007, *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs.*

Although less than 150 respondents addressed any of the proposed changes to monitoring under the administrative review process, the comments were overall supportive of proposed changes. Respondents agreed that the proposed monitoring amendments would free up time and resources for State agencies to more effectively perform reviews, provide technical assistance, and focus on program improvement. They championed the increased flexibility, reduced redundancy, and paperwork savings that would be achieved. Their comments expressed support for changes that would allow opportunities for State agencies to provide technical assistance, instead of what respondents perceived as penalizing schools. Respondents also asserted that the proposed rule would provide State agencies the autonomy to determine the review processes that make the most operational sense for their situation.

In addition to providing training and technical assistance, State agencies are responsible for regularly monitoring SFA operations. Since School Year 2013–2014, the unified administrative review process has provided a more robust review of the school meal programs. It also includes a review of an SFA's financial practices through the Resource Management Module to better ensure compliance with Federal regulations.

As was discussed in the proposed rule, program regulations under 7 CFR

210.18 address various aspects of the administrative review, including the timing of review, use of audit findings as part of the scope of review, areas of critical and general review, corrective action, withholding of payments, fiscal action, and appeal rights. FNS examined the review process to identify a number of elements that could favorably reduce administrative burden in a responsible way.

B. Streamlining the Administrative Review Process

1. Return to a 5-Year Review Cycle

The unified administrative review process provides a robust review of the school meal programs, supporting integrity and administrative responsibility. Current regulations at 7 CFR 210.18(c) require State agencies to conduct a comprehensive administrative review of each SFA participating in NSLP and SBP at least once during a 3-year cycle.

FNS proposed modifying the review cycle to ease the burden for State agencies and SFAs, by allowing State agencies to return to a 5-year administrative review cycle. An SFA that has any findings on the previous administrative review or noncompliance with Federal procurement regulations would be designated high risk. The proposed rule would require State agencies to designate and, within 2 years, perform follow-up reviews of high-risk SFAs. The proposed rule would also allow State agencies to conduct more frequent reviews.

FNS received 147 comments on the proposed 5-year review cycle—97 were supportive, 38 were opposed, and 12 were mixed. Proponents recognized that the high number of waivers granted to State agencies under the current waiver process—which allows State agencies to request to extend the 3-year review cycle—underscores the need for relief. State agencies currently using waivers to extend their review cycles have reported that it allows them to better balance resources between technical assistance and formal reviews, and better support schools in their operations. Many respondents supported requiring targeted follow-up reviews for high-risk SFAs, maintaining that additional oversight could improve their performance. Many also agreed that a risk-based approach would target limited State agency oversight resources where they are most needed.

Opponents suggested that a 5-year gap between reviews would be too long and could weaken program integrity. Instead of making this change, they suggested that FNS retain the 3-year cycle and work to streamline the administrative review process or ensure that SFAs selected for follow-up reviews receive technical assistance. FNS is committed to robust oversight, integrity, and quality in the school meal programs. However, FNS recognizes that the 3-year review cycle is taxing for State agencies and SFAs and diverts resources from technical assistance and program improvement.

This final rule amends 7 CFR 210.18(c), to allow State agencies to implement a 5-year administrative review cycle, while targeting additional oversight to those SFAs most in need of assistance. State agencies may continue with a shorter review cycle if they wish to do so. This rule also requires State agencies that review SFAs on a longer than 3-year cycle to identify high-risk SFAs for additional oversight. SFAs in need of more frequent monitoring—those that present program integrity concerns—will receive it through the required targeted follow-up review. Each State agency that reviews SFAs on a longer than 3-year cycle must develop a plan for FNS approval describing the criteria that will be used to identify high-risk SFAs for targeted follow-up reviews.

In this final rule, minimum high-risk criteria that must be included in State plans will be outlined at 7 CFR 210.18(c)(2). These core elements are consistent with recommendations from State agencies to focus on compliance with the performance standards and the appropriate use of Federal funds. State agencies may add other criteria and use other information to designate an SFA as high-risk on a case-by-case basis.

State agencies must also conduct a targeted follow-up review of any SFA designated as high-risk within 2 years of the initial review. The targeted follow-up review must, at a minimum, include the areas identified in the most recent review that caused the SFA to be designated high-risk.

FNS also proposed a corresponding change at 7 CFR 210.19(a)(5) to align the food service management company (FSMC) review with the 5-year administrative review cycle. FNS received 19 comments on this proposal—13 were supportive, 3 were opposed, and 3 were mixed. Most respondents cited the same reasons for supporting or opposing a return to a 5-year administrative review cycle. One respondent argued that there should be no change in cycle because the review of FSMCs is primarily a procurement review, which would be completed annually off-site. Another suggested that more frequent reviews of invoices should be conducted instead.

Accordingly, this final rule amends 7 CFR 210.18(c), and allow State agencies to implement a 5-year administrative review cycle, while targeting additional oversight to those SFAs most high risk. This final rule also amends 7 CFR 210.19(a)(5) to allow State agencies to conduct the FSMC review on a 5-year cycle to align with the administrative review cycle. This final rule does not make any changes to the oversight of FSMCs, including the requirement for State agencies to review each contract between an SFA and FSMC annually. State agencies may continue with a shorter FSMC review cycle if they wish to do so. The compliance date is July 1, 2024.

2. Substitution of Local-Level Audits

Current regulations at 7 CFR 210.18(f)(3) allow State agencies to use applicable findings from federally-required audit activity or State-imposed audit requirements in lieu of reviewing the same information on an administrative review, provided the audit activity complies with the same standards and principles that govern the Federal single audit. FNS proposed building on this flexibility by expanding the allowable use of local-level audits. The proposed rule would allow State agencies to use recent and applicable findings from local-level audits initiated by SFAs or other entities including tribes, supplementary audit activities, or requirements added to Federal or State audits by local operators, as long as the audit activity complies with the same standards.

FNS received 47 comments that addressed this proposed amendment—38 were supportive, 3 were opposed, and 6 were mixed. One respondent argued that external audits would only add confusion because they do not necessarily align with the same standards used in the administrative review process. However, FNS agrees with most respondents that the use of local-level audits will simplify monitoring—limiting unnecessary duplication of efforts and minimizing burden on State agency staff—without compromising program integrity.

Accordingly, this final rule amends 7 CFR 210.18(f)(3) to allow State agencies, with FNS approval, to use information from local-level audits to substitute for related parts of the administrative review. Requiring FNS approval will ensure that the local-level audit aligns with Federal audit standards. The compliance date is July 1, 2024.

3. Completion of Review Requirements Outside of the Administrative Review

State agencies conduct a variety of oversight activities outside of the formal administrative review process. FNS proposed adding a new amendment under 7 CFR 210.18(f), (g), and (h), to allow State agencies to satisfy sections of the administrative review through equivalent State oversight activities that take place outside of the formal administrative review process, if the State agency or SFA has implemented FNS-specified error reduction strategies or monitoring efficiencies. In other words, State agencies would be able to omit specific, redundant areas of the administrative review, when sufficient oversight is conducted elsewhere.

FNS received 22 comments on this proposal—21 were supportive and 1 was opposed. Respondents described a number of equivalent State oversight activities that would satisfy sections of the administrative review, including health inspections, validation of Community Eligibility Provision source data at the time of election, school reports of financial revenues and expenses, information collected during annual agreement renewals, on-site and comprehensive technical assistance visits, and review of financial and other types of reports. FNS agrees with respondents that this proposed amendment will increase flexibility and reduce redundancy by allowing State agencies to satisfy parts of the administrative review through activities they have already performed.

Accordingly, this final rule amends 7 CFR 210.18(f), (g), and (h) to allow State agencies, with FNS approval, to omit specific, redundant areas of the administrative review, when sufficient oversight is conducted outside of the administrative review. Each of these State agencies must submit a plan, for FNS approval, that describes the State agency's specific oversight activities and the critical or general areas of review that would be replaced. State agencies must submit updates or additions to their plan for FNS approval. The compliance date is July 1, 2024.

4. Framework for Integrity-Focused Process Improvements

To address the improper payment challenges facing the NSLP and SBP, where much of the underlying program error cannot be identified or addressed through monitoring alone, additional efforts must be directed to process reform. FNS proposed further amending 7 CFR 210.18(f), (g), and (h) to allow State agencies to elect to modify, reduce, or eliminate a specified administrative review requirement, if the State agency or the SFA has adopted a given set of process improvements. The goal would be to redirect some of the costs of the administrative review into State agency or SFA investment in designated systems or process improvements to reduce or eliminate program errors. The streamlined review would be the incentive to make the necessary investments in systems or process improvements that can reduce or eliminate program errors.

FNS received 26 comments on this proposal—12 were supportive, 3 were opposed, and 11 were mixed. Many of the comments identified potential challenges or asked for clarification. For example, respondents requested more specific information on what the integrity-focused processes entail, expressed concerns about potential impacts of the proposal on State agencies or SFAs, and posed questions about the effect of proposed integrity features. FNS believes that providing States and SFAs the option of adopting integrity focused process reforms could increase outcomes and decrease errors.

FNS intends to develop guidance and a series of FNS-approved optional process reforms that respond to the latest findings from USDA research, independent audits, and FNS analysis of administrative data that State agencies and SFAs may adopt. FNS understands there will be costs associated with some of these process reforms, but that these will be offset, in whole or in part, through savings from the streamlined administrative review.

FNS will test potential reforms, in cooperation with State and local program administrators, to assess their feasibility and effectiveness. States or SFAs may then adopt these FNS-approved process reforms, at their option, in exchange for elimination, modification, or reduction of existing administrative review requirements. FNS anticipates that this package of optional reforms will grow over time in response to new research and changes in the nature of the integrity challenges facing the programs.

Accordingly, this final rule amends 7 CFR 210.18(f), (g), and (h) to allow State agencies to omit designated areas of review, in part or entirely, where a State agency or SFA has implemented FNS-specified error reduction strategies or utilized FNS-specified monitoring efficiencies. The effective date is September 22, 2023.

5. Assessment of Resource Management Risk

Current regulations at 7 CFR 210.18(h)(1) direct State agencies to perform an off-site assessment of an SFA's nonprofit school food service account to evaluate the risk of noncompliance with resource management requirements. If risk indicators show that the SFA is at high risk for noncompliance with resource management requirements, the State agency must conduct a comprehensive review. FNS proposed giving State agencies discretion to conduct this assessment at any point in the review process rather than requiring it to take place off-site.

FNS received 19 comments on this proposal—16 were supportive and 3 were opposed. While proponents supported greater flexibility for State agencies to determine when and how they conduct the resource management module, opponents were concerned that reviews would become less efficient and more disruptive to SFAs under this proposal. For example, one respondent argued that SFAs need a firm timeline to prepare for the administrative review. FNS recognizes that allowing State agencies to set up the review process to meet their needs will increase the usefulness of the resource management assessment, while reducing unnecessary burden.

Accordingly, this final rule amends 7 CFR 210.18(h)(1) to allow State agencies to conduct the assessment of an SFA's nonprofit school food service account at any point in the review process. Similar to the on-site portion of the review, FNS will no longer require that this assessment take place off-site before the administrative review. Although the State agency should make this assessment in the school year that the review began, completion of the resource management module may occur before, during, or after the on-site portion of the administrative review. The compliance date is September 22, 2023.

6. Buy American Area of Review

Program regulations under 7 CFR 210.21(d) and 7 CFR 220.16(d) describe requirements SFAs must follow to purchase, to the maximum extent practicable, domestic commodities or products and State agencies already review this provision as a part of the administrative review. However, Buy American is not currently included in regulation as part of the general areas of the administrative review. FNS proposed including compliance with the Buy American requirements as a general area of review, under 7 CFR 210.18(h)(2), that State agencies must monitor when they conduct administrative reviews.

FNS received 20 comments—9 were supportive, 4 were opposed, and 7 were mixed. While many of the comments went beyond the scope of the proposed rule, one respondent argued that a Buy American review should be included in either the oversight of procurement practices required under governmentwide regulations at 2 CFR 200 or the administrative review, but not both. State agencies review Buy American on-site through the administrative review, which then allows the State agency to conduct the oversight of procurement practices entirely off-site. To the extent practicable, these review teams should coordinate reviews and communicate findings in order to provide comprehensive monitoring of the Buy American requirements.

Accordingly, this final rule amends 7 CFR 210.18(h)(2) to add a new paragraph (xi) to require State agencies to ensure compliance with the Buy American requirements to purchase domestic commodities or products. This final rule also makes a corresponding technical change to the definition of ''General areas'' under 7 CFR 210.18(b). This small change provides consistency by aligning the lists of general areas of review that appear in paragraphs (b) and (h)(2). The compliance date is September 22, 2023.

7. Discretion in Taking Fiscal Action for Meal Pattern Violations

Current regulations at 7 CFR 210.18(l)(2) require State agencies to take fiscal action to recover Federal funds from SFAs for repeated violations of milk type and vegetable subgroup requirements. FNS proposed to instead give the State agency discretion to take fiscal action against SFAs for repeated violations of milk type and vegetable subgroup requirements. This would align with current State discretion to take fiscal action to address repeated violations of food quantity, whole grain-rich, and dietary specifications requirements.

FNS received 54 comments on this proposal—23 were supportive, 28 were opposed, and 3 were mixed. Proponents suggested that this amendment would allow State agencies to provide technical assistance, instead of penalizing schools for unintentional errors. Opponents argued that continued violations of program requirements should be addressed uniformly, with consequences that will prevent integrity concerns. FNS continues to believe that implementing this amendment will increase efficiency and reduce burden, without compromising integrity.

While most SFAs strive to make a good faith effort to comply with meal pattern requirements, FNS recognizes that some SFAs may need additional support from the State agency to fully and correctly implement the meal pattern. Rather than require State agencies to fiscally penalize SFAs, this rule allows States to consider each unique situation and determine whether technical assistance, fiscal action, or a combination of both, is the appropriate response. FNS encourages State agencies to communicate with their SFAs about situations that would warrant fiscal action, to ensure a uniform and fair approach.

Accordingly, this final rule amends 7 CFR 210.18(l)(2) to give State agencies the discretion to take fiscal action against SFAs for repeated violations of milk type and vegetable subgroup requirements. This amendment aligns with State's existing discretion to take fiscal action for repeated violations concerning food quantities, whole grain-rich foods, and the dietary specifications. This final rule retains the requirement that State agencies must take fiscal action for missing food components. The compliance date is September 22, 2023.

C. Reducing Performance-Based Reimbursement Reporting

Program regulations at 7 CFR 210.5(d)(2)(ii) require State agencies to submit to FNS a quarterly report detailing the total number of SFAs in the State and the names of SFAs that are certified to receive the statutorily-established 8-cents performance-based reimbursement. The regulations further affirm that State agencies will no longer be required to submit the quarterly report once all SFAs in the State have been certified. In the *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs,* 85 FR 4094, *https://www.fns.usda.gov/nslp/fr-012120,* FNS proposed reducing the frequency of this reporting requirement from quarterly to annually, as almost all SFAs are already certified to receive the performance-based reimbursement.

FNS received 21 comments on this proposal—20 were supportive and 1 was mixed. The mixed comment generally supported the provision but suggested a change to the rate structure which is statutorily driven. FNS agrees with respondents that eliminating or reducing non-essential administrative requirements and simplifying program regulations will allow more time for State agencies to focus on improving program operations.

Accordingly, this final rule amends 7 CFR 210.5(d) to reduce the performance-based reimbursement reporting requirement from quarterly to annually. This rulemaking moves the performance-based reimbursement report from the quarterly report under paragraph (d)(2) to the end-of-the-year report under paragraph (d)(3). Corresponding changes remove references to the performance-based reimbursement report at 7 CFR 210.7(d)(1)(vii) and (d)(2) that are now obsolete. This rulemaking amends 7 CFR 210.5(d)(2) and (d)(3) and 210.7(d). The compliance date is September 22, 2023.

IV. Miscellaneous Amendments

A. State Administrative Expense (SAE) Funds

SAE regulations require State agencies to return to FNS any unexpended SAE funds at the end of the fiscal year following the fiscal year for which the funds are awarded. FNS proposed an amendment that would require State agencies to return any unobligated SAE funds—instead of unexpended—to give State agencies more flexibility to spend their funds. FNS received 40 comments on this proposal—38 were supportive, 1 was opposed, and 1 was mixed. FNS agrees with respondents that making this change will help ensure that State agencies are not missing opportunities to use their funds. This change also gives State agencies a longer period of time to expend SAE funds to complete critical work. Accordingly, this final rule amends 7 CFR 235.5(d) and (e)(2) to require State agencies to return any unobligated SAE funds to FNS. The compliance date is September 22, 2023.

B. FNS Contact Information

A realignment of FNS Regional Offices took effect on September 29, 2019. These organizational changes achieve operational efficiencies, increased accountability, and improved communications to support program integrity, and ensure continued executive supervisory oversight for mission critical functions such as human resources, contracting, and logistics. This final rule makes a technical change to advise the public to contact the appropriate State agency or FNS Regional Office to obtain program information. Accordingly, this final rule amends 7 CFR 210.32, 215.17, 220.21, 225.19, and 226.26 to direct the public to the FNS website to obtain contact information. The effective date is September 22, 2023.

C. Program Application Requirements

CACFP institutions must submit a certification, under 7 CFR 226.6(b)(1)(xv), that all information on the application is true and correct, along with the name, mailing address, and date of birth of the institution's executive director and board of directors chair or, in the case of a for-profit center, the owner of the for-profit center. Similar information about the executive director, board of directors chair, and other responsible principals must be included in each SFSP application. SFSP sponsors and CACFP institutions must also provide Federal Employer Identification Numbers (FEIN) or the Unique Entity Identifier (UEI). This final rule codifies these amendments under 7 CFR 225.6(c)(1), 226.6(b)(1)(xv), and 226.6(b)(2)(iii)(F). The effective date is September 22, 2023.

V. Procedural Matters

Executive Orders 12866 and 13563

Executive Orders 12866, 13563, and 14094 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This final rule was reviewed by the Office of Management and Budget (OMB) and determined to be significant. As required, an economic summary was developed for this final rule.

Economic Summary

Need for Action: This action implements statutory requirements and policy improvements to strengthen administrative oversight and operational performance of the Child Nutrition Programs. Strong integrity safeguards for taxpayer investments in nutrition are fundamental to earning and keeping the public confidence that make these programs possible. As FNS continues to work towards improving integrity in these programs, this final rule establishes criteria and procedures through a number of provisions that are designed to increase accountability, maximize operational efficiency, and ensure that the National School Lunch Program, School Breakfast Program, Special Milk Program, Summer Food Service Program, and Child and Adult Care Food Program deliver important nutritional benefits and protect scarce Federal resources with the highest level of integrity.

Affected Parties: The programs affected by this rule are the National School Lunch Program (NSLP), School Breakfast Program (SBP), Special Milk Program (SMP), Child and Adult Care Food Program (CACFP), and the Summer Food Service Program (SFSP). The parties affected by this regulation are the USDA's Food and Nutrition Service, State agencies administering Child Nutrition programs, local school food authorities, schools, institutions, sponsoring organizations, sponsor sites, and day care centers.

Summary: A regulatory impact analysis (RIA) must be prepared for major rules with effects of $200 million or more in any one year. USDA does not anticipate that this final rule is likely to have an economic impact of $200 million or more in any one year, and therefore, does not meet the definition of ''significant effects'' under 3(f)(1) under Executive Order 12866, as amended.

USDA estimates the cost of this rule to State and local government agencies to be approximately $0.7 million over 5 years, and for the cost to businesses (*i.e.,* CN program sponsors) to be $6 million over 5 years, for a total 5-year nominal cost of $6.7 million. At least some of those costs will be offset by new federal CACFP audit funding made available under this rule; USDA estimates the lower bound of these transfers from the federal government to the States to be $27.2 million over 5 years and the upper bound to be $108.9 million over 5 years. Due to these transfers, USDA anticipates that the net costs to the State and local parties will be lower than $6.7 million over 5 years. All estimates in this economic summary are given in 2023 dollars.

Baseline for analysis: The baseline for this particular analysis is the administrative costs prior to the provisions' implementation on State agencies, SFAs, and CACFP sponsors for administering programs in compliance with Federal CN rules and statute, including reporting and recordkeeping costs. The cost estimates presented are the additional costs and transfer impacts above this baseline attributable to the provisions of this rule. Some of the rule's provisions have already been implemented and are simply codified through this rule. The cost impacts of provisions being codified are included with the total cost impacts of all provisions in this economic summary for transparency; those provisions are explicitly identified in the discussion below. The estimates and tables in this analysis assume that all provisions will be in effect by 2025, so 2025 is used as the starting year for simplification and consistency in this economic summary.

Summary of provisions from Child Nutrition Program Integrity Proposed rule factored into economic analysis: This section states and summarizes the provisions considered in the Final Integrity rule carried over from the Child Nutrition Program Integrity Proposed rule, with a particular focus on the components with administrative cost implications.

- *Fines for Violating Program Requirements:* The CNI final rule authorizes the imposition of fines by the USDA and State agencies against school food authorities (SFAs) that have an agreement with a State agency to administer any of USDA's child nutrition programs. USDA and State agencies may impose fines against these institutions for failure to correct severe mismanagement of one of the CN programs, disregard of program requirements, and failure to correct repeated violations of program requirements. It also provides for the imposition of fines by the USDA against State agencies for failure to correct State or local mismanagement of a CN program, disregard of program requirements, or failure to correct repeated violations of program requirements. The rule sets limits on these fines and provides for the right to appeal fines imposed under this section.
- *State Agency Review Requirements in CACFP:* The final rule increases the minimum frequency of review, from once every three years to once every two, for certain CACFP institutions—independent centers or sponsoring organizations that have been identified as having or are at risk of having serious management problems, and sponsors of up to 100 facilities that conduct activities in addition to the CACFP (known as multi-purpose sponsors).
- *State Liability for Payments to Aggrieved Child Care Institutions:* The final rule sets reporting requirements for the administrative review process for CACFP sponsors or providers that face State agency administrative or fiscal actions and requires that State agencies issue administrative review decisions within 60 days, and permits USDA to make the State agency liable to pay all valid claims for reimbursement (meals and administrative) to the institution from non-Federal sources starting on the 61st day. This provision amends current regulations at 7 CFR 226.6(k).
- *CACFP Audit Funding:* Beginning in FY 2016, if a State agency demonstrated that it can effectively use additional funds to improve program

management in accordance with USDA criteria, USDA increased the funds made available to the State from 1.5 percent to 2 percent of the CACFP funds used by that State in the second preceding fiscal year. This provision is already in effect, and the final rule codifies this change in regulation.

• *Financial Review of Sponsoring Organizations in CACFP:* The final rule requires sponsoring organizations to report actual program expenditures, and it requires State agencies to annually review at least one month of all sponsoring organization's CACFP bank account activity against supporting documents to validate that all transactions meet program requirements. This provision amends current regulations at 7 CFR 226.7(b) and 7 CFR 226.10(c).

• *Informal Purchase Methods for CACFP:* This final rule amends 7 CFR 226.21(a) and 226.22(i)(1) to link the values of the Federal micro-purchase threshold and Federal simplified acquisition threshold to 2 CFR 200 (currently $10,000 for micro-purchases and $250,000 for the simplified acquisition threshold).

• *SFA Contracts with Food Service Management Companies:* This final rule amends NSLP regulations to require each State agency to annually review and approve each contract and contract amendment between any SFA and FSMC. (Currently, State agencies are required to review procurement contracts, but not to approve them formally.) It also amends NSLP and SBP regulations to require the value of USDA Foods to accrue only to the benefit of the SFA's nonprofit school food service. The proposed rule did not extend this second provision to SBP. However, FNS is correcting this oversight in this final rule by adding the USDA Foods provision to both NSLP and SBP regulations. Finally, the final rule adds a definition for fixed-price contract to NSLP and SBP regulations for clarity. Current NSLP and SBP regulations define cost-reimbursable contract. This provision amends current regulations at 7 CFR 210.19(a)(5).

• *Annual NSLP Procurement Training:* This provision requires that State directors of school nutrition programs, State directors of distributing agencies, and school nutrition program directors, management, and staff who work on NSLP procurement activities successfully complete annual training in procurement standards. It also requires State agencies and SFAs to retain records to document compliance with professional standards training requirements.

• *FNS Contact Information:* A realignment of FNS Regional Offices took effect on September 29, 2019. These organizational changes achieve operational efficiencies, increased accountability, and improved communications to support program integrity, and ensure continued executive supervisory oversight for mission critical functions such as human resources, contracting, and logistics. This final rule makes a technical change to advise the public to contact the appropriate State agency or FNS Regional Office to obtain program information.

• *Program Applications:* CACFP institutions must submit a certification, under 7 CFR 226.6(b)(1)(xv), that all information on the application is true and correct, along with the name, mailing address, and date of birth of the institution's executive director and board of directors chair or, in the case of a for-profit center, the owner of the for-profit center. Similar information about the executive director, board of directors chair, and other responsible principals must be included in each SFSP application. SFSP sponsors and CACFP institutions must also provide Federal Employer Identification Numbers (FEIN) or the Unique Entity Identifier (UEI).

Summary of provisions from CACFP amendments factored into economic analysis: This section states and summarizes the provisions in the Final Integrity rule carried over from the CACFP amendments Proposed rule.

• *Elimination of the Annual Application for Institutions:* This provision eliminates renewal applications and modifies the frequency with which initial and follow-up applications must be submitted by sponsoring organizations to state agencies. It also adds new definitions of New Institution, Participating Institution, Renewing Institution, and Lapse in Participation. Finally, the rule reorganizes applications submission and renewal requirements. This provision is already in effect.

• *Timing of Unannounced Reviews:* The timing of reviews conducted by sponsoring organizations will be required to vary and be unannounced, so they are unpredictable to sponsored facilities. The unannounced reviews from this provision are intended to uncover program integrity issues more effectively. This provision is already in effect.

• *Standard Agreements Between Sponsoring Organizations and Sponsored Child Care Centers:* This final rule requires State agencies to develop and provide for the use of permanent operating agreements between sponsoring organizations of sponsored centers and day care homes. A standard agreement can be developed by State agencies to be used between sponsoring organizations and unaffiliated childcare centers. State agencies are also allowed to approve an agreement developed by the sponsoring organization. This provision is already in effect.

• *Collection and Transmission of Household Income Information:* The provision requires sponsoring organizations to allow providers of tier II day care homes to assist in the collection and transmission of household income information with the written consent of the parents or guardians of children in their care. It provides specific steps a day care home must take when assisting with this process. It also strongly encourages sponsoring organizations to establish procedures to protect the confidentiality of a household's income information and prohibits the provider from reviewing applications from households. This provision is already in effect.

• *Calculation of Administrative Funding for Sponsoring Organizations of Day Care Homes:* A modification was made to the method of calculating administrative payments to sponsoring organizations of day care homes by eliminating the ''lesser of'' cost and budget comparisons. FNS proposed calculating administrative reimbursement by multiplying the number of day care homes under the sponsoring organization's oversight by the appropriate annually adjusted administrative payment rate. This provision is already in effect.

• *Carryover of Administrative Funding for Sponsoring Organizations of Day Care Homes:* Under this provision, sponsoring organizations of day care homes can carry over and obligate up to 10 percent of administrative payments into the following year with State agency approval. The State agency is required to establish procedures to recover the funds from sponsoring organizations that are not properly payable, are in excess of the 10 percent maximum carryover amount, or any carryover amounts not expended or obligated by the end of the fiscal year following the year they were earned. This provision is already in effect.

Summary of provisions from the Simplifying Monitoring in NSLP and SBP proposed rule: The provisions listed below were carried over from the Simplifying Monitoring in NSLP and

SBP proposed rule into the Final Integrity Rule.

• *Discretion in Taking Fiscal Action for Meal Pattern Violations:* The final rule provision removes the requirement that State agencies must take fiscal action against SFAs for repeated violations of milk type and vegetable subgroup requirements. State agencies will instead have the discretion to take fiscal action, consistent with the guidance for food quantities, whole grain-rich foods, and dietary specifications. Waivers have been in place during the COVID–19 public health emergency to allow for State agency discretion for meal pattern violations.

• *Return to a 5-Year Review Cycle:* The final rule allows State agencies to return to a 5-year administrative review cycle and allows review of SFAs more frequently. The State agencies that review on a 3-year cycle are not required to designate high-risk or targeted reviews; however, high-risk designations and targeted reviews are required for State agencies that review SFAs on a longer than 3-year cycle. Each State agency that reviews SFAs on a longer than 3-year cycle must develop a plan for FNS approval describing the criteria that will be used to identify high-risk SFAs for targeted follow-up reviews. State Agencies must conduct targeted follow-up reviews of high-risk SFAs within two years of the review findings. This provision also changes the food service management company review from a 3-year to 5-year cycle, to align with the amendments to the administrative review cycle. This allows State agencies to review SFAs contracting with food service management companies more frequently, if they choose. Thirty-six State agencies had a waiver in place allowing reviews to be conducted on a 5-year review cycle prior to publication of the rule proposing this provision.

• *Framework for Integrity-focused Process Improvements:* The final rule proposes a framework for waiving or bypassing certain review requirements for State agencies or SFAs as an incentive to invest in one or more USDA-designated systems or process improvements that can reduce or eliminate Program errors. The series of optional process reforms will be published separately from the final rule.

• *Substitution of Third-Party Audits:* The final rule allows State agencies to use recent and applicable findings from the following audits in lieu of reviewing the same information on an administrative review, provided the audit activity complies with the same standard and principals that govern the Federal single audit:

○ Supplementary audit activities,

○ Requirements added to federal or State audits by local operators,

○ Other third-party audits initiated by SFAs, or

○ Other third-party audits initiated by other local entities.

• *Completion of Review Requirements Outside of the Administrative Review:* State agencies may satisfy sections of the administrative review through equivalent State oversight activities that take place outside of the formal administrative review process, with required regional office approval.

• *Assessment of Resource Management Risk:* Under this provision, State agencies may conduct the assessment of an SFA's nonprofit school food service account at whichever point in the review process makes the most operational sense to the State agency. State agencies may also set up a review process and staff work units in the manner that they see fit.

• *Buy American Area of Review:* The requirement to review Buy American as part of the general areas of the administrative review are codified in the final rule and added to the regulatory definition of ''general areas.'' Guidance on Buy American is provided currently.

• *Performance-based Reimbursement Quarterly Report:* The final rule changes the frequency of the reporting from quarterly to annual as most SFAs are already certified to receive the 6-cents performance-based reimbursement.

• *State Administrative Expense Funds:* This provision updates regulatory language to state that State agencies must return any State Administrative Expense funds which are unobligated. This is a change from the current requirement that unexpended funds must be returned.

Addressing Public Comments on the Proposed 2016 CN Integrity Program Rule RIA: The following list summarizes the comments on the proposed rule's Regulatory Impact Analysis:

• Five commenters discussed costs related to the Regulatory Impact Analysis (RIA) for the proposed CN Integrity Proposed Rule. A general advocacy group opposed many of the provisions in the proposed rule and expressed dissatisfaction that the original Congressional Budget Office analysis of Public Law 111–296 did not provide an estimate of the imposition of fines against entities other than State Agencies and SFAs. Although the dissatisfaction was not directed at the regulatory impact analysis of the proposed rule, USDA notes that the final rule removes the provision authorizing fines against entities other than State Agencies and SFAs, so there will be no fines against entities other than State Agencies and SFAs. This is a change from the proposed rule, which would have extended fines to SFSP sponsors and CACFP institutions.

• An individual commenter also expressed concern about the additional administrative costs to the States of monitoring CACFP providers, which USDA estimated at $4.3 million in FY2017 and $22.7 million from FY2017–FY2021 in the RIA for the proposed rule. USDA presents updated estimates for FY2025–FY2029 for the final rule below, which results in a net decrease in cost and burden on State and local government agencies. Similarly, a State agency argued that State agencies would need more State funds (*i.e.,* non-federal funds) in order to comply with the ''more frequent investigations and reporting'' in the proposed rule. The State agency also recommended the creation of a national list of seriously deficient sponsors, rather than requiring each State to devise their own database reporting methodology and requiring each State to maintain the database itself. USDA also notes that the final rule makes available additional audit funding to State agencies that can justify a need for that funding.

• Finally, a State agency expressed concern about the ability of a State agency to pay any potential fines, as they do not have general funds available for this kind of liability, and any final ability to pay ''will be severely hampered by the State's budgeting process.''

• FNS was required by statute to codify the criteria and procedures under which FNS may establish fines against State agencies. In general, FNS expects fines to be established in *exceptional* circumstances, when existing processes (technical assistance, corrective action, and routine fiscal action) do not bring State agencies into compliance. FNS is *not required* to establish fines against State agencies, and fines would be limited to *severe or repeated* program violations that FNS, in consultation with its legal counsel, determines warrant a fine. Additionally, if an exceptional circumstance does warrant a fine, FNS may establish a fine below the maximum threshold established in regulation.

• There were no comments received on the RIA for the CACFP Amendments or the Simplifying Monitoring in NSLP and SBP proposed rules.

Cost/Benefit Assessment Summary: The analysis that follows quantifies the

impact of the four provisions of the above-listed provisions that we estimate have non-negligible cost implications for the Federal government, State agencies, SFAs, and/or businesses (including CACFP sponsors and centers), as well as the new reporting and recordkeeping requirements of the final rule.

The analysis does not quantitatively estimate the value of the CNI final rule's benefits or the magnitude of most of its potential transfer impacts (such as the recovery of improper program payments) due to a lack of data, but we expect the overall economic effect to be relatively small. The provisions codified in this final rule are designed to increase program operators' accountability and operational efficiency, while improving the ability of FNS and State agencies to address severe or repeated violations of program requirements.

TABLE 1—SUMMARY OF ESTIMABLE ADMINISTRATIVE COST DIFFERENCES AND RESOURCES

	Fiscal year (millions)					
	2025	2026	2027	2028	2029	Total
State agency programmatic administrative costs						
State Agency MIS Upgrade and Maintenance Costs	$2.9	$0.1	$0.1	$0.1	$0.1	$3.1
State and Local Government Reporting and Recordkeeping Costs						
State and Local Government Information collection burden (reporting and recordkeeping)	−0.4	−0.5	−0.5	−0.5	−0.5	−2.3
Institutions (Business) administrative costs						
Businesses—Reporting Requirements	1.1	1.2	1.2	1.2	1.3	6.0
Increase in Federal audit funding for State agencies (CACFP)						
low estimate	5.1	5.2	5.4	5.6	5.9	27.2
upper bound estimate	20.3	20.9	21.7	22.6	23.4	108.9

Note: Numbers may not sum to totals due to rounding.

Administrative Impact: This section begins with cost estimates for the four provisions expected to have the most significant effect on State agencies', local governments', and CACFP and SFSP providers' administrative responsibilities. We follow that with a qualitative discussion of the potential administrative impact of the rule's remaining provisions.

State Agency Review Requirements in CACFP: This provision is expected to be implemented by 2025. The CNI final rule increases the minimum frequency of review, from once every three years to once every two, for certain CACFP institutions—independent centers or sponsoring organizations that have been identified as having or are at risk of having serious management problems, and sponsors of up to 100 facilities that conduct activities in addition to the CACFP (known as multi-purpose sponsors). (Sponsoring organizations with more than 100 facilities already must be reviewed at least once every two years.)

The cost of this provision is included in the burden estimate under the Paperwork Reduction Act, so it is included in our estimate of the total reporting and recordkeeping costs for State and local government and for businesses. It accounts for 6,728 of the increased burden hours, or 12.5% of the total increase in burden hours attributed to the rule as estimated in Table 10. At a rate of $67.97, based on 2022 BLS State and Government Management and Professional compensation rates, this is an estimated annual cost of approximately $457,302.

The administrative costs of this provision may vary across States with the relative concentration of small multi-purpose and other high-risk sponsors. In FY2022, FNS administrative data shows that there were 19,460 sponsors and independent centers, and a total of 140,434 centers and homes participating in CACFP. About 53 percent of CACFP providers are day care homes, and childcare centers account for about 46 percent of CACFP providers. At least for family day care homes, there is considerable variation in the distribution of homes per sponsor across the States (Table 2). For example, in November 2022, all sponsors of day care homes in New Hampshire oversaw 1 to 50 homes. Conversely, in Oregon, 67 percent of sponsoring organizations of day care homes oversaw 200 to 1,000 homes. Table 2 shows that 18 States report that more than half of their family day care home sponsors administer between 1 and 50 homes.

Independent childcare centers made up 10.6% of all childcare providers in 2015 and are more likely to operate fewer than 10 sites. Among family day care home sponsors, 14.7 percent have 10 or fewer sites compared to 94.6 percent of childcare center and 75.4 percent of Head Start center sponsors. Conversely, 38.3 percent of family day care home sponsors have more than 100 sites compared to less than 0.2 percent of childcare centers and 0.1 percent of Head Start center sponsors. FNS data cannot distinguish multi-purpose sponsors from other sponsors that oversee no more than 100 daycare homes. FNS administrative data offer some indication that the administrative burden associated with this provision may vary across States. States with the highest percentage of small family day care home sponsors (those responsible for no more than 100 homes) may have a disproportionate number of small multi-purpose sponsors and may therefore be disproportionately impacted by this provision.[1]

[1] Source: FNS Administrative Data.

TABLE 2—PROFILE SPONSORING ORGANIZATIONS OF DAY CARE HOMES

States*	Percent of sponsoring organizations administering 1–50 day care homes				Percent of sponsoring organizations administering 51–200 day care homes				Percent of sponsoring organizations administering 201–1000 day care homes				Percent of sponsoring organizations administering 1000 + day care homes			
	1% to 25%	26% to 50%	51% to 75%	>75%	1% to 25%	26% to 50%	51% to 75%	>75%	1% to 25%	26% to 50%	51% to 75%	>75%	1% to 25%	26% to 50%	51% to 75%	>75%
November 2022																
.....	10	16	8	10	9	22	9	5	16	9	2	1	3	0	0	0

*52 States including DC and Puerto Rico.
Source: FNS Administrative Data.

Financial Review of Sponsoring Organizations in CACFP: This provision amends current regulations at 7 CFR 226.7(b) and 7 CFR 226.10(c) and is expected to be implemented by 2025. The cost of this provision is included in the burden estimate as published in the ICR that accompanies this rule, so it is included in our estimate of the total reporting and recordkeeping costs for State and local government and for businesses in Table 10. The estimated burden associated with this provision is 6,638 hours annually, making up 12.4% of total increase in burden. At a rate of $67.97, based on 2022 BLS State and Government Management and Professional compensation rates, this is an estimated annual cost of approximately $451,185.

CACFP Audit Funding: Section 17(i) of the NSLA (42 U.S.C. 1766(i)) was amended by Section 335 of the Healthy, Hunger-Free Kids Act of 2010 (P.L. 111–296) to provide additional CACFP audit funding. This provision will codify the already-implemented increase of the maximum amount of CACFP audit funding from 1.5 percent to 2 percent of CACFP expenditures. The provision took effect in FY 2016. Consistent with current program rules, audit funds are computed as a percent of CACFP spending in the second preceding year. Table 3 contains the Department's actual value of CACFP audit distributions to the States in FY 2020, FY 2021, and FY 2022 for illustrative purposes.[2]

TABLE 3—FEDERAL TRANSFERS TO STATE AGENCIES FOR CACFP AUDIT FUNDING

CACFP projections	Fiscal year (millions)		
	2020	2021	2022
Maximum Available Audit Funding Projections from 2020 President's Budget (1.5% + 0.5%)	$70.1	$71.8	$58.4
1.5% Share Max Available	$52.6	$53.9	$43.8
0.5% Share Max Available	$17.5	$18.0	$14.6
Actual 1.5% funds used	$52.0	$53.6	$43.4
Actual 0.5% funds used	$4.3	$4.9	$6.2
Percent of available 0.5% funds used[3]	24.4%	27.5%	42.4%

If all State agencies request and demonstrate the need for additional funds under this provision, then projected extra FY 2025 CACFP funds would be calculated by multiplying CACFP expenditures by the full ½ percent, giving an increase in FY 2025 audit funding of $20.3 million. We use the same methodology to estimate the upper bound estimate in Tables 1 and 4. Our upper bound estimate assumes that all State agencies will request and use the full ½ percent increase in audit funds.

In practice, additional audit funds are only made available to States that are able to justify a need for the funds. States are required to detail their plans for the use of additional funds in written requests to USDA. In FY 2018, 47.3% of these available funds were actually spent; in FY 2022, 42.4% of the available funds were actually spent.[4] Therefore, we may assume that, in most years, fewer than 100% of States Agencies will request 100% of the available 0.5% in additional audit funding. USDA estimates an additional four burden hours per State that chooses to submit a plan and request for additional funding, as outlined in the ICR and our estimate of the administrative burden below.

To account for the additional reviews required by this final rule, we estimate the costs of increasing CACP audit funding in Table 4. We establish our lower bound estimate at 25% of the maximum additional audit funding available.

TABLE 4—COST OF INCREASE IN STATE AUDIT FUNDING IN CACFP

	Fiscal year (millions)					
	2025	2026	2027	2028	2029	Total
Increase in Federal audit funding (CACFP)						
Lower estimate (25% of available funding)	$5.1	$5.2	$5.4	$5.6	$5.9	$27.2
Upper bound (100% of available funding)	20.3	20.9	21.7	22.6	23.4	108.9

Administrative Review Cycle: The transition from a 5-year cycle to a 3-year cycle for the administrative review process resulted in some State agencies and SFAs struggling to complete reviews and oversight activities. This provision is expected to be implemented in all States agencies by 2025. Thirty-six State agencies had a waiver in place allowing reviews to be conducted on a 5-year review cycle prior to publication of the rule proposing this provision. USDA has received feedback through several avenues regarding the difficulties faced by State agencies. The Child Nutrition Burden Study was conducted in SY 2017–2018 in response to a Congressional mandate in House Report 114–531 to identify areas to reduce burden in the Child Nutrition Programs. This study collected data through workgroups with State and local Program operators, as well as a survey from a census of all State agencies and a nationally representative sample of SFAs. One reoccurring theme in this study, from both the State agency and SFA perspectives, was the burden associated with the 3-year administrative review cycle. To comply with the 3-year administrative review requirements, some State agencies and

[2] Figures used in these actuals and in the FY2025–FY2029 projections were prepared for the FY 2024 President's Budget.

[3] The years most affected by the COVID–19 pandemic (2019–2021) resulted in a lower percent of available 0.5% funds used compared to other years.

[4] USDA administrative data.

SFAs were sacrificing staff resources needed for program administration, including providing technical assistance. State agencies face a number of time and resource constraints, and Program operators struggled to adopt the new procedures and timeframes.

It is important to assess the impact of returning to a 5-year cycle. Fewer SFAs would be reviewed each year, resulting in the potential for program error to continue for longer. Table 5 shows the projected number of annual reviews that would be conducted using a 5-year cycle and the number of annual reviews that would be conducted using a 3-year cycle. It also provides the number of actual reviews conducted in SY 2018–2019.

TABLE 5—NUMBER OF ANNUAL REVIEWS CONDUCTED

Total number of SFAs in SY 2018–19	Number of SFAS reviewed during 5-year cycle	Number of SFAs reviewed during 3-year cycle	Number of SFAs reviewed SY 2018–19
18,925	3,785	6,308	5,972

To better understand the impact of the proposed follow-up review for the designated high-risk SFAs, the data from the SY 2018–2019 review year was analyzed to estimate the potential number of follow-up reviews that may have been conducted, if the proposed follow-up reviews were implemented. The criteria used in this simulation only focuses on the results of the administrative reviews and does not account for other important criteria that the State agency may identify or items that may be identified through public comments. To estimate the potential number of follow-up reviews, FNS forms 640A and 640B were analyzed to group reviewed SFAs by the number of error flags triggered during administrative reviews in SY 2018–2019. The methodology of this flag count analysis has been updated since the 2020 proposed rule to reduce the margin of error in the flag counts for SY 2018–19 data.

Forms 640A and 640B document administrative review findings, including types of errors found during the review. For this analysis, a flag was assigned to unique SFAs per type of error, not for every error found (Table 6). SFAs with any application errors (for example missing child or household name or income information) were assigned an error flag for applications, the same process was done for SFAs with certification benefit issuance errors (for example, during a review, a sampled student was approved for free meals but was not eligible). SFAs with a fiscal action amount that was not disregarded were assigned a fiscal action error flag. SFAs were also assigned an error flag if they triggered the risk flag for the resource management errors (nonprofit school food service account, Paid Lunch Equity, revenue from nonprogram foods, and indirect costs) or served meals missing components.

TABLE 6—NUMBER OF SFAS BY ERROR FLAG

[SY 2018–19 Reviews]

Total SFAs reviewed	No error flags	Application error flags	Certification benefit error flag	Fiscal action taken flag	Resource management flag	Incomplete meal error flag
5,972	1,289	869	874	411	3,845	663

TABLE 7—NUMBER OF SFAS BY ERROR FLAGSY 2018–19 REVIEWS

Number of error flags	Count of SFAs	Percent of SFAs reviewed by number of flags (percent)
0	1,289	21.6
1	3,241	54.3
2	1,002	16.8
3	354	5.9
4	76	1.3
5	10	0.2

The number of SFAs by type of error flag is presented in Table 6. Similarly, the number of SFAs reviewed by total number of error flags is in Table 7. It is important to note this analysis does not consider the magnitude of a particular error, just the presence of an error found during an administrative review.

TABLE 8—ANNUAL AND 5-YEAR COST DIFFERENCE OF OPTIONAL 5-YEAR ADMINISTRATIVE REVIEW CYCLE & TARGETED, FOLLOW-UP REVIEWS FOR HIGH-RISK SFAS

Fiscal year (millions)					
2025	2026	2027	2028	2029	Total
−$3.3	−$3.4	−$3.5	−$3.6	−$3.7	−$17.4

Based on the projected number of reviews in a 5-year cycle compared to a 3-year cycle (Table 5), there would be about 2,244 fewer annual reviews conducted under this proposed change assuming about 7 percent of SFAs with 3 or more flags require follow-up review (Table 7). This reduction in reviews leaves the potential for issues to continue for additional years. However, the targeted nature of the follow-up review, in both selection and scope, would aim to redirect resources to fixing program issues and providing the necessary technical assistance that is currently difficult to do for some resource-strapped States under the current 3-year cycle.

This final rule also amends NSLP regulations to change frequency of food service management company review from 3-year to 5-year cycle, in alignment with the changes to the administrative review cycle. State agencies would still be allowed to review SFAs contracting with food service management companies more frequently if they choose.

An overall decrease in burden hours (-42,760 hours) is expected for moving from a 3-year to a 5-year review cycle. The targeted nature of the follow-up reviews are intended to be more directly focused on noncompliance and high-risk areas and therefore be less burdensome than the initial review. This aids in streamlining the review procedures while balancing the need to quickly resolve program errors and the importance of addressing noncompliance in high-risk SFAs. This is intended to help State and local operators focus resources on technical assistance and technology to improve Program operations.

These changes are anticipated to save $17.4 million over 5 years, calculated by multiplying the total burden hour reduction over 5 years by projected 2025–2029 management and professional wages according to BLS.[5] The savings shown in Table 8 isolates the cost impact specific to this provision and are factored into total reporting and recordkeeping cost impacts in Table 10. The change in estimate from the 2020 proposed rule is largely due to the change in reporting and recordkeeping burden estimates (from –171,330 hours) according to the NSLP ICR, along with state and local government occupation wage increases over recent years.

Fines for Violating CN Program Requirements: This provision is expected to be in effect by 2025. FNS stresses that the statutory authority conferred on State administering agencies to impose fines on SFAs will be used rarely and only against egregious and repeat violators of program rules. For example, fines may be warranted to address a serious violation, such as the deliberate destruction of records or the deliberate misappropriation of program funds. Fines would not be warranted for routine problems, such as a menu planning or meal pattern violation or a recordkeeping or resource management error, which can be corrected with State agency oversight and technical assistance.

A fine would never replace established technical assistance, corrective action, or fiscal action measures to solve commonplace or unintentional problems. Rather, the assessment of fines provides a new accountability tool for FNS and State agencies to use when there are severe or repeated non-criminal violations—the types of programs abuses that seriously threaten the integrity of Federal funds or significantly impair the delivery of service to eligible students. Each situation is different, and FNS and State agencies, in consultation with their legal counsel, will carefully consider whether a fine is the appropriate response. USDA expects that the risk of more substantial financial penalties will further reduce the already low incidence of severe or repeated violations, making the need to exercise the authority under the rule unnecessary, except in extreme circumstances.

Similarly, we do not expect this statutory authority to result in substantial fines by USDA against State agencies. The authority to impose fines against State agencies places additional pressure on those agencies to reduce the incidence of severe mismanagement and repeat violations of program rules at the provider and sponsor levels. The expected effect of this authority is increased vigilance by State administrators against exceptional mismanagement at the provider and sponsor levels.

State Liability for Payments to Aggrieved Child Care Institutions: This provision is expected to be in effect by 2025. The data collected in the 2010 and the 2011 Targeted Management Evaluations (TMEs), an instrument used by USDA to monitor State agency compliance with CACFP regulation, provides some of the measures used in estimating the impact of this provision. Twenty-one States[6] reported the average number of days elapsed between the State agency's receipt of an institution's request for a hearing and the date of the hearing official's decision on their 2010 and 2011 TMEs. Ten percent of those States reported no requests for hearings; 33 percent reported averages of 60 days or less; 19 percent reported averages between 61 and 90 days; and 38 percent reported averages over 91 days. This data show that in the absence of a financial penalty, 43 percent of the States reporting information either had no appeals or provided a determination within the 60-day timeframe.

We expect that increased monitoring by FNS and a shift in the responsibility for program payments to the States will encourage the States to resolve administrative reviews within the established regulatory timeframe of 60 days. Although the provision is intended to speed the processing of administrative reviews, it is not intended or expected to add significantly to the States' cost of

[5] Based on reported wage rate for State and local government sector management, professional, and related workers from the Bureau of Labor Statistics' ''Table 3. State and local government workers by occupational and industry group'' database (*https://www.bls.gov/news.release/ecec.t03.htm*). For FY 2022 (September), the total compensation per hour for these positions averaged $67.96 per hour. We inflate this figure through FY 2029 with projected growth in the State and Local Expenditure Index prepared by OMB for use in the FY 2024 President's Budget.

[6] Twenty-one States reported information about ten of their appeals of a Notice of Proposed Termination during the 2010 and the 2011 Targeted Management Evaluations (TMEs). More recent data on delay times are not available.

handling those reviews. Procurement Training Requirement for State Agency and SFA Staff: The CNI final rule requires State directors of school nutrition programs, State directors of distributing agencies, and school nutrition program directors, management, and staff who work on NSLP procurement activities to successfully complete procurement training annually. The required training would cover the procurement topics specified in subsection 210.21(h).

FNS expects that State Agencies and SFAs will integrate this training requirement into their current training curriculums required under the Professional Standards Rule,[7] with no additional annual training hours required on average. Furthermore, the final rule preamble notes that State agencies may use SAE funds to pay for the costs of receiving or delivering annual NSLP procurement training. This is expected to be implemented by 2025.

Performance-based Reimbursement Quarterly Report: This proposed change would reduce, from quarterly to annually, the frequency of a State Agency report on the status of SFAs certified for the performance-based reimbursement. As of February 2019, 99 percent of SFAs are certified to receive the performance-based reimbursement. This change responds to feedback from the *Child Nutrition Program Reducing Burden Study;* State agencies requested USDA to review the reporting requirements and determine areas to streamline reporting. USDA currently receives a count of the monthly number of lunches receiving the performance-based reimbursement on the Report of School Meal Operations (form FNS–10) from States.

The reduced frequency of the quarterly certification report aims to enable State and local Program operators to direct resources to maintain effective and efficient program operations while still providing USDA the necessary information on SFA certification. Along with the monthly FNS–10 reporting, the annual update will be sufficient for USDA to track the status of SFA certification. This change slightly decreases the burden hours associated with moving the frequency of reporting from quarterly to annually. This is a small reduction of 42 annual burden hours, which is about $3,000 annually. This is expected to be implemented by 2025.

[7] ''Professional Standards for State and Local School Nutrition Programs Personnel as Required by the Healthy, Hunger-Free Kids Act of 2010,'' **Federal Register** Vol 80, No. 40 (March 2, 2015), p. 11077–11096.

Standard Agreements Between Sponsoring Organizations and Sponsored Centers: This provision is already in effect. The State Agency must develop/revise and provide a sponsoring organization agreement between sponsor and facilities, which must have standard provisions. Sponsoring organizations must enter into permanent agreements with their unaffiliated centers and annually provide State agencies with bank account activity against other associated records to verify that the transactions meet program requirements. FNS estimates that there are 18,601 sponsoring organizations that are businesses, each of which will submit 1 month's bank statement to their State agency.

The terms of the standard agreement adds requirements of centers to allow visits by sponsoring organizations or State Agencies to review meal service and records, promptly inform sponsors about any change in licensing or approval status, meet any State agency approved time limit for submissions of meal records, and distribute to parents a copy of the sponsoring organization's notice to parents if directed by the sponsor. This provision contributes 5,646 additional burden hours that are accounted for in the projected reporting and recordkeeping costs (Table 10).

Elimination of the Annual Application for Institutions: This provision has already been implemented. This final rule codified elimination of the requirement for renewing institutions to submit an annual application for renewal; however, these institutions must demonstrate that they are capable of operating the Program in accordance with this part as set forth in § 226.6b(b) by reviewing annual certification of an institution's eligibility to continue participating in CACFP (replaces the renewal application process). Therefore, a total of 3,005 burden hours associated with the renewing institutions to submit an annual application has been removed because of this rule. This difference is included in Table 10.

Collection and Transmission of Household Income Information: This provision is already in effect. This final rule codifies the right of tier II day care homes to assist in collecting meal benefit forms from households and transmitting the forms to the sponsoring organization on the household's behalf. If a tier II day care home elects to assist in collecting and transmitting the applications to the sponsoring organization, sponsoring organizations must establish procedures to ensure the provider does not review or alter the application. The burden associated with this is 5,199 hours, which are accounted for in the projected reporting and recordkeeping costs in Table 10. This provision has been a standard operating practice for sponsoring organizations of day care homes since 2011.

Carryover of Administrative Funding for Sponsoring Organizations of Day Care Homes: This provision is already in effect. The final rule codifies allowing sponsoring organizations of day care homes to carry over up to 10 percent of unspent administrative reimbursement from the current federal fiscal year to the next fiscal year. The sponsoring organizations of day care homes seeking to carry over administrative funds must submit an amended budget, to include an estimate of requested administrative fund carryover amounts and a description of proposed purpose for which those funds would be obligated or expended.

The State agency must review the budget and supporting documentation prior to approval, for sponsoring organizations of day care homes seeking to carry over administrative funds. The State agency must establish procedures to recover administrative funds from sponsoring organizations of day care homes that are not properly payable under FNS Instruction 796–2, administrative funds that are in excess of the 10 percent maximum carryover amount, and carryover amounts that are not expended or obligated by the end of the fiscal year following the fiscal year in which they were received. This provision is codifying standard operating practice. The burden associated with this is 1,462 hours, which are accounted for in the projected reporting and recordkeeping costs in Table 10.

Remaining Provisions: The CNI final rule's remaining provisions are expected to have only modest impacts on State agency or sponsor administrative costs. State agency and sponsor responsibilities under these provisions are limited largely but not entirely to improved documentation.

The following provisions will likely have no costs or negligible cost impacts:

1. Varied Timing of Reviews Conducted by CACFP Sponsoring Organizations

(a) Program impact: Reviews are more effective at ensuring program integrity when they are unannounced and unpredictable. Sponsoring organization are already required to conduct two unannounced reviews out of 3 reviews per year in a manner that makes the reviews unpredictable to sponsored facilities. One of the unannounced reviews must include observation of a

meal service. This provision requires the timing of the mandatory unannounced reviews and type of meal serviced reviewed to vary and is already in effect.

(b) Cost Impact: We estimate no change in cost associated with this provision. This change merely requires sponsors to vary the timing of unannounced reviews but does not impact the frequency. This provision has also been a standard operating practice for sponsoring organizations and State agencies since 2011.

2. Fiscal Action for Meal Pattern Violations

(a) Program impact: This provision gives State agencies the discretion to take fiscal action against SFAs for repeated violations of milk type and vegetable subgroup requirements, instead of requiring fiscal action. This amendment aligns with State's existing discretion to take fiscal action for repeated violations concerning food quantities, whole grain-rich foods, and the dietary specifications.

(b) Cost Impact: We estimate no change in cost associated with this provision. Fiscal action will be at the discretion of the State agencies, instead of required. Waivers have been in place during the COVID–19 public health emergency to allow for State agency discretion for meal pattern violations, and we expect this provision to be fully implemented by 2025.

3. NSLP Resource Management Module

(a) Program impact: Flexibility and discretion is allowed to State agencies in this provision. FNS will no longer require that this assessment take place off-site before the administrative review. Although the State agency should make this assessment in the school year that the review began, completion of the resource management module may occur before, during, or after the on-site portion of the administrative review.

(b) Cost Impact: We estimate no change in cost associated with this provision. This does not change frequency or burden of conducting assessment of SFA's nonprofit school food service account. This provision merely allows State agencies to complete the assessment of an SFA's nonprofit school food service account and to conduct the resource management module at any point in the review process.

4. Buy American Review

(a) Program impact: Program regulations under 7 CFR 210.21(d) and 7 CFR 220.16(d) describe requirements SFAs to purchase, to the maximum extent practicable, domestic commodities or products, and State agencies already review this provision as a part of the administrative review. However, Buy American is not currently included in regulation as part of the general areas of the administrative review. FNS proposed including compliance with the Buy American requirements as a general area of review, under 7 CFR 210.18(h)(2), that State agencies must monitor when they conduct administrative reviews.

(b) Cost Impact: We estimate no change in cost associated with this provision. Existing Guidance is codified and modifies the technical definition of ''General Areas'' in this provision with no practical change in current program operations.

5. State Administrative Expense Funds

(a) Program impact: This amendment updated regulatory language that would require State agencies to return any unobligated SAE funds—instead of unexpended—to give State agencies more flexibility to spend their funds.

(b) Cost Impact: We estimate a negligible change in cost associated with this provision by 2025. The regulatory language increases flexibility of State agencies to utilize their SAE funds but is not expected to have measurable impacts on the amount of funds returned. Between 2018 and 2021 unobligated SAE funds ranged from approximately 1 to 3 percent.

6. Administrative Payment Rates to Sponsoring Organizations for Day Care Homes

(a) *Program impact:* This rule amends 7 CFR 226.12(a) to simplify the calculation of monthly administrative reimbursement that sponsoring organizations of day care homes are eligible to receive. To determine the amount of payment, the State agency must multiply the appropriate administrative reimbursement rate, which is announced annually in the **Federal Register**, by the number of day care homes submitting claims for reimbursement during the month. This provision has been a standard operating practice for State agencies since 2010.

(b) *Cost Impact:* Existing practice is codified. We estimate a negligible cost (104 hours) of this provision that is accounted for in projected reporting and recordkeeping costs (Table 10).

The following are provisions that may have minor, non-quantifiable administrative impacts:

(1) NSLP Integrity-focused Process improvements

(a) *Program impact:* The administrative review process is an integral part of program integrity but is burdensome to State agency staff and resources. Impacts of this rule include FNS seeking out input to develop a series of optional process reforms. The process improvements would give State agencies more flexibility to satisfy parts of the administrative review and reduce or eliminate human errors. State agencies will require FNS approval of process reforms.

(b) *Cost Impact:* This provision may incur minor potential future costs that are not quantifiable at the time of this rule, but USDA does not expect these costs to be material.

(2) NSLP Third-party Audits

(a) *Program impact:* With FNS approval, third party audits may be used in lieu of reviewing the same information on an administrative review. This will give State agencies more flexibility to satisfy parts of the administrative review and limit needless duplication through activities they already perform if the audit activity complies with the same standard that govern the federal single audit.

(b) *Cost Impact:* The variation in what is used to satisfy parts of an administrative review is too wide to be able to quantify.

(3) Completion of Review Requirements Outside of the Administrative Review

(a) *Program impact:* With FNS and regional office approval, State agencies are allowed to satisfy sections of the administrative review through equivalent State oversight activities that take place outside of the formal administrative review process. This gives State agencies more flexibility and limits redundancies to satisfy parts of the administrative review through activities they already perform.

(b) *Cost Impact:* This provision will have minimal administrative savings that are not quantified.

Management Information System (MIS) Upgrade Costs: FNS expects that SAs, SFAs, SFSP and CACFP program operators will be able to implement the vast majority of the provisions of the rule with no changes to their current management information systems (MIS) or information technology (IT) infrastructure.

However, FNS acknowledges that this will not be universally true, and that some SAs, SFAs, SFSP, and/or CACFP program operators may incur some one-time and/or ongoing IT costs to be able to implement the required provisions of the rule. In most cases, FNS expects these additional IT costs to be marginal or minimal, and that most or all of the additional costs to SAs, SFAs, SFSP, and CACFP program operators will be administrative, as estimated elsewhere in this document.

Two of the finals rule's requirements—that CACFP administering SAs must annually review at least one month's bank account activity of all sponsoring organizations against documents adequate to support that the financial transactions meet Program requirements, and that CACFP administering SA's must annually review actual expenditures reported of Program funds and the amount of meal reimbursement funds retained from unaffiliated centers to support the sponsoring organization's administrative costs—have the potential to incur larger costs to the respective SAs, as these provisions may require those SAs to integrate new functions into their MIS.

FNS does not have information specifically on the cost to SAs to make changes to their CACFP MIS, but an internal FNS data collection from all NSLP/SBP SAs on the 2016–2017 school year provides some information on MIS costs to SAs running NSLP/SBP, and this is the best proxy we have available for potential costs for a CACFP MIS. This data collection found that only a couple of complex modules (menu planning and direct certification/matching) tend to cost more than $500,000 to develop, while less complex modules (*e.g.,* federal reporting, nutrient analysis, financial management for SFAs, and professional standards training) tend to cost less than $100,000. We assume that the requirements of this rule are of the less complex nature.

Similarly, upgrade costs for NSLP/SBP SA modules tended to be greater for more complex modules, and less for less complex modules. However, between 20% and 50% of SAs reported no direct costs to the SA when upgrading modules, so some SAs may be able to absorb these functions into their existing MIS maintenance with no additional costs beyond costs already budgeted for planned maintenance.

Given this wide variation in MIS development and maintenance costs, FNS is providing both a point estimate and range for possible costs for MIS upgrades required to implement the provisions of the CNI final rule. The lower-bound estimate of MIS costs is $0 per SA, if SAs are able to absorb these functions into their MIS as part of their existing MIS modules and/or maintenance schedule.

At the upper-bound, it is possible that a SA may have to develop a new module for reviewing bank account activity and may have to upgrade their existing module for reviewing sponsors' expenditures. If we assume that the new module costs $100,000, and upgrading an existing module costs $50,000, then our initial upper-bound estimate would be $150,000 per SA for initial development/upgrade costs. Average annual maintenance fees for NSLP/SBP SA MIS are approximately $225,000 per year; if we assign 5% of these costs to the new rule, then we have an average annual maintenance cost of $11,250 per SA that we assign to this final rule.

For an intermediate point estimate (which we present as our primary estimate), FNS expects that SAs will be able to implement the requirements of this rule with a single upgrade to an existing module. FNS assumes the cost of this upgrade will be $50,000 per SA, and the annual maintenance cost of this upgrade will be an additional $1,000 per SA above SAs' baseline MIS maintenance costs. Table 9 presents 5-year estimates of the cost ranges (including inflation).

TABLE 9—MIS UPGRADE COSTS TO CACFP ADMINISTERING SAS

	Fiscal year (millions)					
	2025	2026	2027	2028	2029	Total
Primary Estimate	$2.9	$0.1	$0.1	$0.1	$0.1	$3.1
Lower-Bound Estimate	0.0	0.0	0.0	0.0	0.0	0.0
Upper-Bound Estimate	9.1	0.7	0.7	0.7	0.6	11.6

However, establishing and maintaining information systems required for the management of Child Nutrition Programs is an allowable cost covered by SAE funds. In addition, once all CACFP audits are funded, CACFP audit funds may be used for systems improvements reasonably connected to monitoring, oversight, and maintaining the operational integrity for the CACFP. Therefore, SAs may use these funds to cover costs to update their State systems as a result of changes in Program requirements due to this final rule. If SAs apply for and receive additional audit funding to make the MIS upgrades and maintenance necessary for these provisions, the net MIS cost to SAs because of this final rule could be $0, depending on the cost of the upgrades and the availability of additional audit funding. Furthermore, USDA regularly makes available a variety of competitive grants that could further defray these potential cost increases for SAs (*e.g.,* Administrative Review and Training Grants and Technology Innovation Grants).

Access Impacts—General: Several of the CNI final rule's provisions restrict participation by service providers, sponsoring organizations, or administering officials in USDA's child nutrition programs who violate program rules or have otherwise been determined to be risks to program integrity.

State Agency Reporting and Recordkeeping: As noted above, several of the provisions in the CNI final rule increase the information collection burden on State and local government agencies and on businesses (*i.e.,* CACFP sponsors and providers). In total, the Department estimates that State and local government agencies will spend an additional 3,869 hours complying with the rule's reporting requirements each year, and an additional 4,297 hours on recordkeeping. Businesses will spend about an additional 13,399 hours complying with the rule's reporting requirements. The total increase in burden hours is estimated to be 7,536 hours per year. These estimates, prepared in satisfaction of the requirements of the Paperwork Reduction Act of 1995, are summarized in the preamble to the rule.

We estimate the State agency cost of complying with the CNI final rule's information collection requirements by applying an average wage for State and local government professional employees to these additional reporting and recordkeeping hours.[8] These costs are summarized by program in Table 10.

[8] Based on reported wage rate for State and local government sector management, professional, and related workers from the Bureau of Labor Statistics' ''Table 3. State and local government workers by occupational and industry group'' database (*https://www.bls.gov/news.release/ecec.t03.htm*). For FY 2022 (September), the total compensation per hour for these positions averaged $67.96 per hour. We inflate this figure through FY 2029 with projected growth in the State and Local Expenditure Index prepared by OMB for use in the FY 2024 President's Budget.

TABLE 10—PROJECTED REPORTING AND RECORDKEEPING COST DIFFERENCES

	Fiscal year (millions)					
	2025	2026	2027	2028	2029	Total
NSLP:						
State and Local Government—Recordkeeping *	$0.17	$0.18	$0.18	$0.19	$0.20	$0.92
State and Local Government—Reporting *	−$1.36	−$1.40	−$1.44	−$1.49	−$1.54	−$7.23
Total	−1.18	−1.22	−1.26	−1.30	−1.34	−6.31
CACFP:						
State and Local Government—Recordkeeping *	0.19	0.19	0.20	0.21	0.21	1.00
State and Local Government—Reporting *	0.55	0.57	0.59	0.60	0.62	2.93
Businesses—Reporting *	1.12	1.16	1.20	1.24	1.28	6.00
Total	1.86	1.92	1.98	2.05	2.11	9.93
SFSP:						
State and Local Government—Recordkeeping *	(*)	(*)	(*)	(*)	(*)	(*)
State and Local Government—Reporting *	(*)	(*)	(*)	(*)	(*)	0.04
Total	(*)	(*)	(*)	(*)	(*)	0.04
Total Difference for Final Rule	0.69	0.71	0.73	0.75	0.78	3.65

* Estimated at less than $10,000.
Note: Sums may not match due to rounding or to the addition of sums below $10,000 to totals.

Benefits: The provisions codified in the CNI final rule are designed to increase program operators' accountability and operational efficiency, while improving the ability of FNS and State agencies to address severe or repeated violations of program requirements. The final rule's provisions add new requirements to existing reviews of child nutrition program sponsors, subject additional sponsors to periodic review, and increase USDA and State agency authority to fine seriously deficient sponsors and prohibit their participation in CN programs.

We note the following specific benefits of particular provisions of the final rule:

• *Extending the administrative review cycle:* This maximizes operational efficiency by relieving time and resources for State Agency staff to focus reviews on SFAs at risk of integrity issues instead of on SFAs without management issues. State agency and SFA cooperation with one another to administer school meal programs is central to ensure the delivery of nutritional food to school children. The Federal funding that supports school meal programs (NSLP and SBP) is to be used and protected with the highest level of integrity by State agencies and SFAs. While the administrative review enforces accountability of these Federal resources, extending to a 5-year review allows State agencies to perform reviews more effectively, allocate more time and resources towards school meal program administration, technical assistance, and program improvement.

• *Implementation of fines, referred to as assessments in the proposed rule:* This provision provides a new accountability tool for FNS and State agencies to use when there are severe or repeated non-criminal violations—the types of programs abuses that seriously threaten the integrity of Federal funds or significantly impair the delivery of service to eligible students.

• *More frequent reviews of childcare institutions and adult care institutions that are at risk of having serious management problems:* This will focus additional resources on those providers who are at greatest risk of intentionally or unintentionally violating program requirements. State agencies are invited to propose alternative approaches for determining review priorities in consultation with the FNS Regional Offices.

• *Additional State agency funding for audits of childcare institutions and adult care institutions:* This provision provides States with additional resources to audit CACFP providers to ensure program integrity and remedy potential wrongdoing. FNS continues to encourage all State agencies to make wider use of SAE along with the additional CACFP audit funds to help ease any burden.

• *Increased financial oversight of sponsoring organizations' bank account activity and reporting requirements:* An OIG audit [9] found that reviewing bank activity (in addition to reviewing budgets) would be effective at uncovering and preventing misuse of funds in a cost-effective manner.

• *Option to carry over unspent federal reimbursement into the new fiscal year:* This provides State agencies the flexibility to rollover up to 10 percent of unspent reimbursement from the previous fiscal year into the following fiscal year.

• *Fiscal action discretion:* This provision provides State agencies with more discretion on when to apply fiscal action for meal pattern violations during an administrative review in the School Meals programs. The requirement that State agencies must take fiscal action against SFAs for repeated violations of milk type and vegetable subgroup violations is removed, allowing states to provide assistance and support instead. Removing the fiscal action requirement increases operational efficiency for State agency staff. States are now only required to take fiscal action for a missing component violation, which is in alignment with the DGA rule.

We are not able to quantify potential nutritional benefits stemming from increased accountability and operational efficiency, nor can we quantify the dollar effects of the actions and transfers listed above, as we do not know the rates or magnitudes of error in the population. Many of the changes are already in effect and the variation in implementation makes it difficult to know the percentage of errors that will

[9] *Review of Management Controls for the Child and Adult Care Food Program,* available online at *https://www.usda.gov/oig/webdocs/27601-0012-SF.pdf.*

be avoided or rectified due to the implementation of these provisions.

Accounting Statement: As required by OMB Circular A–4, available at *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf,* we have prepared an accounting statement summarizing the annualized estimates of benefits, costs and transfers associated with the provisions of this rule.

The benefits of the CNI final rule include increasing program operators' accountability and operational efficiency, while improving the ability of FNS and State agencies to address severe or repeated violations of program requirements. Monetary benefits are not quantified in this analysis.

The costs associated with provisions of the final rule are incurred primarily by State agencies, program sponsors, and SFAs. These include the following, only some of which are quantified in Table 11 below:

- The costs of conducting additional CACFP sponsor reviews and
- The cost of reviewing CACFP sponsor bank account statements and expenditure reports of unaffiliated sponsored centers.

Transfers include distribution of new CACFP audit funds from the USDA to State agencies (which has been quantified), and the return of (or reduction in) misappropriated program funds and improper payments (which has not been quantified).

TABLE 11—UNDISCOUNTED STREAM OF QUANTIFIABLE COSTS AND TRANSFERS

	Fiscal year (millions)					
	2025	2026	2027	2028	2029	Total
Nominal cost stream to States	$2.4	−$0.4	−$0.4	−$0.4	−$0.4	$0.7
Nominal cost stream to Businesses	1.1	1.2	1.2	1.2	1.3	6.0
Nominal transfer stream:						
low estimate	5.1	5.2	5.4	5.6	5.9	27.2
high estimate	20.3	20.9	21.7	22.6	23.4	108.9

Applying 3 percent and 7 percent real discount rates to these nominal streams gives present values (in 2023 dollars): [10]

TABLE 12—DISCOUNTED COSTS AND TRANSFERS

	Fiscal year (millions)					
	2025	2026	2027	2028	2029	Total
Discounted cost stream to States:						
3 percent	$2.1	−$0.3	−$0.3	−$0.3	−$0.3	$0.9
7 percent	2.0	−0.3	−0.3	−0.3	−0.2	0.9
Discounted cost stream to Businesses:						
3 percent	1.0	1.0	0.9	0.9	0.9	4.7
7 percent	0.9	0.9	0.8	0.8	0.7	4.1
Discounted transfer stream:						
low estimate:						
3 percent	4.5	4.4	4.3	4.2	4.1	21.4
7 percent	4.2	3.9	3.7	3.5	3.3	18.5
high estimate:						
3 percent	18.0	17.5	17.1	16.7	16.3	85.5
7 percent	16.7	15.6	14.7	13.9	13.1	74.0

Table 13 takes the discounted streams from Table 12 and computes annualized values in FY 2023 dollars.

TABLE 13—ACCOUNTING STATEMENT

	Range	Estimate	Year dollar	Discount rate (%)	Period covered
Benefits					
Qualitative: Increased program integrity and accountability.					
Program participants:					
Annualized Monetized ($millions/year)	n.a.	n.a.	n.a.	n.a.	FY 2025–2029.

[10] Note that the discounted transfer streams include two components—3 and 7 percent discount rates plus the 3.2% inflation rate used to inflate future nominal costs. Therefore, the discount rates applied to the nominal streams to generate these estimates are approximately 6 percent and 10 percent, respectively.

TABLE 13—ACCOUNTING STATEMENT—Continued

	Range	Estimate	Year dollar	Discount rate (%)	Period covered
Costs					
Quantitative: Cost of a subset of administrative expenses related to additional reviews, documentation, reporting, training, recordkeeping, and MIS upgrades. (Only a portion of these costs have been estimated.)					
State agencies, SFAs, and Institutions (Businesses):					
Annualized Monetized ($millions/year)	n.a	$1.0 1.1	2023 2023	10 6	FY 2025–2029.
Transfers					
Quantitative: Distribution of CACFP audit funds to State agencies. *Non-quantified:* The return of (or reduction in) misappropriated program funds and improper payments.					
From USDA to State Agencies:					
Annualized Monetized ($millions/year)	low	3.7 4.3	2023 2023	10 6	FY 2025–2029.
	high	14.8 17.1	2023 2023	10 6	

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. The FNS Administrator has certified that this final rule will not have a significant economic impact on a substantial number of small entities. This rulemaking codifies provisions designed to increase program operators' accountability and operational efficiency, while improving the ability of FNS and State agencies to address severe or repeated violations of program requirements. While this rulemaking will affect State agencies, sponsoring organizations, school food authorities, and day care homes and centers, any economic effect will not be significant.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and the private sector. Under section 202 of UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rulemaking, section 205 of UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rulemaking. This final rule contains no Federal mandates, under the regulatory provisions of title II of UMRA, for State, local, and tribal governments, or the private sector, of $100 million or more in any one year. Therefore, this rulemaking is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 12372

The Child and Adult Care Food Program is listed in the Assistance Listings under the Catalog of Federal Domestic Assistance Number 10.558. The Summer Food Service Program is listed under No. 10.559. The National School Lunch Program and School Breakfast Program are listed under No. 20.555 and 10.553, respectively. They are subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. Since the Child Nutrition Programs are State-administered, FNS has formal and informal discussions with State and local officials, including representatives of Indian tribal organizations, on an ongoing basis regarding program requirements and operations. This provides FNS with the opportunity to receive regular input from State administrators and local program operators, which contributes to the development of feasible requirements.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section 6(b)(2)(B) of Executive Order 13132. FNS has determined that this final rule has federalism implications.

1. *Prior Consultation with State and Local Agencies:*

FNS has been gathering input from National, State, and local community partners through a variety of public engagement activities. Webinars, listening sessions, and town hall meetings have helped FNS monitor program operations, identify best practices, and take into consideration requests from States and local program operators. Since Child Nutrition Programs are State administered, federally-funded programs, FNS Regional offices have informal and formal discussions with State and local officials on an ongoing basis regarding program implementation and performance. Additionally, FNS published rulemaking actions to obtain formal public comment.

2. *Nature of Concerns and the Need to Issue this Rulemaking:*

State agencies and local program operators have provided wide support for implementing robust integrity practices and valuable suggestions for improvement. Most of their concerns relate to the current serious deficiency process as a model for establishing procedures in other Child Nutrition Programs, fiscal consequences of the provisions addressing fines and State liability, and the overall impact of provisions that may increase administrative burden. This rulemaking allows FNS to address these concerns while meeting statutory obligations.

3. *Extent to Which We Meet These Concerns:*

FNS has made every effort to address these concerns, balancing the goal of strengthening program integrity against the need to minimize administrative burden, within the constraints of statutory authority. This final rule is responsive to public input requesting that FNS make improvements to the serious deficiency process, limit the assessment of fines, and allow exceptions in cases involving State liability. There will be a 1-year delay to provide the additional time stakeholders have requested to implement many of the provisions. FNS will provide guidance and technical assistance to State agencies and local program operators to ensure the provisions of this final rule are implemented efficiently and in a manner that is least burdensome.

Executive Order 12988, Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rulemaking is intended to have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full implementation. This rulemaking is not intended to have retroactive effect. Prior to any judicial challenge to the application of the provisions of this rulemaking, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed the final rule, in accordance with the Department Regulation 4300–004, ''Civil Rights Impact Analysis'' to identify and address any major civil rights impacts the final rule may have on participants on the basis of age, race, color, national origin, sex, and disability. Due to the unavailability of data, FNS is unable to determine whether this rule will have an adverse or disproportionate impact on protected classes among entities that administer and participate in the Child Nutrition programs. The promulgation of this final rule will impact State agencies that administer FNS Child Nutrition programs and program operators by increasing accountability and operational efficiency while improving the ability of State agencies to address severe or repeated violations of program requirements. Children and adults participating in NSLP, SMP, SBP, SFSP, and CACFP may be impacted by the final rule if an operating agreement in the CACFP or SFSP is terminated. However, the FNS Civil Rights Division finds that the current mitigation strategies outlined in this CRIA provide ample consideration to participants' ability to participate in Child Nutrition programs. Additionally, the FNS Civil Rights Division finds that mitigation strategies, such as delaying implementation of several provisions to allow FNS to evaluate regulatory improvements, developing resources, and providing technical assistance, may lessen the impacts on State agencies and program operators. If deemed necessary, the FNS Civil Rights Division will propose further mitigation to alleviate impacts that may result from the implementation of the final rule.

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. Tribal representatives were informed about this rulemaking during the FNS listening session at the meeting of the National Congress of American Indians in February 2020 and at the tribal consultation that took place on May 23, 2023. FNS anticipates that this rulemaking will have no significant cost and no major increase in regulatory burden on tribal organizations.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; see 5 CFR part 1320) requires that the Office of Management and Budget (OMB) approve all collection of information requirements by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This final rule will implement statutory requirements and policy improvements to strengthen administrative oversight and operational performance of the Child Nutrition Programs. As FNS continues to work towards improving integrity in these programs, this final rule establishes criteria and procedures required under the Healthy, Hunger-Free Kids Act of 2010 to help FNS and State administering agencies reduce program errors of all types, resulting in more effective operations and improved compliance with program requirements. FNS is also using this opportunity to codify statutory requirements that are designed to improve the administration and operational efficiency of the Child and Adult Care Food Program, with less paperwork. This rulemaking also simplifies monitoring requirements in the National School Lunch and School Breakfast Programs to reduce administrative burden by providing targeted flexibilities designed to allow States to tailor oversight to meet program circumstances.

In accordance with the Paperwork Reduction Act of 1995, this final rule revises existing information collection requirements and contains new information collection requirements, which are subject to review and approval by the Office of Management and Budget. These existing requirements are currently approved under OMB Control Number 0584–0055, ''7 CFR part 226 Child and Adult Care Food Program,'' expiration date March 31, 2025, OMB Control Number 0584–0280, ''7 CFR Summer Food Service Program,'' expiration date September 30, 2025, and OMB Control Number 0584–0006, ''7 CFR part 210 National School Lunch Program,'' expiration date July 31, 2023.

In connection with the proposed rule, ''Child Nutrition Program Integrity,'' published in the **Federal Register** on March 29, 2016 (Vol. 81, No. 60, page 17564), USDA submitted an Information Collection Request (ICR) discussing the information requirements impacted by the rule to OMB for review. The final rule codifies into regulations many of the provisions incorporated under the proposed rule, as well as modifies some to ensure compliance by State agencies and program operators. It also adds additional integrity safeguards, including incorporating provisions from the proposed rules, ''Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs'' and ''Child and Adult Care Food Program: Amendments Related to the Healthy, Hunger-Free Kids Act of 2010.''

The majority of the information collection requirements and associated burdens will remain the same as previously proposed. However, there are a few changes in the requirements and burden. The revisions to the existing information collection requirements and the introduction of new information collection requirements will result in an overall increase in burden hours and responses on the State agencies, local government, and business respondents to this final rule.

Therefore, FNS is submitting for public comment the changes in the information collection burden that would result from adoption of the proposals in this final rule. These burden estimates are contingent upon OMB approval under the Paperwork Reduction Act of 1995. When the final rulemaking information collection request is approved, the Department will publish a separate notice in the **Federal Register** announcing OMB's approval.

This is a new information collection, assigned OMB Control Number 0584–0610 by OMB in August 2016 at the proposed rule stage, which is being submitted in support of the final rule, ''Child Nutrition Program Integrity (RIN 0584–AE08).'' In connection with the proposed rule, ''Child Nutrition Program Integrity, published in the **Federal Register** on March 29, 2016 (81 FR 17564),'' FNS submitted an ICR discussing the information requirements impacted by the rule to the Office of Management and Budget (OMB) for review.

The final rule codifies many of the changes proposed by FNS based on amendments to the Richard B. Russell National School Lunch Act (NSLA), enacted under the Healthy, Hunger-Free Kids Act of 2010 (HHFKA), Public Law 111–296. The final rule incorporates provisions from the *Child and Adult Care Food Program: Amendments Related to the Healthy, Hunger-Free Kids Act of 2010 Proposed Rule* and the *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs Proposed Rule.* The information collection associated with this rule is necessary to ensure compliance with legislative and regulatory requirements amended to the NSLA and contained in HHFKA.

Since FNS had requested a new information collection at the proposed rule stage, due to the information collection inventories affected by this rulemaking undergoing renewal, the proposals outlined in this final rule will be captured in a new information collection under OMB Control Number 0584–0610 as an increase to the information collection inventory. After OMB has approved the information collection requirements submitted in conjunction with the final rule and the current renewals of the impacted information collections are completed, FNS will merge these requirements and their burden into OMB Control Number 0584–0055, ''7 CFR part 226 Child and Adult Care Food Program,'' expiration date March 31, 2025, OMB Control Number 0584–0280, ''7 CFR Summer Food Service Program,'' expiration date September 30, 2025, and OMB Control Number 0584–0006, ''7 CFR part 210 National School Lunch Program,'' expiration date July 31, 2023. At this point, the decreases in burden noted throughout this section will be fully captured in the burden for the various collections.

Comments on the Paperwork Reduction Act section of this final rule must be received by October 23, 2023. Please send comments to Program Monitoring and Operational Support Division 1320 Braddock Place, Alexandria, VA 22314. For further information, please contact Megan Geiger, *megan.geiger@usda.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. 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.

Title: Child Nutrition Program Integrity.

Form Number: None.

OMB Control Number: 0584–0610.

Expiration Date: Not Yet Determined.

Type of Request: New Collection. While OMB assigned an OMB Control Number to this collection during the proposed rule stage, the collection is not yet part of the active information collection inventory.

Abstract: This is a new information collection that contains new information collection requirements that will eventually be incorporated into OMB Control Number 0584–0055, ''7 CFR part 226 Child and Adult Care Food Program,'' OMB Control Number 0584–0280, ''7 CFR Summer Food Service Program,'' and OMB Control Number 0584–0006, ''7 CFR part 210 National School Lunch Program.'' This new information collection also revises existing information collection requirements in the same OMB Control Numbers that are also impacted by this final rule.

This final rule codifies provisions designed to increase program operators' accountability and operational efficiency, while improving the ability of FNS and State agencies to address severe or repeated violations of program requirements. This rulemaking impacts information reporting, recordkeeping, and public notification at the State and local government levels (State agencies and sponsoring organizations) and at the businesses level (sponsoring organizations) in the Child and Adult Care Food Program (CACFP); at the State and local government level (State agencies and School Food Authorities (SFAs)) in the Summer Food Service Program (SFSP); and at the State and local government level (State agencies and SFAs) in the National School Lunch Program (NSLP).

FNS is using the publication of the *Child Nutrition Program Integrity* final rule as an opportunity to additionally merge sections of two previously published rules that were not finalized and codified. This includes the *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs* and *Child and Adult Care Food Program: Amendments Related to the Healthy, Hunger-Free Kids Act of 2010.*

In the proposed rule, *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs* (85 FR 4094, January 23, 2020), FNS included a number of discretionary changes to streamline the administrative review process for schools, without compromising State agency and school food authority efforts to maintain accountability and integrity. Through the *Child Nutrition Program Integrity* final rule, FNS is taking action to codify the proposed changes that impact monitoring. These amendments will give State agencies greater flexibility, eliminate redundancy, and target limited State resources to higher risk school food authorities. Provisions in *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs* unrelated to monitoring and oversight will not be finalized in the *Child Nutrition Program Integrity* Final Rule and will instead be incorporated in other rulemaking.

The proposed rule, *Child and Adult Care Food Program: Amendments Related to the Healthy, Hunger-Free Kids Act of 2010* (77 FR 21018, April 9, 2012), included amendments to codify statutory requirements designed to improve the administration and operational efficiency of CACFP, with

less paperwork. However, in the intervening years since publication of the proposed rule, FNS was unable to publish a subsequent rulemaking to incorporate these amendments into CACFP regulations under 7 CFR part 226. Through the *Child Nutrition Program Integrity* final rule, FNS is taking action to codify these statutory requirements, which will provide clarity and consistency in their implementation. FNS will not codify any of the discretionary provisions included in the proposed rule.

The changes proposed in the *Child Nutrition Program Integrity Rule* that will not be finalized are the requirement that SFAs contracting with an FSMC can no longer use cost-reimbursable contracts, reciprocal disqualification in CACFP and SFSP, and serious deficiency process and disqualification in SFSP and CACFP. FNS will pursue a separate rule making for the reciprocal disqualification in CACFP and SFSP, as well as the serious deficiency process and disqualification in SFSP and CACFP in response to public comments. FNS intends to seek more information on the fixed-price contract provision in response to information collected during the COVID–19 public health emergency.

In total, FNS estimates that the changes to the Child Nutrition Program requirements as a result of this rule decrease the burden for the NSLP information collection, OMB Control Number 0584–0006, by 14,734 hours; increase the burden for the SFSP information collection, OMB Control Number 0584–0280, by 80.81 hours; and increase the burden for the CACFP information collection, OMB Control Number 0584–0055, by 22,190.72 hours. The provisions from the previously proposed rules that are included in this final rule are related to increasing program integrity and codifying statutory requirements into regulations.

In the proposed Child Nutrition Integrity Rule, FNS expected 23,113 responses and 16,060.5 burden hours. For this final rule, because of changes due to merging this rule with two other rules, moving some provisions to another rulemaking (on Serious Deficiency), and other changes due to public feedback, FNS has adjusted the burden for this final rule. FNS now expects that this final rule will increase over that estimated in the proposed rule, to 225,205 total responses and 190,924 total burden hours.

Below is a summary of the changes in the final rule and the accompanying reporting, recordkeeping, and public notification requirements that will impact the burden that these program requirements have on State agencies, local governments, and businesses.

Reporting: NSLP

Affected Public: State Agencies

The changes proposed in this rule will impact the existing reporting requirements currently approved under OMB Control Number 0584–0006 and found at 7 CFR part 210, National School Lunch Program. The below information provides details regarding the reporting changes associated with OMB Control Number 0584–0006 as a result of the Child Nutrition Program Integrity final rule OMB Control Number 0584–0610.

The final rule adjusts a requirement at Section 210.18(i)(3) for the State agencies to notify the School Food Authorities (SFAs) in writing of review findings, corrective actions, deadlines, and potential fiscal action with grounds and right to appeal. FNS estimates that 56 State agencies will respond, for a total of 3,808 responses (56 × 68 = 3,808). The estimated average number of burden hours per response is 8 hours resulting in an estimated total annual burden hours of 30,464 (3,808 × 8 = 30,464). FNS estimates that this information requirement will have 30,464 burden hours and 3,808 responses. Once the requirements and burden from this new collection are merged into OMB Control Number 0584–0006 (7 CFR PART 210 NATIONAL SCHOOL LUNCH PROGRAM), FNS estimates that this final rule will reduce the burden hours by 20,160 hours, from 50,624 to 30,464 hours. It will also reduce the responses by 2,520, from 6,328 to 3,808 responses. This reduction is due to a program change reducing the frequency of the administrative review cycle.

The final rule amends the requirements found at Section 210.5(d)(2)(ii) (now at Section 210.5(d)(3)) that SAs submit a quarterly report to FNS detailing the disbursement of performance-based reimbursement to SFAs by changing the frequency of the report to annually. FNS estimates that there are 56 SAs that will each file 1 report annually for a total of 56 responses (56 × 1 = 56). The estimated average number of burden hours per response is 15 minutes (0.25 hours) resulting in an estimated total annual burden hours of 14 (56 × 0.25 = 14). FNS estimates that this information requirement will have 14 burden hours and 56 responses. The previous burden (OMB#0584–0006) was 56 hours, so with this final rule, FNS estimates that the burden will be reduced by 42 burden hours. The final rule will also reduce the responses by 168, from 224 to 56 responses. These reductions are due to a program change reducing the frequency of this report.

The final rule adds a requirement at Section 210.18(c)(2) that State agencies with a review cycle longer than 3 years must submit a plan to FNS describing the criteria that it will use to identify high-risk SFAs for targeted follow-up reviews. FNS estimates there are 56 SAs that will each file 1 report for a total of 56 responses (56 × 1 = 56). The estimated average number of burden hours per response is 8 hours resulting in an estimated total annual burden hours of 488 (56 × 8 = 448). FNS estimates that this information requirement will have 448 burden hours and 56 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule will add 448 hours and 56 responses to OMB's inventory due to a program change.

This final rule adds a specific requirement to Section 210.21(h), that State agencies complete procurement training requirements annually. FNS estimates that each of the 56 SAs will complete procurement training requirements annually, for a total of 56 responses annually (56 × 1 = 56). The estimated average number of burden hours per response is 1 hour resulting in estimated total burden hours of 56 (56 × 1 = 56). FNS estimates that this information requirement will have 56 burden hours and 56 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule will add 56 hours and 56 responses to OMB's inventory due to a program change.

Section 210.26(b)(4) requires that State agencies notify SFAs of fines and specific violations or actions that constituted the fine, and of appeal rights and procedures, and submit a copy of the notice to FNS. FNS estimates that each of the 56 State agencies will notify SFAs of fines, specific violations, actions that constituted the fine, appeal rights, and procedures, and submit a copy of the notice to FNS 0.09 times, for a total of 5.04 notifications annually (56 × 0.09 = 5.04). The estimated average number of burden hours per response is 3 hours, resulting in estimated total burden hours of 15.12 (5.04 × 3 = 15.12) FNS estimates that this information requirement will have 15.12 burden hours and 5.04 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule will add 15.12 hours and 5.04

responses to OMB's inventory due to a program change.

Affected Public: SFAs/Local Education Agency Level

Sections 210.15(a)(3) and 210.18(j)(2) require SFAs to submit to the SA a written response to reviews documenting corrective action taken for Program deficiencies. FNS estimates 3,804 SFAs will each file 1 report annually for a total of 3,804 responses (3,804 × 1 = 3,804). The estimated average number of burden hours per response is 8 hours resulting in an estimated total annual burden hours of 30,430 (3,804 × 8 = 30,430). FNS estimates that this information requirement will have 30,430 burden hours and 3,804 responses. Once the requirements and burden from this new collection are merged into OMB Control Number 0584–0006, FNS estimates that this final rule will reduce the burden hours by 20,290 hours, from 50,720 to 30,430 hours. It will also reduce the responses by 2,536, from 6,340 to 3,804 responses. This reduction is due to a program change reducing the frequency of the administrative review cycle.

Section 210.21(h) requires that SFAs complete procurement training requirements annually. FNS estimates that 19,019 SFAs will complete procurement training requirements annually, for a total of 19,019 records annually (19,019 × 1 = 19,019). The estimated average number of burden hours per response is 1 hour and 15 minutes (1.25 hours) resulting in estimated total burden hours of 23,774 (19,019 × 1.25 = 23,774). FNS estimates that this information requirement will have 23,774 burden hours and 19,019 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule will add 23,774 hours and 19,019 responses to OMB's inventory due to a program change.

Section 210.26(b)(5) states that SFAs may appeal State agency's determination of violations and fines. SFAs must submit to the Stage agency any pertinent information, explanation, or evidence addressing the Program violations identified by the SA. Any SFA seeking to appeal the SA determination must follow SA appeal procedures. FNS estimates that 5 SFAs will appeal the State agency's determination of violations and fines, for a total of 5 records annually (5 × 1 = 5). The estimated average number of burden hours per response is 8 hours resulting in estimated total burden hours of 40 (5 × 8 = 40). FNS estimates that this information requirement will have 40 hours and 5 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule will add 40 hours and 5 responses to OMB's inventory due to a program change.

Recordkeeping: NSLP

Affected Public: State Agencies

Section 210.18(h)(2)(iv) requires each SA to ensure that the LEA and SFA comply with the nutrition standards for all competitive food and maintain records documenting compliance. FNS estimates that 56 SAs will each maintain 68 records annually for a total estimated number of records of 3,808 (56 × 68 = 3,808). The estimated average number of burden hours per record is 15 minutes (0.25 hours) resulting in an estimated total annual burden hours of 952 (3,808 × 0.25 = 952). When OMB approves the information collection request (ICR) for this final rule, FNS estimates that this information requirement will have 952 burden hours and 3,808 responses. Once the requirements and burden from this new collection are merged into OMB Control Number 0584–0006, FNS estimates that this final rule will reduce the burden hours by 630 hours, from 1,582 hours to 952 hours. It will also reduce the responses by 2,520, from 6,328 responses to 3,808 responses. This reduction is due to a program change from the Final Rule, reducing the number of compliance reviews.

Sections 210.20(b)(6); 210.18(o)(f)(k)(l)(m); and 210.23(c) require the SA to maintain records of all reviews and audits (including Program violations, corrective action, fiscal action, and withholding of payments). The currently approved burden for this activity is 50,638. FNS estimates that there are 56 SAs that will each file 68 records annually for a total of 3,808 records (56 × 68 = 3,808). The estimated average number of burden hours per record is 8.00214 hours resulting in a revised estimated total annual burden hours of 30,472 hours (3,808 × 8.00214 = 30,472). When OMB approves the information collection request (ICR) for this final rule, FNS estimates that this information requirement will have 30,472 burden hours and 3,808 responses. Once the requirements and burden from this new collection are merged into OMB Control Number 0584–0006, FNS estimates that this final rule will reduce the burden hours by 20,166 hours, from 50,638 hours to 30,472 hours. It will also reduce the responses by 2,520, from 6,328 to 3,808 responses. This reduction is due to a program change from the Final Rule, reducing the number of compliance reviews.

Sections 210.20(b)(7); 210.19(c); and 210.18(o) require the SA document fiscal action taken to disallow improper claims submitted by SFAs, as determined through claims processing, reviews and USDA audits. FNS estimates that there are 56 SAs that will each file 68 records annually for a total of 3,808 records (56 × 68 = 3,808). The estimated average number of burden hours per record is 30 minutes (0.50 hours) resulting in an estimated total annual burden hours of 1,904 hours (3,808 × 0.5 = 1,904). When OMB approves the information collection request (ICR) for this final rule, FNS estimates that this information requirement will have 1,904 burden hours and 3,808 responses. Once the requirements and burden from this new collection are merged into OMB Control Number 0584–0006, FNS estimates that this final rule will reduce the burden hours by 1,260 hours, from 3,164 hours to 1,904 hours. It will also reduce the responses by 2,520, from 6,328 to 3,808 responses. The reduction in burden is due to a program change from the Final Rule, reducing the number of compliance reviews.

Sections 210.18(c–h) require the SA to complete and maintain documentation used to conduct Administrative Reviews. FNS estimates there are 56 SAs that will each file 68 reports annually for a total of 3,808 responses (56 × 68 = 3,808). The estimated average number of burden hours per response is 30 minutes (.50 hours) resulting in an estimated total annual burden hours of 1,904 (3,808 × .5 = 1,904). When OMB approves the information collection request (ICR) for this final rule, FNS estimates that this information requirement will have 1,904 burden hours and 3,808 responses. Once the requirements and burden from this new collection are merged into OMB Control Number 0584–0006, FNS estimates that this final rule will reduce the burden hours by 1,269 hours, from 3,173 hours to 1,904 hours. It will also reduce the responses by 2,520, from 6,328 to 3,808 responses. The reduction in burden is due to a program change from the Final Rule, reducing the number of compliance reviews.

Section 210.18(c) requires the SA to complete and maintain documentation used to conduct targeted Follow Up Administrative Review. FNS estimates there are 56 SAs that will each file 23 reports annually for a total of 1,288 responses (56 × 23 = 1,288). The estimated average number of burden hours per response is 16 hours resulting

in an estimated total annual burden hours of 20,608 (1,288 × 16 = 20,608). When OMB approves the information collection request (ICR) for this final rule, FNS estimates that this information requirement will have 20,608 burden hours and 1,288 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule will add 20,608 hours and 1,288 responses to OMB's inventory due to a program change.

Section 210.15(b)(8) requires that State agencies maintain records to document compliance with the procurement training requirements. FNS estimates that each of the 56 State agencies will maintain 1 record to document compliance with the procurement training requirements, for a total of 56 records annually (56 × 1 = 56). The estimated average number of burden hours per response is 15 minutes (0.25 hours) resulting in estimated total burden hours of 14 (56 × 0.25 = 14). When OMB approves the information collection request (ICR) for this final rule, FNS estimates that this information requirement will have 14 burden hours and 56 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule will add 14 hours and 56 responses to OMB's inventory due to a program change.

Section 210.26(b) requires that State agencies maintain records related to fines and specific violations. FNS estimates that each of the 56 State agencies will maintain 0.09 records to related fines and specific violations, for a total of 5.04 records annually (56 × 0.09 = 5.04). The estimated average number of burden hours per response is 15 minutes (0.25 hours) resulting in estimated total burden hours of 1.26 hours (5.04 × 0.25 = 1.26). When OMB approves the information collection request (ICR) for this final rule, FNS estimates that this information requirement will have 1.26 burden hours and 5.04 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule will add 1.26 hours and 5.04 responses to OMB's inventory due to a program change.

Affected Public SFAs/LEAs

Section 210.21(h) requires that SFAs maintain document compliance with the procurement training requirements. FNS estimates that 19,019 SFAs will maintain document compliance with the procurement training requirements, for a total of 19,019 records annually (19,019 × 1 = 19,019). The estimated average number of burden hours per response is 15 minutes (0.25 hours) resulting in estimated total burden hours of 4,755 hours (19,019 × 0.25 = 4,755). When OMB approves the information collection request (ICR) for this final rule, FNS estimates that this information requirement will have 4,755 burden hours and 19,019 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule will add 4,755 hours and 19,019 responses to OMB's inventory due to a program change.

Public Notification: NSLP

Affected Public: State Agencies

Section 210.18(m)(1) requires SAs to make the most recent final administrative review results available to the public in an easily accessible manner (by posting a summary to the SA website and making a copy available upon request). FNS estimates there are 56 SAs that will each file 68 reports annually for a total of 3,808 responses (56 × 68 = 3,808). The estimated average number of burden hours per response is 15 minutes (0.25 hours) resulting in an estimated total annual burden hours of 952 (3,808 × 0.25 = 952). FNS estimates that this information requirement will have 952 burden hours and 3,808 responses. The previous burden (OMB# 0584–0006) was 1,582 hours and 6,328 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0006, FNS estimates that this final rule results in a decrease of 630 burden hours and a decrease of 2,520 responses, from 6,328 responses to 3,808 due to a program change reducing the frequency of the administrative review.

Reporting SFSP

Affected Public: State Agencies

The changes proposed in this rule will impact the reporting burden currently approved under OMB Control Number 0584–0280 and found at 7 CFR part 225, Summer Food Service Program. The below information provides details regarding the reporting changes associated with OMB Control Number 0584–0280 as a result of the Child Nutrition Program Integrity final rule, OMB control number 0584–0610.

Section 225.6(i) requires that State agencies consult with FNS prior to taking any action to terminate for convenience. This is a new information requirement resulting from this final rule. FNS estimates that each of the 53 State agencies will consult with FNS once prior to taking any action to terminate for convenience, for a total of 53 consultations (53 × 1 = 53). The estimated average number of burden hours per notification is 30 minutes (0.5 hours) resulting in estimated total burden hours of 27 (53 × 0.5 = 27). FNS estimates that this information requirement will have 27 burden hours and 53 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0280 (7 CFR Summer Food Service Program), FNS estimates that this final rule results in an increase of 27 burden hours and 53 responses due to a program change.

Section 225.18(k) requires that State agencies notify SFAs of fines and submit a copy of the notice to FNS.FNS estimates that each of the 53 State agencies will notify SFAs of fines and submit a copy of the notice to FNS 0.09 times, for a total of 4.77 notifications annually (53 × 0.09 = 4.77). The estimated average number of burden hours per response is 3 hours, resulting in estimated total burden hours of 14.31 (4.77 × 3 = 14.31). FNS estimates that this information requirement will have 14.31 hours and 4.77 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0280, FNS estimates that this final rule results in an increase of 14.31 burden hours and 4.77 responses due to a program change.

Section 225.18(k) states that SFAs may appeal State agency's determination of fines. SFAs must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any SFA seeking to appeal the State agency determination must follow State agency appeal procedures.FNS estimates that 5 SFAs will appeal the State agency's determination of violations and fines, for a total of 5 records annually (5 × 1 = 5). The estimated average number of burden hours per response is 8 hours resulting in estimated total burden hours of 40 (5 × 8 = 40). FNS estimates that this information requirement will have 40 burden hours and 5 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0280, FNS estimates that the final rule will result in an increase of 40 burden hours and 5 responses due to a program change.

Record Keeping: SFSP

There is no change in burden for the record keeping requirements in the SFSP due to this rulemaking.

Reporting: CACFP

The changes proposed in this rule will impact the existing reporting requirements currently approved under OMB Control Number 0584–0055 and found at 7 CFR part 226, Child and Adult Care Food Program. The below information provides details regarding the reporting changes associated with OMB Control Number 0584–0055 as a result of the Child Nutrition Program Integrity final rule, OMB control number 0584–0610.

Affected Public: State Agencies

Section 226.4(j) requires State agencies to submit a plan to FNS for additional audit funding. This is a new information requirement resulting from this final rule. FNS estimates that on average there are 8 State agencies that will each file 1 report annually for a total of 8 responses (8 × 1=8). The estimated average number of burden hours per response is 4 hours resulting in estimated total burden hours of 32 (8 × 4 =32). FNS estimates that this information requirement will have 32 hours and 8 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055 (7 CFR part 226 Child and Adult Care Food Program), FNS estimates that this final rule will add 32 burden hours and 8 responses to OMB's inventory due to a program change.

Section 226.6(k)(11)(iii) allows the SA to submit, for FNS review, information supporting a request for a reduction in the State's liability, a reconsideration of the State's liability, or an exception to the 60-day deadline, for exceptional circumstances. FNS estimates that on average there will be 5 State agencies that will each file 1 request annually for a total of 5 responses (5 × 1 = 5). The estimated average number of burden hours per response is 4 hours resulting in estimated total burden hours of 20 (5 × 4 = 20). FNS estimates that this information requirement will have 20 burden hours and 5 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this final rule will add 20 hours and 5 responses to OMB's inventory due to a program change.

Section 226.6(b)(4)(ii) requires State agencies to consult with FNS prior to taking action to terminate for convenience. FNS estimates that each of the 56 State agencies will consult with FNS once per year prior to terminating a sponsoring organization for convenience, for a total of 56 responses annually (56 × 1 = 56). The estimated average number of burden hours per response is 30 minutes (0.5 hours), resulting in estimated total burden hours of 28 hours (56 × 0.5 = 28). FNS estimates that this information requirement will have 28 burden hours and 56 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this final rule results in an increase of 28 burden hours and 56 responses due to a program change.

Section 226.6(m)(6) requires that State agencies conduct reviews every two years for sponsoring organizations with less than 100 facilities and conduct activities other than the CACFP or are at risk of having serious management problems.FNS estimates that each of the 56 State agencies will each conduct 20 reviews for sponsoring organizations every two years (nationwide, average 10 with less than 100 centers and conduct activities other than CACFP and average 10 having serious management problems), for a total of 1,120 reviews biennially (56 × 20 = 1,120). The estimated average number of burden hours per response is 4 hours resulting in estimated total burden hours of 4,480 (1,064 × 4 = 4,480). FNS estimates that this information requirement will have 4,480 burden hours and 1,120 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of 4,480 burden hours and 1,120 responses due to a program change.

Section 226.7(b)(1) requires that State agencies have procedures in place for annually reviewing at least one month of the sponsoring organization's bank account activity against other associated records to verify that the transactions meet program requirements.FNS estimates that each of the 56 State agencies will each have reviewing procedures in place to review sponsoring organization's bank account activity, for a total of 56 procedures annually (56 × 1 = 56). The estimated average number of burden hours per response is 1 hour resulting in estimated total burden hours of 56 (56 × 1 = 56). FNS estimates that this information requirement will have 56 burden hours and 56 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055 (7 CFR part 226 Child and Adult Care Food Program), FNS estimates that this results in an increase of 56 burden hours and 56 responses to OMB's inventory due to a program change.

Section 226.7(b)(1)(ii) requires that State agencies have procedures for annually reviewing a sponsoring organization's actual expenditures of CACFP funds and the amount of meal reimbursement funds retained from unaffiliated centers. FNS estimates that there are 56 State agencies that will each have reviewing procedures in place to review sponsoring organizations' CACFP funds and meal reimbursement funds retained from unaffiliated centers, for a total of 56 reviewing procedures annually (56 × 1 = 56). The estimated average number of burden hours per reviewing procedures is 1 hour resulting in estimated total burden hours of 56 (56 × 1 = 56). FNS estimates that this information requirement will have 56 burden hours and 56 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of 56 burden hours and 56 responses to OMB's inventory due to a program change.

Section 226.25(j) requires that State agencies notify SFAs of fines and submit a copy of the notice to FNS. FNS estimates that each of the 56 State agencies will notify SFAs of fines and submit a copy of the notice to FNS 0.09 times, for a total of 5.04 notifications annually (56 × 0.09 = 5.04). The estimated average number of burden hours per response is 3 hours, resulting in estimated total burden hours of 15.12 (5.04 × 3 = 15.12). FNS estimates that this information requirement will have 15.12 burden hours and 5.04 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this final rule results in an increase of 15.12 burden hours and 5.04 responses to OMB's inventory due to a program change.

Section 226.6(b)(2) requires that State agencies review annual certification of an institution's eligibility to continue participating in CACFP (which replaces the renewal application process). FNS estimates that there are 56 State agencies that will each have to review 390 certifications, for a total of 21,840 reviews annually (56 × 390 = 21,840). The estimated average number of burden hours per review is 20 minutes (.334 hours), resulting in estimated total burden hours of 7,295 (21,840 × .334 = 7,295). When OMB approves the information collection request (ICR) for this final rule, FNS estimates that this information requirement will have 7,295 burden hours and 21,840 responses. Once the requirements and burden from this new collection are merged into OMB Control Number 0584–0055, FNS estimates that this final rule will reduce the burden hours by 3,625 hours, from 10,920 to 7,295 hours. The number of responses will remain at 21,840

responses. This reduction is the result of a program change due to the Final Rule, due to the reduced number of hours it will take State agencies for this review.

Section 226.6(m)(3)(ix) requires that State agencies assess the timing of each sponsoring organization's reviews of day care homes and sponsored centers. FNS estimates that there are 56 State agencies that will each have to review the timing of 390 sponsors, for a total of 21,840 reviews annually (56 × 390 = 21,840). The estimated average number of burden hours per review is 10 minutes (.167 hours), resulting in estimated total burden hours of 3,640 (21,840 × .17 = 3,640). FNS estimates that this information requirement will have 3,640 burden hours and 21,840 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this final rule results in an increase of 3,640 burden hours and 21,840 responses to OMB's inventory due to a program change.

Section 226.6(p) requires State agencies to develop/revise and provide a sponsoring organization agreement between sponsor and facilities, which must have standard provisions. FNS estimates that there are 56 State agencies that will each have to develop 1 agreement, for a total of 56 agreements, as a one-time burden (56 × 1 = 56). The estimated average number of burden hours per agreement is 6 hours, resulting in estimated total burden hours of 336 (56 × 6 = 336). FNS estimates that this information requirement will have 336 burden hours and 56 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of 336 burden hours and 56 responses to OMB's inventory due to a program change.

Section 226.12(a) requires the State agency to multiply the appropriate administrative reimbursement rate by the number of day care homes submitting claims for reimbursement during the month, to determine the amount of payment that sponsoring organizations will receive. FNS estimates that there are 56 State agencies that will each determine payments for 11 sponsors, for a total of 623 sponsors paid annually (56 × 11 = 623). The estimated average number of burden hours per sponsor's calculation is ten minutes per year (.167 hours), resulting in estimated total burden hours of 104 (623 × .167 = 104). FNS estimates that this information requirement will have 104 burden hours and 623 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of 104 burden hours and 623 responses to OMB's inventory due to a program change.

Section 226.7(g)(2) requires the State agency to review the budget and supporting documentation prior to approval, for sponsoring organizations of day care homes seeking to carry over administrative funds. FNS estimates that there are 56 State agencies that will each review and approve 11 budgets, for a total of 623 responses (56 × 11 = 623). The estimated average number of burden hours per State agency is 1 hour, resulting in estimated total burden hours of 623 (1 × 623 = 623). FNS estimates that this information requirement will have 623 burden hours and responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of both 623 burden hours and responses to OMB's inventory due to a program change.

Section 226.7(j) requires each State agency to establish procedures to recover administrative funds from sponsoring organizations of day care homes that are not properly payable under FNS Instruction 796–2, administrative funds that are in excess of the 10 percent maximum carryover amount, and carryover amounts that are not expended or obligated by the end of the fiscal year following the fiscal year in which they were received. FNS estimates that there are 56 State agencies that will each establish 1 procedure, for a one-time burden total of 56 responses (56 × 1 = 56). The estimated average number of burden hours per State agency is 2 hours, resulting in estimated total burden hours of 112 (2 × 56 = 112). FNS estimates that this information requirement will have 112 burden hours and 56 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of 112 burden hours and 56 responses to OMB's inventory due to a program change.

Affected Public: Local Governments (Sponsoring Organizations)

Section 226.7(b)(1) requires sponsoring organizations to annually provide State agencies with bank account activity against other associated records to verify that the transactions meet program requirements. FNS estimates that there are 3,257 sponsoring organizations that are local agencies. Each sponsoring organization will submit 1 bank statement to their respective State agency, resulting in 3,257 annual records (3,257 × 1 = 3,257). FNS estimates that it will take an average of 15 minutes (0.25 hours) per response; therefore, this change will result in an estimated total burden hours of 814 hours annually (3,257 × 0.25 = 814). FNS estimates that this information requirement will have 814 burden hours and 3,257 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of 814 burden hours and 3,257 responses to OMB's inventory due to a program change.

Section 226.7(b)(1)(i) requires sponsoring organizations to provide State agency with actual expenditures of CACFP funds and the amount of meal reimbursement funds retained from unaffiliated centers to support the sponsoring organization's administrative costs. FNS estimates that 32 sponsoring organizations will provide their State agency with 1 actual expenditure of CACFP funds and the amount of meal reimbursement funds retained from unaffiliated centers, for a total of 32 expenditures annually (32 × 1 = 32). FNS estimates that it will take an average of 1 hour per submission; therefore, this change will result in an estimated total burden hours of 32 hours annually (32 × 1 = 32). FNS estimates that this information requirement will have 32 burden hours and responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of both 32 burden hours and responses to OMB's inventory due to a program change.

Section 226.6(b) requires that each participating institution submit annual updates to continue its participation (annual certification of information, updated licensing information, and a budget). This replaces the renewal application process in 226.6(f)(2)(i). FNS estimates that there are 3,257 institutions that will each have 1 annual update, for a total of 3,257 updates annually (3,257 × 1 = 3,257). The estimated average number of burden hours per review is 20 minutes (.33 hours), resulting in estimated total burden hours of 1,088 (3,257 × .334 = 1,088). FNS estimates that this information requirement will have 1,088 burden hours and 3,257 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this final rule will reduce the burden hours by 541 hours, from 1,629 to 1,088 hours. The number of responses will remain at 3,257 responses. This reduction is due to a program change

from the Final Rule, due to the lower amount of time it will take institutions to submit updates rather than renewal applications.

Sections 226.6(p), 226.17(e), (f), 226.17a(f), 226.19(d), and 226.19a(d) require that each sponsoring organization must enter into permanent agreements with their unaffiliated centers. FNS estimates that there are 32 sponsoring organizations that will each enter into 10 agreements, for a total of 320 agreements as a one-time burden ($32 \times 10 = 320$). The estimated average number of burden hours per review is 30 minutes (.5 hours), resulting in estimated total burden hours of 160 ($320 \times .5 = 160$). FNS estimates that this information requirement will have 160 burden hours and 320 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of 160 burden hours and 320 responses to OMB's inventory due to a program change.

Section 226.6(f)(1)(iv) requires sponsoring organizations of day care homes seeking to carry over administrative funds to submit an amended budget, to include an estimate of requested administrative fund carryover amounts and a description of proposed purpose for which those funds would be obligated or expended. FNS estimates that there are 83 sponsoring organizations that will each file 1 report, for a total of 83 reports ($83 \times 1 = 83$). The estimated average number of burden hours per report is 1 hour, resulting in estimated total burden hours of 83 ($1 \times 83 = 83$). FNS estimates that this information requirement will have 83 burden hours and responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this results in an increase of both 83 burden hours and responses to OMB's inventory due to a program change.

Section 226.25 states that SFAs may appeal the State agency's determination of fines. SFAs must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. FNS estimates that 5 SFAs will appeal the State agency's determination of violations and fines, for a total of 5 records annually ($5 \times 1 = 5$). The estimated average number of burden hours per response is 8 hours resulting in estimated total burden hours of 40 ($5 \times 8 = 40$). FNS estimates that this information requirement will have 40 burden hours and 5 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that the final rule will result in an increase of 40 burden hours and 5 responses to OMB's inventory due to a program change.

Section 226.23(e)(1)(vii) states that if a tier II day care home elects to assist in collecting and transmitting the applications to the sponsoring organization, sponsoring organizations must establish procedures to ensure the provider does not review or alter the application. FNS estimates that 83 sponsoring organizations will establish procedures, for a total of 83 records as a one-time burden ($83 \times 1 = 83$). The estimated average number of burden hours per response is 1 hour resulting in estimated total burden hours of 83 ($83 \times 1 = 83$). FNS estimates that this information requirement will have 83 burden hours and responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that the final rule will result in an increase of both 83 burden hours and responses to OMB's inventory due to a program change.

Affected Public: Businesses

Section 226.7(b)(1)(i) requires sponsoring organizations to annually provide State agencies with bank account activity against other associated records to verify that the transactions meet program requirements. FNS estimates that there are 18,601 sponsoring organizations that are businesses, each of which will submit 1 month's bank statement to their State agency for a total of 18,601 annual records. FNS expects it will take an average of 15 minutes (0.25 hours) for the sponsoring organization to report their bank activity to the State agency, resulting in estimated total burden hours of 4,650 ($18,601 \times 0.25 = 4,650$). FNS estimates that this information requirement will have 4,650 burden hours and 18,601 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that the final rule will result in an increase of 4,650 burden hours and 18,601 responses to OMB's inventory due to a program change.

Section 226.7(b) requires that sponsoring organizations provide the State agency with actual expenditures of CACFP funds and the amount of meal reimbursement funds retained from unaffiliated centers to support the sponsoring organization's administrative costs. FNS estimates that 1,030 sponsoring organizations of unaffiliated centers will provide their State agency with actual expenditures of CACFP funds and the amount of meal reimbursement funds retained from 1 unaffiliated center to support the sponsoring organization's administrative costs for a total of 1,030 annual records ($1,030 \times 1 = 1,030$). FNS expects it will take an average of 1 hour for the sponsoring organization to report CACFP funds and meal reimbursement funds to the State agency, resulting in an estimated total burden hours of 1,030 ($1,030 \times 1 = 1,030$). FNS estimates that this information requirement will have 1,030 burden hours and responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this final rule results in an increase of both 1,030 burden hours and responses to OMB's inventory due to a program change.

Section 226.6(b) requires that each participating institution submit annual updates to continue its participation (annual certification of information, updated licensing information, and a budget). This replaces the renewal application process in 226.6(f)(2)(i). FNS estimates that there are 18,601 institutions that will each have 1 annual update, for a total of 18,601 updates annually ($18,601 \times 1 = 18,601$). The estimated average number of burden hours per review is 20 minutes (.334 hours), resulting in estimated total burden hours of 6,213 ($18,601 \times .334 = 6,138$). FNS estimates that this information requirement will have 6,213 burden hours and 18,601 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this final rule will reduce the burden hours by 3,088 hours, from 9,301 to 6,213 hours. The number of responses will remain at 18,601 responses. This reduction is due to a program change due to the Final Rule, due to the lower amount of time it will take institutions to submit updates rather than renewal applications.

Sections 226.6(p), 226.17(e), (f), 226.17a(f), 226.19(d), and 226.19a(d) require that each sponsoring organization must enter into permanent agreements with their unaffiliated centers. FNS estimates that there are 1,030 institutions that will each enter into 10 agreements, for a total of 10,300 agreements as a one-time burden ($1,030 \times 10 = 10,300$). The estimated average number of burden hours per review is 30 minutes (0.5 hours), resulting in estimated total burden hours of 5,150 ($10,300 \times .5 = 5,150$). FNS estimates that this information requirement will have 5,150 burden hours and 10,300 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that this final rule results in

an increase of 5,150 burden hours and 10,300 responses to OMB's inventory due to a program change.

Section 226.23(e)(1)(vii) states that if a tier II day care home elects to assist in collecting and transmitting the applications to the sponsoring organization, sponsoring organizations must establish procedures to ensure the provider does not review or alter the application. FNS estimates that 540 sponsoring organizations will establish procedures, for a total of 540 records as a one-time burden (540 × 1 = 540). The estimated average number of burden hours per response is 1 hour resulting in estimated total burden hours of 540 (540 × 1 = 540). FNS estimates that this information requirement will have 540 burden hours and responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that the final rule will result in an increase of both 540 burden hours and responses to OMB's inventory due to a program change.

Section 226.6(f)(1)(iv) requires sponsoring organizations of day care homes seeking to carry over administrative funds to submit an amended budget, to include an estimate of requested administrative fund carryover amounts and a description of proposed purpose for which those funds would be obligated or expended. FNS estimates that there are 540 sponsoring organizations that will each file 1 report, for a total of 540 reports (540 × 1 = 540). The estimated average number of burden hours per report is 1 hour, resulting in estimated total burden hours of 540 (1 × 540 = 540). FNS estimates that this information requirement will have 540 burden hours and responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that the final rule will result in an increase of both 540 burden hours and responses to OMB's inventory due to a program change.

Affected Public: Business Level (Facilities)

Section 226.18(b)(12) allows tier II day care homes to assist in collecting meal benefit forms from households and transmitting the forms to the sponsoring organization on the household's behalf. FNS estimates that there are 9,321 tier II day care homes that will each collect and transmit 5.88 forms, for a total of 54,804 forms annually (9,321 × 5.88 = 54,804). The estimated average number of burden hours per form is five minutes (.0835 hours), resulting in estimated total burden hours of 4,576 (54,804 × .0835 = 4,576). FNS estimates that this information requirement will have 4,576 burden hours and 54,804 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that the final rule will result in an increase of 4,576 burden hours and 54,804 responses to OMB's inventory due to a program change.

Recordkeeping: CACFP

Affected Public: State Agencies

Section 226.4(j) requires that State agencies maintain a plan for additional audit funds. FNS estimates that on average there are 8 State agencies that will each file 1 report annually for a total of 8 responses (8 × 1 = 8). The estimated average number of burden hours per response is 30 minutes (0.5 hours) resulting in estimated total burden hours of 4 (8 × 0.5 = 4). FNS estimates that this information requirement will have 4 burden hours and 8 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that the final rule will result in an increase of 4 burden hours and 8 responses to OMB's inventory due to a program change.

Section 226.6(m)(6) requires that State agencies maintain records for reviewing Sponsoring organizations with less than 100 facilities and conduct activities other than the CACFP, or are at risk of having serious management problems every two years. FNS estimates that there are 56 State agencies that will each maintain 20 records for reviewing sponsoring organizations with less than 100 facilities and conducting activities other than the CACFP, for a total of 1,120 records annually (56 × 20 = 1,120). The estimated average number of burden hours per response is 2 hours resulting in estimated total burden hours of 2,240 (1,120 × 2 = 2,240). FNS estimates that this information requirement will have 2,240 burden hours and 1,120 responses. Once this requirement and its associated burden is merged into OMB Control Number 0584–0055, FNS estimates that the final rule will result in an increase of 2,240 burden hours and 1,120 responses due to a program change.

Annualized Costs

For the CACFP, given the wide variation in MIS development and maintenance costs across State agencies, FNS estimates a cost of $50,000 per State agency to perform system upgrades and an additional cost of $1,000 per State agency for annual maintenance for respondents of this final rule ICR. Therefore, as a result of the proposals outlined in this final rule, FNS estimates that this collection is expected to have $2,800,000 in costs related to system upgrades and $56,000 in annual maintenance. As a result of the provisions in this final rule, FNS estimates that a total of $2,856,000 in combined system upgrades and annual maintenance costs will be added to the currently approved burden for the CACFP under OMB Control Number 0584–0055.

As a result of the proposals outlined in this final rule, FNS estimates that this new information collection will have 46,997 respondents, 225,205 responses, and 190,924 burden hours. The average burden per response and the annual burden hours are explained below and summarized in the charts that follow. Once the ICR for the final rule is approved, the information collection requirements and their associated burden will be merged into the corresponding existing collections. In the case of OMB Control Number 0584–0006, FNS estimates that this final rule will increase the burden by 21,666 responses from the currently approved 47,631,996 responses to 47,653,662 and will decrease the burden by 14,734 burden hours from the currently approved 9,808,454 hours to 9,793,720. It will not change the burden for the number of respondents (it will remain at 115,935). For OMB Control Number 0584–0280, FNS estimates that this final rule will not change the burden for the number of respondents (it will remain at 63,942), but the rule will increase the responses by 63 from 391,795 to 391,858 and will increase the burden by 80.81 burden hours from the currently approved 462,698.97 hours to 462,779.78. For OMB Control Number 0584–0055, FNS estimates that this final rule will increase the burden by 115,171 responses from the currently approved 16,213,093 responses to 16,328,263.76 and will increase the burden by 22,190.724 burden hours from the currently approved 4,213,210.886 hours to 4,235,401.61. It will not change the number of respondents (it will remain at 3,794,949).

NSLP

Reporting

Respondents (Affected Public): State, Local, and Tribal Government. The identified respondent groups include 56 State agencies and 19,019 School Food Authorities that will participate in this collection.

Estimated Number of Respondents: 19,075.

Estimated Number of Responses per Respondent: 1.41.

Estimated Total Annual Responses: 26,809.

Estimate Time per Response: 3.18 hours.

Estimated Total Annual Burden: 85,241 hours.

Recordkeeping

Respondents (Affected Public): State, Local, and Tribal Government. The identified respondent groups include an estimated 56 State agencies and 19,019 School Food Authorities that will participate in this collection.

Estimated Number of Respondents: 19,075.

Estimated Number of Responses per Respondent: 1.87.

Estimated Total Annual Responses: 35,600.

Estimate Time per Response: 1.70 hours.

Estimated Total Annual Burden: 60,610 hours.

Public Notification

Respondents (Affected Public): State, Local, and Tribal Government. The identified respondent groups include 56 State agencies that will participate in this collection.

Estimated Number of Respondents: 56.

Estimated Number of Responses per Respondent: 68.

Estimated Total Annual Responses: 3,808.

Estimate Time per Response: .25 hours.

Estimated Total Annual Burden: 952 hours.

SFSP

Reporting

Respondents (Affected Public): State, Local, and Tribal Government. The identified respondent groups include 53 State agencies and 5 local governments that will participate in this collection.

Estimated Number of Respondents: 58.

Estimated Number of Responses per Respondent: 1.08.

Estimated Total Annual Responses: 62.77.

Estimate Time per Response: 1.29 hours.

Estimated Total Annual Burden: 80.81 hours.

CACFP

Reporting

Respondents (Affected Public): State, Local, and Tribal Government, For Profit, and Non-Profit Businesses. The respondent groups include 56 State agencies, 3,257 Local governments, 18,601 sponsoring organizations, and 9,321 facilities that will participate in this collection.

Estimated Number of Respondents: 31,235.

Estimated Number of Responses per Respondent: 5.05.

Estimated Total Annual Responses: 157,797.04.

Estimate Time per Response: 0.26 hours.

Estimated Total Annual Burden: 41,795.72 hours.

Recordkeeping

Respondents (Affected Public): State, Local, and Tribal Government. The respondent groups include 56 State agencies that will participate in this collection.

Estimated Number of Respondents: 56.

Estimated Number of Responses per Respondent: 20.14.

Estimated Total Annual Responses: 1,128.

Estimate Time per Response: 1.99 hours.

Estimated Total Annual Burden: 2,244 hours.

OMB Control Number 0584–0006, ''**7 CFR Part 210 National School Lunch Program**''

REPORTING

Program rule	CFR citation	Title	Estimated # respondents	Responses per respondents	Total annual records	Estimated avg. # of hours per response	Estimated total hours	Current OMB approved burden hrs	Due to program change	Total difference
State Agency Level										
	210.18(i)(3)	SA notifies SFAs in writing of review findings, corrective actions, deadlines, and potential fiscal action with grounds and right to appeal.	56	68	3,808	8.00	30,464	50,624	−20,160	−20,160
	210.5(d)(3)	SAs submit an annual report to FNS detailing the disbursement of performance-based reimbursement to SFAs (in FPRS).	56	1	56	0.25	14	56	−42	−42
	210.18(c)(2)	SAs with a review cycle longer than 3-years submit a plan to FNS describing the criteria that it will use to identify high-risk SFAs for targeted follow-up reviews.	56	1	56	8.00	448	0	448	448
CN Integrity	210.21(h)	State agencies must complete procurement training requirements annually.	56	1	56	1.00	56	0	56	56
CN Integrity	210.26(b)(4)	SAs must notify SFAs of fine and specific violations or actions that constituted the fine, and of appeal rights and procedures; submit a copy of the notice to FNS.	56	0.09	5.04	3.00	15.12	0	15.12	15.12
State Agency Level Total			56.00	71.09	3,981.04	7.79	30,997.12	50,680.00	−19,683	−19,683
School Food Authority/Local Education Agency Level										
	210.15(a)(3) & 210.18(j)(2).	SFA submits to the SA a written response to reviews documenting corrective action for Program deficiencies.	3,804	1	3,804	8.00	30,430	50,720	−20,290	−20,290
CN Integrity	210.21(h)	SFAs must complete procurement training requirements annually.	19,019	1	19,019	1.25	23,774	0	23,774	23,774
CN Integrity	210.26(b)(5)	SFAs may appeal SA's determination of violations and fines. SFAs must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the SA. Any SFA seeking to appeal the SA determination must follow SA appeal procedures.	5	1	5	8.00	40	0	40	40
School Food Authority Level Total			19,019	1.200	22,828	2.38	54,244	50,720	3,525	3,525
School Level										
Total Reporting Burden			19,075	1.41	26,809	3.18	85,241	101,400	−16,158	(16,158)

RECORDKEEPING

Program rule	CFR citation	Title	Estimated # record-keepers	Records per record-keeper	Total annual records	Estimated avg. # of hours per record	Estimated total hours	Current OMB approved burden hrs	Due to program change—rule	Total difference
			A	B	C = (A * B)	D	E = (C * D)	F		G = E − F
State Agency Level										
	210.18(h)(2)(iv)	SA maintains documentation of LEA/SFA compliance with nutrition standards for competitive foods.	56	68	3,808	0.25	952	1,582	−630	−630

	210.20(b)(6) & 210.18(o)(f)(k,l,m) & 210.23(c).	SA maintains records of all reviews and audits (including Program violations, corrective action, fiscal action and withholding of payments).	56	68	3,808	8.00	30,472	50,638	−20,166	−20,166
	210.20(b)(7) & 210.19(c) & 210.18(o).	SA maintains documentation of fiscal action taken to disallow improper claims submitted by SFAs, as determined through claims processing, reviews, and USDA audits.	56	68	3,808	0.50	1,904	3,164	−1,260	−1,260
	210.18(c–h)	SA completes and maintains documentation used to conduct Administrative Review.	56	68	3,808	0.50	1,904	3,173	−1,269	−1,269
	210.18(c)	SA completes and maintains documentation used to conduct targeted Follow Up Administrative Review.	56	23	1,288	16.00	20,608	0	20,608	20,608
CN Integrity	210.15(b)(8)	State agencies must maintain records to document compliance with the procurement training requirements.	56	1	56	0.25	14	0	14	14
CN Integrity	210.26(b)	State agencies must maintain records to related fines and specific violations.	56	0.09	5.04	0.25	1.26	0	1.26	1.26
State Agency Level Total			56	296	16,581	3.37	55,855	58,557	−2,702	−2,702
School Food Authority/Local Education Agency Level										
CN Integrity	210.21(h)	School food authorities must maintain document compliance with the procurement training requirements.	19,019	1	19,019	0.25	4,755	0	4,755	4,755
School Food Authority Level Total			19,019	1	19,019	0.25	4,755	0	4,756	4,756
School Level										
				0	0	0	0	0		
School Level Total			0						0	0
Total Recordkeeping Burden			19,075	1.87	35,600	1.70	60,610	58,557	2,054	2,054

PUBLIC NOTIFICATION

Program rule	CFR citation	Title	Form No.	Estimated # respondents A	Responses per respondents B	Total annual records C = (A * B)	Estimated avg. # of hours per response D	Estimated total hours E = (C * D)	Current OMB approved burden hrs F	Due to authorizing statute	Due to program change—final rule	Due to an adjustment	Total difference G = E − F
	210.18(m)(1)	SA must post a summary of the most recent administrative review results of SFAs on the SA website and make a copy available upon request.		56	68	3,808	0.25	952.0	1,582.0		−630		−630
State Agency Level Total				56	68.00	3,808	0.25	952	1,582	0	−630	0	−630
Local Educational Agency/School Food Authority Level Total.				0	#DIV/0!	0	#DIV/0!	0	0	0	0	0	0
School Level Total											0		0
Total Public Notification Burden				56	68.00	3,808	0.25	952	1,582	0	−630	0	−630
Grand Total for NSLP Due to Final Rule (as shown in OMB#0584–0610).				19,075	3.47	66,217	2.22	146,803	0	0	146,803	0	146,803

OMB Control Number 0584–0280, ''**7 CFR Summer Food Service Program**''

REPORTING

Program rule	CFR citation	Title	Estimated # respondents A	Responses per respondents B	Total annual records C = (A * B)	Estimated avg. # of hours per response D	Estimated total hours E = (C * D)	Current OMB approved burden hrs F	Due to program adjustment	Total difference G = E − F
State/Local/Tribal Governments										
Integrity	225.6(i)	State agency must consult with FNS prior to taking any action to terminate for convenience.	53.00	1.00	53.00	0.50	26.50	0.00	26.50	26.50
Integrity	225.18(k)	State agencies must notify SFAs of fines and submit a copy of the notice to FNS.	53.00	0.09	4.77	3.00	14.31	0.00	14.31	14.31
Integrity	225.18(k)	SFAs may appeal State agency's determination of fines. SFAs must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any SFA seeking to appeal the State agency determination must follow State agency appeal procedures.	5.00	1.00	5.00	8.00	40.00		40.00	40.00
State/Local/Tribal Governments Total			58	1	63	1.29	81	0	81	80.81
Businesses (Non-profit Institutions and Camps)										
								0	0.00	0.00
								0.00	0	0
								0.00	0	0.00
Total Reporting Burden			58	1.08	62.77	1.29	80.81	0.00	81	81

OMB Control Number 0584–0055, ''7 CFR Part 226 Child and Adult Care Food Program''

REPORTING

CFR citation	Title	Estimated # respondents	Responses per respondents	Total annual records	Estimated avg. # of hours per response	Estimated total hours	Current OMB approved burden hrs	Due to program change—rulemaking	Total difference
State and Local Government Level									
State Agency									
226.4(j)	SAs may submit plan to FNS for additional audit funding	8	1	8	4	32	0	32.00	32
226.6(k)(11)(iii)	SA to submit, for FNS review, information supporting a request for a reduction in the State's liability, a reconsideration of the State's liability, or an exception to the 60-day deadline, for exceptional circumstances.	5	1	5	4	20	0	20.00	20
226.6(b)(4)(ii)	State agency must consult with FNS prior to any taking action to terminate for convenience.	56	1	56	0.50	28	0	28.00	28
226.6(m)(6)	SAs to conduct reviews every two years for sponsoring organizations with less than 100 facilities and conduct activities other than the CACFP or are at risk of having serious management problems.	56	20	1120	4.00	4,480	0	4,480.00	4,480
226.7(b)(1)	Have procedures in place for annually reviewing at least one month of the sponsoring organization's bank account activity against other associated records to verify that the transactions meet program requirements.	56	1	56	1.00	56	0	56.00	56
226.7(b)(1)(ii)	State agency must have procedures for annually reviewing a sponsoring organization's actual expenditures of CACFP funds and the amount of meal reimbursement funds retained from unaffiliated centers.	56	1	56	1.00	56	0	56.00	56
226.25(j)	State agencies must notify SFAs of fines and submit a copy of the notice to FNS.	56	0.09	5.04	3.00	15.12	0	15.12	15.12
226.6(b)(2)	SAs must review annual certification of an institution's eligibility to continue participating in CACFP (replaces the renewal application process).	56	390	21,840	0.334	7,295	10,920	−3,625.44	−3,625
226.6(m)(3)(ix)	The State agency is required to assess the timing of each sponsoring organization's reviews of day care homes and sponsored centers.	56	390	21,840	0.167	3,640	0	3,640.00	3,640
226.6(p)	The SA must develop/revise and provide a sponsoring organization agreement between sponsor and facilities, which must have standard provisions.	56	1	56	6.00	336	0	336.00	336
226.12(a)	SAs must multiply the appropriate administrative reimbursement rate by the number of day care homes submitting claims for reimbursement during the month, to determine the amount of payment that sponsoring organizations will receive.	56	11	623	0.167	104	0	103.83	104
226.7(g)(2)	State agency must review the budget and supporting documentation prior to approval, for sponsoring organizations of day care homes seeking to carry over administrative funds.	56	11	623	1.00	623	0	623.00	623
226.7(j)	State agency must establish procedures to recover administrative funds from sponsoring organizations of day care homes that are not properly payable under FNS Instruction 796–2, administrative funds that are in excess of the 10 percent maximum carryover amount, and carryover amounts that are not expended or obligated by the end of the fiscal year following the fiscal year in which they were received.	56	1	56	2.00	112	0	112.00	112
State agency Subtotal		56	827.57	46,344	0.36	16,797	10,920	5,877	5,877
Local Governments (Sponsoring Organizations)									
226.7(b)(1)	Sponsoring organizations have to annually provide State agencies with bank account activity against other associated records to verify that the transactions meet program requirements.	3,257	1	3,257	0.25	814	0	814	814

REPORTING—Continued

CFR citation	Title	Estimated # respondents	Responses per respondents	Total annual records	Estimated avg. # of hours per response	Estimated total hours	Current OMB approved burden hrs	Due to program change—rulemaking	Total difference
226.7(b)(1)(i)	Sponsoring organizations must provide State agency with actual expenditures of CACFP funds and the amount of meal reimbursement funds retained from unaffiliated centers to support the sponsoring organization's administrative costs.	32	1	32	1	32	0	32	32.00
226.6(b)	Each participating institution must submit annual updates to continue its participation (annual certification of information, updated licensing information, and a budget).	3,257	1	3,257	0.33	1,088	1,629	−541	−540.66
226.6(p), 226.17(e),(f), 226.17a(f), 226.19(d), and 226.19a(d).	Sponsoring organizations must enter into permanent agreements with their unaffiliated centers.	32	10	320	0.50	160	0	160	160.00
226.6(f)(1)(iv)	Sponsoring organizations of day care homes seeking to carry over administrative funds must submit an amended budget, to include an estimate of requested administrative fund carryover amounts and a description of proposed purpose for which those funds would be obligated or expended.	83	1	83	1.00	83	0	83	83.00
226.25	SFAs may appeal the State agency's determination of fines. SFAs must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency.	5	1	5	8.00	40	0	40	40.00
226.23(e)(1)(vii)	If a tier II day care home elects to assist in collecting and transmitting the applications to the sponsoring organization, sponsoring organizations must establish procedures to ensure the provider does not review or alter the application.	83	1	83	1.00	83	0	83	83
Local Govt Subtotal		3,257	2.16	7,037	0.33	2,300.09	1,629	671.59	671.59
Reporting burden for State and Local Government Level		3,313	16.11	53,381	0.36	19,096.60	12,549	6,548.10	6,548.10
Businesses Level (Institutions)									
226.7(b)(1)(i)	Sponsoring organizations have to annually provide State agencies with bank account activity against other associated records to verify that the transactions meet program requirements.	18,601	1.00	18,601	0.25	4,650	0	4,650	4,650
226.7(b)	Sponsoring organizations must provide State agency with actual expenditures of CACFP funds and the amount of meal reimbursement funds retained from unaffiliated centers to support the sponsoring organization's administrative costs.	1,030	1	1,030	1	1,030	0	1,030	1,030.00
226.6(b)	Each participating institution must submit annual updates to continue its participation (annual certification of information, updated licensing information, and a budget).	18,601	1	18,601	0.33	6,213	9301	(3,088)	(3,088)
226.6(p), 226.17(e),(f), 226.17a(f), 226.19(d), and 226.19a(d).	Sponsoring organizations must enter into permanent agreements with their unaffiliated centers.	1,030	10	10,300	0.50	5,150	0	5,150	5,150
226.23(e)(1)(vii)	If a tier II day care home elects to assist in collecting and transmitting the applications to the sponsoring organization, sponsoring organizations must establish procedures to ensure the provider does not review or alter the application.	540	1	540	1.00	540	0	540	540
226.6(f)(1)(iv)	Sponsoring organizations of day care homes seeking to carry over administrative funds must submit an amended budget, to include an estimate of requested administrative fund carryover amounts and a description of proposed purpose for which those funds would be obligated or expended.	540	1	540	1.00	540	0	540	540
Total Burden for Businesses (Sponsoring Organizations)		18,601	2.67	49,612.00	0.37	18,122.98	9,301	8,822.48	8,822.48

Business Level (Facilities)									
226.18(b)(12)	Tier II day care homes may assist in collecting meal benefit forms from households and transmitting the forms to the sponsoring organization on the household's behalf.	9,321	5.88	54,804	0.08	4,576	0	4,576	4,576
Total Burden for Businesses (Facilities)		9,321	5.88	54,804.00	0.08	4,576.13	0.00	4,576.13	4,576.13
Total for Businesses		27,922	3.74	104,416	.217	22,699.11	9,301	13,398.61	13,398.61
Total Reporting Burden		31,235	5.05	157,797.04	0.26	41,795.72	21,849	19,946.72	19,946.72

RECORDKEEPING

Program rule	Title	Estimated # recordkeepers	Records per recordkeeper	Total annual records	Estimated avg. # of hours per record	Estimated total hours	Current OMB approved burden hrs	Due to program change—rulemaking	Total difference
State and Local Government Level									
State Agency									
226.4(j)	SAs to maintain a plan for additional audit funds	8	1	8	0.50	4	0	4	4
226.6(m)(6)	Maintain records for reviewing Sponsoring organizations with less than 100 facilities and conduct activities other than the CACFP, or are at risk of having serious management problems every two years.	56	20	1,120	2	2,240	0	2,240	2,240
State agency subtotal		56	20.14	1,128	1.99	2,244	0	2,244	2,244
Local Governments (Sponsoring Organizations)									
Total Recordkeeping Burden		56	20.14	1,128	1.99	2,244.00	0.00	2,244.00	2,244.00
Grand Total for CACFP Due to Final Rule (as shown in OMB#0584–0610)		31,235	5	158,925.04	.28	44,039.72	0	44,039.72	44,039.72

	OMB #0584–0280 due to final rule	Once merged with OMB #0584–0280
Total No. Respondents	58	63,942
Average No. Responses Per Respondent	1.08	6.13
Total Annual Responses	63	391,858
Average Hours Per Response	1.29	1.181
Total Burden Hours	80.81	462,779.78
Current OMB Inventory	0	462,698.97
Difference Due To Rulemaking	80.81	80.81

	OMB #0584–0055 due to final rule	Once merged with OMB #0584–0055
Total No. Respondents	31,235	3,794,949
Average No. Responses Per Respondent	5	4
Total Annual Responses	158,925.04	16,328,263.76
Average Hours Per Response	0.28	.26
Total Burden Hours	44,039.72	4,235,401.61
Current OMB Inventory	0	4,213,210.886
Difference Due To Rulemaking	44,039.72	22,190.72

E-Government Act Compliance

FNS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 210

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Penalties, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

7 CFR Part 215

Food assistance programs, Grant programs—education, Grant programs—health, Infants and children, Milk, Reporting and recordkeeping requirements.

7 CFR Part 220

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Reporting and recordkeeping requirements, School breakfast and lunch programs.

7 CFR Part 225

Food assistance programs, Grant programs—health, Infants and children, Labeling, Reporting and recordkeeping requirements.

7 CFR Part 226

Accounting, Aged, Day care, Food assistance programs, Grant programs, Grant programs—health, American Indians, Individuals with disabilities, Infants and children, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

7 CFR Part 235

Administrative practice and procedure, Food assistance programs, Grant programs—education, Grant programs—health, Infants and children, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, 7 CFR parts 210, 215, 220, 225, 226, and 235 are amended as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

■ 2. Amend § 210.2 by adding, in alphabetical order, the definition of ''Fixed-price contract'' to read as follows:

§ 210.2 Definitions.

* * * * *

Fixed-price contract means a contract that charges a fixed cost per meal, or a fixed cost for a certain time period. Fixed-price contracts may include an economic price adjustment tied to a standard index.

* * * * *

■ 3. In § 210.5, revise paragraphs (d)(2) and (3) to read as follows:

§ 210.5 Payment process to States.

* * * * *

(d) * * *

(2) *Quarterly report.* Each State agency administering the National School Lunch Program must submit to FNS a quarterly Financial Status Report (FNS–777) on the use of Program funds. Such reports must be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter.

(3) *End of year reports.* (i) Each State agency must submit an annual report detailing the disbursement of performance-based cash assistance described in § 210.4(b)(1). The report must be submitted no later than 30 days after the end of each fiscal year. The report must include the total number of school food authorities in the State and the names of certified school food authorities. If all school food authorities in the State have been certified, the State agency is no longer required to submit the report.

(ii) Each State agency must submit a final Financial Status Report (FNS–777) for each fiscal year. This final fiscal year grant closeout report must be postmarked or submitted to FNS within 120 days after the end of each fiscal year or part thereof that the State agency administered the Program. Obligations must be reported only for the fiscal year in which they occur. FNS will not be responsible for reimbursing Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred. Grant closeout procedures are to be carried out in accordance with 2 CFR part 200, subpart D and USDA implementing regulations 2 CFR part 400 and part 415.

■ 4. In § 210.7, revise paragraph (d) to read as follows:

§ 210.7 Reimbursement for school food authorities.

* * * * *

(d) *Performance-based cash assistance.* The State agency must provide performance-based cash

assistance as authorized under § 210.4(b)(1) for lunches served in school food authorities certified by the State agency to be in compliance with meal pattern and nutrition requirements set forth in § 210.10 and, if the school food authority participates in the School Breakfast Program (7 CFR part 220), § 220.8 or § 220.23 of this chapter, as applicable. State agencies must establish procedures to certify school food authorities for performance-based cash assistance in accordance with guidance established by FNS. Such procedures must ensure State agencies:

(1) Make certification procedures readily available to school food authorities and provide guidance necessary to facilitate the certification process.

(2) Require school food authorities to submit documentation to demonstrate compliance with meal pattern requirements set forth in § 210.10 and § 220.8 of this chapter, as applicable. Such documentation must reflect meal service at or about the time of certification.

(3) State agencies must review certification documentation submitted by the school food authority to ensure compliance with meal pattern requirements set forth in § 210.10, or § 220.8 of this chapter, as applicable. For certification purposes, State agencies should consider any school food authority compliant:

(i) If when evaluating daily and weekly range requirements for grains and meat/meat alternates, the certification documentation shows compliance with the daily and weekly minimums for these two components, regardless of whether the school food authority has exceeded the maximums for the same components.

(ii) If when evaluating the service of frozen fruit, the school food authority serves products that contain added sugar.

(4) Certification procedures must ensure that no performance-based cash assistance is provided to school food authorities for meals served prior to October 1, 2012.

(5) Within 60 calendar days of a certification submission or as otherwise authorized by FNS, review submitted materials and notify school food authorities of the certification determination, the date that performance-based cash assistance is effective, and consequences for non-compliance,

(6) Disburse performance-based cash assistance for all lunches served beginning with the start of certification provided that documentation reflects meal service in the calendar month the certification materials are submitted or, in the month preceding the calendar month of submission.

* * * * *

■ 5. In § 210.16, add paragraph (c)(4) to read as follows:

§ 210.16 Food service management companies.

* * * * *

(c) * * *

(4) Provisions in part 250, subpart D of this chapter must be included to ensure the value of donated foods, *i.e.,* USDA Foods, are fully used in the nonprofit food service and credited to the nonprofit school food service account.

* * * * *

■ 6. In § 210.18:

■ a. Amend paragraph (b) by revising the definitions of ''Administrative review'' and ''General areas'';

■ b. Revise paragraphs (c), (f), (g) introductory text, (h) introductory text, and (h)(1);

■ c. Add paragraph (h)(2)(xi);

■ d. Revise paragraph (l) introductory text and paragraph (l)(2); and

■ e. Revise the first sentence of paragraph (p) introductory text and paragraph (p)(1).

The addition and revisions read as follows:

§ 210.18 Administrative Reviews.

* * * * *

(b) * * *

Administrative reviews means the comprehensive evaluation of all school food authorities participating in the programs specified in paragraph (a) of this section. It includes a review of both critical and general areas in accordance with paragraphs (g) and (h) of this section, as applicable for each reviewed program. With FNS approval, the administrative review may include other areas of program operations determined by the State agency.

* * * * *

General areas means the areas of review specified in paragraph (h) of this section. These areas include free and reduced-price process, civil rights, school food authority on-site monitoring, reporting and recordkeeping, food safety, competitive food services, water, program outreach, resource management, Buy American, and other areas identified by FNS.

* * * * *

(c) *Review cycle.* State agencies must conduct administrative reviews of all school food authorities participating in the National School Lunch Program (including Afterschool Snacks and the Seamless Summer Option) and the School Breakfast Program at least once during a 5-year review cycle, provided that each school food authority is reviewed at least once every 6 years, depending on review cycle observed. At a minimum, the on-site portion of the administrative review must be completed during the school year in which the review began.

(1) *Targeted follow-up reviews.* A State agency that reviews school food authorities on a cycle longer than 3 years must identify school food authorities that are high-risk to receive a targeted follow-up review. A State agency must develop and receive FNS approval of a plan to identify school food authorities that meet the high-risk criteria.

(2) *High-risk criteria for targeted follow-up reviews.* At a minimum, a State plan should identify as high-risk those school food authorities that during the most recent administrative review conducted in accordance with this § 210.18 had one or more of the following risk factors as determined by the State Agency: a 10 percent or greater certification and benefit issuance error rate; incomplete verification for the review year; or one or more significant or systemic errors in Performance Standard 1 as defined at (g)(1) of this section, Performance Standard 2 as defined at paragraph (g)(2) of this section, or allowable costs.

(3) *Timing and scope of targeted follow-up reviews.* Within two years of the review, high-risk school food authorities must receive a targeted follow-up review. Targeted follow-up reviews must include the areas of significant or systemic error identified in the previous review, and may include other areas at the discretion of the State agency. The State agency may conduct targeted follow-up reviews in the same school year as the administrative review, and may conduct any additional reviews at its discretion.

* * * * *

(f) *Scope of review.* During the course of an administrative review for the National School Lunch Program and the School Breakfast Program, the State agency must monitor compliance with the critical and general areas in paragraphs (g) and (h) of this section, respectively. Selected critical and general areas must be monitored when reviewing the National School Lunch Program's Afterschool Snacks and the Seamless Summer Option, the Special Milk Program, and the Fresh Fruit and Vegetable Program, as applicable and as specified in the FNS Administrative Review Manual. State agencies may add

additional review areas with FNS approval.

(1) *Review forms.* State agencies must use the administrative review forms, tools and workbooks prescribed by FNS.

(2) *Timeframes covered by the review.* (i) The timeframes covered by the administrative review include the review period and the day of review, as defined in paragraph (b) of this section.

(ii) Subject to FNS approval, the State agency may conduct a review early in the school year, prior to the submission of a Claim for Reimbursement. In such cases, the review period must be the prior month of operation in the current school year, provided that such month includes at least 10 operating days.

(3) *Audit results.* The State agency may use any recent and currently applicable results from Federal, State, or local audit activity to meet FNS monitoring requirements. Such results may be used only when they pertain to the reviewed school(s) or the overall operation of the school food authority, when they are relevant to the review period, and when they adhere to audit standards contained in 2 CFR part 200, subpart F. The State agency must document the source and the date of the audit. The content of local level audits activity requires the approval of FNS to ensure that these audits align with Federal audit standards.

(4) *Completion of review requirements outside the administrative review.* State agencies may, with FNS approval, omit specific, redundant areas of the administrative review, when sufficient oversight is conducted outside of the administrative review.

(5) *Error reduction strategies.* State agencies may omit designated areas of review, in part or entirely, where a school food authority or State agency has implemented FNS-approved error reduction strategies or utilized FNS-approved monitoring efficiencies.

(g) *Critical areas of review.* The performance standards listed in this paragraph are directly linked to meal access and reimbursement, and to the meal pattern and nutritional quality of the reimbursable meals offered. These critical areas must be monitored by the State agency when conducting administrative reviews of the National School Lunch Program and the School Breakfast Program. Selected aspects of these critical areas must also be monitored, as applicable, when conducting administrative reviews of the National School Lunch Program's Afterschool Snacks and the Seamless Summer Option, and of the Special Milk Program. State agencies may omit designated critical areas of review, in part or entirely, where school food authority or State agency has implemented FNS-specified error reduction strategies or utilized FNS-specified monitoring efficiencies.

* * * * *

(h) *General areas of review.* The general areas listed in this paragraph reflect requirements that must be monitored by the State agency when conducting administrative reviews of the National School Lunch Program and the School Breakfast Program. Selected aspects of these general areas must also be monitored, as applicable and as specified in the FNS Administrative Review Manual, when conducting administrative reviews of the National School Lunch Program's Afterschool Snacks and Seamless Summer Option, the Fresh Fruit and Vegetable Program, and the Special Milk Program. State agencies may omit designated general areas of review, in part or entirely, where the school food authority or State agency has implemented FNS-specified error reduction strategies or utilized FNS-specified monitoring efficiencies. State agencies may omit designated general areas of review, in part or entirely, where the school food authority or State agency has implemented FNS-specified error reduction strategies or utilized FNS-specified monitoring efficiencies. The general areas of review must include, but are not limited to, the following:

(1) *Resource management.* The State agency must conduct an assessment of the school food authority's nonprofit school food service account to evaluate the risk of noncompliance with resource management requirements. If risk indicators show that the school food authority is at high risk for noncompliance with resource management requirements, the State agency must conduct a comprehensive review including, but not limited to, the following areas using procedures specified in the FNS Administrative Review Manual.

* * * * *

(2) * * *

(xi) *Buy American.* The State agency must ensure that the school food authority complies with the Buy American requirements set forth in § 210.21(d) and 7 CFR 220.16(d), as specified in the FNS Administrative Review Manual.

* * * * *

(l) *Fiscal action.* The State agency must take fiscal action for all Performance Standard 1 violations and specific Performance Standard 2 violations identified during an administrative review, including targeted follow-up review or other reviews, as specified in this section. Fiscal action must be taken in accordance with the principles in § 210.19(c) and the procedures established in the FNS Administrative Review Manual. The State agency must follow the fiscal action formula prescribed by FNS to calculate the correct entitlement for a school food authority or a school. While there is no fiscal action required for general area violations, the State agency has the ability to withhold funds for repeat or egregious violations occurring in the majority of the general areas as described in paragraph (k)(1)(iv) of this section.

* * * * *

(2) *Performance Standard 2 violations.* Fiscal action for Performance Standard 2 violations applies as follows:

(i) For missing food components or missing production records cited under paragraph (g)(2) of this section, the State agency must apply fiscal action.

(ii) For repeated violations involving food quantities, whole grain-rich foods, milk type, and vegetable subgroups cited under paragraph (g)(2) of this section, the State agency has discretion to apply fiscal action as follows:

(A) If the meals contain insufficient quantities of the required food components, the deficient meals may be disallowed and reclaimed.

(B) If no whole grain-rich foods are offered during the week of review, meals for up to the entire week of review may be disallowed and reclaimed.

(C) If insufficient whole grain-rich foods are offered during the week of review, meals for up to the entire week of review may be disallowed and/or reclaimed.

(D) If an unallowable milk type is offered, or no milk variety is offered, the deficient meals may be disallowed and reclaimed.

(E) If one vegetable subgroup is not offered over the course of the week of review, meals for up to the entire week of review may be disallowed and reclaimed.

(F) If a weekly vegetable subgroup is offered in insufficient quantity to meet the weekly vegetable subgroup requirement, meals for one day of the week of review may be disallowed and reclaimed.

(G) If the amount of juice offered exceeds the weekly limitation, meals for up to the entire week of review may be disallowed and/or reclaimed.

(iii) For repeated violations of calorie, saturated fat, sodium, and trans fat dietary specifications cited under paragraph (g)(2)(ii) of this section, the

State agency has discretion to apply fiscal action to the reviewed school as follows:

(A) If the average meal offered over the course of the week of review does not meet one of the dietary specifications, meals for the entire week of review may be disallowed and reclaimed; and

(B) Fiscal action is limited to the school selected for the targeted menu review and must be supported by a nutrient analysis of the meals at issue using USDA-approved software.

(iv) The following conditions must be met prior to applying fiscal action as described in paragraphs (l)(2)(ii) and (iii) of this section:

(A) Technical assistance has been given by the State agency;

(B) Corrective action has been previously required and monitored by the State agency; and

(C) The school food authority remains noncompliant with the meal requirements established in part 210 and part 220 of this chapter.

* * * * *

(p) * * * Except for FNS-conducted reviews authorized under § 210.29(d)(2), each State agency must establish an appeal procedure to be followed by a school food authority requesting a review of a denial of all or a part of the Claim for Reimbursement, withholding payment arising from administrative or follow-up review activity conducted by the State agency under this § 210.18, or fines established under § 210.26, or § 215.15 or § 220.18 of this chapter.

* * *

(1) The written request for a review must be postmarked within 15 calendar days of the date the appellant received the notice of the denial of all or a part of the Claim for Reimbursement, withholding of payment, or fines established under § 210.26, or § 215.15 or § 220.18 of this chapter, and the State agency must acknowledge the receipt of the request for appeal within 10 calendar days;

* * * * *

■ 7. In § 210.19, revise paragraph (a)(5) to read as follows:

§ 210.19 Additional Responsibilities.

(a) * * *

(5) *Food service management companies.* (i) The State agency must annually review and approve each contract and contract amendment, including all supporting documentation, between any school food authority and food service management company before implementation of the contract by either party to ensure compliance with all the provisions and standards set forth in this part.

(A) When the State agency develops a prototype contract for use by the school food authority that meets the provisions and standards set forth in this part, this annual review may be limited to changes made to that contract.

(B) The State agency may establish due dates for submission of the contract or contract amendment documents.

(ii) The State agency must perform a review of each school food authority that contracts with a food service management company, at least once during each 5-year period. The reviews must examine the school food authority's compliance with § 210.16 of this part.

(iii) The State agency may require all food service management companies to register with the State agency prior to contracting for food service with any school food authority in the State.

(iv) State agencies must provide assistance to school food authorities upon request to assure compliance with the requirements for contracting with a food service management company.

* * * * *

§ 210.20 [Amended]

■ 8. In § 210.20, amend paragraph (b)(14) by removing the term ''§ 235.11(g)'' and adding in its place the term ''§ 235.11(h)''.

■ 9. In § 210.21 add paragraph (h) to read as follows:

§ 210.21 Procurement.

* * * * *

(h) *Procurement training.* (1) State directors of school nutrition programs, State directors of distributing agencies, and school nutrition program directors, management, and staff tasked with National School Lunch Program procurement responsibilities must complete annual training on Federal procurement standards annually.

(2) Procurement training may count towards the professional standards training standards at § 210.30(g) of this part and § 235.11(h) of this chapter.

(3) State agencies and school food authorities must retain records to document compliance with the requirement in this section.

■ 10. Revise § 210.26 to read as follows:

§ 210.26 Penalties and fines.

(a) *Penalties.* Whomever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part whether received directly or indirectly from the Department will, if such funds, assets, or property are of a value of $100 or more, be fined no more than $25,000 or imprisoned not more than 5 years or both; or if such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than 1 year or both. Whomever receives, conceals, or retains for personal use or gain, funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, will be subject to the same penalties.

(b) *Fines.* (1) The State agency may establish a fine against any school food authority when it has determined that the school food authority or a school under its agreement has:

(i) Failed to correct severe mismanagement of this Program or a Child Nutrition Program under parts 225 or 226 of this chapter;

(ii) Disregarded a Program requirement of which the school food authority or school had been informed; or

(iii) Failed to correct repeated violations of Program requirements under this part or under parts 225 or 226 of this chapter.

(2) FNS may direct the State agency to establish a fine against any school food authority when it has determined that the school food authority or school meets the criteria set forth under paragraph (b)(1) of this section.

(3) Funds used to pay fines established under this paragraph must be derived from non-Federal sources. The State agency must calculate the fine based on the amount of Program reimbursement earned by the school food authority or school for the most recent fiscal year for which full year data is available, provided that the fine does not exceed the equivalent of:

(i) For the first fine, 1 percent of the amount of meal reimbursement earned for the fiscal year;

(ii) For the second fine, 5 percent of the amount of meal reimbursement earned for the fiscal year; and

(iii) For the third or subsequent fine, 10 percent of the amount of meal reimbursement earned for the fiscal year.

(4) The State agency must inform FNS at least 30 days prior to establishing the fine under this paragraph. The State agency must send the school food authority written notification of the fine established under this paragraph and provide a copy of the notification to FNS. The notification must:

(i) Specify the violations or actions which constitute the basis for the fine and indicate the amount of the fine;

(ii) Inform the school food authority that it may appeal the fine and advise

the school food authority of the appeal procedures established under § 210.18(p);

(iii) Indicate the effective date and payment procedures should the school food authority not exercise its right to appeal within the specified timeframe.

(5) Any school food authority subject to a fine under paragraph (b)(1) of this section may appeal the State agency's determination. In appealing a fine, the school food authority must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any school food authority seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay a fine established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of a fine established under this paragraph against a school food authority and any interest charged in the collection of these fines must be remitted to FNS, and then remitted to the United States Treasury.

■ 11. In § 210.30, add paragraph (g)(3) to read as follows:

§ 210.30 School nutrition program professional standards.

* * * * *

(g) * * *

(3) Each employee tasked with Program procurement has completed annual procurement training, as required under § 210.21(h), by the end of each school year.

■ 12. Revise § 210.32 to read as follows:

§ 210.32 Program information.

Persons seeking information about this Program should contact their State administering agency or the appropriate FNSRO. The FNS website has contact information for State agencies at *https://www.fns.usda.gov/contacts* and FNSROs at *https://www.fns.usda.gov/fns-regional-offices.*

PART 215—SPECIAL MILK PROGRAM

■ 13. The authority citation for part 215 continues to read as follows:

Authority: 42 U.S.C. 1772 and 1779.

■ 14. Revise § 215.15 to read as follows:

§ 215.15 Withholding payments and establishing fines.

(a) *Withholding payments.* In accordance with Departmental regulations 2 CFR 200.338 through 200.342, the State agency must withhold Program payments, in whole or in part, from any school food authority which has failed to comply with the provisions of this part. Program payments must be withheld until the school food authority takes corrective action satisfactory to the State agency, or gives evidence that such corrective actions will be taken, or until the State agency terminates the grant in accordance with § 215.16. Subsequent to the State agency's acceptance of the corrective actions, payments will be released for any milk served in accordance with the provisions of this part during the period the payments were withheld.

(b) *Fines.* (1) The State agency may establish a fine against any school food authority when it has determined that the school food authority or a school under its agreement has:

(i) Failed to correct severe mismanagement of the Program;

(ii) Disregarded a Program requirement of which the school food authority or school had been informed; or

(iii) Failed to correct repeated violations of Program requirements.

(2) FNS may direct the State agency to establish a fine against any school food authority when it has determined that the school food authority or school meets the criteria set forth under paragraph (b)(1) of this section.

(3) Funds used to pay a fine established under this paragraph must be derived from non-Federal sources. The State agency must calculate the fine based on the amount of Program reimbursement earned by the school food authority or school for the most recent fiscal year for which full year data is available, provided that the fine does not exceed the equivalent of:

(i) For the first fine, 1 percent of the amount of reimbursement for milk earned for the fiscal year;

(ii) For the second fine, 5 percent of the amount of reimbursement for milk earned for the fiscal year; and

(iii) For the third or subsequent fine, 10 percent of the amount of reimbursement for milk earned for the fiscal year.

(4) The State agency must inform FNS at least 30 days prior to establishing a fine under this paragraph. The State agency must send the school food authority written notification of the fine established under this paragraph and provide a copy of the notification to FNS. The notification must:

(i) Specify the violations or actions which constitute the basis for the fine and indicate the amount of the fine;

(ii) Inform the school food authority that it may appeal the fine and advise the school food authority of the appeal procedures established under § 210.18(p) of this chapter;

(iii) Indicate the effective date and payment procedures should the school food authority not exercise its right to appeal within the specified timeframe.

(5) Any school food authority subject to a fine under paragraph (b)(1) of this section may appeal the State agency's determination. In appealing a fine, the school food authority must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any school food authority seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay a fine established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of a fine established under this paragraph against a school food authority and any interest charged in the collection of these fines must be remitted to FNS, and then remitted to the United States Treasury.

■ 15. Revise § 215.17 to read as follows:

§ 215.17 Program information.

Persons seeking information about this Program should contact their State administering agency or the appropriate FNSRO. The FNS website has contact information for State agencies at *https://www.fns.usda.gov/contacts* and FNSROs at *https://www.fns.usda.gov/fns-regional-offices.*

PART 220—SCHOOL BREAKFAST PROGRAM

■ 16. The authority citation for part 220 continues to read as follows:

Authority: 42 U.S.C. 1773, 1779, unless otherwise noted.

■ 17. In § 220.2, add in alphabetical order the definition ''Fixed-price contract'' to read as follows:

§ 220.2 Definitions.

* * * * *

Fixed-price contract means a contract that charges a fixed cost per meal, or a fixed cost for a certain time period. Fixed-price contracts may include an economic price adjustment tied to a standard index.

* * * * *

■ 18. In § 220.7, add paragraph (d)(3)(iv) to read as follows:

§ 220.7 Requirements for participation.

* * * * *

(d) * * *
(3) * * *
(iv) Provisions in part 250, subpart D of this chapter must be included to ensure the value of donated foods, *i.e.,* USDA Foods, are fully used in the nonprofit food service and credited to the nonprofit school food service account.
* * * * *

■ 19. Revise § 220.18 to read as follows:

§ 220.18 Withholding payments and establishing fines.

(a) *Withholding payments.* In accordance with 2 CFR 200.338 through 342, the State agency must withhold Program payments, in whole or in part, from any school food authority which has failed to comply with the provisions of this part. Program payments must be withheld until the school food authority takes corrective action that is satisfactory to the State agency, or gives evidence that such corrective actions will be taken, or until the State agency terminates the grant in accordance with § 220.19. Subsequent to the State agency's acceptance of the corrective actions, payments will be released for any breakfasts served in accordance with the provisions of this part during the period the payments were withheld.

(b) *Fines.* (1) The State agency may establish a fine against any school food authority when it has determined that the school food authority or a school under its agreement has:

(i) Failed to correct severe mismanagement of the Program or a Child Nutrition Program under parts 225 or 226 of this chapter;

(ii) Disregarded a Program requirement of which the school food authority or school had been informed; or

(iii) Failed to correct repeated violations of Program requirements under this part or under parts 225 or 226 of this chapter.

(2) FNS may direct the State agency to establish a fine against any school food authority when it has determined that the school food authority or school meets the criteria set forth under paragraph (b)(1) of this section.

(3) Funds used to pay a fine established under this paragraph must be derived from non-Federal sources. The State agency must calculate the fine based on the amount of Program reimbursement earned by the school food authority or school for the most recent fiscal year for which full year data are available, provided that the fine does not exceed the equivalent of:

(i) For the first fine, 1 percent of the amount of meal reimbursement earned for the fiscal year;

(ii) For the second fine, 5 percent of the amount of meal reimbursement earned for the fiscal year; and

(iii) For the third or subsequent fine, 10 percent of the amount of meal reimbursement earned for the fiscal year.

(4) The State agency must inform FNS at least 30 days prior to establishing a fine under this paragraph. The State agency must send the school food authority written notification of the fine established under this paragraph and provide a copy of the notification to FNS. The notification must:

(i) Specify the violations or actions which constitute the basis for the fine and indicate the amount of the fine;

(ii) Inform the school food authority that it may appeal the fine, and advise the school food authority of the appeal procedures established under § 210.18(p) of this chapter;

(iii) Indicate the effective date and payment procedures should the school food authority not exercise its right to appeal within the specified timeframe.

(5) Any school food authority subject to a fine under paragraph (b)(1) of this section may appeal the State agency's determination. In appealing a fine, the school food authority must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any school food authority seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay a fine established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of a fine established under this paragraph against a school food authority and any interest charged in the collection of these fines must be remitted to FNS, and then remitted to the United States Treasury.

■ 20. Revise § 220.21 to read as follows:

§ 220.21 Program information.

Persons seeking information about this Program should contact their State administering agency or the appropriate FNSRO. The FNS website has contact information for State agencies at *https://www.fns.usda.gov/contacts* and FNSROs at *https://www.fns.usda.gov/fns-regional-offices.*

PART 225—SUMMER FOOD SERVICE PROGRAM

■ 21. The authority citation for part 225 continues to read as follows:

Authority: Secs. 9, 13, and 14, Richard B. Russell National School Lunch Act, as amended, 42 U.S.C. 1758, 1761 and 1762a.

■ 22. In § 225.2, add in alphabetical order a definition for ''Termination for convenience'' to read as follows:

§ 225.2 Definitions.

* * * * *

Termination for convenience means:

(1) Termination of a State agency's participation in the Program in whole, or in part, when FNS and the State agency agree that the continuation of the Program would not produce beneficial results commensurate with the further expenditure of funds; or

(2) Termination of a permanent operating agreement by a State agency or sponsor due to considerations unrelated to either party's performance of Program responsibilities under the agreement.

* * * * *

■ 23. In § 225.6, revise paragraph (c)(1)(i) and paragraph (i) introductory text to read as follows:

§ 225.6 State agency responsibilities.

* * * * *

(c) * * *
(1) * * *

(i) The sponsor must submit a written application to the State agency for participation in the Program. The State agency may use the application form developed by FNS, or develop its own application form, provided that the form requests the full legal name, any previously used names, mailing address; date of birth of the sponsor's responsible principals, which include the executive director and board chair; and the sponsor's Federal Employer Identification Number (FEIN) or Unique Entity Identifier (UEI). Application to sponsor the Program must be made on a timely basis within the deadlines established under paragraph (b)(1) of this section.

* * * * *

(i) *State-Sponsor agreement.* A sponsor approved for participation in the Program must enter into a permanent written agreement with the State agency. The existence of a valid permanent agreement does not limit the State agency's ability to terminate the agreement, as provided under § 225.11(c). The State agency must terminate the sponsor's agreement whenever a sponsor's participation in the Program ends. The State agency or sponsor may terminate the agreement at its convenience for considerations unrelated to the sponsor's performance of Program responsibilities under the agreement. However, any action

initiated by the State agency to terminate an agreement for its convenience requires prior consultation with FNS. All sponsors must agree in writing to:

* * * * *

■ 24. In § 225.18, add paragraph (k) to read as follows:

§ 225.18 Miscellaneous administrative provisions.

* * * * *

(k) *Fines.* (1) A sponsor that is a school food authority may be subject to fines. The State agency may establish an assessment when it has determined that the sponsor or its site has:

(i) Failed to correct severe mismanagement of the Program;

(ii) Disregarded a Program requirement of which the sponsor or its site had been informed; or

(iii) Failed to correct repeated violations of Program requirements.

(2) FNS may direct the State agency to establish a fine against any sponsor when it has determined that the sponsor or its site has committed one or more acts under paragraph (k)(1) of this section.

(3) Funds used to pay a fine established under this paragraph must be derived from non-Federal sources. In calculating an assessment, the State agency must calculate the fine based on the amount of Program reimbursement earned by the sponsor or its site for the most recent fiscal year for which full year data is available, provided that the fine does not exceed the equivalent of:

(i) For the first fine, 1 percent of the amount of meal reimbursement earned for the fiscal year;

(ii) For the second fine, 5 percent of the amount of meal reimbursement earned for the fiscal year; and

(iii) For the third or subsequent fine, 10 percent of the amount of meal reimbursement earned for the fiscal year.

(4) The State agency must inform FNS at least 30 days prior to establishing the fine under this paragraph. The State agency must send the sponsor written notification of the fine established under this paragraph and provide a copy of the notification to FNS. The notification must:

(i) Specify the violations or actions which constitute the basis for the fine and indicate the amount of the fine;

(ii) Inform the institution that it may appeal the fine and advise the sponsor of the appeal procedures established under § 225.13;

(iii) Indicate the effective date and payment procedures should the sponsor not exercise its right to appeal within the specified timeframe.

(5) Any sponsor subject to a fine under paragraph (k)(1) of this section may appeal the State agency's determination. In appealing a fine, the sponsor must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any sponsor seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay a fine established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of a fine established under this paragraph against a sponsor and any interest charged in the collection of these fines must be remitted to FNS, and then remitted to the United States Treasury.

■ 25. Revise § 225.19 to read as follows:

§ 225.19 Program information.

Persons seeking information about this Program should contact their State administering agency or the appropriate FNSRO. The FNS website has contact information for State agencies at *https://www.fns.usda.gov/contacts* and FNSRO at *https://www.fns.usda.gov/fns-regional-offices.*

PART 226—CHILD AND ADULT CARE FOOD PROGRAM

■ 26. The authority citation for 7 CFR part 226 continues to read as follows:

Authority: Secs. 9, 11, 14, 16, and 17, Richard B. Russell National School Lunch Act, as amended, 42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766.

■ 27. In § 226.2:

■ a. Revise the definitions for ''Facility'' and ''New institution'';

■ b. Add in alphabetical order definitions for ''Participating institution'';

■ c. Revise the definition of ''Renewing institution'';

■ d. Add the definition of ''Sponsored center'';

■ e. Revise the definitions for ''Sponsoring organization'', ''TANF recipient'', and ''Termination for convenience''.

The revisions and additions read as follows:

§ 226.2 Definitions.

* * * * *

Facility means a sponsored center or a day care home.

* * * * *

New institution means a sponsoring organization or an independent center making an application to participate in the Program or applying to participate in the Program after a lapse in participation.

* * * * *

Participating institution means a sponsoring organization or an independent center, including a renewing institution, that holds a current agreement with the State agency to operate the Program.

* * * * *

Renewing institution means a sponsoring organization or an independent center that is participating in the Program at the time it submits annual renewal information.

* * * * *

Sponsored center means a child care center, an at-risk afterschool care center, an adult day care center, an emergency shelter, or an outside-school-hours care center that operates the Program under the auspices of a sponsoring organization. The two types of sponsored centers are as follows:

(1) An affiliated center is a part of the same legal entity as the CACFP sponsoring organization; or

(2) An unaffiliated center is legally distinct from the sponsoring organization.

Sponsoring organization means a public or nonprofit private organization that is entirely responsible for the administration of the food program in:

(1) One or more day care homes;

(2) A child care center, emergency shelter, at-risk afterschool care center, outside-school-hours care center, or adult day care center which is a legally distinct entity from the sponsoring organization;

(3) Two or more child care centers, emergency shelters, at-risk afterschool care centers, outside-school-hours care center, or adult day care centers; or

(4) Any combination of child care centers, emergency shelters, at-risk afterschool care centers, outside-school-hours care centers, adult day care centers, and day care homes.

The term ''sponsoring organization'' also includes an organization that is entirely responsible for administration of the Program in any combination of two or more child care centers, at-risk afterschool care centers, adult day care centers or outside-school-hours care centers, which meet the definition of *For-profit center* in this section and are part of the same legal entity as the sponsoring organization.

* * * * *

TANF recipient means an individual or household receiving assistance (as defined in 45 CFR 260.31) under a State-

administered Temporary Assistance for Needy Families program.

Termination for convenience means termination of a Program agreement due to considerations unrelated to either party's performance of Program responsibilities under the agreement between:

(1) A State agency and the independent center,

(2) A State agency and the sponsoring organization,

(3) A sponsoring organization and the unaffiliated center, or

(4) A sponsoring organization and the day care home.

* * * * *

■ 28. In § 226.4, revise paragraph (j) to read as follows:

§ 226.4 Payments to States and use of funds.

* * * * *

(j) *Audit funds.* (1) Funds are available to each State agency in an amount equal to 1.5 percent of the Program funds used by the State during the second fiscal year preceding the fiscal year for which these funds are to be made available. These funds are for the expense of conducting audits under § 226.8 and Program monitoring under § 226.6(m).

(2) State agencies may request an increase in the amount of funds made available under this paragraph.

(i) FNS approval for increased funding will be based on the State agency's expressed need for an increase in resources to meet audit requirements, fulfill monitoring requirements, or effectively improve Program management.

(ii) The total amount of audit funds made available to any State agency under this paragraph may not exceed 2 percent of Program funds used by the State during the second fiscal year preceding the fiscal year for which the funds are made available.

(iii) The amount of assistance provided to a State agency under this paragraph in any fiscal year may not exceed the State's expenditures under §§ 226.6(m) and 226.8 during the fiscal year in which the funds are made available.

* * * * *

■ 29. In § 226.6:

■ a. Revise paragraph (b) introductory text, paragraphs (b)(1)(xv), (b)(2), (3), (4), and (f)(1)(iv);

■ b. Remove paragraph (f)(2) and redesignate paragraph (f)(3) as paragraph (f)(2);

■ c. Add a sentence at the end of paragraph (k)(5)(ii);

■ d. Add a sentence at the end of paragraph (k)(5)(ix);

■ e. Add paragraph (k)(11); and

■ f. Revise paragraphs (m)(3), (m)(6); and (p).

The additions and revisions read as follows:

§ 226.6 State agency administrative responsibilities.

* * * * *

(b) *Program applications and agreements.* Each State agency must establish application review procedures, as described in paragraph (b)(1) of this section, to determine the eligibility of new institutions and facilities for which applications are submitted by sponsoring organizations. Each State agency must establish procedures for the review of renewal information, as described in paragraph (b)(2) of this section, to determine the continued eligibility of renewing institutions. The State agency must enter into written agreements with institutions, as described in paragraph (b)(4) of this section.

(1) * * *

(xv) *Certification of truth of applications and submission of names and addresses.* Institutions must submit a certification that all information on the application is true and correct, along with the names, mailing addresses, and dates of birth of the institution's executive director and chair of the board of directors or the owner, in the case of a for-profit center that does not have an executive director or is not required to have a board of directors. In addition, the institution's Federal Employer Identification Number (FEIN) or the Unique Entity Identifier (UEI) must be provided;

* * * * *

(2) *Annual information submission requirements for State agency review of renewing institutions.* Each State agency must establish annual information submission procedures to confirm the continued eligibility of renewing institutions under this part. Renewing institutions must not be required to submit a free and reduced-price policy statement or a nondiscrimination statement unless they make substantive changes to either statement. In addition, the State agency's review procedures must ensure that institutions annually submit information or certify that certain information is still true based on the requirements of this section. For information that must be certified, any new changes made in the past year and not previously reported to the State agency must be updated in the annual renewal information submission. Any additional information submitted in the renewal must be certified by the institution to be true.

(i) This paragraph (b)(2) contains the information that must be certified. The State agency must ensure that renewing independent centers certify the following to be true:

(A) The institution and its principals are not currently on the National disqualified list, per paragraph (b)(1)(xii) of this section;

(B) A list of any publicly funded programs that the sponsoring organization and its principals have participated in, in the past 7 years, is current, per paragraph (b)(1)(xiii)(B) of this section;

(C) The institution and its principals have not been determined ineligible for any other publicly funded programs due to violation of that program's requirements, in the past 7 years, per paragraphs (b)(1)(xiii)(B) and (C) of this section;

(D) No principals have been convicted of any activity that occurred during the past 7 years and that indicated a lack of business integrity, per paragraph (b)(1)(xiv)(B) of this section;

(E) The names, mailing addresses, and dates of birth of all current principals have been submitted to the State agency, per paragraph (b)(1)(xv) of this section;

(F) The institution is currently compliant with the required performance standards of financial viability and management, administrative capability, and program accountability, per paragraph (b)(1)(xviii) of this section; and

(G) Licensing or approval status of each child care center or adult day care center is up-to-date.

(ii) The State agency must ensure that renewing sponsoring organizations certify the following to be true:

(A) All of the requirements under paragraph (b)(2)(i) of this section are certified to be true;

(B) The management plan on file with the State agency is complete and up to date, per paragraph (b)(1)(iv) of this section;

(C) No sponsored facility or principal of a sponsored facility is currently on the National disqualified list, per paragraph (b)(1)(xii) of this section;

(D) The outside employment policy most recently submitted to the State agency remains current and in effect, per paragraph (b)(1)(xvi) of this section;

(E) Licensing or approval status of each sponsored child care center, adult day care center, or day care home is up-to-date;

(F) The list of the sponsoring organization's facilities on file with the State agency is up-to-date; and

(G) All facilities under the sponsoring organization's oversight have adhered to Program training requirements.

(iii) *State agency review of institution information.* The State agency's review of information that must be submitted, certified or updated annually is as follows:

(A) *Management plan.* The State agency must ensure that renewing sponsoring organizations certify that the sponsoring organization has reviewed the current management plan on file with the State agency and that it is complete and up to date. If the management plan has changed, the sponsoring organization must submit updates to the management plan that meet the requirements of § 226.16(b)(1). The State agency must establish factors, consistent with § 226.16(b)(1), that it will consider in determining whether a renewing sponsoring organization has sufficient staff to perform required monitoring responsibilities at all of its sponsored facilities. As part of its management plan review, the State agency must determine the appropriate level of staffing for the sponsoring organization, consistent with the staffing range of monitors set forth at § 226.6(b)(1) and the factors the State agency has established.

(B) *Administrative budget submission.* The State agency must ensure that renewing sponsoring organizations submit an administrative budget for the upcoming year with sufficiently detailed information concerning projected CACFP administrative earnings and expenses, as well as other non-Program funds to be used in Program administration. The State agency must be able to determine the allowability, necessity, and reasonableness of all proposed expenditures, and to assess the sponsoring organization's capability to manage Program funds. The administrative budget must demonstrate that the sponsoring organization will expend and account for funds in accordance with regulatory requirements, FNS Instruction 796–2 (*Financial Management in the Child and Adult Care Food Program*), 2 CFR part 200, subpart D and USDA implementing regulations 2 CFR part 400 and part 415, and applicable Office of Management and Budget circulars. The administrative budget submitted by a sponsoring organization of centers must demonstrate that the administrative costs to be charged to the Program do not exceed 15 percent of the meal reimbursements estimated or actually earned during the budget year, unless the State agency grants a waiver, as described in § 226.7(g). For sponsoring organizations of day care homes seeking to carry over administrative funds, as described in § 226.12(a)(3), the budget must include an estimate of requested administrative fund carryover amounts and a description of proposed purpose for which those funds would be obligated or expended.

(C) *Presence on the National disqualified list.* The State agency must ensure that renewing institutions certify that neither the institution nor its principals are on the National disqualified list. The State agency must also ensure that renewing sponsoring organizations certify that no sponsored facility or facility principal is on the National disqualified list.

(D) *Ineligibility for other publicly funded programs.* A State agency is prohibited from approving a renewing institution or facility's application if, during the past 7 years, the institution, facility, responsible principals, or responsible individuals have been declared ineligible for any other publicly funded program by reason of violating that program's requirements. However, this prohibition does not apply if the institution, facility, responsible principals, or responsible individuals have been fully reinstated in or determined eligible for that program, including the payment of any debts owed. The State agency must follow up with the entity administering the publicly funded program to gather sufficient evidence to determine whether the institution or its principals were, in fact, determined ineligible.

(E) *Information on criminal convictions.* The State agency must ensure that renewing institutions certify that the institution's principals have not been convicted of any activity that occurred during the past 7 years and that indicates a lack of business integrity, as defined in paragraph (c)(1)(ii)(A) of this section.

(F) *Submission of names and addresses.* The State agency must ensure that renewing institutions submit a certification attesting to the validity of the following information: full legal name and any names previously used, mailing address, and dates of birth of the institution's executive director and chair of the board of directors or the owner, in the case of a for-profit center that does not have an executive director or is not required to have a board of directors. In addition, the institution's Federal Employer Identification Number (FEIN) or the Unique Entity Identifier (UEI) must be provided.

(G) *Outside employment policy.* The State agency must ensure that renewing sponsoring organizations certify that the outside employment policy most recently submitted to the State agency remains current and in effect or the sponsoring organization must submit an updated outside employment policy at the time of renewal. The policy must restrict other employment by employees that interferes with an employee's performance of Program-related duties and responsibilities, including outside employment that constitutes a real or apparent conflict of interest.

(H) *Compliance with performance standards.* The State agency must ensure that each renewing institution certifies that it is still in compliance with the performance standards described in paragraph (b)(1)(xviii) of this section, meaning it is financially viable, is administratively capable of operating the Program in accordance with this part, and has internal controls in effect to ensure accountability.

(I) *Licensing.* The State agency must ensure that each independent center certifies that its licensing or approval status is up-to-date and that it continues to meet the licensing requirements described in paragraphs (d) and (e) of this section. Sponsoring organizations must certify that the licensing or approval status of their facilities is up-to-date and that they continue to meet the licensing requirements described in paragraphs (d) and (e) of this section. If the independent center or facility has a new license not previously on file with the State agency, a copy must be submitted, unless the State agency has other means of confirming the licensing or approval status of any independent center or facility providing care.

(J) *Facility lists.* The State agency must ensure that each sponsoring organization certifies that the list of all of their applicant day care homes, child care centers, outside-school-hours-care centers, at-risk afterschool care centers, emergency shelters, and adult day care centers on file with the State agency is up-to-date.

(K) *Facility training.* The State agency must ensure that renewing sponsoring organizations certify that all facilities under their oversight have adhered to the training requirements set forth in Program regulations.

(iv) *Additional Information collection.* Institutions must provide information to the State agency as specified in paragraphs (f)(3), (f)(4), and (f)(7) of this section.

(3) *State agency notification requirements.* (i) Any new institution applying for participation in the Program must be notified in writing of approval or disapproval by the State agency, within 30 calendar days of the State agency's receipt of a complete application. Whenever possible, State agencies should provide assistance to institutions that have submitted an

incomplete application. Any disapproved applicant institution must be notified of the reasons for its disapproval and its right to appeal, as described in paragraph (k) of this section. Any disapproved applicant day care home or unaffiliated center must be notified of the reasons for its disapproval and its right to appeal, as described in paragraph (l) of this section.

(ii) Any renewing institution must be provided written notification indicating whether it has completely and sufficiently met all renewal information requirements within 30 days of the submission of renewal information. Whenever possible, State agencies should provide assistance to institutions whose information is incomplete.

(4) *Program agreements.* (i) The State agency must require each institution that has been approved for participation in the Program to enter into a permanent agreement governing the rights and responsibilities of each party. The existence of a valid permanent agreement, however, does not eliminate the need for an institution to comply with the annual information submission requirements and related provisions at paragraphs (b) and (f) of this section.

(ii) The existence of a valid permanent agreement does not limit the State agency's ability to terminate the agreement, as provided under paragraph (c)(3) of this section. The State agency must terminate the institution's agreement whenever an institution's participation in the Program ends. The State agency must terminate the agreement for cause based on violations by the institution, facility, responsible principals, or responsible individuals, as described in paragraph (c) of this section. The State agency or institution may terminate the agreement at its convenience for considerations unrelated to the institution's performance of Program responsibilities under the agreement. However, any action initiated by the State agency to terminate an agreement for its convenience requires prior consultation with FNS. Termination for convenience does not result in ineligibility for any program authorized under this part or parts 210, 215, 220, or 225 of this chapter.

(iii) The Program agreement must include the following requirements:

(A) The responsibility of the institution to accept final financial and administrative management of a proper, efficient, and effective food service, and comply with all requirements under this part.

(B) The responsibility of the institution to comply with all requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Department's regulations concerning nondiscrimination (parts 15, 15a and 15b of this title), including requirements for racial and ethnic participation data collection, public notification of the nondiscrimination policy, and reviews to assure compliance with the nondiscrimination policy, to the end that no person may, on the grounds of race, color, national origin, sex, age, or disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, the Program.

(C) The right of the State agency, the Department, and other State or Federal officials to make announced or unannounced reviews of their operations during the institution's normal hours of child or adult care operations, and that anyone making such reviews must show photo identification that demonstrates that they are employees of one of these entities.

(f) * * *

(1) * * *

(iv) Require each sponsoring organization to submit an administrative budget with sufficiently detailed information concerning projected CACFP administrative earnings and expenses, as well as other non-Program funds to be used in Program administration, for the State agency to determine the allowability, necessity, and reasonableness of all proposed expenditures, and to assess the sponsoring organization's capability to manage Program funds. The administrative budget must demonstrate that the sponsoring organization will expend and account for funds in accordance with regulatory requirements, FNS Instruction 796–2 (*Financial Management—Child and Adult Care Food Program*), 2 CFR part 200, subpart D, and USDA implementing regulations 2 CFR part 400 and part 415, and applicable Office of Management and Budget circulars. The administrative budget submitted by a sponsoring organization of centers must demonstrate that the administrative costs to be charged to the Program do not exceed 15 percent of the meal reimbursements estimated or actually earned during the budget year, unless the State agency grants a waiver, as described in § 226.7(g). For sponsoring organizations of day care homes seeking to carry over administrative funds, as described in § 226.12(a)(3), the budget must include an estimate of requested administrative fund carryover amounts and a description of proposed purpose for which those funds would be obligated or expended.

* * * * *

(k) * * *

(5) * * *

(ii) * * * The State agency must provide a copy of the written request for an administrative review, including the date of receipt of the request to FNS within 10 days of its receipt of the request.

* * * * *

(ix) * * * State agencies failing to meet the timeframe set forth in this paragraph are liable for all valid claims for reimbursement to aggrieved institutions, as specified in paragraph (k)(11)(i) of this section.

* * * * *

(11) *State liability for payments.* (i) A State agency that fails to meet the 60-day timeframe set forth in paragraph (k)(5)(ix) of this section must pay, from non-Federal sources, all valid claims for reimbursement to the institution during the period beginning on the 61st day and ending on the date on which the hearing determination is made, unless FNS determines that an exception should be granted.

(ii) FNS will notify the State agency of its liability for reimbursement at least 30 days before liability is imposed. The timeframe for written notice from FNS is an administrative requirement and may not be used to dispute the State's liability for reimbursement.

(iii) The State agency may submit, for FNS review, information supporting a request for a reduction in the State's liability, a reconsideration of the State's liability, or an exception to the 60-day deadline, for exceptional circumstances. After review of this information, FNS will recover any improperly paid Federal funds.

* * * * *

(m) * * *

(3) *Review content.* As part of its conduct of reviews, the State agency must assess each institution's compliance with the requirements of this part pertaining to:

(i) Recordkeeping;

(ii) Meal counts;

(iii) Administrative costs;

(iv) Any applicable instructions and handbooks issued by FNS and the Department to clarify or explain this part, and any instructions and handbooks issued by the State agency which are not inconsistent with the provisions of this part;

(v) Facility licensing and approval;

(vi) Compliance with the requirements for annual updating of enrollment forms;

(vii) Compliance with the requirements for submitting and ensuring the accuracy of the annual renewal information;

(viii) If an independent center, observation of a meal service;

(ix) If a sponsoring organization, training and monitoring of facilities, including the timing of reviews, as described in § 226.16(d)(4)(iii);

(x) If a sponsoring organization, implementation of the household contact system established by the State agency pursuant to paragraph (m)(5) of this section;

(xi) If a sponsoring organization of day care homes, the requirements for classification of tier I and tier II day care homes; and

(xii) All other Program requirements.

* * * * *

(6) *Frequency and number of required institution reviews.* The State agency must annually review at least 33.3 percent of all institutions. At least 15 percent of the total number of facility reviews required must be unannounced. The State agency must review institutions according to the following schedule:

(i) At least once every 3 years, independent centers and sponsoring organizations that operate 1 to 100 facilities must be reviewed. A sponsoring organization review must include reviews of 10 percent of the sponsoring organization's facilities.

(ii) At least once every 2 years, sponsoring organizations that operate more than 100 facilities, that conduct activities other than CACFP, that have been identified during a recent review as having serious management problems, or that are at risk of having serious management problems must be reviewed. These reviews must include reviews of 5 percent of the sponsoring organization's first 1,000 facilities and 2.5 percent of the sponsoring organization's facilities in excess of 1,000.

(iii) At least once every 2 years, independent centers that conduct activities other than CACFP, that have been identified during a recent review as having serious management problems, or that are at risk of having serious management problems must be reviewed.

(iv) New sponsoring organizations that operate five or more facilities must be reviewed within the first 90 days of Program operations.

* * * * *

(p) *Sponsoring organization agreement.* (1) Each State agency must develop and provide for the use of a standard form of written permanent agreement between each sponsoring organization and the day care homes or unaffiliated child care centers, outside-school-hours-care centers, at-risk afterschool care centers, emergency shelters, or adult day care centers for which it has responsibility for Program operations. The agreement must specify the rights and responsibilities of both parties. The State agency may, at the request of the sponsoring organization, approve an agreement developed by the sponsoring organization. Nothing in this paragraph limits the ability of the sponsoring organization to suspend or terminate the permanent agreement, as described in § 226.16(l).

(2) At a minimum, the standard agreement must require day care homes and centers to:

(i) Allow visits by sponsoring organizations or State agencies to review meal service and records;

(ii) Promptly inform the sponsoring organization about any change in its licensing or approval status;

(iii) Meet any State agency approved time limit for submission of meal records; and

(iv) Distribute to parents a copy of the sponsoring organization's notice to parents if directed to do so by the sponsoring organization.

(3) The agreement must include the right of day care homes and centers to receive timely reimbursement. The sponsoring organization must pay program funds to day care homes and centers within 5 working days of receipt from the State agency.

(4) The State agency must include in this agreement its policy to restrict transfers of day care homes among sponsoring organizations. The policy must restrict the transfers to no more frequently than once per year, except under extenuating circumstances, such as termination of the sponsoring organization's agreement or other circumstances defined by the State agency.

(5) The State agency may, at the request of the sponsoring organization, approve an agreement developed by the sponsoring organization.

* * * * *

■ 30. In § 226.7:

■ a. Revise paragraphs (b), (g), and (j); and

■ b. Remove paragraph (m).

The revisions read as follows:

§ 226.7 State agency responsibilities for financial management.

* * * * *

(b) *Financial management system.* Each State agency must establish and maintain an acceptable financial management system, adhere to financial management standards and otherwise carry out financial management policies in accordance with 2 CFR parts 200, 400, 415, 416, 417, 418, and 421, and FNS Instruction 796–2, as applicable, and related FNS guidance to identify allowable Program costs and establish standards for institutional recordkeeping and reporting. The State agency must provide guidance on financial management requirements to each institution.

(1) State agencies must also have a system in place for:

(i) Annually reviewing at least 1 month's bank account activity of all sponsoring organizations against documents adequate to support that the financial transactions meet Program requirements. The State agency may expand the review to examine additional months of bank account activity if discrepancies are found. If the State agency identifies and is unable to verify any expenditures that have the appearance of violating Program requirements, or if the discrepancy is significant, the State agency must refer the sponsoring organization's bank account activity to the appropriate State authorities.

(ii) Annually reviewing actual expenditures reported of Program funds and the amount of meal reimbursement funds retained from centers, if any, for administrative costs for all sponsoring organizations of unaffiliated centers. State agencies must reconcile reported expenditures with Program payments to ensure that funds are fully accounted for, and use the reported actual expenditures as the basis for selecting a sample of expenditures for validation. If the State agency identifies and is unable to verify any expenditures that have the appearance of violating Program requirements, the State agency must refer the sponsoring organization's bank account activity to the appropriate State authorities.

(iii) Monitoring and reviewing the institutions' documentation of their nonprofit status to ensure that all Program reimbursement funds are used solely for the conduct of the food service operation or to improve food service operations, principally for the benefit of children or adult participants.

(2) The financial management system standards for institutional recordkeeping and reporting must:

(i) Prohibit claiming reimbursement for meals provided by a child or an adult participant's family, except as authorized at §§ 226.18(e) and 226.20(b)(2), (g)(1)(ii), and (g)(2)(ii); and

(ii) Allow the cost of meals served to adults who perform necessary food service labor under the Program, except in day care homes.

* * * * *

(g) *Budget approval.* The State agency must review institution budgets and must limit allowable administrative claims by each sponsoring organization to the administrative costs approved in its budget, except as provided in this section. The budget must demonstrate the institution's ability to manage Program funds in accordance with this part, FNS Instruction 796–2, 2 CFR part 200, subpart D and USDA implementing regulations 2 CFR part 400 and part 415, and applicable Office of Management and Budget circulars. Sponsoring organizations must submit an administrative budget to the State agency annually, and independent centers must submit budgets as frequently as required by the State agency. Budget levels may be adjusted to reflect changes in Program activities. If the institution does not intend to use non-CACFP funds to support any required CACFP functions, the institution's budget must identify a source of non-Program funds that could be used to pay overclaims or other unallowable costs. If the institution intends to use any non-Program resources to meet CACFP requirements, these non-Program funds should be accounted for in the institution's budget, and the institution's budget must identify a source of non-Program funds that could be used to pay overclaims or other unallowable costs.

(1) For sponsoring organizations of centers, the State agency is prohibited from approving the sponsoring organization's administrative budget, or any amendments to the budget, if the administrative budget shows the Program will be charged for administrative costs in excess of 15 percent of the meal reimbursements estimated to be earned during the budget year. However, the State agency may waive this limit if the sponsoring organization provides justification that it requires Program funds in excess of 15 percent to pay its administrative costs and if the State agency is convinced that the institution will have adequate funding to provide meals meeting the requirements of § 226.20. The State agency must document all waiver approvals and denials in writing and provide a copy of all such letters to the appropriate FNSRO.

(2) For sponsoring organizations of day care homes seeking to carry over administrative funds, as described in § 226.12(a)(3), the State agency must require the budget to include an estimate of the requested administrative fund carryover amount and a description of the purpose for which those funds would be obligated or expended by the end of the fiscal year following the fiscal year in which they were received. In approving a carryover request, State agencies must take into consideration whether the sponsoring organization has a financial management system that meets Program requirements and is capable of controlling the custody, documentation, and disbursement of carryover funds. As soon as possible after fiscal year close-out, the State agency must require sponsoring organizations carrying over administrative funds to submit an amended budget for State agency review and approval. The amended budget must identify the amount of administrative funds actually carried over and describe the purpose for which the carry-over funds have been or will be used.

* * * * *

(j) *Recovery of overpayments.* Each State agency must establish procedures to recover outstanding start-up, expansion, and advance payments from institutions which, in the opinion of the State agency, will not be able to earn these payments. In addition, each State agency must establish procedures to recover administrative funds from sponsoring organizations of day care homes that are not properly payable under FNS Instruction 796–2, administrative funds that are in excess of the 10 percent maximum carryover amount, and carryover amounts that are not expended or obligated by the end of the fiscal year following the fiscal year in which they were received.

* * * * *

■ 31. In § 226.10, revise paragraph (c) to read as follows:

§ 226.10 Program payment procedures.

* * * * *

(c) Claims for Reimbursement must report information in accordance with the financial management system established by the State agency, and in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the final Report of the Child and Adult Care Food Program (FNS 44) required under § 226.7(d). In submitting a Claim for Reimbursement, each institution must certify that the claim is correct and that records are available to support that claim.

(1) Prior to submitting its consolidated monthly claim to the State agency, each sponsoring organization must perform edit checks on each facility's meal claim. At a minimum, the sponsoring organization's edit checks must:

(i) Verify that each facility has been approved to serve the types of meals claimed; and

(ii) Compare the number of children or eligible adult participants enrolled for care at each facility, multiplied by the number of days on which the facility is approved to serve meals, to the total number of meals claimed by the facility for that month. Discrepancies between the facility's meal claim and its enrollment must be subjected to more thorough review to determine if the claim is accurate.

(2) Sponsoring organizations of unaffiliated centers must make available to the State agency an annual report detailing actual expenditures of Program funds and the amount of meal reimbursement funds retained from centers, if any, for administrative costs for the year to which the claims apply. The report must use the same cost categories as the approved annual budget submitted by the sponsoring organization.

(3) Sponsoring organizations of for-profit child care centers or for-profit outside-school-hours care centers must submit the number and percentage of children in care—enrolled or licensed capacity, whichever is less—that documents that at least 25 percent are eligible for free or reduced-price meals or are title XX beneficiaries. Sponsoring organizations must not submit a claim for any for-profit center in which less than 25 percent of the children in care—enrolled or licensed capacity, whichever is less—during the claim month were eligible for free or reduced-price meals or were title XX beneficiaries.

(4) For each month they claim reimbursement, independent for-profit child care centers and independent for-profit outside-school-hours care centers must submit the number and percentage of children in care—enrolled or licensed capacity, whichever is less—that documents at least 25 percent are eligible for free or reduced-price meals or are title XX beneficiaries. However, children who only receive at-risk afterschool meals or snacks must not be considered in determining this eligibility.

(5) For each month they claim reimbursement, independent for-profit adult day care centers must submit the percentages of enrolled adult participants receiving title XIX or title XX benefits for months in which not less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries. For the claim, sponsoring

organizations of adult day care centers must submit the percentage of enrolled adult participants receiving title XIX or title XX benefits for each center. Sponsoring organizations must not submit claims for adult day care centers for months in which less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries.

* * * * *

■ 32. In § 226.12, revise paragraph (a) to read as follows:

§ 226.12 Administrative payments to sponsoring organizations for day care homes.

(a) *General.* Sponsoring organizations of day care homes receive payments for administrative costs, subject to the following conditions:

(1) Sponsoring organizations will receive reimbursement for the administrative costs of the sponsoring organization in an amount that is not less than the product obtained each month by multiplying:

(i) The number of day care homes of the sponsoring organization submitting a claim for reimbursement during the month, by

(ii) The appropriate administrative rates announced annually in the **Federal Register**.

(2) FNS determines administrative reimbursement by annually adjusting the following base administrative rates, as set forth in § 226.4(i):

(i) Initial 50 day care homes, 42 dollars;

(ii) Next 150 day care homes, 32 dollars;

(iii) Next 800 day care homes, 25 dollars;

(iv) Additional day care homes, 22 dollars.

(3) With State agency approval, a sponsoring organization may carry over a maximum of 10 percent of administrative funds received under paragraph (a)(1) of this section for use in the following fiscal year. If any carryover funds are not obligated or expended in the following fiscal year, they must be returned to the State agency, as described in § 226.7(j).

(4) State agencies must recover any administrative funds not properly payable, as described in FNS Instruction 796–2.

* * * * *

■ 33. In § 226.13, revise paragraph (a) to read as follows:

§ 226.13 Food service payments to sponsoring organizations for day care homes.

(a) Payments will be made only to sponsoring organizations operating under an agreement with the State agency for the meal types specified in the agreement served to enrolled nonresident children and eligible enrolled children of day care home providers, at approved day care homes. Each State agency must base reimbursement to each approved day care home on daily meal counts recorded by the provider.

* * * * *

■ 34. In § 226.15, revise paragraph (b) to read as follows:

§ 226.15 Institution provisions.

* * * * *

(b) *New applications and renewals.* Each new institution must submit to the State agency an application with all information required for its approval, as set forth in §§ 226.6(b)(1) and 226.6(f). This information must demonstrate that a new institution has the administrative and financial capability to operate the Program, as described in the performance standards set forth in § 226.6(b)(1)(xviii). Renewing institutions must annually certify that they are capable of operating the Program, as set forth in § 226.6(b)(2).

* * * * *

■ 35. Amend § 226.16 as follows:

■ a. In paragraphs (b)(2) and (b)(3), remove the words ''child care and adult day care'';

■ b. In paragraph (b)(4), remove the words ''on or after June 20, 2000'';

■ c. Remove the word ''and'' at the end of paragraph (b)(7);

■ d. Remove the ''.'' at the end of paragraph (b)(8) and add in its place ''; and'';

■ e. Add paragraph (b)(9);

■ f. In paragraphs (c) and (d)(1), remove the words ''child care and adult day care'';

■ g. Revise paragraph (d)(3);

■ h. Add paragraphs (d)(4)(iii)(E) and (F);

■ i. In paragraph (i), remove the words ''child and adult day care'';

■ j. Revise paragraph (m).

The additions and revisions read as follows:

§ 226.16 Sponsoring organization provisions.

* * * * *

(b) * * *

(9) For sponsoring organizations of unaffiliated centers, the name and mailing address of each center.

* * * * *

(d) * * *

(3) Additional mandatory training sessions, as defined by the State agency, for key staff from all sponsored facilities not less frequently than annually. At a minimum, this training must include instruction, appropriate to the level of staff experience and duties, on the Program's meal patterns, meal counts, claims submission and review procedures, recordkeeping requirements, and reimbursement system.

(4) * * *

(iii) * * *

(E) The timing of unannounced reviews must be varied so that they are unpredictable to the facility; and

(F) All types of meal service must be subject to review and sponsoring organizations must vary the meal service reviewed.

* * * * *

(m) Sponsoring organizations of day care homes or unaffiliated centers must not make payments to employees or contractors solely on the basis of the number of homes or centers recruited. However, employees or contractors may be paid or evaluated on the basis of recruitment activities accomplished.

■ 36. In § 226.17, add paragraphs (e) and (f) to read as follows:

§ 226.17 Child care center provisions.

* * * * *

(e) Unaffiliated sponsored child care centers must enter into a written permanent agreement with the sponsoring organization. The agreement must specify the rights and responsibilities of both parties. At a minimum, the agreement must include the provisions set forth in paragraph (b) of this section.

(f) Independent child care centers must enter into a written permanent agreement with the State agency. The agreement must specify the rights and responsibilities of both parties as required by § 226.6(b)(4). At a minimum, the agreement must include the provisions set forth in paragraph (b) of this section.

■ 37. In § 226.17a, revise paragraphs (f)(2) and (g) to read as follows:

§ 226.17a At-risk afterschool care center provisions.

* * * * *

(f) * * *

(2) *Agreements.* The State agency must enter into a permanent agreement with an institution approved to operate one or more at-risk afterschool care centers, as described in § 226.6(b)(4). The agreement must describe the approved afterschool care programs and list the approved centers. The agreement must also require the institution to comply with the applicable requirements of this part 226.

(i) Unaffiliated sponsored afterschool care centers must enter into a written permanent agreement with the

sponsoring organization. The agreement must specify the rights and responsibilities of both parties. At a minimum, the agreement must include the applicable provisions set forth in this section.

(ii) Independent afterschool care centers must enter into a written permanent agreement with the State agency. The agreement must specify the rights and responsibilities of both parties as required by § 226.6(b)(4). At a minimum, the agreement must include the applicable provisions set forth in this section.

(g) *Application process in subsequent years.* To continue participating in the Program, independent at-risk afterschool care centers must comply with the annual information submission requirements, as described in §§ 226.6(b)(2)(i) and (f)(3)(ii). Sponsoring organizations of at-risk afterschool care centers must comply with the annual information submission requirements, as described in in § 226.6(b)(2)(ii), and provide area eligibility data, as described in § 226.15(g).

* * * * *

■ 38. In § 226.18:

■ a. Revise paragraph (b)(11);

■ b. Redesignate paragraphs (b)(13) through (b)(16) as paragraphs (b)(14) through (b)(17), respectively; and

■ c. Add new paragraph (b)(13).

The addition and revision read as follows:

§ 226.18 Day care home provisions.

* * * * *

(b) * * *

(11) The responsibility of the sponsoring organization to inform tier II day care homes of all of their options for receiving reimbursement for meals served to enrolled children. These options include:

(i) Receiving tier I rates for the meals served to eligible enrolled children, by electing to have the sponsoring organization identify all income-eligible children through the collection of free and reduced-price applications and the sponsoring organization or day care home's possession of other proof of a child or household's participation in a categorically eligible program;

(ii) Receiving tier I rates for the meals served to eligible enrolled children, by electing to have the sponsoring organization identify only those children for whom the sponsoring organization or day care home possess documentation of the child or household's participation in a categorically eligible program, under the expanded categorical eligibility provision, as described in § 226.23(e)(1); or

(iii) Receiving tier II rates of reimbursement for all meals served to enrolled children;

* * * * *

(13) The right of the tier II day care home to assist in collecting applications from households and transmitting the applications to the sponsoring organization. However, a tier II day care home may not review the collected applications. The sponsoring organizations may prohibit a tier II day care home from assisting in collection and transmittal of applications if the day care home does not comply with the process, as described in § 226.23(e)(2)(viii);

* * * * *

■ 39. In § 226.19, add paragraphs (d) and (e) to read as follows:

§ 226.19 Outside-school-hours care center provisions.

* * * * *

(d) Unaffiliated sponsored outside-school-hours-care centers must enter into a written permanent agreement with the sponsoring organization. The agreement must specify the rights and responsibilities of both parties. At a minimum, the agreement must include the provisions set forth in paragraph (b) of this section.

(e) Independent outside-school-hours care centers must enter into a written permanent agreement with the State agency. The agreement must specify the rights and responsibilities of both parties as required by § 226.6(b)(4). At a minimum, the agreement must include the provisions described in paragraph (b) of this section.

■ 40. In § 226.19a, add paragraphs (d) and (e) to read as follows:

§ 226.19a Adult day care center provisions.

* * * * *

(d) Unaffiliated sponsored adult day care centers must enter into a written permanent agreement with the sponsoring organization. The agreement must specify the rights and responsibilities of both parties. At a minimum, the agreement must address the provisions set forth in paragraph (b) this section.

(e) Independent adult day care centers must enter into a written permanent agreement with the State agency. The agreement must specify the rights and responsibilities of both parties as required by § 226.6(b)(4). At a minimum, the agreement must include the provisions described in paragraph (b) of this section.

■ 41. In § 226.21, revise paragraph (a) introductory text to read as follows:

§ 226.21 Food service management companies.

(a) Any institution may contract with a food service management company. An institution which contracts with a food service management company must remain responsible for ensuring that the food service operation conforms to its agreement with the State agency. All procurements of meals from food service management companies must adhere to the procurement standards set forth in § 226.22 and comply with the following procedures intended to prevent fraud, waste, and Program abuse:

* * * * *

■ 42. Revise § 226.22 to read as follows:

§ 226.22 Procurement standards.

(a) *General.* This section establishes standards and guidelines for the procurement of foods, supplies, equipment, and other goods and services. These standards are furnished to ensure that goods and services are obtained efficiently and economically and in compliance with the provisions of applicable Federal law and Executive orders.

(b) *Compliance.* Institutions may use their own procedures for procurement with Program funds to the extent that:

(1) Procurements by public institutions comply with applicable State or local laws and standards set forth in 2 CFR part 200, subpart D and USDA implementing regulations 2 CFR parts 400 and 415; and

(2) Procurements by private nonprofit institutions comply with standards set forth in 2 CFR part 200, subpart D and USDA implementing regulations 2 CFR parts 400 and 415.

(c) *Geographic preference.* (1) Institutions participating in the Program may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products. When utilizing the geographic preference to procure such products, the institution making the purchase has the discretion to determine the local area to which the geographic preference option will be applied;

(2) For the purpose of applying the optional geographic preference in paragraph (c)(1) of this section, ''unprocessed locally grown or locally raised agricultural products'' means only those agricultural products that retain their inherent character. The effects of the following food handling and preservation techniques will not be considered as changing an agricultural product into a product of a different

kind or character: Cooling; refrigerating; freezing; size adjustment made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding; forming ground products into patties without any additives or fillers; drying/dehydration; washing; packaging (such as placing eggs in cartons), vacuum packing and bagging (such as placing vegetables in bags or combining two or more types of vegetables or fruits in a single package); addition of ascorbic acid or other preservatives to prevent oxidation of produce; butchering livestock and poultry; cleaning fish; and the pasteurization of milk.

■ 43. In § 226.23, add paragraph (e)(1)(vii) to read as follows:

§ 226.23 Free and reduced-price meals.

* * * * *

(e) * * *

(1) * * *

(vii) If a tier II day care home elects to assist in collecting and transmitting the applications to the sponsoring organization, it is the responsibility of the sponsoring organization to establish procedures to ensure the provider does not review or alter the application. The household consent form must explain that:

(A) The household is not required to complete the income eligibility form in order for their children to participate in CACFP;

(B) The household may return the application to either the sponsoring organization or the day care home provider;

(C) By signing the letter and giving it to the day care home provider, the household has given the day care home provider written consent to collect and transmit the household's application to the sponsoring organization; and

(D) The application will not be reviewed by the day care home provider.

* * * * *

■ 44. In § 226.25, add paragraph (j) to read as follows:

§ 226.25 Other provisions.

* * * * *

(j) *Fines.* (1) An institution that is a school food authority may be subject to fines. The State agency may establish an assessment when it has determined that the institution or its facility has:

(i) Failed to correct severe mismanagement of the Program;

(ii) Disregarded a Program requirement of which the institution or its facility had been informed; or

(iii) Failed to correct repeated violations of Program requirements.

(2) FNS may direct the State agency to establish a fine against any institution when it has determined that the institution or its facility has committed one or more acts under paragraph (j)(1) of this section.

(3) Funds used to pay a fine established under this paragraph must be derived from non-Federal sources. In calculating an assessment, the State agency must calculate the fine based on the amount of Program reimbursement earned by the institution or its facility for the most recent fiscal year for which full year data is available, provided that the fine does not exceed the equivalent of:

(i) For the first fine, 1 percent of the amount of meal reimbursement earned for the fiscal year;

(ii) For the second fine, 5 percent of the amount of meal reimbursement earned for the fiscal year; and

(iii) For the third or subsequent fine, 10 percent of the amount of meal reimbursement earned for the fiscal year.

(4) The State agency must inform FNS at least 30 days prior to establishing the fine under this paragraph. The State agency must send the institution written notification of the fine established under this paragraph and provide a copy of the notification to FNS. The notification must:

(i) Specify the violations or actions which constitute the basis for the fine and indicate the amount of the fine;

(ii) Inform the institution that it may appeal the fine and advise the institution of the appeal procedures established under § 226.6(k);

(iii) Indicate the effective date and payment procedures should the institution not exercise its right to appeal within the specified timeframe.

(5) Any institution subject to a fine under paragraph (j)(1) of this section may appeal the State agency's determination. In appealing a fine, the institution must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any institution seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay a fine established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of a fine established under this paragraph against an institution and any interest charged in the collection of these fines must be remitted to FNS, and then remitted to the United States Treasury.

■ 45. Revise § 226.26 to read as follows:

§ 226.26 Program information.

Persons seeking information about this Program should contact their State administering agency or the appropriate FNSRO. The FNS website has contact information for State agencies at *https://www.fns.usda.gov/fns-contacts* and FNSROs at *https://www.fns.usda.gov/fns-regional-offices.*

PART 235—STATE ADMINISTRATIVE EXPENSE FUNDS

■ 46. The authority citation for part 235 continues to read as follows:

Authority: Secs. 7 and 10 of the Child Nutrition Act of 1966, 80 Stat. 888, 889, as amended (42 U.S.C. 1776, 1779).

§ 235.4 [Amended]

■ 47. In § 235.4, amend paragraph (b)(2) by removing the term ''§ 235.11(g)'' and add in its place the term ''§ 235.11(h)''.

■ 48. In § 235.5:

■ a. Revise paragraph (d); and

■ b. Amend paragraph (e)(2) by removing the word ''unexpended'' and adding in its place the word ''unobligated''.

The revision reads as follows:

§ 235.5 Payments to States.

* * * * *

(d) *Reallocation of funds.* Annually, between March 1 and May 1 on a date specified by FNS, of each year, each State agency shall submit to FNS a State Administrative Expense Funds Reallocation Report (FNS–525) on the use of SAE funds. At such time, a State agency may release to FNS any funds that have been allocated, reallocated or transferred to it under this part or may request additional funds in excess of its current grant level. Based on this information or on other available information, FNS shall reallocate, as it determines appropriate, any funds allocated to State agencies in the current fiscal year which will not be obligated in the following fiscal year and any funds carried over from the prior fiscal year which remain unobligated at the end of the current fiscal year. Reallocated funds shall be made available for payment to a State agency upon approval by FNS of the State agency's amendment to the base year plan which covers the reallocated funds, if applicable. Notwithstanding any other provision of this part, a State agency may, at any time, release to FNS for reallocation any funds that have been allocated, reallocated or transferred to it under this part and are not needed to

implement its approved plan under this section.

* * * * *

§ 235.6 [Amended]

■ 49. In § 235.6, amend paragraph (a) by:

■ a. Redesignating as paragraph (a–1) as paragraph (a)(1);

■ b. In newly redesignated paragraph (a)(1), removing the term ''§ 235.11(g)(3)'' and adding in its place the term ''§ 235.11(h)(3)'' and removing the term ''§ 235.11(g)(1) and (2)'' and adding in its place the term ''§§ 235.11(h)(1) and (2)''; and

■ c. Redesignating paragraph (a–2) as paragraph (a)(2).

■ 50. In § 235.11:

■ a. Redesignate paragraphs (c) through (g) as paragraphs (d) through (h), respectively, and add new paragraph (c);

■ b. In newly redesignated paragraph (e), remove the term ''paragraphs (b) or (c)'' and add in its place the term ''paragraphs (b), (c), or (d)'';

■ c. In redesignated paragraph (g), remove the term ''paragraph (b)'' and add in its place the term ''paragraphs (b) and (c)'' and add the words ''or fine'' after the word ''sanction'' each time it appears; and

■ d. Revise redesignated paragraph (h)(3).

The addition and revision read as follows:

§ 235.11 Other provisions.

* * * * *

(c) *Fines.* (1) FNS may establish a fine against any State agency administering the programs under parts 210, 215, 220, 225, 226, and 250 of this chapter, as it applies to the operation of the Food Distribution Program in schools and child and adult care institutions, when it has determined that the State agency has:

(i) Failed to correct severe mismanagement of the programs;

(ii) Disregarded a program requirement of which the State has been informed; or

(iii) Failed to correct repeated violations of program requirements.

(2) Funds used to pay a fine established under paragraph (c)(1) of this section must be derived from non-Federal sources. The amount of the fine will not exceed the equivalent of:

(i) For the first fine, 1 percent of all allocations made available under § 235.4 during the most recent fiscal year for which full year data are available;

(ii) For the second fine, 5 percent of all allocations made available under § 235.4 during the most recent fiscal year for which full year data are available; and

(iii) For the third or subsequent fines, 10 percent of all allocations made available under § 235.4 during the most recent fiscal year for which full year data are available.

(3) State agencies seeking to appeal a fine established under this paragraph must follow the procedures set forth in this paragraph (g).

* * * * *

(h) * * *

(3) *Continuing education and training standards for State directors of school nutrition programs and distributing agencies.* Each school year, all State directors with responsibility for the National School Lunch Program under part 210 of this chapter and the School Breakfast Program under part 220 of this chapter, as well as those responsible for the distribution of USDA donated foods under part 250 of this chapter, must complete a minimum of 15 hours of training in core areas that may include nutrition, operations, administration, communications and marketing. State directors tasked with National School Lunch Program procurement responsibilities must complete annual procurement training, as required under § 210.21(h) of this chapter. Additional hours and topics may be specified by FNS, as needed, to address program integrity and other critical issues.

* * * * *

Cynthia Long,

Administrator, Food and Nutrition Service.

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