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Federal Register
Vol. 88, No. 166
Tuesday, August 29, 2023

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 235

[CBP Dec. No. 23–09]

Interpretation of the Term Kiosk for Global Entry

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Interpretive rule.

SUMMARY: This interpretive rule provides guidance to the public on U.S. Customs and Border Protection's interpretation of the term ''kiosk'' as used in the Global Entry regulations.

DATES: This rule is effective on August 29, 2023.

FOR FURTHER INFORMATION CONTACT: Rafael E. Henry, Branch Chief, Office of Field Operations, (202) 344–3251, *Rafael.E.Henry@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

U.S. Customs and Border Protection (CBP) operates the Global Entry program, a voluntary international trusted traveler program, at designated airports to provide certain pre-approved travelers dedicated processing into the United States. Members of Global Entry are vetted travelers who have voluntarily applied for membership, have paid a required application fee, and have provided certain personal data to CBP. Travelers with active membership in Global Entry are considered to be a low risk, because CBP conducts vetting both when the participant applies to the Global Entry program and on an ongoing basis after the participant becomes a Global Entry member.

Upon arrival at a designated airport, Global Entry members can use a self-service process to report their arrival and facilitate their inspection. The Global Entry arrival procedures are set forth in section 235.12(g) of title 8 of the Code of Federal Regulations (8 CFR 235.12(g)). That regulation requires that an arriving passenger utilize a Global Entry kiosk, follow the on-screen instructions, and declare all articles brought into the United States. The term ''kiosk'' is not defined in the regulations; however, the kiosks used by CBP until now have been machines that are permanently installed in airports and that print paper receipts for verification of the traveler's arrival (''legacy kiosks''). Participants must physically go to the legacy kiosk in order to be processed using the Global Entry program.

To facilitate their inspection, Global Entry members utilize the legacy kiosks to have their photographs and fingerprints taken, submit identifying information, and answer several automated questions about items that they are bringing into the United States. When using the legacy kiosks, participants are required to declare all articles that they are bringing into the United States, pursuant to 19 CFR 148.11.

CBP is in the process of transitioning from the legacy kiosks to Global Entry portals and the Global Entry Mobile application. CBP expects all the legacy kiosks to be retired at the end of calendar year 2023. The portals are already being used in some locations and are essentially mobile processing units, similar to a tablet, with screens and cameras. The portals are enabled with Wi-Fi to allow CBP the flexibility to position the portals anywhere inside an airport Federal Inspection Station (FIS) to optimize traveler processing. Global Entry participants physically approach the portals for processing in a manner similar to the legacy kiosks. However, instead of issuing a paper receipt to travelers, the portals will transmit an electronic file to the CBP officers at egress for review and verification of the traveler's arrival. In addition to the portals, advancing technology will now allow CBP to perform the same processing for Global Entry members through use of the Global Entry Mobile application. The Global Entry Mobile application will be deployed at 5 airport locations across the United States (Los Angeles, Miami, Houston, Fort Lauderdale, and Washington Dulles) starting in the summer of 2023. The portal or the mobile application will take the traveler's facial image and match it with the existing image from the application process. With these new processes, travelers will now make a verbal declaration to a CBP officer instead of responding to on screen questions that were previously asked during processing at the legacy kiosk. All of the technologies that will now be included in CBP's interpretation of ''kiosk'' assign a class of admission and provide a paper or electronic record that is given to a CBP officer stationed within the Federal Inspection Service area for verification that the traveler was processed for admission into the United States.

For this reason, the Department of Homeland Security (DHS) is issuing this interpretive rule to clarify its interpretation of the undefined term ''kiosk'' to include the currently available technology as well as future advances in processing technology for Global Entry participants to be processed by CBP for entry into the United States.

DHS is issuing this interpretive rule as an interim measure prior to publication of a final rule that will remove the term ''kiosk'' from the Global Entry regulations entirely. On September 9, 2020, DHS published a notice of proposed rulemaking (85 FR 55597) in the **Federal Register** entitled ''Harmonization of the Fees and Application Procedures for the Global Entry and SENTRI Programs and Other Changes'' (the NPRM). In the NPRM, DHS proposed to remove references to ''kiosk'' from the regulations. As noted above, ''kiosk'' is not a defined term in the regulations, and DHS proposed to remove that term in order to make the regulations more inclusive of developing technologies. The final rule promulgating the proposed change is expected to publish in 2024.

II. Interpretation of ''Kiosk''

For the purposes of 8 CFR 235.12, CBP interprets the term ''kiosk'' to include the following: [1]

1. Legacy kiosks (machines that are permanently installed in airports and that print a paper receipt);

[1] All of the technologies included in the CBP's interpretation of ''kiosk'' assign a class of admission and provide a paper or electronic record that is given to a CBP officer stationed within the Federal Inspection Service area for verification that the traveler was processed for admission into the United States.

2. Receipt-less Facial Kiosks (RFK) (modified legacy kiosks that send an electronic record to a CBP officer);

3. Global Entry Portals (Wi-Fi enabled mobile processing units with a screen and camera); and

4. the Global Entry Mobile application or any successor technology for processing Global Entry members at ports of entry.

III. Effective Date

Because this rule is solely interpretive, it is not subject to the 30-day delayed effective date for substantive rules under section 553(d) of the Administrative Procedure Act.[2] Therefore, this rule is effective on August 29, 2023, the same date that it is published in the **Federal Register**.

Regulatory Analysis

Executive Orders 12866, 13563, and 14094 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a ''significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed this regulation.

This rule merely explains to the public how CBP interprets a certain term used in an existing regulation, 8 CFR 235.12. This rule imposes no new requirements on the public and simply clarifies its interpretation of a kiosk to include other forms of technology, broadening the public's processing options. As such, there are no costs to this interpretive rule. To the extent that this rule results in processing time savings for the public, there may be some unquantified benefits to this interpretive change.

As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[3] Because no notice of proposed rulemaking is required, analysis under the Regulatory Flexibility Act is not required.[4]

An agency may not conduct or sponsor, and an individual is not required to respond to a collection of information unless it displays a valid OMB control number. This collection of information has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned OMB control number 1651–0121.

Alejandro N. Mayorkas,

Secretary of Homeland Security.

[FR Doc. 2023–18581 Filed 8–28–23; 8:45 am]

BILLING CODE 9111–14–P

[2] 5 U.S.C. 553(d).

[3] 5 U.S.C. 553(b).

[4] 5 U.S.C. 603(a), 604(a).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1806; Project Identifier MCAI–2023–00934–Q; Amendment 39–22535; AD 2023–17–09]

RIN 2120–AA64

Airworthiness Directives; Cameron Balloons Ltd. Fuel Cylinders

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–13–03, which applied to a certain Cameron Balloons Ltd. (Cameron) fuel cylinder installed on hot air balloons. AD 2022–13–03 required removing any installed fuel cylinder part number (P/N) CB2990 (Alugas) from service before further flight. Since the FAA issued AD 2022–13–03, the fuel cylinder part number has been identified as CB2990/A instead of CB2990 (Alugas). This AD requires removing any installed fuel cylinders P/N CB2990/A from service before further flight. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective September 13, 2023.

The FAA must receive comments on this AD by October 13, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1806; 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 street address for Docket Operations is listed above.

- For service information identified in this final rule, contact Cameron Balloons Ltd., St Johns Street, Bedminster, Bristol, BS3 4NH, United Kingdom; phone: +44 0 117 9637216; email: *technical@cameronballoons.co.uk;* website: *cameronballoons.co.uk.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust Street, 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–2023–1806.

FOR FURTHER INFORMATION CONTACT: Fred Guerin, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (206) 231–2346; email: *fred.guerin@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1806; Project Identifier MCAI–2023–00934–Q'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and

actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent Fred Guerin, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2022–13–03, Amendment 39–22089 (87 FR 36053, June 15, 2022) (AD 2022–13–03), for a certain Cameron fuel cylinder installed on hot air balloons. AD 2022–13–03 was prompted by MCAI originated by the Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom (UK). The UK CAA issued Emergency AD G–2022–0010–E, dated May 12, 2022, to correct an unsafe condition identified as cracks in the weld between the cylinder valve plate and the upper dished end of Cameron fuel cylinder part number (P/N) CB2990 (Alugas). AD 2022–13–03 required removing any installed fuel cylinder P/N CB2990 (Alugas) from service before further flight. The FAA issued AD 2022–13–03 to prevent uncontrolled fuel leakage of liquid propane. The unsafe condition, if not addressed, could lead to fire or explosion and consequent emergency landing.

Actions Since AD 2022–13–03 Was Issued

Since the FAA issued AD 2022–13–03, the UK CAA superseded Emergency AD G–2022–0010–E, dated May 12, 2022, and issued UK CAA Emergency AD G–2023–0005–E, dated July 31, 2023, (referred to after this as ''the MCAI''). The MCAI identifies the fuel cylinder part number as CB2990/A instead of CB2990 (Alugas), references a re-design of the fuel cylinder to P/N CB2990–B, and requires removing fuel cylinder P/N CB2990/A from service.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1806.

FAA's Determination

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this AD after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

AD Requirements

This AD retains no requirements of AD 2022–13–13. This AD requires, before further flight, removing any installed fuel cylinder P/N CB2990/A from service.

Differences Between This AD and the MCAI

The MCAI applies to hot air balloons and certain airships. This AD only applies to hot air balloons because the airships identified in the MCAI do not have an FAA type certificate.

Although the MCAI specifies emptying the removed fuel cylinder, this AD does not require this action. While this action is encouraged for the general safety related to the leakage of liquid propane from these fuel cylinders once they have been removed from the balloon, those actions are not required to address the unsafe condition identified in this AD.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because a liquid propane leak on the fuel cylinder could lead to an in-flight fire or explosion, damaging the hot air balloon and leading to a forced emergency landing, which could injure balloon occupants and persons on the ground. Additionally, the corrective actions must be accomplished before further flight. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forgo notice and comment.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because FAA has determined that it has good cause to adopt this rule without prior notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 696 fuel cylinders installed on hot air balloons worldwide. The FAA has no way of knowing the number of hot air balloons of U.S. Registry that may have an affected fuel cylinder installed. The estimated cost on U.S. operators reflects the maximum possible cost based on fuel cylinders worldwide. The average labor rate is $85 per work-hour.

The FAA estimates that removing the affected fuel cylinder will take 1 work-hour costing $85, for a cost of up to $59,160 for the U.S. fleet. The FAA estimates that installing a non-affected fuel cylinder will take 1 work-hour costing $85 and will cost $3,200 per fuel cylinder, for a cost of up to $2,286,360 for the U.S. fleet.

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, and

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive 2022–13–03, Amendment 39–22089 (87 FR 36053, June 15, 2022); and

■ b. Adding the following new airworthiness directive:

2023–17–09 Cameron Balloons Ltd.: Amendment 39–22535; Docket No. FAA–2023–1806; Project Identifier MCAI–2023–00934–Q.

(a) Effective Date

This airworthiness directive (AD) is effective September 13, 2023.

(b) Affected ADs

This AD replaces AD 2022–13–03, Amendment 39–22089 (87 FR 36053, June 15, 2022).

(c) Applicability

(1) This AD applies to hot air balloons, certificated in any category, equipped with a Cameron Balloons Ltd. fuel cylinder part number (P/N) CB2990/A (the affected fuel cylinder).

(2) The affected fuel cylinder may be installed on hot air balloon models including, but not limited to, those of the following design approval holders:

(i) Aerostar International, Inc.;

(ii) Ballonbau Worner GmbH;

(iii) Balóny Kubíček spol. s.r.o.;

(iv) Cameron Balloons Ltd.;

(v) Eagle Balloons Corp.;

(vi) JR Aerosports, Ltd. (type certificate previously held by Sundance Balloons (US));

(vii) Lindstrand Balloons Ltd.; and

(viii) Michael D. McGrath (type certificate subsequently transferred to Andrew Philip Richardson, Adams Aerostats LLC).

(d) Subject

Joint Aircraft System Component (JASC) Code: 2810, Fuel Storage.

(e) Unsafe Condition

This AD was prompted by cracks in the weld between the cylinder valve plate and the upper dished end of Cameron Balloons Ltd. fuel cylinder P/N CB2990/A. The FAA is issuing this AD to prevent uncontrolled fuel leakage of liquid propane. The unsafe condition, if not addressed, could lead to fire or explosion and consequent emergency landing.

(f) Compliance

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

(g) Required Actions

Before further flight after the effective date of this AD, remove the affected fuel cylinder from service.

Note 1 to paragraph (g): Cameron Balloons Alert Service Bulletin No. 33, Revision 2, dated June 2023, contains information related to this AD, including reference to a replacement fuel cylinder P/N CB2990–B.

(h) Special Flight Permits

Special flight permits are prohibited.

(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 manager of the International Validation Branch, send it to the attention of the person identified in paragraph (j)(2) of this AD and email to: *9-AVS-AIR-730-AMOC@faa.gov*. If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office.

(j) Additional Information

(1) Refer to United Kingdom (UK) Civil Aviation Authority (CAA) Emergency AD G–2023–0005–E, dated July 31, 2023, for related information. This UK CAA AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–1806.

(2) For more information about this AD, contact Fred Guerin, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (206) 231–2346; email: *fred.guerin@faa.gov.*

(3) For service information identified in this AD that is not incorporated by reference, contact Cameron Balloons Ltd., St Johns Street, Bedminster, Bristol, BS3 4NH, United Kingdom; phone: +44 0 117 9637216; email: *technical@cameronballoons.co.uk;* website: *cameronballoons.co.uk.*

(k) Material Incorporated by Reference

None.

Issued on August 24, 2023.

Victor Wicklund,

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

[FR Doc. 2023–18700 Filed 8–25–23; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1491; Project Identifier MCAI–2022–01644–T; Amendment 39–22505; AD 2023–14–05]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–10–08, which applied to certain Airbus SAS Model A320–214, –251N, and –271N airplanes. AD 2022–10–08 required a one-time detailed inspection of the affected passenger seats and corrective actions if necessary. Since the FAA issued AD 2022–10–08, it was determined that additional passenger seats are affected. This AD continues to require the actions in AD 2022–10–08, and also requires inspecting additional affected passenger seats; as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective September 13, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 13, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of June 7, 2022 (87 FR 31129, May 23, 2022).

The FAA must receive comments on this AD by October 13, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR

11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1491; 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 street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA AD 2021–0166 and EASA AD 2021–0166R1 that are incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find EASA AD 2021–0166R1 on the EASA website at *ad.easa.europa.eu.* You may find EASA AD 2021–0166 incorporated by reference in this AD at *regulations.gov* under Docket No. FAA–2023–1491.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2023–1491.

FOR FURTHER INFORMATION CONTACT: Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3667; email *Timothy.P.Dowling@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1491; Project Identifier MCAI–2022–01644–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3667; email *Timothy.P.Dowling@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2022–10–08, Amendment 39–22046 (87 FR 31129, May 23, 2022) (AD 2022–10–08), for certain Airbus SAS Model A320–214, –251N, and –271N airplanes. AD 2022–10–08 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2021–0166, dated July 13, 2021 (EASA AD 2021–0166), to correct an unsafe condition.

AD 2022–10–08 required a one-time detailed inspection of the affected passenger seats and corrective actions if necessary. The FAA issued AD 2022–10–08 to address deformation or compression of the seat rail covers caused by improper transportation, handling, or installation on the airplane. This condition, if not addressed, could lead to seat track detachment, possibly resulting in injury to passengers.

Actions Since AD 2022–10–08 Was Issued

Since the FAA issued AD 2022–10–08, EASA superseded EASA AD 2021–0166, and issued EASA AD 2021–0166R1, dated December 22, 2022 (EASA AD 2021–0166R1) (also referred to as the MCAI), to correct an unsafe condition for certain Airbus SAS Model A320–214, –251N, and –271N airplanes. The MCAI states that damaged seat rail covers were detected in the forward and aft seat fixation area of some airplanes during initial delivery. The MCAI states that since EASA AD 2021–0166 was issued, it was determined that additional passenger seats are affected.

The FAA is issuing this AD to address deformation or compression of the seat rail covers caused by improper transportation, handling, or installation on the airplane. This condition, if not addressed, could lead to seat track detachment, possibly resulting in injury to passengers. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1491.

Explanation of Retained Requirements

Although this AD does not explicitly restate the requirements of AD 2022–10–08, this AD retains all of the requirements of AD 2022–10–08. Those requirements are referenced in EASA AD 2021–0166R1, which, in turn, is referenced in paragraph (g) of this AD.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0166R1 specifies procedures for a detailed inspection of the affected parts and corrective actions. Corrective actions include replacement of the seat or the seat rail covers.

This AD also requires EASA AD 2021–0166, which the Director of the Federal Register approved for incorporation by reference on June 7, 2022 (87 FR 31129, May 23, 2022).

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.

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI described above. The FAA is issuing this AD after determining that

the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2021–0166R1 described previously, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, EASA AD 2021–0166R1 is incorporated by reference in this AD. This AD requires compliance with EASA AD 2021–0166R1 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in EASA AD 2021–0166R1 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2021–0166R1. Service information required by EASA AD 2021–0166R1 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–1491 after this AD is published.

FAA's Justification and Determination of the Effective Date

There are currently no domestic operators of these products. Accordingly, notice and opportunity for prior public comment are unnecessary, pursuant to 5 U.S.C. 553(b)(3)(B). In addition, for the forgoing reasons, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

Regulatory Flexibility Act (RFA)

The requirements of the RFA do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without notice and comment, RFA analysis is not required.

Costs of Compliance

Currently, there are no affected U.S.-registered airplanes. If an affected airplane is imported and placed on the U.S. Register in the future, the FAA provides the following cost estimates to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product
Retained actions from AD 2022–10–08	2 work-hours × $85 per hour = $170	$0	$170
New actions	2 work-hours × $85 per hour = $170	0	170

The FAA estimates the following costs to do any necessary on-condition action that would be required based on the results of any required actions. The FAA has no way of determining the number of aircraft that might need this on-condition action:

ESTIMATED COSTS OF ON-CONDITION ACTION

Action	Labor cost	Parts cost	Cost per product
Seat rail cover replacement	1 work-hour × $85 per hour = $85	Up to $160	Up to $245 (per rail cover).
Seat replacement	3 work-hours × $85 per hour = $255	Up to $21,600	Up to $21,855 (per seat).

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, and

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:
■ a. Removing Airworthiness Directive (AD) 2022–10–08, Amendment 39–22046 (87 FR 31129, May 23, 2022); and
■ b. Adding the following new AD:

2023–14–05 Airbus SAS: Amendment 39–22505; Docket No. FAA–2023–1491; Project Identifier MCAI–2022–01644–T.

(a) Effective Date

This airworthiness directive (AD) is effective September 13, 2023.

(b) Affected ADs

This AD replaces AD 2022–10–08, Amendment 39–22046 (87 FR 31129, May 23, 2022) (AD 2022–10–08).

(c) Applicability

This AD applies to Airbus SAS Model A320–214, –251N, and –271N airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2021–0166R1, dated December 22, 2022 (EASA AD 2021–0166R1).

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by reports that damaged seat rail covers were detected in the forward and aft seat fixation area of some airplanes during initial delivery. Since AD 2022–10–08 was issued, it was determined that additional passenger seats are affected. The FAA is issuing this AD to address deformation or compression of the seat rail covers caused by improper transportation, handling, or installation on the airplane. This condition, if not addressed, could lead to seat track detachment, possibly resulting in injury to passengers.

(f) Compliance

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

(g) Requirements

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2021–0166R1.

(h) Exceptions to EASA AD 2021–0166R1

(1) Where paragraph (1) of EASA AD 2021–0166R1 specifies to accomplish a detailed inspection of each affected part within 12 months after July 27, 2021 (the effective date of EASA AD 2021–0166, dated July 13, 2021 (EASA AD 2021–0166)), for this AD do the inspection at the applicable compliance time specified in paragraph (h)(1)(i) or (ii) of this AD.

(i) For the parts identified in Appendix 1 of EASA AD 2021–0166, do the inspection within 12 months after June 7, 2022 (the effective date of AD 2022–10–08).

(ii) For the parts identified in Appendix 1 of EASA AD 2021–0166R1, except those identified in Appendix 1 of EASA AD 2021–0166, do the inspection within 6 months after the effective date of this AD.

(2) Where paragraph (2) of EASA AD 2021–0166R1 specifies actions if ''discrepancies are detected,'' for this AD a discrepancy is an out-of-tolerance distance between the forward and aft attachment screws or a damaged (deformed or compressed) seat rail cover.

(3) Where paragraph (3) of EASA AD 2021–0166R1 allows deferral of certain actions, for this AD replace the text ''in accordance with the applicable instructions and limitations of Master Minimum Equipment List (MMEL) item 25–20–01A'' with ''in accordance with the applicable instructions and limitations of FAA MMEL item 25–21–01 or equivalent instructions and limitations in the operator's existing FAA-approved minimum equipment list (MEL)''.

(4) Where paragraph (4) of EASA AD 2021–0166R1 refers to its effective date, this AD requires using the effective date of this AD.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2021–0166R1.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2021–0166R1 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Additional AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraph (j)(2) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(k) Additional Information

For more information about this AD, contact Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3667; email *Timothy.P.Dowling@faa.gov.*

(l) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on September 13, 2023.

(i) European Union Aviation Safety Agency (EASA) AD 2021–0166R1, dated December 22, 2022.

(ii) [Reserved]

(4) The following service information was approved for IBR on June 7, 2022 (87 FR 31129, May 23, 2022).

(i) EASA AD 2021–0166, dated July 13, 2021.

(ii) [Reserved]

(5) For EASA AD 2021–0166 and EASA AD 2021–0166R1, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find EASA AD 2021–0166R1 on the EASA website at *ad.easa.europa.eu.* You may find EASA AD 2021–0166 at *regulations.gov* under Docket No. FAA–2023–1491.

Note 1 to paragraph (l)(5): EASA AD 2021–0166 is no longer available through the EASA website. The FAA will provide access to this material for the life of this AD as required by 5 U.S.C. 552(a) and 1 CFR part 51.

(6) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–1491.

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

Issued on August 22, 2023.

Victor Wicklund,

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

[FR Doc. 2023–18527 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 738

[Docket No. 230815–0195]

RIN 0694–AJ25

Expansion of Nuclear Nonproliferation Controls on the People's Republic of China and Macau; Correction

Correction

In rule document 2023–18047 beginning on page 56763 of the issue of Monday, August 21, 2023, make the following correction:

Supplement No. 1 to Part 738 [Corrected]

■ On page 56763, following Amendatory instruction 2 at the bottom of the page, the table entitled COMMERCE COUNTRY CHART is corrected to read as set forth below:

COMMERCE COUNTRY CHART

[Reason for control]

Countries	Chemical & biological weapons			Nuclear nonprolif-eration		National security		Missile tech	Regional stability		Firearms convention	Crime control			Anti-terrorism	
	CB1	CB2	CB3	NP1	NP2	NS1	NS2	MT1	RS1	RS2	FC1	CC1	CC2	CC3	AT1	AT2
			*		*			*		*	*					
China	X	X	X	X	X	X	X	X	X	X		X		X		
			*		*			*		*	*					
Macau	X	X	X	X	X	X	X	X	X	X		X		X		
			*		*			*		*	*					

[FR Doc. C1–2023–18047 Filed 8–28–23; 8:45 am]

BILLING CODE 0099–10–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9979]

RIN 1545–BQ81

Additional Guidance on Low-Income Communities Bonus Credit Program

Correction

■ In Rule Document 2023–17078, appearing on pages 55506 to 55548 in the issue of Tuesday, August 15, 2023, in the second column, on page 55540, amendatory instruction 2 is corrected to read as follows:

■ **Par. 2.** Sections 1.48(e)–0 and 1.48(e)–1 are added to read as follows:

[FR Doc. C1–2023–17078 Filed 8–28–23; 8:45 am]

BILLING CODE 0099–10–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2022–0013; T.D. TTB–189; Ref: Notice No. 218]

RIN 1513–AC91

Establishment of the Winters Highlands Viticultural Area

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) establishes the approximately 7,296-acre ''Winters Highlands'' viticultural area in portions of Solano and Yolo Counties in California. The Winters Highlands viticultural area is not located within any other established viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

DATES: This final rule is effective September 28, 2023.

FOR FURTHER INFORMATION CONTACT: Karen A. Thornton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; phone 202–453–1039, ext. 175.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). In addition, the Secretary of the Treasury has delegated certain administrative and enforcement authorities to TTB through Treasury Order 120–01.

Part 4 of the TTB regulations (27 CFR part 4) authorizes TTB to establish definitive viticultural areas and regulate the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB

regulations (27 CFR part 9) sets forth standards for the preparation and submission to TTB of petitions for the establishment or modification of American viticultural areas (AVAs) and lists the approved AVAs.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features, as described in part 9 of the regulations, and a name and a delineated boundary, as established in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to the wine's geographic origin. The establishment of AVAs allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of an AVA is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations (27 CFR 4.25(e)(2)) outlines the procedure for proposing an AVA and provides that any interested party may petition TTB to establish a grape-growing region as an AVA. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions for the establishment or modification of AVAs. Petitions to establish an AVA must include the following:

- Evidence that the area within the proposed AVA boundary is nationally or locally known by the AVA name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed AVA;
- A narrative description of the features of the proposed AVA affecting viticulture, such as climate, geology, soils, physical features, and elevation, that make the proposed AVA distinctive and distinguish it from adjacent areas outside the proposed AVA boundary;
- The appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed AVA, with the boundary of the proposed AVA clearly drawn thereon; and
- A detailed narrative description of the proposed AVA boundary based on USGS map markings.

Petition To Establish the Winters Highlands AVA

TTB received a petition on behalf of Berryessa Gap Vineyards proposing the establishment of the ''Winters Highlands'' AVA in portions of Solano and Yolo counties in California. The proposed Winters Highlands AVA covers approximately 7,296 acres and is not located within any other AVA. There are planted vineyards covering approximately 134 acres within the proposed AVA, as well as three wineries. According to the petition, an additional 60 acres of vineyards are planned for planting in the next few years. According to the petition, the distinguishing features of the proposed Winters Highlands AVA are its climate, specifically, its temperature, precipitation, and relative air humidity, and its soils.

According to the petition, the proposed AVA is located on the eastern side of the Coast Ranges, which provide shelter from most of the cool air blowing eastward from the Pacific Ocean. However, the Berryessa Gap, a break in the Coast Ranges where Putah Creek flows into the manmade Lake Berryessa, does allow some cool air from the Pacific Ocean directly into the proposed AVA, particularly in the evenings. The petition states that, as a result, the proposed AVA tends to have cooler evenings than the more inland regions to the north. The petition also says that the proposed AVA has more growing degree days [1] (GDDs) than surrounding areas and a wide difference between daily minimum and maximum temperatures. This set of conditions promotes the growth of Mediterranean-type grapes.

The GDD data indicates that the proposed Winters Highlands AVA has higher average GDD accumulations than all surrounding regions except those to the northeast. The proposed AVA has a greater average monthly maximum temperature than all the other regions, except the Woodlands region to the northeast from May to September, when temperature differences are most pronounced. From March to September, the average monthly minimum temperature of the proposed AVA is similar to locations east and northeast of the proposed AVA and higher than temperatures in the other surrounding locations. The petition includes frost-free data that indicates the proposed AVA has more frost-free days than any of the other locations except the region east of the proposed AVA. According to the petition, frost-free days are the criterion that determines the length of the growing season for wine grape production regions, since spring frost can damage the newly emerged shoots and fall frost can lead to berry damage and aging of the leaves, or leaf senescence. Precipitation amounts in the proposed AVA were similar to amounts in the region southeast of the proposed AVA; greater than the amounts in the regions to the southwest, east, and northeast; and lower than the amounts to the west during winter. Precipitation amounts greatly affect the level of water retained in the soil and decisions about vineyard irrigation during the growing season. Data for average relative air humidity suggests the proposed Winters Highlands AVA has lower humidity than all the surrounding regions throughout the year, except during October and November, when the humidity rises slightly and becomes similar to that of the region northeast of the proposed AVA. Air humidity during the growing season profoundly influences pest and disease control in the vineyards.

The proposed Winters Highlands AVA contains soils that are dominated by fine clay or loamy alfisols and inceptisols with gentle to steep slopes and a mean annual soil temperature between 15 to 22 degrees C. The petition also describes the soils as warm and somewhat dry in the summer and cool and wet in the winter. The soils within the proposed AVA are mostly well or moderately well drained, which is critical for root growth and respiration. The petition also states that soils within the proposed AVA generally have a lower soil pH than those to the east. A higher soil pH could affect the availability of soil nutrients.

The petition states that soils found in the northeastern portion of the proposed AVA are very deep and derived from mixed sources on the alluvial fan, while soils found on the western and southeastern portions are relatively shallow and formed on the terraces from sedimentary rocks. North and south of the proposed AVA, the soils have a similar profile to those of the proposed AVA. However, according to the petition, soils with poor or somewhat poor drainage are more prevalent in the region to the north of the proposed AVA, while soils derived from sedimentary rocks, rather than alluvium, are more common in the region to the south. The regions east and

[1] Heat summation is calculated as the sum of the mean monthly temperature above 50 degrees Fahrenheit (F) during the growing season from April 1 to October 31 and is expressed as growing degree days (GDDs). A baseline of 50 degrees F is used because there is almost no shoot growth below this temperature. *See* Albert J. Winkler et al., *General Viticulture* (Berkeley: University of California Press, 2nd ed. 1974), pages 67–71.

southeast of the proposed AVA are dominated by soils formed from the alluvium of mixed sources. To the southwest of the proposed AVA, soils are mainly loamy or clay mollisols, vertisols, ultisols and alfisols on alluvial fans and terraces.

Notice of Proposed Rulemaking and Comments Received

TTB published Notice No. 218 in the **Federal Register** on November 28, 2022 (87 FR 72932), proposing to establish the Winters Highlands AVA. In the notice, TTB summarized the evidence from the petition regarding the name, boundary, and distinguishing features of the proposed AVA. The notice also compared the distinguishing features of the proposed AVA to the surrounding areas. For a detailed description of the evidence relating to the name, boundary, and distinguishing features of the proposed AVA and for a detailed comparison of the distinguishing features of the proposed AVA to the surrounding areas, see Notice No. 218. In Notice No. 218, TTB solicited comments on the sufficiency and accuracy of the name, boundary, and other required information submitted in support of the petition. The comment period closed on January 27, 2023.

In response to Notice No. 218, TTB received one comment. The commenter expressed their full support for the AVA, but also stated that the proposed AVA should be expanded to the west to incorporate additional area. They stated that they have 2 ranches in the area that they plan for future vineyards and would like the AVA to include their planned vineyards that border the proposed area. The commenter did not provide additional information regarding how the name, climate, and soil evidence might apply to the expansion area.

TTB Determination

After careful review of the petition and the comment received in response to Notice No. 218, TTB finds that the evidence provided by the petitioner supports establishing the Winters Highlands AVA as proposed. TTB is not expanding the boundary of the AVA as suggested by the comment due to a lack of information to support such a change. Accordingly, under the authority of the FAA Act, section 1111(d) of the Homeland Security Act of 2002, and parts 4 and 9 of the TTB regulations, TTB establishes the ''Winters Highlands'' AVA in Solano and Yolo Counties, California, effective 30 days from the publication date of this document.

Boundary Description

See the narrative description of the boundary of the Winters Highlands AVA in the regulatory text published at the end of this final rule.

Maps

The petitioner provided the required maps, and they are listed below in the regulatory text. The Winters Highlands AVA boundary may also be viewed on the AVA Map Explorer on the TTB website at *https://www.ttb.gov/wine/ava-map-explorer.*

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. For a wine to be labeled with an AVA name or with a brand name that includes an AVA name, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible for labeling with an AVA name and that name appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the AVA name appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label. Different rules apply if a wine has a brand name containing an AVA name that was used as a brand name on a label approved before July 7, 1986. *See* 27 CFR 4.39(i)(2) for details.

With the establishment of the Winters Highlands AVA, its name, ''Winters Highlands,'' will be recognized as a name of viticultural significance under § 4.39(i)(3) of the TTB regulations (27 CFR 4.39(i)(3)). The text of the regulations clarifies this point. Consequently, wine bottlers using the name ''Winters Highlands'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, will have to ensure that the product is eligible to use the AVA name as an appellation of origin.

Establishing the Winters Highlands AVA will not affect any existing AVA. Establishing the Winters Highlands AVA will allow vintners to use ''Winters Highlands'' as an appellation of origin for wines made primarily from grapes grown within the Winters Highlands AVA if the wines meet the eligibility requirements for the appellation.

Regulatory Flexibility Act

TTB certifies that this regulation will not have a significant economic impact on a substantial number of small entities. The regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of an AVA name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

It has been determined that this final rule is not a significant regulatory action as defined by Executive Order 12866 of September 30, 1993. Therefore, no regulatory assessment is required.

Drafting Information

Vonzella C. Johnson of the Regulations and Rulings Division drafted this final rule.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

For the reasons discussed in the preamble, TTB amends title 27, chapter I, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Add § 9.290 to read as follows:

§ 9.290 Winters Highlands.

(a) *Name.* The name of the viticultural area described in this section is ''Winters Highlands.'' For purposes of part 4 of this chapter, ''Winters Highlands'' is a term of viticultural significance.

(b) *Approved maps.* The four United States Geological Survey (USGS) 1:24,000 scale topographic maps used to determine the boundary of the Winters Highlands viticultural area are:

(1) Winters, CA, 2018;

(2) Allendale, CA, 2018;

(3) Mount Vaca, CA, 2018; and

(4) Monticello Dam, CA, 2018.

(c) *Boundary.* The Winters Highlands viticultural area is located in portions of Solano and Yolo Counties, California. The boundary of the Winters Highlands viticultural area is as follows:

(1) The boundary begins on the Winters map at the intersection of Putah

Creek Road and Wintu Way. From the beginning point, proceed southeasterly along Wintu Way, crossing onto the Allendale map, to the terminus of Wintu Way; then

(2) Proceed south-southwest in a straight line for 1.05 miles to the eastern terminus of Morse Lane; then

(3) Proceed westerly along Morse Lane to its intersection with Olive School Lane; then

(4) Proceed north-northwest in a straight line for 2.52 miles, crossing over the northeastern corner of the Mount Vaca map and onto the Monticello Dam map, to the line's intersection with Highway 128, approximately 2.78 miles west of the intersection of Highway 128 and County Road 89; then

(5) Proceed north in a straight line to the intersection of the line with the Chickahominy Slough; then

(6) Proceed east-southeast along the Chickahominy Slough, crossing onto the Winters map, to its intersection with the 170-foot elevation contour; then

(7) Proceed south-southeasterly along the 170-foot elevation contour to its intersection with the Winters Canal; then

(8) Proceed south along the Winters Canal to its intersection with the terminus of an unnamed local road; then

(9) Proceed due west in a straight line to the 200-foot elevation contour; then

(10) Proceed south in a straight line to the northern terminus of County Road 88; then

(11) Proceed south along County Road 88 to its southern terminus and continue south in a straight line to Valley Oak Drive; then

(12) Proceed southerly along Valley Oak Drive to its intersection with Highway 128; then

(13) Proceed southeasterly in a straight line for 1.04 miles, returning to the beginning point.

Signed: August 21, 2023.

Mary G. Ryan,

Administrator.

Approved: August 22, 2023.

Thomas C. West, Jr.,

Deputy Assistant Secretary (Tax Policy).

[FR Doc. 2023–18588 Filed 8–28–23; 8:45 am]

BILLING CODE 4810–31–P

SELECTIVE SERVICE SYSTEM

32 CFR Part 1660

RIN 3240–AA02

Release of Official Information in Litigation and Presentation of Witness Testimony by Selective Service System (SSS) Personnel (Touhy Regulation)

AGENCY: United States Selective Service System.

ACTION: Final rule.

SUMMARY: The Selective Service System (SSS) is finalizing regulations to ensure consistent processing of *Touhy* requests; clarify the responsibilities of all parties in the *Touhy* process; and provide additional information about criteria that SSS and its Components should consider in the *Touhy* process.

DATES: This rule is effective September 28, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. Daniel A. Lauretano, Sr., General Counsel, 703–605–4012, *dlauretano@sss.gov.*

SUPPLEMENTARY INFORMATION: SSS published a proposed rule on June 23, 2023 (88 FR 41051). No public comments were received and SSS is finalizing this rule without change.

A. Summary of New Regulatory Provisions and Their Impact

The final rule creates *Touhy* regulations for the SSS to: (1) Promote consistent processing of *Touhy* requests among the SSS and SSS Components; (2) clarify the responsibilities of all parties in the *Touhy* process; and (3) provide additional information about criteria that SSS should consider in the *Touhy* process. The final rule sets forth the procedures to be followed with respect to a demand seeking official information or employee testimony relating to official information for use in a legal proceeding. The final rule also sets forth certain definitions, it applies to all SSS personnel (see § 1660.3), in particular, members and personnel of the Office of the Director, National Headquarters Directorates and Offices, Region Offices, the Data Management Center, the National Appeals Board, District Appeals Boards, Local Boards (including panels, multicounty, and intracounty boards), and all other organizational entities within the SSS (referred to collectively in this part as the ''SSS Components'').

The final rule is intended to provide guidance for the internal operations of the SSS, without displacing the responsibility of the Department of Justice to represent the United States in litigation. The final rule does not apply to the release of official information or the presentation of witness testimony in connection with:

(1) Administrative proceedings or investigations conducted by the SSS.

(2) Security-clearance adjudicative proceedings.

(3) Administrative proceedings conducted by or for the Equal Employment Opportunity Commission or the Merit Systems Protection Board.

(4) Negotiated grievance proceedings conducted in accordance with a collective bargaining agreement.

(5) Requests by Government counsel representing the United States or a Federal agency in litigation.

(6) Disclosures to Federal, State, local, or foreign authorities related to investigations or other law-enforcement activities conducted by a Federal law-enforcement officer, agent, or organization.

The final rule does not affect in any way existing laws or SSS programs governing:

(1) The release of official information or the presentation of witness testimony in grand jury proceedings.

(2) Freedom of Information Act requests submitted pursuant in accordance with 32 CFR part 1662, even if the records sought are related to litigation.

(3) Privacy Act requests submitted pursuant in accordance with 32 CFR part 1665, even if the records sought are related to litigation.

(4) The release of official information outside of litigation.

The final rule does not create any right or benefit (substantive or procedural) enforceable by law against the SSS or the United States.

The final rule defines: *Court, Demand, Disclosure, Legal advisor, Litigation, Litigation request, Official information, Personnel,* and *SSS Components.*

The final rule outline the SSS policy to make official factual information, both testimonial and documentary, reasonably available for use in Federal courts, State courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure. It makes clear that SSS personnel shall not provide such official information, testimony, or documents, submit to interview, or permit a view or visit, without the authorization required by this part. It stresses that SSS personnel shall not provide, with or without compensation, opinion or expert testimony concerning official SSS information, subjects, personnel, or

activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written special authorization required by this part. Finally, it provides that upon a showing by a requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the SSS or the United States, the SSS GC may, in their sole discretion, and pursuant to the guidance contained in part 1660, grant such written special authorization for SSS personnel to appear and testify as expert or opinion witnesses at no expense to the United States.

Parties who submit a litigation request or demand to the SSS must describe, in writing and with specificity:

(1) The nature of the official information or witness testimony sought, its relevance to the litigation, and other pertinent details addressing the factors in § 1660.8.

(2) The litigation request or demand must show whether the request is consistent with the policy and rules of part 1660.

(3) The litigation request or demand must include copies of the complaint and relevant proceedings and be submitted at least 30 days before the desired date to the Selective Service System, General Counsel, 1501 Wilson Blvd., Suite 800, Arlington, Virginia 22209.

(4) If the litigation request or demand seeks testimony, the identity of the SSS employee whose testimony is sought and a detailed summary about the relevance of the employee's testimony to the underlying legal proceeding.

(5) If the litigation request or demand seeks documents or other materials, a description of the requested official information sought and a detailed summary about its relevance to the underlying legal proceeding.

(6) An explanation of the unavailability of the requested official information or employee testimony through other sources.

(7) An explanation of how each of the factors set forth in 32 CFR 1660.8 applies to their demand.

The final rule requires that this information must be submitted at least 30 calendar days before the official information or employee testimony is needed and further require the submission of the above information even if parties serve a subpoena on the SSS or a SSS employee. A litigation request or demand will not be granted if a party fails to follow the instructions set forth in the regulations.

SSS personnel who receive a litigation request or demand are to:

(1) Inform their supervisors about the litigation request or demand so the supervisors may inform the SSS GC or other SSS legal advisor; and

(2) Refrain from providing official information and/or testimony in response to the litigation request or demand.

B. Background & Legal Basis for This Rule

The Housekeeping Statute, 5 U.S.C. 301, authorizes agency heads to promulgate regulations governing ''the custody, use, and preservation of its records, papers, and property.''

The Supreme Court held in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951), that under such authority, agency heads may establish procedures for determining whether to release official information and allow personnel testimony sought through a subpoena or other litigation request. This final rule sets forth SSS's procedures, which as the Supreme Court explained, are useful and necessary as a matter of internal administration to prevent possible harm from unrestricted disclosures in court. Currently, the SSS does not have *Touhy* regulations. This final rule creates new regulations spanning §§ 1660.1 through 1660.11.

C. Expected Impact of the Final Rule

This final rule action will not impose any new costs. These SSS *Touhy* regulations will clarify and streamline requests and will produce efficiency and uniformity to the public's benefit. Less attorney time will be spent searching for SSS request procedures and complying with its requirements. After reviewing other agency regulations, the SSS concluded that attorneys for third-party litigants will save considerable time in performing research, review, and compliance time per subpoena or litigation request when referring to the Code of Federal Regulations for guidance.

For purposes of estimating the cost savings, the SSS's subject matter experts deemed it reasonable to use the mean hourly wage for lawyers as informed by the Bureau of Labor and Statistics, $78.74.[1] In addition to these cost savings, there will be an unquantified benefit of transparency through access to official information, while safeguarding classified, privileged, and personally identifiable information.

[1] This information can be found in the website of the Bureau of Labor Statistics under National Wage Data for Lawyers, Occupation Code 23–1011 (available at *https://www.bls.gov/oes/current/oes231011.htm*), last updated in May 2019.

D. Executive Order (E.O.) 12866, ''Regulatory Planning and Review,'' E.O. 13563, ''Improving Regulation and Regulatory Review,'' and Congressional Review Act (5 U.S.C. 801–08)

E.O.s 12866 and 13563 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, distribute impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Following the requirements of these E.O.s, the Office of Management and Budget has determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866 nor a ''major rule'' as defined by 5 U.S.C. 804(2).

E. Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

SSS certifies that this final rule is not subject to the Regulatory Flexibility Act, 5 U.S.C. 601, because it would not have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require SSS to prepare a regulatory flexibility analysis.

F. Section 202 of Public Law 104–4, ''Unfunded Mandates Reform Act'' (2 U.S.C. 1532)

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require the expenditure of $100 million or more (in 1995 dollars, adjusted annually for inflation) in any one year. This final rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

G. Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 1660 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act.

H. E.O. 13132, ''Federalism''

E.O. 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This final rule will not

have a substantial effect on State and local governments.

I. E.O. 11623, Delegation of Authority & Coordination Requirements

In E.O. 11623, the President delegated to the Director of Selective Service the authority to prescribe the necessary rules and regulations to carry out the provisions of the Military Selective Service Act. In carrying out the provisions of E.O. 11623, as amended by E.O. 13286, the Director shall request the views of the Secretary of Defense, the Attorney General, the Secretary of Labor, the Secretary of Health, Education, and Welfare, the Secretary of Homeland Security (when the Coast Guard is serving under the Department of Homeland Security), the Director of the Office of Emergency Preparedness, and the Chairman of the National Selective Service Appeal Board with regard to such proposed rule or regulation, and shall allow not less than 10 days for the submission of such views before publication of the proposed rule or regulation. On June 13, 2023, the SSS completed its coordination requirements, and the Director certifies that he has requested the views of the officials required to be consulted pursuant to subsection (a) of E.O. 11623, considered those views and as appropriate incorporated those views in these regulations, and that none of them has timely requested that the matter be referred to the President for decision.

List of Subjects in 32 CFR Part 1660

Government employees, Organization and functions (Government agencies).

■ For the reasons discussed in the preamble, the Selective Service System amends 32 CFR chapter XVI by adding part 1660 to read as follows:

PART 1660—RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND PRESENTATION OF WITNESS TESTIMONY BY SSS PERSONNEL (TOUHY REGULATION)

Sec.

Authority: 5 U.S.C. 301; 50 U.S.C. 3809; and E.O. 11623, 36 FR 19963, 3 CFR, 1971–1975 Comp., p. 614, as amended by E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

§ 1660.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for the release of official information in litigation and the presentation of witness testimony by Selective Service System (SSS) personnel pursuant to 5 U.S.C. 301 and the Supreme Court's decision in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

§ 1660.2 Applicability.

This part:

(a) Applies to all SSS personnel (see § 1660.3), in particular, members and personnel of the Office of the Director, National Headquarters Directorates and Offices, Region Offices, Data Management Center, the National Appeals Board, District Appeals Boards, Local Boards (including panels, multicounty, and intercounty boards), and all other organizational entities within the SSS (referred to collectively in this part as the ''SSS Components'').

(b) Is intended only to provide guidance for the internal operations of the SSS, without displacing the responsibility of the Department of Justice to represent the United States in litigation.

(c) Does not preclude official comments on matters in litigation.

(d) Does not apply to the release of official information or the presentation of witness testimony in connection with:

(1) Administrative proceedings or investigations conducted by or for a SSS Component.

(2) Security-clearance adjudicative proceedings.

(3) Administrative proceedings conducted by or for the Equal Employment Opportunity Commission or the Merit Systems Protection Board.

(4) Negotiated grievance proceedings conducted in accordance with a collective bargaining agreement.

(5) Requests by Government counsel representing the United States or a Federal agency in litigation.

(6) Disclosures to Federal, State, local, or foreign authorities related to investigations or other law-enforcement activities.

(e) Does not affect in any way existing laws or SSS programs governing:

(1) The release of official information or the presentation of witness testimony in grand jury proceedings.

(2) Freedom of Information Act requests submitted pursuant to 32 CFR part 1662, even if the records sought are related to litigation.

(3) Privacy Act requests submitted pursuant to 32 CFR part 1665, even if the records sought are related to litigation.

(4) The release of official information outside of litigation.

(f) Does not create any right or benefit (substantive or procedural) enforceable at law against the SSS or the United States.

§ 1660.3 Definitions.

These terms and their definitions are for the purpose of this part.

Court. A Federal, State, or local court, tribunal, commission, board, or other adjudicative body of competent jurisdiction.

Demand. An order or subpoena by a court of competent jurisdiction for the production or release of official information or for the presentation of witness testimony by SSS personnel at deposition or trial.

Disclosure. The release of official information in litigation or the presentation of witness testimony by SSS personnel.

Legal advisor. (1) The General Counsel of the SSS (SSS GC).

(2) Any legal advisor designated by the SSS GC.

Litigation. All pretrial (*e.g.,* discovery), trial, and post-trial stages of existing judicial or administrative actions, hearings, investigations, or similar proceedings before a court, whether foreign or domestic.

Litigation request. Any written request by a party in litigation or the party's attorney for the production or release of official information or for the presentation of witness testimony by SSS personnel at deposition, trial, or similar proceeding.

Official information. All information of any kind and however stored that is in the custody and control of the SSS, relates to information in the custody and control of the SSS, or was acquired by SSS personnel due to their official duties or status.

Personnel. (1) Employees of the SSS.

(2) Present and former (*e.g.,* retired, separated) Service members assigned to, detailed to, or otherwise affiliated with the SSS.

(3) Present and former (*e.g.,* retired, separated) employees of another Federal agency assigned to, detailed to, or otherwise affiliated with the SSS.

(4) Any individuals who are or were supervised by an SSS official and who perform or have performed services for the SSS through a contractual arrangement.

(5) Any individuals who perform or have performed services for the SSS as

a volunteer board member (local, panel, multicounty, intracounty, district appeals).

(6) Members of the National Appeals Board.

SSS Components. The SSS Components consist of:

(1) The Office of the Director.

(2) National Headquarters Directorates and Offices.

(3) Region Offices.

(4) Data Management Center.

(5) the National Appeals Board.

(6) District Appeals Boards.

(7) Local Boards (including panels, multicounty, and intercounty boards).

(8) All other organizational entities within the SSS.

§ 1660.4 Policy.

(a) It is the policy of the SSS to make official factual information, both testimonial and documentary, reasonably available for use in Federal courts, State courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure.

(b) SSS personnel, as defined in § 1660.3, however, shall not provide such official information, testimony, or documents, submit to interview, or permit a view or visit, without the authorization required by this part.

(c) SSS personnel shall not provide, with or without compensation, opinion or expert testimony concerning official SSS information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written special authorization required by this part.

(d) Paragraphs (b) and (c) of this section constitute a regulatory general order, applicable to all SSS personnel individually, and need no further implementation. A violation of the provisions in paragraphs (b) and (c) is the basis for appropriate administrative procedures with respect to civilian employees. Moreover, violations of this paragraph (d) by SSS personnel may, under certain circumstances, be actionable under 18 U.S.C. 207.

(e) Upon a showing by a requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the SSS or the United States, the SSS GC may, in their sole discretion, and pursuant to the guidance contained in this part, grant such written special authorization for SSS personnel to appear and testify as expert or opinion witnesses at no expense to the United States.

§ 1660.5 Responsibilities—the Selective Service System General Counsel.

The SSS GC has overall responsibility for the policy in this part, oversees the implementation of its procedures throughout the SSS, and provides supplemental guidance as appropriate.

§ 1660.6 Responsibilities—the SSS Component heads.

The SSS Component heads implement the policy and procedures in this part and, through the SSS GC or other SSS legal advisor, provide guidance for their respective components.

§ 1660.7 Procedures—authorities.

(a) In response to a litigation request or demand, and after any required coordination with the Department of Justice, the SSS GC and other SSS legal advisor (see § 1660.3) are authorized to:

(1) Determine whether the respective SSS Components may release official information originated by or in the custody of such components.

(2) Determine whether personnel assigned to, detailed to, or affiliated with the respective SSS Components may be contacted, interviewed, or used as witnesses concerning official information or, in exceptional circumstances, as expert witnesses.

(3) Impose conditions or limitations on disclosures approved pursuant to this paragraph (a) (*e.g.,* approve the release of official information only to a Federal judge for in-camera review).

(4) Assert claims of privilege or protection before any court.

(b) The SSS GC may assume primary responsibility for responding to any litigation request or demand.

§ 1660.8 Procedures—factors to consider.

In making a determination pursuant to § 1660.7(a), the SSS GC and other SSS legal advisor will consider whether:

(a) The litigation request or demand is overbroad, unduly burdensome, or otherwise inappropriate under applicable law or court rules, or this part.

(b) The disclosure would be improper (*e.g.,* the information is irrelevant, cumulative, or disproportional to the needs of the case) under the rules of procedure governing the litigation from which the request or demand arose.

(c) The official information or witness testimony is privileged or otherwise protected from disclosure under applicable law.

(d) The disclosure would violate a statute, Executive order, regulation, or policy.

(e) The disclosure would reveal:

(1) Information properly classified pursuant to 44 U.S.C. chapters 21, 22, 31, 33, and 35; 5 U.S.C. 102, 105, 552, and 552a; Executive Order 12968, ''Access to Classified Information,'' August 2, 1995, as amended; Intelligence Community Directive 703, ''Protection of Classified National intelligence, Including Sensitive Compartmental Information (SCI),'' June 21, 2013; Executive Order 12958, ''Classified National Security Information,'' April 17, 1995, as amended; and Presidential Memorandum, ''Implementation of the Executive Order, 'Classified National Security Information,' '' December 29, 2009.

(2) Controlled Unclassified Information pursuant to Executive Order 13556, ''Controlled Unclassified Information,'' November 4, 2010, as amended; and 32 CFR part 2002.

(3) Technical data withheld pursuant to 32 CFR part 250.

(4) Information protected by the Privacy Act, which may not be disclosed in the absence of written consent, a routine use, or other authority listed in 5 U.S.C. 552a(b).

(5) Information otherwise exempt from unrestricted disclosure.

(f) The disclosure would:

(1) Interfere with an ongoing law enforcement proceeding.

(2) Compromise a constitutional right of another.

(3) Expose an intelligence source or confidential informant.

(4) Divulge a trade secret or similar confidential information.

(5) Be otherwise inappropriate.

§ 1660.9 Procedures—requirements and determinations.

(a) A litigation request or demand must describe, in writing and with specificity, the nature of the official information or witness testimony sought, its relevance to the litigation, and other pertinent details addressing the factors in § 1660.8.

(b) A litigation request or demand must be submitted at least 30 days before the desired date to the Selective Service System, General Counsel, 1501 Wilson Blvd., Suite 800, Arlington, Virginia 22209.

(c) Personnel and former personnel (*e.g.,* retired employees and Reserve Service Members, past volunteers) who receive a litigation request or demand must notify the SSS GC or their SSS legal advisor immediately.

(d) If another Federal agency originated the responsive information or otherwise has the primary equity with respect to that information, the SSS GC will:

(1) Transfer the litigation request or demand (or the appropriate portions) to such other agency for action.

(2) Inform the requesting party or issuing court.

(e) If the litigation request or demand requires a response before a determination can be made, the SSS GC or other SSS legal advisor will inform the requesting party or the issuing court (through the Department of Justice) that the request or demand is still under consideration. The SSS GC or other SSS legal advisor also may seek a stay from the court in question until a final determination is made.

(f) Upon making a final determination pursuant to § 1660.7(a), the SSS GC or other SSS legal advisor will inform the requesting party or issuing court.

(g) If the SSS GC or other SSS legal advisor approves the release of official information or the presentation of witness testimony, personnel will limit the disclosure to those matters approved by the SSS GC or other SSS legal advisor. Personnel may not release, produce, comment on, or testify about any official information without the prior written approval of the SSS GC or other SSS legal advisor.

(h) If a court orders a disclosure that the SSS GC or other SSS legal advisor previously disapproved or has yet to approve, personnel must respectfully decline to comply with the court's order unless the SSS GC or other SSS legal advisor directs otherwise.

§ 1660.10 Procedures—fees.

Parties seeking official information by litigation request or demand may be charged reasonable fees to reimburse expenses associated with the Government's response. These reimbursable expenses may include the cost of:

(a) Materials and equipment used to search for, copy, and produce responsive information.

(b) Personnel time spent processing and responding to the request or demand.

(c) Attorney time spent assisting with the Government's response, to include reviewing the request or demand and the potentially responsive information.

§ 1660.11 Procedures—expert or opinion testimony.

In any legal proceeding before the SSS or in which the United States (including any Federal agency or officer of the United States) is a party:

(a) The SSS GC shall arrange for an employee to testify as a witness for the United States whenever the attorney representing the United States requests it.

(b) SSS personnel may testify for the United States both as to facts within their personal knowledge and as an expert or opinion witness. Except as provided in paragraph (c) of this section, SSS personnel may not testify as an expert or opinion witness, with regard to any matter arising out of their official duties or the functions of the SSS, for any party other than the United States in any legal proceeding in which the United States is a party. SSS personnel who receive a demand to testify on behalf of a party other than the United States may testify as to facts within the employee's personal knowledge, provided that the testimony be subject to the prior written approval of the SSS GC or other SSS legal advisor and to the Federal Rules of Civil Procedure and any applicable claims of privilege, the anticipated testimony is not adverse to the interests of the SSS or the United States Government, and is presented at no cost to the Government.

(c) SSS personnel may testify as an expert or opinion witness on behalf of the SSS or in any legal proceeding conducted by the SSS or the United States.

Daniel A. Lauretano, Sr.,

General Counsel.

[FR Doc. 2023–18601 Filed 8–28–23; 8:45 am]

BILLING CODE 8015–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0743]

RIN 1625–AA00

Safety Zone; Lahaina Boat Basin, Maui, HI—Emergency Operations and Port Recovery

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

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the navigable waters in the vicinity of Lahaina Boat Basin, Maui, Hawaii. The temporary safety zone encompasses all waters extending 200 yards from shore starting from the potential safety hazards associated with the damage assessment, debris management, vessel salvage and port recovery of Lahaina Boat Basin and surrounding waters, through September 27, 2023. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Honolulu or designated representative.

DATES: This rule is effective without actual notice from August 29, 2023, through September 27, 2023. For the purposes of enforcement, actual notice will be used from August 24, 2023, until August 29, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2021–0742 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Commander Wade Thomson, Waterways Management Division, U.S. Coast Guard Sector Honolulu at (808) 541–4359 or *Wade.P.Thomson@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

On August 9, 2023, high winds and wildfires struck portions of Maui, Hawaii, causing damage to coastal infrastructure and prompting mass rescue operations for area residents.

On August 9, 2023, the Coast Guard issued a rulemaking creating a temporary safety zone for all waters extending 1 nautical mile from shore starting from the northernmost point of Kekaa Point, Maui, thenceforth to the southernmost point at Hekili Point, Maui, to protect personnel, vessels, and the marine environment from potential hazards associated with emergency response and port recovery operations after wildfires affected the area (88 FR 55373, August 15, 2023). The safety zone was effective through August 23, 2023. A copy of the rulemaking that ended on August 23, 2023, is available in Docket USCG–2023–0669, which can be found using instructions in the **ADDRESSES** section. However, additional time is needed to continue to provide protection against hazards in the area due to emergency response and port recovery operations. The safety zone encompasses all waters extending 200 yards from shore starting from the northernmost boundary at Wahikuli Wayside Park, Maui, thenceforth to the southernmost boundary at Launiupoko Beach Park, Maui.

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) because it would be impracticable and contrary to the public interest. The Coast Guard was unable to publish an NPRM and hold a reasonable comment period for this rulemaking due to the emergent nature of the continuing damage assessment and salvage operations.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action to restrict vessel traffic within the safety zone is needed to protect life, property and the environment, therefore a 30-day notice period is impracticable. Delaying the effective date would be contrary to the safety zone's intended objectives of providing immediate protection to on-scene emergency personal, creating a working buffer necessary to mitigate any safety and potential pollution threats caused by the wildfires and establishing immediate maritime safety in the vicinity of on-scene damage assessments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. On August 9, 2023, the Coast Guard was informed of damage, pollution, and debris in the vicinity of Lahaina Boat Basin, Maui, Hawaii. The Coast Guard COTP Sector Honolulu has determined that the potential hazards associated with the emergency response and port recovery efforts connected to wildfires in the area constitute a safety concern for anyone within the designated safety zone. This rule is necessary to protect personnel, vessels, and the marine environment within the navigable waters of the safety zone during ongoing emergency response and port recovery operations.

IV. Discussion of the Rule

This rule is in effect from August 24, 2023, through September 27, 2023, at 11:59 p.m., or until emergency response and port recovery operations are complete, whichever is earlier. If the safety zone is terminated prior to 11:59 p.m. on September 27, 2023, the Coast Guard will provide notice via a broadcast notice to mariners. The temporary safety zone encompasses all waters extending 200 yards from shore starting from the northernmost boundary at Wahikuli Wayside Park, Maui, thenceforth to the southernmost boundary at Launiupoko Beach Park, Maui. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards associated with ongoing emergency response and port recovery operations after wildfires affected the area. No vessel or person will be permitted to enter the safety zone absent the express authorization of the COTP or his 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 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 limited duration of the safety zone. This zone impacts a small, designated area of the Lahaina Harbor and surrounding waters and operations may suspend early at the discretion of the Captain of the Port, Sector Honolulu.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting that will prohibit entry within certain navigable waters of Lahaina Boat Basin. It is categorically excluded from further review under paragraph L60(d) of 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 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.T14–0743 to read as follows:

§ 165.T14–0743 Safety Zone; Pacific Ocean, Lahaina Boat Basin, Maui, HI—Emergency Operations and Port Recovery.

(a) *Location.* The following area is a safety zone: All waters extending 200 yards from shore starting from the northernmost boundary at Wahikuli Wayside Park, Maui, thenceforth to the southernmost boundary at Launiupoko Beach Park, Maui.

(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, and local officer designated by or assisting the Captain of the Port Sector Honolulu (COTP) in the enforcement of the safety zone.

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

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF/FM Chanel 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced August 24, 2023, through September 27, 2023, unless an earlier end is announced by broadcast notice to mariners.

Dated: August 24, 2023.

A.L. Kirksey,

Captain, U.S. Coast Guard, Captain of the Port Sector Honolulu.

[FR Doc. 2023–18697 Filed 8–25–23; 4:15 pm]

BILLING CODE 9110–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 74

[MB Docket No. 03–185; FCC 23–58; FR ID 159756]

Digital Low Power Television and Television Translator Stations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission or FCC) adopts rules to clarify for all stakeholders the status of LPTV FM6 service and codify that these services may be provided by a group of 14 existing FM6 stations, and only by those stations.

DATES: Effective September 28, 2023, except for the amendments in § 74.790(o)(9) and (10), which are delayed indefinitely. The Commission will publish a separate document in the **Federal Register** announcing the effective date of those amendments.

FOR FURTHER INFORMATION CONTACT: Shaun Maher, Video Division, Media Bureau at (202) 418–2324 or *Shaun.Maher@fcc.gov,* or, Mark Colombo, Video Division, Media Bureau at (202) 418–7611 or *Mark.Colombo@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 Commission's R&O, in MB Docket No. 03–185; FCC 23–58, adopted on July 20, 2023, and released on July 20, 2023. The full text of this document is available for download at *https://docs.fcc.gov/public/attachments/FCC-23-58A1.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).

Paperwork Reduction Act of 1995 Analysis

This document contains a new or modified information collection requirement subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirement contained in the proceeding. These new or modified information collections will become effective after the Commission publishes a document in the **Federal Register** announcing such approval and the relevant effective date. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, (Pub. L. 107–198), it previously sought specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25

employees.'' (44 U.S.C. 3506(c)(4)). The Commission described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis (FRFA), attached as Appendix C.

Congressional Review Act

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

Synopsis

Authorizing FM6 Operations as Ancillary or Supplementary Services

In the R&O, the Commission concludes that both the Communications Act of 1934 (Act) and its rules allow existing FM6 operations to be provided on an ancillary or supplementary basis to a channel 6 LPTV station's digital television operation, and that it is in the public interest to preserve FM6 operations by existing FM6 LPTV stations. The Act provides that ancillary or supplementary services must be ''consistent with the public interest, convenience, and necessity''; must be ''consistent with the technology or method designated by the Commission for the provision of advanced television services''; and must ''avoid derogation of any advanced television services.'' The Commission concludes that existing FM6 services meet all of these requirements of the Act.

Existing FM6 Operations Serve the Public Interest as Required by Section 336(a)(2)

The Commission concludes that existing FM6 operations are consistent with the mandate of section 336(a)(2) of the Act that the Commission allow digital television stations ''to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.'' Specifically, the Commission notes the length of time that certain FM6 LPTV stations have been operating and efforts they undertook to convert to digital operations to limit consumer impact. To preserve their programming (especially public safety and emergency information) that viewers have come to rely on, the Commission finds the public interest will be served by continuing existing FM6 operations. Further, the Commission finds that the benefits of preserving *existing* FM6 LPTV stations outweigh concerns that FM6 operations are an inefficient use of spectrum or could cause interference to their own television service or other licensed users.

The Commission found that the record in this proceeding reflects widespread recognition of the long history of public interest benefits provided by existing FM6 LPTV stations' FM6 operations. Since the 1980s, FM6 LPTV stations have maintained a close connection with the communities they serve through their FM6 programming. Listeners have tuned to existing FM6 LPTV stations for foreign language, religious and sports programming; programming intended to support historically underserved populations such as native Spanish speakers, immigrant populations; and programming designed for niche music audiences. In addition, existing FM6 LPTV stations provide emergency and public safety information that their listeners have come to rely upon in times of disasters. Although some commenters contend that certain FM6 LPTV stations are not serving the public interest because they are not providing any programming designed specifically for their local audiences but are merely airing music programming, the Commission does not make distinctions based on format. Therefore, the Commission finds that the record weighs in favor of the public interest benefits provided by existing FM6 LPTV stations.

Although FM6 LPTV stations were required to discontinue analog television operations and convert to digital in July 2021, there were 13 FM6 LPTV stations that were able to complete their digital transition and resume their FM6 operations with an FM6 STA with limited, if any, service interruptions. The Commission notes that more than half of the 13 existing FM6 LPTV stations were able to convert to digital and resume their FM6 operations within 2 months of terminating their analog operations in July 2021. The remaining stations resumed FM6 operations between 4 and 8 months after the July 2021 transition deadline mainly due to supply chain delays in obtaining the necessary FM6 equipment that were outside of their control. The Commission finds that preserving the long-time audio programming offered by these remaining FM6 LPTV stations aligns with one of the Commission's core principles guiding the digital transition—minimizing service disruptions. FM6 LPTV stations provide free, over-the-air synchronized video and audio programming using a standard-compliant ATSC 3.0 signal and supplement that programming with additional free, over-the-air analog audio broadcast services. The availability of these additional audio services has provided programmers with a platform on which to invest in programming directed to unserved or underserved audiences that may not be available on any other stations in their markets—all while continuing to provide free over-the-air video programming pursuant to their television licenses. To remove this service that radio listeners have relied on for many years would contravene the Commission's goal of preserving service.

The public interest benefits of preserving existing FM6 operations also outweigh concerns about inefficient use of spectrum. Some analog FM6 LPTV stations had a history of minimal video service. With analog television operations, an FM6 LPTV station could not transmit a separate audio stream for its video programming and for radio reception. The rules the Commission adopted in the R&O address this issue. FM6 LPTV stations will be required to transmit a dual digital television and analog radio signal, thereby providing both new digital television services while maintaining existing audio services. The rules the Commission adopts ensure that FM6 LPTV stations are first and foremost LPTV stations and that their video programming stream is prioritized over any audio stream. Further, enhanced compression technologies encompassed in the ATSC 3.0 standard provide broadcasters even greater bandwidth capacity on their channel for television services than under the ATSC 1.0 standard. Therefore, the Commission believes the rules it adopts appropriately address previous concerns that FM6 LPTV stations are using their spectrum inefficiently. The Commission is not persuaded by commenters that suggest FM6 LPTV stations will abandon their current programming thereby undoing the public interest basis for allowing their continued FM6 operations. As the Commission has previously recognized, offering additional services on an existing television channel ''contributes to efficient spectrum use and can expand and enhance use of existing spectrum.''

Further, the Commission concludes that the public interest benefits of preserving existing FM6 operations offset concerns about existing FM6 operations causing interference to an

FM6 LPTV station's own digital television service or to FM radio licensees. To date, existing FM6 LPTV stations that have been operating under the technical limitations in the FM6 STAs and using ATSC 3.0 for their digital television signal have an established track record of not causing interference to adjacent channel FM stations or their own television signal. Existing FM6 LPTV stations have been operating for almost two years via engineering STAs without any legitimate interference complaints from either adjacent channel FM radio stations or their own TV viewers. Moreover, the Commission notes that no commenter has presented credible evidence in the record that any of the existing FM6 LPTV stations have caused interference.

To the extent that there have been interference-free FM6 operations, the Commission observes that such record is limited to the anecdotal history of the 13 existing FM6 LPTV stations. Based on co-existence concerns raised throughout this proceeding, the Commission has sought to develop a comprehensive record on the potential for FM6 operations to cause interference. One area of potential interference is to the ''host'' channel 6 LPTV station's own digital operations. A ''host'' station is a channel 6 LPTV station that provides a digital television service, but also provides an analog FM radio operation over the same channel. The Commission has asked if an FM6 LPTV station would be able to operate an analog transmitter without interfering or derogating its co-channel digital operation. Some commenters argued that an FM6 LPTV station operating in digital could experience so-called ''host interference''—a phenomena where a new signal interferes with a station's existing signal, in this case an LPTV station operating both digital television and analog FM radio signals. Similarly, the Commission sought comment on the potential of interference to adjacent channel FM radio stations on 88.1 and 88.3 MHz. Some commenters raised concerns that higher power FM6 operations on 87.75 MHz could interfere with lower power adjacent channel FM radio stations operating on 88.1 MHz and 88.3 MHz. Despite repeated requests, commenters have failed to produce detailed interference studies that show that FM6 operations will not cause interference to either host digital television operations or adjacent channel FM radio stations in all circumstances. Therefore, because the Commission has only anecdotal evidence involving specific unmodified stations, it is unable to conclusively state that no interference will occur from prospective new FM6 LPTV stations that do not have a track record of interference-free operations.

For prospective new FM6 operations, such interference concerns outweigh any benefits from adopting rules allowing new FM6 operations to commence, thus leading us to conclude that adopting rules to allow all channel 6 LPTV stations to offer new FM6 services would not serve the public interest as required by section 336(a)(2) of the Act. Even though some TV6 LPTV stations may have previously provided FM6 service while operating in analog before the digital transition (*i.e.,* legacy analog FM6 stations), the Commission again does not have sufficient technical analysis to say for certain that there would be no interference to their own television operations or adjacent FM radio stations were it to allow them to recommence FM6 operations. Accordingly, the Commission believes it prudent to proceed cautiously and establish rules in this Order only for existing FM6 stations, which have an established track record of non-interference and a history of providing FM6 service to the public. Commenters support limiting FM6 operations to the existing LPTV stations, provided the Commission take steps to ensure that the existing stations (and WVOA–LD) will continue to provide FM6 service without causing interference. To that end, the Commission adopts specific FM6 operational rules, such as limiting modifications and explicitly requiring that FM6 operations be conducted only on a non-interference basis.

The Commission also concludes that the record in this proceeding demonstrates that there are no reasonable alternatives for existing FM6 operations that provide the same level of accessibility to existing audiences. The Commission is persuaded that the additional expense and/or lack of access make other options impractical as reasonable substitutes for established audiences and services. As commenters point out, to receive a digital audio stream on an LPTV station's multicast channel, the listener would need to purchase a digital television receive antenna in order to access the audio stream. Further, listeners would lose the portability of an existing FM6 LPTV station's audio signal as it would only be available on a television set, which is generally a fixed device. Instead of having to take these additional, potentially costly steps to continue receiving this established audio programming, permitting existing FM6 operations to continue as they are currently offered will allow listeners to utilize existing FM radio receivers, including in cars and using other portable radio devices, and continue to obtain FM6 audio programming in the manner that radio listeners are accustomed to receiving such audio content.

Similarly, the Commission finds that relocating FM6 programming to digital subchannels on local FM or LPFM stations could also be a more costly option because it too would potentially involve the purchase of new equipment for some consumers instead of relying on existing receivers. Additionally, FM6 LPTV stations would have to negotiate programming agreements with FM and LPFM radio stations and pay to air their programming on other stations instead of simply airing their programming on their own station. Further, given the unique types of programming often provided by FM6 LPTV stations, it may be difficult to find an entity interested in carrying their streams that is different from the entity's programming. As for making the programming available through the internet, this would create significant barriers for listeners who do not have internet access, may only have fixed internet access (thus losing portability of the existing FM6 audio signal), or may not have mobile internet access with sufficient data plans or a device capable of streaming audio.

Finally, the Commission finds that obtaining a separate FM or LPFM radio license provides an unlikely alternative. In particular, because LPFM stations must be operated on a noncommercial educational basis, they are not an option for FM6 LPTV stations that historically have operated as commercial stations. The Commission believes most if not all FM6 LPTV stations are operating on a commercial basis as evidenced by the fact that most FM6 LPTV stations submitted Annual DTV Ancillary/Supplementary Services Reports (LMS Form 2100—Schedule 317) indicating that they have had revenues from their FM6 operations. Further, in the case of either LPFM or full power FM, acquiring a station could be an expensive and time consuming proposition for many FM6 LPTV stations, especially for those in larger markets. Therefore, for all of the foregoing reasons, the Commission concludes that the public interest is best served by allowing existing FM6 operations to continue as an ancillary or supplementary service.

Existing FM6 Operations Satisfy Section 336(b)(1)

As required by section 336(b)(1), the Commission concludes that existing FM6 operations are ''consistent with'' the ''technology or method designated by the Commission for the provision of advanced television services . . . .'' As an initial matter, the Commission interprets the phrase ''consistent with'' to allow for a degree of flexibility by requiring ancillary or supplementary services to be compatible with the technology or method for providing advanced television services. A more narrow reading of the phrase ''consistent with'' that affords less flexibility would unreasonably constrain the types of ancillary or supplementary services stations can provide, thereby frustrating Congressional intent to ''[p]ermit[ ] broadcasters more flexibility in using their spectrum assignments [ ] consistent with the public policy goal of providing additional services to the public.'' The Commission has most recently interpreted this provision of the Act broadly, observing that ''Congress recognized that the transition from analog to digital broadcast technology would enable DTV licensees to provide new and innovative services . . . over their additional spectrum capacity and wanted to provide licensees with the flexibility necessary to utilize fully that new potential.'' In addition, the Commission interprets the phrase ''technology or method designated by the Commission for the provision of advanced television services'' to mean the transmission standards required for digital television stations that have been adopted by the Commission and incorporated in the rules. While the Commission's rules allow LPTV stations to comply with either the ATSC 1.0 or 3.0 standard in providing advanced television services, the Commission analyzes here compatibility of analog FM6 with only ATSC 3.0 consistent with the rules the Commission adopts below.

The Commission finds that existing analog FM6 radio operations are compatible with the ATSC 3.0 standard, and therefore satisfy section 336(b)(1). The ATSC 3.0 standard allows for configurability, permitting FM6 LPTV stations to make their television signal narrower and/or have the signals settings modified to have increased error correction intended to prevent co-channel interference between the stations' digital television and analog radio signals. Existing FM6 LPTV stations operating in ATSC 3.0 have been able to continue to deliver free over-the-air ATSC 3.0 television signals configured to occupy approximately 5.5 MHz of their digital channel capacity while at the same time providing analog FM6 on a frequency within their 6 MHz channel. Television channel 6 encompasses the 82–88 MHz band. The Act and the rules do not require a licensee to use its *entire* 6 MHz channel solely for the provision of advanced television services. In fact, in adopting the ancillary or supplementary provisions of the rules, the Commission provided numerous examples of non-television services as being permissible ancillary or supplementary services including: ''computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, subscription video'' whether offered on a ''broadcast, point-to-point, or point-to-multipoint basis.'' For these reasons, including the configurability afforded by ATSC 3.0, the Commission finds that existing analog FM6 radio operations are compatible with the ATSC 3.0 standard.

The Commission disagrees with commenters suggesting that the definition of ''advanced television services'' should apply to all services that are incorporated into a digital television station's 6 MHz digital bitstream. Such a finding would be in complete contradiction with the flexibility afforded to broadcasters under the Act, and implemented by the rules, to offer ancillary or supplementary services. A digital LPTV station may offer ancillary or supplementary services on its assigned frequencies as long as such services are ''*consistent* with the technology or method designated by the Commission for the provision of advanced television services'' and, as discussed in greater detail below, ''*avoid derogation of* any advanced television services . . . that the Commission may require using such frequencies.'' Based on these facts, the Commission concludes that FM6 LPTV stations operations are consistent with the technology or method designated by the Commission for the provision of advanced television systems, as required by section 336(b)(1) of the Act and defined by the rules.

The Commission rejects arguments that FM6 operations are precluded by section 336(b)(1) of the Act because FM6 stations are providing separate audio and visual offerings or that FM6 operations are not ''consistent with technology or method designated by the Commission for the provision of advanced television services'' because neither the ATSC 3.0 standard nor the rules specifically refer to analog audio signals. As an initial matter, neither section 336 nor the rules mandate that particular ancillary or supplementary services must be specifically integrated into or mentioned within the pertinent digital television transmission standard (in this case, ATSC 3.0) or in the rules. Rather, the Commission's rules require only that a digital television station transmit at least one over-the-air video program signal at no charge to viewers as a precondition to offering ancillary and supplementary services. The rules also permit digital LPTV broadcasters to transmit separate aural and visual program material as long as the visual signal can be viewed on a receiver based on the ATSC standard. Here, FM6 stations comply with this rule by providing a television signal while the analog audio stream is transmitted through a separate analog audio carrier.

Existing FM6 Operations Satisfy Section 336(b)(2)

As required by section 336(b)(2), the Commission next finds that existing FM6 operations do not ''derogat[e] any advanced television services.'' One commenter claims that, by providing an FM6 operation that uses a portion of an LPTV station's bandwidth, it is ''denying advanced television services to the entire 6 MHz band as required by statute'' and that this ''derogate[s] the NextGen ATSC 3.0 experience and therefore does not meet the statutory test.'' The Commission disagrees. The derogation prong of section 336(b)(2) prohibits derogation of ''any advanced television services . . . that the Commission may require using such frequencies.'' The derogation standard does not address what hypothetical advanced television services a station could offer; rather, it addresses the advanced television services a station actually offers and are otherwise required by the Commission. Under the rules broadcasters are only required to provide one free over-the-air video programming stream. Further, as discussed above, broadcasters are not required to utilize their entire 6 MHz stream solely for television services and are authorized by the Act and the rules to offer ancillary or supplementary services over a portion of their spectrum. The record demonstrates that the use of ATSC 3.0 to broadcast a station's television stream(s) is intended to prevent interference between the station's digital television and analog radio signals and thereby does not run afoul of the derogation provision of section 336(b)(2) of the Act or § 73.624(c) of the rules.

Limiting FM6 Operations to Existing Operators

The Commission adopts its proposal to allow only FM6 LPTV stations with ''active'' FM6 STAs to continue to provide FM6 service. The Commission will define ''active'' FM6 STAs to be initial FM6 STAs that were either granted and unexpired, or a request for extension of an STA that was granted or pending on June 7, 2022 of the release date of the adopted Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations, Fifth Notice of Proposed Rulemaking, MB Docket No. 03–185, FCC 22–40 (87 FR 36440) (*Further Notice of Proposed Rulemaking* (*FNPRM*)). The Commission also requires that to be considered an ''active'' FM6 STA, the STA must remain unexpired (*i.e.,* through grant of subsequent extension(s)) or have a pending extension request on file as of the effective date of this R&O.

Eligible FM6 LPTV Stations. The Commission concludes that the public interest benefits of preserving the existing programming of the 13 FM6 LPTV stations with active FM6 STAs outweighs the risk of potential interference to other licensed users by these 13 FM6 LPTV stations. The Commission also finds that limiting the class of stations eligible to provide FM6 services is consistent with both section 336(a)(2) of the Act, which states that the Commission shall adopt regulations authorizing ancillary or supplementary services that ''may be consistent with the public interest, convenience, and necessity,'' and section 336(b)(5) of the Act, which states that in adopting regulations authorizing ancillary or supplementary services the Commission shall ''prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.'' These 13 stations (as well as WVOA–LD), present unique circumstances that weigh in favor of permitting continued FM6 operations as an ancillary or supplementary service. Some commenters maintain that limiting the class of entities that can provide FM6 service is inconsistent with the requirement under section 307(b) of the Act to ''provide a fair, efficient, and equitable distribution of radio service.'' As an initial matter, section 307(b) applies only when the Commission is ''considering applications for licenses, and modifications and renewals thereof.'' In this R&O, however, no applications are before us; rather, the Commission establishes rules for existing licensees to provide certain ancillary or supplementary services, so section 307(b) does not apply. In addition, given their lower power and secondary nature, the Commission has not considered the mandate of section 307(b) of the Act when deciding how to allocate LPTV stations.

The Commission finds the 13 FM6 LPTV stations with active FM6 STAs are distinguishable from other channel 6 LPTV stations that have either never provided FM6 service or were legacy FM6 stations when they were operating in analog, but are no longer providing such service. As an initial matter, the 13 FM6 LPTV stations with active FM6 STAs have a history of providing consistent FM6 service both prior to and following the July 13, 2021 LPTV digital television transition. These stations not only promptly transitioned to digital operations, but they also converted to ATSC 3.0 and obtained an FM6 STA within a reasonable period following their digital transition. As a result, listeners have maintained their reliance on these stations, and preserving access to programming on which listeners have come to rely weighs heavily in favor of permitting these 13 FM6 LPTV stations to continue their existing FM6 operations. Second, permitting only the existing FM6 LPTV stations to provide FM6 service presents a solution to the interference concerns raised by adjacent-band FM stations. Existing FM6 LPTV stations' facilities have been ''frozen'' in place and were not permitted to be modified. While such stations have been operating without any verified complaints of interference, the Commission has established rules to ensure that such interference-free operations continue into the future with no negative impact on other licensees or their own digital television service. The same cannot be said of FM6 operations from prospective new FM6 LPTV stations for which the Commission does not have a track record of non-interference since the LPTV digital television transition.

WVOA–LD. The Commission concludes that WVOA–LD, Westvale, New York, licensed to Metro TV, Inc., should be permitted to provide FM6 operations. The station previously provided FM6 service while an analog station, and was prepared to operate an FM6 station prior to the release of the *FNPRM.* However, the station was unable to complete its conversion to ATSC 3.0 digital operations and initiate FM6 operations pursuant to an FM6 STA due to a delay in grant of an application for minor modification. Grant of the application was delayed because the requisite international coordination clearance from Canada had not been received by the Commission prior to release of the *FNPRM.* WVOA–LD indicates that such minor modification was necessary in order to adequately implement their digital television service and recommence its FM6 operation. Because this proceeding was ongoing at the time of the grant, the license was granted with a condition stating that WVOA–LD was not permitted to conduct FM6 operations, subject to the outcome of this proceeding. Given the Commission's decision to permit WVOA–LD to offer FM6 services, the Commission instructs the Media Bureau to add a notation to the WVOA–LD license indicating that FM6 operations are permitted pursuant to § 74.790(o) of the Commission's rules and this *R&O.* The Commission finds the delay in obtaining international coordination was truly outside of WVOA–LD's control, and good cause to permit WVOA–LD to provide FM6 operations. The Commission has recognized certain delays in international coordination as truly beyond the control of the station. Here, WVOA–LD took all steps necessary to secure Canadian approval and the delays in approval were truly outside the control of WVOA. No commenter opposes this finding.

In order to confirm that no interference will occur, the Commission requires that WVOA–LD initially commence FM6 operations under special temporary authority and operate under such authority for a period of one-year. Although WVOA–LD argues that such a requirement is unnecessary, the Commission disagrees because unlike the 13 existing FM6 LPTV stations, the Commission does not have a record of WVOA–LD operating in digital while providing FM6 service. Therefore, within 85 days of the effective date of this *R&O*, the Commission requires WVOA–LD to commence both ATSC 3.0 and FM6 operations by filing an application to convert its facility to ATSC 3.0, and request for engineering STA. The period of 85 days represents the amount of time WVOA–LD would have had to resume FM6 operations in order to have been included in the group of 13 FM6 LPTV stations with ''active'' FM6 STAs if its minor modification application did not require international coordination and was actionable upon filing when filed on March 11, 2022. WVOA–LD must notify the Bureau no more than 10 days after it commences FM6 operations by filing a written letter with the Secretary's office, to the attention of the Chief, Video Division, Media Bureau

and by providing an electronic version of that letter to the Chief of the Video Division, Media Bureau. The letter must provide the date the Station completed its transition to ATSC 3.0 and the date that it commenced FM6 operations. During the one-year period the station is operating pursuant to an FM6 STA, WVOA–LD will be required to comply with all rules adopted in this *R&O* that would otherwise pertain to an LPTV station conducting FM6 operations. In addition, WVOA–LD is required to file status reports of interference, as required for FM6 STAs, disclosing whether it has received any complaints of interference. During the initial six-month STA, status reports will be required after 90 days and 180 days of operation. WVOA–LD's status reports must be filed with the Secretary's office, to the attention of the Chief of the Video Division, Media Bureau. An electronic copy must also be sent via electronic mail to the Chief of the Video Division, Media Bureau. Upon extension of its STA, if granted, WVOA–LD must file one final status report disclosing whether it has received any interference complaints within five days of expiration of the STA. It must also state whether it intends to continue to provide FM6 service on a permanent basis following expiration of the STA. If no interference is found and WVOA–LD states it wishes to continue FM6 operations permanently, then WVOA–LD will be permitted to continue FM6 operations on the same basis as the other 13 stations discussed herein without the need for an STA.

New Entrants and Other ''Legacy'' Analog FM6 LPTV Stations. In contrast, the Commission cannot make similar conclusions about legacy analog FM6 LPTV stations that ceased FM6 operations or LPTV channel 6 stations that have never provided FM6 services. In the *FNPRM,* the Commission recognized that there may be a limited number of legacy analog FM6 LPTV stations that discontinued their FM6 operations at the time of the LPTV digital transition in July 2021, but intended to resume their FM6 operations once their new digital facilities were completed. The Commission asked if it should permit these stations to begin providing FM6 operations under the same conditions as existing FM6 LPTV stations. In response, the Commission received comments from two legacy FM6 LPTV stations—WJMF–LD, Jackson, Mississippi, licensed to KTL, and KBFW–LD, Arlington, Texas, licensed to Benavides. The Commission finds that these stations are distinguishable from the 13 FM6 LPTV stations with active FM6 STAs and WVOA–LD.

WJMF–LD terminated its analog television operations in July 2021 to comply with the LPTV digital transition deadline and completed its conversion to ATSC 1.0 digital operations in January 2022. Although it was a legacy FM6 LPTV station, the station, at a minimum, has not provided FM6 service since at least July 13, 2021, nor (unlike WVOA–LD) did it take steps to preserve FM6 operations. As such the Commission is unable to conclude that there is an audience that relies on WJMF–LD's FM6 operations, in contrast to the 13 existing operators that have been providing service and submitting periodic reporting demonstrating a lack of interference from their operations. There is also no record of FM6 operations upon which to determine if the station could operate without causing interference. While the station's current digital license largely mirrors the contour of its former analog facility, in May 2022 WJMF–LD was granted a construction permit to increase its coverage area. Such a modification could significantly alter the potential interference profile of the station and remains unbuilt, unlike the 13 existing operators about whose FM6 operations the Commission does have a record of non-interference. WJMF–LD also failed to provide any circumstances, as in the case of WVOA–LD, that prevented it from taking steps to maintain its FM6 operations, as the 13 other stations did, following the digital television transition deadline. The Commission finds that KTL had ample time following the digital transition deadline and prior to release of the *FNPRM* to pursue steps to preserve its FM6 operations, but for its own independent reasons chose not to take action.

As for KBFW–LD, it was a legacy analog FM6 LPTV station that did not convert to digital ATSC 1.0 until September 1, 2021. Unlike WJMF–LD, however, it continued its FM6 analog operation, without Commission authority, until sometime in May 2022 when the station was instructed by the Enforcement Bureau to cease and desist its FM6 analog operations. The station did not seek to convert to ATSC 3.0 until July 2022. KBFW–LD has pending before the Bureau an application to convert its station to ATSC 3.0. The Commission provides KBFW–LD 30 days following release of this *R&O* to notify the Video Division (Division) of its intent to proceed with transitioning its facility to ATSC 3.0 operations. If KBFW–LD intends to proceed with transitioning to ATSC 3.0, it must amend its pending application to identify its new transition date. Alternatively, KBFW–LD may withdraw its application. Should KBFW–LD fail to amend its request or seek withdrawal of its application within 30 days, the Bureau is instructed to dismiss the pending application. Benavides contends that Bureau staff assured him that he would be permitted to obtain an FM6 STA. This appears to be an inaccurate characterization of the guidance provided. In a series of emails dating back to August 2021, Bureau staff provided both Benavides and his counsel detailed instructions on how to proceed with filing an FM6 STA. Benavides and his counsel failed to follow these instructions and instead proceeded to continue to provide, at minimum, analog FM service, without a valid authorization. Notwithstanding any potential misunderstanding about obtaining an FM6 STA, Benavides still was not prepared to convert to ATSC 3.0 and commence FM6 operations pursuant to FM6 STA until July 2022.

Similar to WJMF–LD, the station has not provided FM6 service for an extended period of time—having last engaged in authorized operations nearly two years ago. As such, the Commission is unable to conclude there is an audience that has continued to rely on KBFW–LD's FM6 operations, as the Commission has for the 13 FM6 stations that have continued to provide FM6 service, with limited or no interruption. Further, as was the case with WJMF–LD, there is no record of the station operating as an FM6 LPTV station pursuant to an FM6 engineering STA upon which to determine if the station could operate without causing interference. KBFW–LD did operate in digital ATSC 1.0 with an FM6 operation for several months but such operation was not authorized and the Commission will not recognize it for purposes of determining the station's operational record. KBFW–LD also fails to provide any circumstances truly beyond its control, as in the case of WVOA–LD, that prevented it from taking steps to maintain its FM6 operations, as 13 other stations did following the LPTV digital television transition deadline. Like KTL, Benavides had ample time following the digital transition deadline and prior to release of the *FNPRM* to pursue steps to preserve its FM6 operations, but did not take the necessary steps in time. In light of all these facts, the Commission rejects KTL and Benavides' calls to be permitted to provide FM6 services on their channel 6 LPTV stations.

Likewise, channel 6 LPTV stations that are seeking to be new entrants to FM6 operations do not have similar equities at play as the 13 FM6 LPTV

stations, as they have no established listener base that relies upon them, and the Commission therefore finds that there are insufficient public interest reasons to outweigh the interference concerns brought on by new FM6 operations. The Commission also finds that WVOA–LD is distinguishable from potential ''new entrants'' because WVOA–LD had an established audience prior to the digital transition and was prepared to proceed with FM6 operations, but was prevented from doing so because approval of its application was pending international coordination. Even to the extent that there are licensees that obtained channel 6 LPTV stations with the expectation that they may be able to provide FM6 operations, the public interest rationale—maintaining service on which an audience has come to rely—does not apply to hypothetical scenarios about service a licensee might provide. In addition, these new entrant stations have no record regarding interference because they have not been providing FM6 service, unlike the 13 existing FM6 operators which have an established track record of no interference. For the foregoing reasons, the Commission also rejects these stations' requests to be permitted to provide FM6 services in the future.

The Commission also rejects arguments that its decision to limit FM6 operations to certain stations is arbitrary and capricious. As discussed above, the Commission concludes that the public interest is served by maintaining existing FM6 services provided by stations that have actively taken steps to ensure continuity of service to their listeners. The Commission is also limiting the class of stations based on concerns of potential interference to other licensed users in areas where FM6 services are not currently provided or to their own digital channel 6 television operations. The 13 existing FM6 LPTV stations have a proven record of not causing interference to either other licensed FM station operations or to their own digital channel 6 operations. While the same cannot currently be said for WVOA–LD, as discussed above WVOA presents a unique circumstance in which the station was prepared to proceed with FM6 operations, but was prevented from doing so due to reasons truly outside of its control. It has subsequently completed construction of its facility and the Commission is adopting requirements herein to determine if the Station can establish a track record of no interference to other licensed operations. The Commission has no such record of interference-free FM6 operations by new stations or legacy FM6 stations no longer operating. The Commission concludes that the risk of upsetting the current, interference-free environment outweighs the benefit of permitting new FM6 LPTV stations and is contrary to the public interest rationale by which the Commission has determined that continued operation of current analog FM6 operations following the stations' digital television transition is justified.

The Commission is not persuaded by the argument that not all potential FM6 operators had the opportunity to convert to digital operations and obtain an FM6 STA. As discussed above, the Commission's examination of whether to permit the continuation of such services has extended nearly a decade. As such, the Commission believes that all channel 6 LPTV stations have had adequate notice of a potential change in Commission rules. In fact, a significant number of stations did take note and have been providing FM6 service following their conversion to digital, thus undermining arguments by some commenters that FM6 LPTV stations were not able to continue operations in the face of regulatory uncertainty.

Establishing Rules Governing FM6 Operations

Codifying Certain FM6 STA Conditions

Existing FM6 LPTV stations will be permitted to continue their FM6 operations subject to a new rule the Commission adopts that codifies certain conditions that are currently contained in the FM6 STAs. FM6 LPTV stations will be required to keep current their FM6 STAs until the rules the Commission adopts become final. The Commission disagrees with commenters that suggest that no rules are necessary. The Commission finds that rules are needed to ensure that FM6 LPTV stations continue to operate in a manner that is consistent with the public interest rationale for allowing FM6 operations to continue, to prevent interference with other licensees, and to prevent the derogation of their television signal as required by the Act and the rules.

The Commission codifies the following requirements based the current conditions set forth in the FM STAs: (1) FM6 LPTV stations must operate in ATSC 3.0 digital format; (2) FM6 LPTV stations must provide their FM6 operations on 87.75 MHz; (3) FM6 operations must be conducted on a non-interference basis to any other licensed primary or secondary user; (4) FM6 LPTV stations must provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum at any time the station is operating; (5) FM6 operations may not exceed the coverage area of the FM6 LPTV station's ATSC 3.0 synchronized video/audio programming stream; and (6) FM6 LPTV stations may make modifications to their technical facilities, as otherwise permitted under Part 74 of the Rules, so long as the contour of the station's modified facilities remains within its current protected contour. The Commission declines to require that FM6 LPTV station licenses be prohibited from being assigned or transferred or that they be subject to periodic reporting requirements, though the Commission does require that FM6 LPTV stations notify us of their intent to continue to or cease to provide FM6 operations and provide an ongoing certification as part of their license renewal application.

Requirement to Operate in ATSC 3.0 Format. The Commission requires FM6 LPTV stations operate using the ATSC 3.0 digital standard. Commenters unanimously support this requirement as a condition of being able to provide FM6 operations. The Commission recognizes that this is a departure from its policy of a voluntary transition for television stations to the ATSC 3.0 digital format; however, the Commission finds in this unique circumstance it is a necessary requirement in order to address concerns that FM6 operations will derogate the FM6 LPTV station's television service. LPTV stations may choose to operate in ATSC 3.0 but are not required to. Some commenters argue that previous studies show the potential for interference from FM6 operations to the LPTV station's own digital operation. However, these studies were conducted while FM6 LPTV stations were operating in ATSC 1.0. As evidenced by the ''Perry Priestly'' study and more recently through real-world operations under the FM6 STAs, because the ATSC 3.0 digital format is more configurable the existing FM6 LPTV stations have been able to make their television signal narrower and/or have the signals settings modified to have increased error correction intended to prevent co-channel interference between the stations' digital television and analog radio signals. Accordingly, in the case of the 13 existing FM6 LPTV stations, operating in ATSC 3.0 appears to have addressed concerns that FM6 operations will interfere with or derogate their own digital television operation. Therefore, in order to ensure that FM6 LPTV stations comply with the derogation standard set forth in the

Act and the rules, the Commission will require that they transmit their television signal using the ATSC 3.0 standard.

Operation on 87.75 MHz. The Commission requires FM6 transmissions to be conducted at 87.75 MHz. A majority of commenters supported this requirement. This is the frequency currently being used by all current FM6 LPTV stations and as a result it has been tested and shown by the 13 existing FM6 LPTV stations through their FM6 STAs to provide a quality FM signal without causing interference to other FM stations. As a condition to their FM6 engineering STAs, FM6 LPTV stations were required to operate on 87.75 MHz and to report any interference that occurred from their operations. No such interference has been reported to date. Absent additional technical data supporting a shift to 87.7 MHz, none of which has been provided in the record, the Commission finds taking the time now to develop a record would only serve to needlessly prolong an already complex proceeding. In addition, it is not clear what cognizable benefit to receivability there would be based on the documented experiences of FM6 LPTV stations that have been providing FM service over 87.75 MHz.

Operation of FM6 on a Non-Interference Basis. The Commission requires that FM6 operations be conducted on a non-interference basis ''to any other licensed user, including but not limited to broadcast television or radio users.'' The Commission agrees with commenters that FM6 LPTV stations must operate without causing any impermissible interference to other licensed users, both users with primary and secondary interference protection rights. The Commission disagrees with NAB that codification of this condition is unnecessary if FM6 operations are restricted to just a limited number of stations. By codifying this condition, the Commission seeks to continue to prevent interference and make clear that any interference to other licensed users will not be permitted as these services are being offered purely on an ancillary or supplementary basis.

Synchronized Video and Audio. The Commission further adopts the requirement that FM6 LPTV stations must provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum at any time the station is operating. The Commission concludes that adoption of this operational requirement will ensure that FM6 LPTV stations remain dedicated to providing the type of digital television service that viewers have come to expect from TV stations in addition to their FM6 operations. This requirement will also ensure that the spectrum, which has been allocated for the provision of television service, is being used in an efficient manner and for its primary purpose. A majority of commenters support this requirement. The Commission disagrees with the single commenter that called this requirement ''constitutionally dubious.'' Its decision to require one stream of synchronized video and audio programming is ''content neutral'' in that it does not reference or implement any requirements regarding the content of the speech. The D.C. Circuit has applied a ''heightened rational basis'' standard of review to content-neutral broadcast regulation. Applied here, requiring one stream of synchronized video and audio programming is reasonably tailored to satisfying the substantial governmental interest in ensuring that frequencies allocated for television service continue to be used for the types of television services viewers have come to expect from TV stations.

The synchronized video and audio programming condition was originally imposed on the FM6 STAs to ensure that digital LPTV stations providing FM6 operations continued to provide television service that meets viewers' expectations. Prior to the LPTV digital television transition in July 2021, when FM6 operations were being conducted as part of an LPTV station's analog channel 6 operation, most FM6 LPTV stations were sacrificing the extent of their television service by airing limited video-only programming. Because the audio signal for their analog TV station was dedicated to providing the FM6 service, the video service contained minimal video-only content, such as community bulletin boards. FM6 LPTV stations appeared to be focusing their resources on their radio FM6 operation over their television operation. However, digital television provides these stations a new opportunity to offer more substantial, independent video content synchronized with audio while still preserving their FM6 operations. Although other digital television stations are required to provide only one over-the-air *video* program signal at no direct charge to viewers, and may offer video only or separate video and audio on their television operations, given FM6 LPTV stations' past practice favoring their FM6 operations at the expense of their television operations, the Commission continues to believe it is prudent to make clear that an FM6 LPTV station must offer at least one stream of synchronized video and audio programming. This will ensure that FM6 LPTV stations provide the type of digital television service that viewers have come to expect from TV stations while also preserving their FM6 operations.

The Commission also declines to adopt the condition imposed in the current FM6 STAs that the synchronized audio and video programming be provided on a full time (24 × 7) basis. Because the rules provide that LPTV stations are ''not required to adhere to any regular schedule of operation,'' the Commission finds it more appropriate to adopt the revised version of this condition proposed in the *FNPRM* that requires that FM6 LPTV stations provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum ''at any time the station is operating.'' There was no opposition to this proposed revision. In order to ensure that a station's FM6 operations are not prioritized over its television service and that television remains its primary purpose, the Commission will consider a station to be ''operating'' any time it is engaged in FM6 operations over its channel.

LPTV and FM6 Operational Contours. The Commission also adopts the requirement that the service contour of a station's FM6 operation may not exceed the protected contour of the LPTV station. The Commission defines ''service contour'' as the service contour provided for in § 73.313 of the rules. The Commission defines ''protected contour'' as the protected contour provided for in § 74.792 of the rules. In the *FNPRM,* it proposed that ''the FM6 coverage area must be contained within and may not exceed the coverage area of the LPTV station's synchronized video/audio programming stream . . . .'' To more accurately describe the coverage areas of the FM6 and TV operations and to reflect the language used by the rules, the Commission will use the term ''service contour'' to describe the FM6 station's coverage area and ''protected contour'' to describe the TV station's coverage area. A similar condition was included in the FM6 STAs to prevent FM6 LPTV stations from configuring their LPTV station's technical facilities in a manner that would favor their FM6 operation over their digital television operation, something that, as just discussed, occurred while FM6 LPTV stations were solely operating in analog. The Commission finds that adopting a similar provision here will help to ensure that FM6 LPTV stations continue to focus their attention on the operation of their digital LPTV station—the primary purpose of their station license.

Further, it concludes that adoption of this requirement will provide a predictable coverage area for the FM6 signal. The Commission notes that currently FM6 LPTV stations operate with co-located television and FM6 facilities. FM6 LPTV stations operate separate transmitters—one digital television and one analog FM radio—that are combined into one transmission line and broadcast with a combined antenna. The rules the Commission adopts today permit only this type of configuration.

Commenters are united in their support for this requirement, however, there is disagreement on how to determine if the service contour of a station's FM6 operation is exceeding the protected contour of its television operation. After considering the record and further technical analysis, the Commission concludes that the best approach is to require the service contour of FM6 operations to be contained within, and may not exceed, the LPTV station's protected contour. The Commission finds the alternative approaches suggested by commenters are impractical and overly burdensome. It would be difficult, if not impossible, for an FM6 station to test all locations where both the synchronized video/audio and the analog FM signal can be heard. Further, the rules recognize different standards for measuring the strength of a digital LPTV signal and an FM audio signal. Rather than try to reconcile those differences in a single, ''one-size-fits-all rule,'' the Commission will allow FM6 LPTV stations to demonstrate the service contour of their FM6 operations and the protected contour of their TV operations using established methodologies for each service in the rules. FM6 LPTV stations have been using this approach in their 90-day and 180-day status reports filed as a condition to their FM6 STAs. FM6 LPTV stations have been successfully demonstrating in these reports that the service contour of their FM6 operations (as determined using the standard Part 73 methodology) does not exceed that of the protected contour of their LPTV operations (as determined using the standard Part 74 methodology). The Commission has no reason to question either the methodologies or results of these showings, especially as it has not received any evidence to the contrary.

Technical Modifications. The Commission will permit FM6 LPTV stations to make modifications to their technical facilities, as otherwise permitted under Part 74 of the Rules, so long as the protected contour of the station's modified television facilities remains within its current protected contour and the service contour of the station's FM6 operations does not exceed the protected contour of the station's television operation. For example, LPTV stations on channel 6 are not authorized to operate with an ERP greater than 3 kW. Initially, as a condition in FM6 engineering STAs, the Bureau restricted modifications in order to ''lock'' the FM6 LPTV station facilities operations in place while it were evaluating the potential for interference from FM6 operations to other users. The condition stated: ''[d]uring the term of this STA, the technical facilities of (FM6 LPTV station) may not be modified.'' In the *FNPRM* the Commission sought comment on whether to maintain this condition and whether to provide any exceptions. Commenters felt that this restriction was too stringent and expressed their concerns that such a condition could limit FM6 LPTV stations from making modifications to better serve their audiences.

Although the record reflects that there have been no reports of interference from the FM6 operations of the 13 existing FM6 LPTV stations, this has been based on their current operations which have been frozen for almost two years. Therefore, in order to prevent possible interference that could result if an FM6 LPTV station were to modify its facilities, the Commission finds it is appropriate to limit modifications that could expand an FM6 LPTV station's FM6 operations beyond the protected contour of its television operations as of the release date of this *R&O.* Allowing such changes could potentially upset the current interference free environment that serves as one basis for permitting continued FM6 operations. FM6 LPTV stations may seek to alter their protected contour if they can demonstrate that the change is an ''engineering necessity'' or can meet the Commission's general waiver standard.

Assignment and Transfer of FM6 LPTV Stations. The Commission concludes that FM6 LPTV stations should be permitted to be assigned or transferred. The FM6 STAs included a condition that limited FM6 LPTV stations from being assigned or transferred while FM6 operations were being conducted. While licensees of FM6 LPTV stations were always free to transfer their stations, such action would have required the termination of their FM6 operation. In the *FNPRM,* the Commission questioned whether inclusion of such a limit in its final FM6 rules would continue to serve the public interest. The Commission now concludes that it would not.

The Bureau imposed a restriction on transfers and assignments in an effort to maintain the status quo during the pendency of this proceeding and to prevent speculative transactions. This action stemmed from a concern that, during the pendency of this proceeding, parties could seek to obtain an FM6 station without any intention of continuing FM6 operations and for the sole purpose of immediately ''flipping'' the station to another party for a quick profit if continued FM6 operations were ultimately permitted. A small number of commenters believe it should be retained ''in perpetuity'' in order to prevent future speculation of FM6 LPTV stations. However, now that this proceeding is complete and the Commission has confined FM6 LPTV stations to only a limited number of stations that have demonstrated an interest in maintaining their FM6 operations into the future, the Commission concludes that there is no longer a risk of parties speculating in FM6 LPTV stations. As discussed above, the steps taken by the remaining FM6 LPTV stations to complete their digital television transition and quickly resume FM6 operations shows their clear desire to continue to provide FM6 service to their listeners. Furthermore, the Commission finds that prohibiting the assignment or transfer of these stations would undermine a key rationale by which it has based its decision to permit the continued operation of these stations—the preservation of existing service that listeners rely upon. To the extent a current licensee no longer wishes to operate its station it should be permitted, like any other licensee, to sell its station to someone that wants to continue to offer its television operations, along with its FM6 operations if they so choose. Accordingly, the Commission finds the limitation on transfers is no longer necessary and it concludes that the public interest would not be served maintaining the restriction. To the extent that an FM6 LPTV station is assigned or transferred and the new licensee intends to continue FM6 operations it must include a statement to that effect in its assignment or transfer application. The new licensee will be required to meet all the requirements in the rules for FM6 operations and should they choose to discontinue FM6 operations, such discontinuation is permanent.

The Commission finds that an FM6 LPTV station's FM6 operation is not severable from its digital television license and may not be assigned or transferred independently from the FM6

LPTV station. The Commission bases this conclusion upon the fact that it is not separately authorizing FM6 operations, but rather are allowing them as an ancillary or supplementary service to the FM6 LPTV station's main digital television license. An FM6 LPTV station is permitted to provide FM6 operations only as a result of it offering a free over-the-air television service.

Reporting Requirements. The Commission adopts its tentative conclusion and will not require FM6 LPTV stations to undertake periodic reporting requirements similar to those contained in their FM6 STAs. The periodic reporting requirement was included as a condition to the FM6 STAs to monitor the ongoing STA operations of FM6 LPTV stations for reports of interference and to see if FM6 LPTV stations were complying with the condition that their digital television and analog FM radio operations were serving similar populations. The Commission agrees with the majority of commenters that the periodic reporting requirement is no longer necessary. In this *R&O*, the Commission adopts permanent rules to address the circumstances that the reporting requirement was established to monitor. Failure to comply with these rules will result in sanction and potentially loss of the ability to continue providing FM6 service.

Other parties argue that the submission of written reports is still needed in order to confirm system operation and to gather data to confirm that the FM6 service can be implemented and operated in the public interest. The Commission disagree. The record, which includes real-world information collected over nearly the last two years from FM6 LPTV stations' FM6 STA operations demonstrates that interference from the 13 existing FM6 LPTV stations is not likely to occur to either adjacent-band FM radio operations or to the host LPTV station's channel 6 operations. Further, there have been no legitimate reports of interference being caused by the 13 FM6 LPTV stations that have been operating under STAs. In addition, FM6 LPTV stations are permitted to make modifications to their facilities only under very limited circumstances. As a result of these facts, the Commission sees no basis for requiring FM6 LPTV stations to continue to submit periodic reports.

Required FM6 Operational Notices. The Commission will require that, after review and approval of the information collection requirements adopted herein by the Office of Management and Budget (OMB), the Bureau will issue a Public Notice announcing the deadline for all FM6 LPTV stations to notify the Media Bureau whether they will continue FM6 operations and confirm their precise FM6 operational parameters. Because the Commission is not licensing FM6 operations separately, this verification enables a confirmation of which stations' FM6 operations will be ongoing and provide continued certainty with regards to those operations. FM6 LPTV stations will also be required to include in this notification the current operating parameters of their FM6 operations. Such information must include: maximum effective radiated power (ERP); radiation center above ground level (RCAGL); radiation center above mean sea level (RCAMSL); antenna height above average terrain (HAAT); antenna type (directional or non-directional); directional antenna pattern (if applicable); antenna make and model; transmitter power output (TPO); and a description of the transmission system, including any transmission lines, connectors, combiners, etc., and their associated losses. Should any technical parameters of the station's FM6 operations change, the licensee must provide written notification to the Media Bureau at least ten (10) days prior to such modifications occurring. An FM6 LPTV station that voluntarily chooses to permanently discontinue FM6 operations is required to notify the Media Bureau within 30 days of permanently ceasing FM6 operations. If an FM6 station permanently ceases FM6 operations either voluntarily or is deemed to have discontinued operations pursuant to The Commission's Part 73 rules, it will not be permitted to resume FM6 operations in the future. All actions with respect to the cessation of FM6 operation will be final as with any action to permanently discontinue a broadcast operation. As part of its finding below that FM6 LPTV station's requirement to comply with certain analogous FM rules, the Commission notes that pursuant to 47 CFR 73.1740(a)(1) FM6 LPTV stations' FM6 operations must adhere to the minimum operating schedule for FM stations. Failure to do so absent valid special temporary authority to operate at variance, will result in sanction or other actions, which could include consideration at renewal of whether the station has served the public interest. One of the primary rationales by which the Commission is permitting continued FM6 operations is in order to provide continuity service. The Commission finds that failure by an FM6 LPTV station to adhere to the minimum operating schedule for FM stations, without valid special temporary authority, is presumptively adverse to the public interest. The Commission also notes that should an FM6 LPTV station's digital television operation temporarily cease operations, the station will be required to also discontinue its FM6 operation until such time as the digital television operation resumes as engaging in FM6 operations is dependent upon it providing the digital television service. Cessation of FM6 operations only shall not affect the status of an LPTV station's license or its ability to continue to provide digital television service. Finally, as an additional measure to ensure that FM6 LPTV stations are continuing to serve the public, the Commission will also require that FM6 LPTV stations certify in their license renewal application that they have continued to provide FM6 operations in accordance with the FM6 rules during their prior license term. The Commission delegates authority to the Media Bureau to determine the most appropriate means for these stations to make such certification, be it by an attachment to the renewal application or some other reasonable means. All notifications required by this paragraph shall be made by written letter and mailed to the FCC Office of the Secretary, Attention: Chief, Video Division, Media Bureau. An electronic copy of any notification must also be sent via electronic mail to the Chief of the Video Division, Media Bureau. A copy of all notifications shall be uploaded by the Media Bureau to the station's LMS file.

Application of Part 73 FM Rules

Although FM6 operations are not separately authorized or licensed, the Commission concludes that the public interest will be best served by requiring FM6 operations to be subject to appropriate Part 73 rules that currently apply to full service FM radio stations, including emergency alert and online public file requirements. The Commission also finds that application of certain of the rules is consistent with and required by section 336(b)(3) of the Act. The Commission also concludes that it adopts such rules and policies for FM6 operations under its general Title III authority. Furthermore, FM6 LPTV stations, as they are licensed as LPTV stations, must continue to comply with all applicable Part 73 and 74 rules that pertain to their digital television operations.

Section 336(b)(3) of the Act provides that, in prescribing the regulations required by ancillary or supplementary services, the Commission shall ''apply

to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person . . . .'' Based on this statutory requirement, the Commission concludes that certain rules that pertain to full service FM radio stations should be applied to FM6 LPTV stations since FM6 LPTV stations offer services that are ''analogous'' to full service FM radio stations. A majority of commenters support this approach.

As a practical matter, the Commission agrees that listeners are not necessarily able to distinguish between an FM6 LPTV station's FM operations and a traditional FM station. Further, viewers watching an FM6 LPTV station's digital television programming may not be simultaneously listening to the station's analog FM6 audio programming, and vice versa. As a result, the Commission finds it is important that FM6 LPTV stations continue to comply with the rules that are otherwise applicable to FM radio operations, including but not limited to the rules related to advertising/commercials, programming, and the Emergency Alert System (EAS). In particular, in order to prevent viewers and listeners from missing vital EAS alerts, the Commission wants to make clear that FM6 LPTV stations must maintain the capability to separately air EAS alerts on both their television and their FM6 operations.

Further, although LPTV stations are not required to maintain an online public inspection file (OPIF), the Commission finds it is appropriate to require FM6 LPTV stations to maintain one for their FM6 operations. While some commenters argue that there is no purpose to be served by requiring that FM6 LPTV stations maintain an OPIF solely for their FM6 operations, the Commission agrees with commenters maintaining that such a requirement safeguards regulatory compliance with regard to FM operations and provides parity with other FM stations. To be clear, the OPIF requirement will apply only to the FM6 LPTV station's FM6 operations. The Media Bureau will create an OPIF for each FM6 LPTV station in the Commission's database for all FM6 LPTV stations and to notify the Stations by written letter once they are able to file documents in their OPIF. Compliance with the OPIF requirement will take effect either upon effective date of the rule or 30 days following creation of the Stations' OPIF, whichever is later.

The Commission disagrees with the argument that requiring FM6 LPTV stations to comply with both LPTV and certain Part 73 FM rules is unnecessary or inappropriate as a result of their secondary status or because all relevant regulations already apply by nature of their status as an LPTV station. This argument does not reflect how FM6 operations are actually conducted in the digital context and would be inconsistent with section 336(b)(3) of the Act. First, the Act specifically mandates that the Commission apply regulations to ancillary or supplementary services that are analogous to other regulated services. The secondary nature of LPTV stations is irrelevant to whether the analogous services provision of the Act should apply. There is no exception in either the Act or the rules from this requirement for stations with secondary status that are providing ancillary or supplementary services. Second, while LPTV and FM radio may have some overlapping rules, they are distinct and independent services with different rules. For example, LPTV stations do not have an OPIF requirement and have different station identification requirements. The record is clear that the aim of these FM6 operations is to provide an audio service that is analogous to other FM radio service and received using FM radio tuners. Therefore, the Commission finds that such FM6 operations provided by FM6 LPTV stations is analogous to those of licensed FM radio operations and should be regulated as such.

The Commission does, however, find that specific Part 73 technical rules for full service FM radio stations should not apply to FM6 operations because FM6 LPTV stations are operating on frequencies and subject to certain conditions that make the application of certain FM technical rules unnecessary and impractical. Although FM6 LPTV stations operate separate television and radio transmission systems, pursuant to the new rules the Commission has adopted today, the FM6 operations will be restricted in certain respects. For example, FM6 LPTV stations are permitted to make changes to their FM6 station facilities only under very limited circumstances (without a showing of ''engineering necessity'' or a waiver), are limited to operating on 87.75 MHz, may offer FM6 service only within the LPTV station's protected contour, and may operate only on a non-interference basis. The Commission has also limited the number of FM6 LPTV stations to a finite group that have already proven they do not cause the interference that many of the Part 73 technical rules for FM stations are intended to prevent. Accordingly, the Commission finds that applying the specific technical rules in §§ 73.201–73.277, 73.310–73.312, and 73.314–73.318 in the context of FM6 operations are not only unnecessary, but could be contradictory to the specific rules it has adopted governing FM6 operations.

Five Percent Fee For Ancillary or Supplementary Services

Consistent with its determination to allow FM6 operations to continue on an ancillary or supplementary basis, the Commission finds that FM6 LPTV stations that offer feeable ancillary or supplementary services are subject to the five percent fee on the gross revenue of such services and must submit an Annual DTV Ancillary/Supplementary Services Report. Commenters unanimously agree that FM6 LPTV stations offering feeable ancillary or supplementary services should be subject to this fee and reporting requirement. The Commission also notes that several FM6 LPTV stations began making fee payments on their FM6 operations.

As the Commission observed in the *FNPRM,* its ancillary or supplementary rules provide that digital television stations (including digital LPTV stations) must annually remit a fee of five percent of the gross revenues derived from all ''feeable'' ancillary and supplementary services. The Commission has defined ''feeable'' ancillary or supplementary services as services for which payment of a subscription fee or charge is required in order to receive the service,'' or if no payment is required from consumers, the licensee ''directly or indirectly receives compensation from a third party in return for the transmission of material provided by that third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required).'' Moreover, the rules provide that ''[t]he fee required by this provision shall be imposed on any and all revenues from such services, including revenues derived from subscription fees and from any commercial advertisements transmitted on the service.'' Given these rules, any FM6 LPTV station that provides ''feeable services'' is required to comply with the Rules and both remit the required fee and submit an Annual DTV Ancillary/Supplementary Services Report to indicate that they provided feeable services, the amount of gross revenues of such services, and whether they have remitted the requisite five percent fee.

Licensing of Additional NCE FM Stations

The Commission declines to adopt the proposal discussed in the *FNPRM* to repurpose TV6 spectrum (82–88 MHz) for FM services nationwide in locations where the channels are not being used to provide television programming. In July 2020, NPR argued FM6 is not an efficient use of spectrum, the TV6 resource was not being fully utilized by television broadcasters and much of the spectrum was laying fallow, especially in the rural parts of the country. The Commission finds that the record does not support such a plan to remove a portion of the remaining spectrum allotted for television use and converting it to radio use. The Commission finds that the plan is neither feasible, because of the possibility of interference; nor efficient, because receivers are not capable of receiving FM stations below 87.7 FM; nor appropriate, because TV6 spectrum is still needed for broadcast television use.

First, the Commission agrees with commenters that the interference implications of NPR's plan to reallocate unused TV6 spectrum have not been adequately considered. Further, the Commission finds that NPR's stated efficiency goal of adding up to 30 new FM channels cannot be achieved because it would not be possible to use all 30 channels in one place. Although in theory 30 FM channels are available in the band that comprises TV6, in practice it would not be possible to use all 30 channels in one place given interference considerations. Practically speaking, the number of channels for use by new FM radio stations in any one area would be significantly fewer.

The Commission finds that even in places where there are available allocations for FM stations under the proposal, listeners would not be able to receive most transmissions because FM radio receivers receive only the top-most portion of the 82–88 MHz band (87.7 or 87.9 MHz) of the 6 MHz channel that comprises TV6. The Commission agrees with commenter concerns that FM radio receivers cannot ''tune down'' to the rest of the spectrum—82.1–87.5 MHz. Therefore, the Commission agrees that it would be impractical to reallocate unused TV6 spectrum for use by new FM radio stations when it is unlikely that listeners would be able to receive most of the broadcasts from these new FM radio stations.

Finally, although some commenters support NPR's proposal by suggesting that it is a better use of spectrum because TV6 is not ideal for digital television broadcasting, the Commission disagrees, and note that many TV stations operate on TV6. According to NAB, as of July 2022, 98 television stations were authorized to operate on TV6 in the United States. Some of these stations serve large, sparsely populated areas where the relatively low power consumption of TV6 transmitters makes it economical to provide television service to rural Americans. Others serve densely populated urban areas where no alternative channels exist in more desirable spectrum. Furthermore, ATBA contends a number of TV6 stations could also serve as ''lighthouse'' stations for NextGen TV, providing a critical transition path for television broadcasters as they migrate to ATSC 3.0. The record persuades us that 82–88 MHz is still needed for television, especially given that the UHF spectrum available for broadcast television has been dramatically reduced in recent years. Therefore, the Commission declines to repurpose TV6 spectrum in areas where there are presently no TV6 stations to permit the construction of new FM stations that, in many cases, listeners will be unable to receive because their receivers cannot ''tune down'' to the lower portions of the 82–88 MHz frequency (*i.e.,* 82.1–87.5 MHz).

Elimination of Certain TV6 Interference Protections

Although the Commission received comments on this matter, it did not receive sufficient technical studies and analysis upon which to base any final decisions to revise its TV6 interference rules. Any changes to these rules, which were originally adopted when television was operating in analog, would need to reflect the fact that all television is now operating in digital. Despite asking in the *FNPRM* for commenters to analyze the existing digital television landscape and suggest whether and how the existing TV6 interference provisions should be retained, revised or updated, the Commission received little comment to that effect. Therefore, given the incomplete nature of the record, the Commission declines to revise the TV6 interference rules at this time. The Commission will seek additional comment about this matter at a future date. In addition, NPR proposed that the Commission adopt a narrow rule change to enable existing NCE FM radio stations to modify their authorizations to relocate to channel 200 (87.9 MHz). As this change could impact the revisions to the TV6 interference rules, the Commission finds that it would be more appropriate to consider NPR's proposal in conjunction with a future TV6 interference proceeding. The Commission encourages interested parties to continue to work together to find a solution and develop comprehensive technical studies to support their position. REC Networks (REC) included a petition for rulemaking requesting that the Commission consider the reallocation of television channels 5 and 6 for use with a new ''WIDE FM'' service. The Commission concludes that REC's proposal is outside of the scope of this proceeding and will not be considered in this *R&O.*

Final Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980 (RFA), *see* 5 U.S.C. 603, as amended, Public Law 104–121, Title II, 110 Stat. 847 (1996), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the (*FNPRM*) released June 7, 2022 at 87 FR 36440. The Commission sought written public comment on the proposals in the *FNPRM,* including comment on the IRFA. No comments were filed addressing the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA, 5 U.S.C. 604.

Need For, and Objectives of, the Report and Order

This *Report and Order* adopts rule changes to allow channel 6 digital low power television stations that have been providing analog FM radio services, and only those stations, to continue their FM6 operations, subject to certain conditions which will also be codified in the rules. Continuing to allow existing FM6 operations serves the public interest and minimizes service disruptions to programming on which listeners have relied.

In the *Report and Order,* the Commission adopts rules for FM6 operations, including that FM6 LPTV stations must operate in ATSC 3.0 digital format, must transmit FM6 at 87.75 MHz, and FM6 operations must not interfere with any other licensed user. The coverage area of an FM6 LPTV station's analog FM radio operation may not exceed the coverage area of the LPTV station's ATSC 3.0 synchronized video/audio programming stream. FM6 LPTV stations must also provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum at any time the station is operating. FM6 LPTV stations may make modifications to their technical facilities, as otherwise permitted under Part 74 of the rules, so long as the protected contour of the station's modified facilities remains within its current protected contour.

The *Report and Order* also adopts reporting requirements, requiring that if an FM6 LPTV station decides to permanently discontinue FM6 operations, it must notify the Media Bureau within 30 days of permanently ceasing FM6 operations. FM6 LPTV stations must also certify in an attachment to their octennial license renewal application that they have continued to provide FM6 operations in accordance with the FM6 rules during their prior license term. Section 74.763(c) of the rules apply to FM6 operations, so that an FM6 LPTV station that does not provide an FM6 operation for a period of 30 days or more, absent circumstances beyond its control, will be deemed to have permanently discontinued FM6 operations. Additionally, FM6 LPTV stations must include all of the items required by the public inspection file (PIF) rule for full service FM radio stations in their LPTV station PIF.

The *Report and Order* also adopts requirements for application of Part 73 and 74 rules to these stations and services. FM6 LPTV stations will continue to be subject to all applicable Part 73 and 74 rules that pertain to their television station operations, and their FM6 operations will be separately subject to those Part 73 rules to which full service FM radio stations are currently subject, as contained in its new FM6 rule—74.790(o).

Finally, the *Report and Order* adopts the fee requirements for FM6 LPTV stations. Any FM6 LPTV station that receives compensation for the transmission of material by a third party, other than commercial advertisements used to support non-subscription based broadcasting, on its FM6 operation shall be subject to the existing rule requiring a five percent fee on gross revenues from such compensation. FM6 LPTV stations that do not receive such compensation shall not be subject to the five percent fee. Any FM6 LPTV station providing feeable ancillary or supplementary services must submit an Annual DTV Ancillary/Supplementary Services Report and report that they provided such fee-based services, the amount of gross revenues of such services, and whether they have remitted the requisite five percent fee.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.

The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small government jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration.

Television Broadcasting. This industry is comprised of ''establishments primarily engaged in broadcasting images together with sound.'' These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA small business size standard for this industry classifies businesses having $41.5 million or less in annual receipts as small. 2017 U.S. Census Bureau data indicate that 744 firms in this industry operated for the entire year. Of that number, 657 firms had revenue of less than $25,000,000. Based on this data the Commission estimates that the majority of television broadcasters are small entities under the SBA small business size standard.

As of March 31, 2023, there were 1,375 licensed commercial television stations. Of this total, 1,282 stations (or 93.2%) had revenues of $41.5 million or less in 2021, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on April 7, 2023, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates as of March 31, 2023, there were 383 licensed noncommercial educational (NCE) television stations, 381 Class A TV stations, 1,887 LPTV stations and 3,119 TV translator stations. The Commission, however, does not compile and otherwise does not have access to financial information for these television broadcast stations that would permit it to determine how many of these stations qualify as small entities under the SBA small business size standard. Nevertheless, given the SBA's large annual receipts threshold for this industry and the nature of these television station licensees, the Commission presumes that all of these entities qualify as small entities under the above SBA small business size standard.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements for Small Entities

The *Report and Order* contains new reporting, recordkeeping, and other compliance requirements for the licensing and certification for small entity FM6 LPTV stations that provide FM6 service.

While the Commission is not in a position to determine whether small entities will have to hire professionals to comply with its decisions and cannot quantify the cost of compliance for small entities, the approaches, it has taken to implement the requirements have minimal or de minimis cost implications for impacted entities because many of these requirements are part of an existing reporting process.

The *Report and Order* adopts four new reporting requirements for FM6 LPTV stations that wish to continue to or cease to provide FM6 service, including the requirement that FM6 LPTV stations notify the Media Bureau within 30 days if they decide to permanently discontinue FM6 operations. FM6 LPTV stations must certify in an attachment to their octennial license renewal application that they have continued to provide FM6 operations in accordance with the FM6 rules during their prior license term. FM6 LPTV stations must also include all of the items required by the PIF rule for full service FM radio stations in their LPTV station PIF. Additionally, FM6 LPTV stations that

provided feeable ancillary or supplementary service must submit an Annual DTV Ancillary/Supplementary Services Report and report that they provided feeable services, the amount of gross revenues of such services and whether they have remitted the requisite five percent fee. These requirements will result in a modified paperwork obligation for small entities and other licensees. The Commission will seek the requisite approval, such as those required to comply with the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, to account for the increased burdens resulting from this modified reporting requirement.

Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to provide, ''a description of the steps the agency has taken to minimize the significant economic impact on small entities, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.''

The actions taken by the Commission in the *Report and Order* were considered to be the least costly and minimally burdensome for small and other entities impacted by the rules. As such, the Commission does not expect the adopted requirements to have a significant economic impact on small entities. Below the Commission discusses actions it takes in the *Report and Order* to minimize any significant economic impact on small entities and some alternatives that were considered.

Among the alternatives considered to minimize significant impact on small entities, the Commission considered whether FM6 programming could be delivered via another delivery method such as other broadcast methods or internet only, and found that these methods were less efficient and potentially more costly to small entities than maintaining the existing service. The Commission also considered whether to preserve or alter the service contour for FM6 service. In deciding that the service contour not exceed the protected contour of the LPTV station's ATSC 3.0 synchronized video/audio programming stream, the Commission determined that alternative approaches presented where impractical and overly burdensome.

It is anticipated that some of the new reporting requirements will likely result in minimal additional costs because the Commission adopted requirements which can be executed as part of an existing process and within the timeframe for certain other filing requirements. This includes certifying in an attachment to an existing octennial license renewal application that the station provided FM6 service during the prior license term in accordance with the FM6 rules. Further, FM6 LPTV stations must adhere to the requirements of licensed users providing similar services, including the PIF rule for full service FM radio stations in their LPTV station PIF, and submitting an Annual DTV Ancillary/Supplementary Services Report if they provide a feeable service, report provision of feeable services, their gross revenues, and whether they have remitted the requisite five percent fee.

Report to Congress

Commission will send a copy of the *Report and Order,* including this FRFA, in a report to Congress pursuant to the Congressional Review Act. 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order,* and FRFA (or summaries thereof) will also be published in the **Federal Register**. 5 U.S.C. 604(b).

List of Subjects in 47 CFR Part 74

Communications equipment, Education, Mexico, Radio, Reporting and recordkeeping requirements, Research, Telecommunications, Television.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 74 as follows:

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

■ 1. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, 307, 309, 310, 325, 336 and 554.

■ 2. Amend § 74.790 by adding paragraph (o) to read as follows:

§ 74.790 Permissible service of digital TV translator and LPTV stations.

* * * * *

(o) Provision of analog FM radio operations by digital LPTV channel 6 stations (FM6 LPTV stations). FM6 LPTV stations may provide analog FM radio operations (FM6 operations) on an ancillary or supplementary basis subject to the following:

(1) The FM6 LPTV station must have been providing FM6 operations pursuant to an active engineering special temporary authority on June 7, 2022, or as otherwise permitted by the Commission.

(2) The FM6 LPTV station must be operating in ATSC 3.0 digital format, as authorized in § 74.782.

(3) FM6 operations may only be conducted on 87.75 MHz.

(4) FM6 operations shall be conducted on a non-interference basis to any other licensed user, including but not limited to broadcast television or radio users.

(5) The FM6 LPTV station's FM6 service contour must be contained within and may not exceed the protected contour of the FM6 LPTV station's synchronized video/audio programming stream. These contours shall be determined using established methodologies in § 73.313 of this chapter (FM radio) and § 74.792 (LPTV).

(6) The FM6 LPTV station must provide at least one stream of synchronized video and audio programming, at any time the station is operating.

(7) FM6 LPTV stations may make minor modifications to their technical facilities, as otherwise permitted under part 73 of this chapter or this part, so long as the station's proposed modified ''protected contour,'' as defined in § 74.792, does not exceed its protected contour as it was authorized on July 20, 2023, or where the station can demonstrate that such change is being made due to an engineering necessity such as the loss of a tower site or change in equipment due to malfunction and where the station can also demonstrate that the modification will not cause any interference to other licensed users.

(8) FM6 LPTV stations may be assigned or transferred; however, an FM6 LPTV station's FM6 operation is not severable from its digital license and may not be assigned or transferred separate from the FM6 LPTV station.

(9)–(10) [Reserved]

(11) FM6 LPTV stations shall continue to be subject to all rules in part 73 of this chapter and this part applicable to low power television stations. In addition, the following rules shall apply to FM6 LPTV stations with respect to their FM6 operations:

(i) Part 11 of this chapter The Emergency Alert System (EAS).

(ii) Section 73.293, Use of FM multiplex subcarriers.

(iii) Section 73.295, FM subsidiary communications services.
(iv) Section 73.297, FM stereophonic sound broadcasting.
(v) Section 73.310, FM technical definitions.
(vi) Section 73.313, Prediction of coverage.
(vii) Section 73.319, FM multiplex subcarrier technical standards.
(viii) Section 73.322, FM stereophonic sound transmission standards.
(ix) Section 73.333, Engineering charts.
(x) Section 73.1201, Station identification.
(xi) Section 73.1206, Broadcast of telephone conversations.
(xii) Section 73.1207, Rebroadcasts.
(xiii) Section 73.1208, Broadcast of taped, filmed, or recorded material.
(xiv) Section 73.1209, References to time.
(xv) Section 73.1211, Broadcast of lottery information.
(xvi) Section 73.1212, Sponsorship identification; list retention; related requirements.
(xvii) Section 73.1216, Licensee-conducted contests.
(xviii) Section 73.1217, Broadcast hoaxes.
(xix) Section 73.1250, Broadcasting emergency information.
(xx) Section 73.1300, Unattended station operation.
(xxi) Section 73.1635, Special temporary authorizations (STA).
(xxii) Section 73.1740, Minimum operating schedule.
(xxiii) Section 73.1750, Discontinuance of operation.
(xxiv) Section 73.1940, Legally qualified candidates for public office.
(xxv) Section 73.1941, Equal opportunities.
(xxvi) Section 73.1942, Candidate rates.
(xxvii) Section 73.1943, Political file.
(xxviii) Section 73.1944, Reasonable access.
(xxix) Section 73.2080, Equal employment opportunities (EEO).
(xxx) Section 73.3526, Online public inspection file of commercial stations.
(xxxi) Section 73.4005, Advertising—refusal to sell.
(xxxii) Section 73.4045, Barter agreements.
(xxxiii) Section 73.4055, Cigarette advertising.
(xxxiv) Section 73.4060, Citizens agreements.
(xxxv) Section 73.4075, Commercials, loud.
(xxxvi) Section 73.4095, Drug lyrics.
(xxxvii) Section 73.4097, EBS (now EAS) attention signals on automated programing systems.
(xxxviii) Section 73.4165, Obscene language.
(xxxix) Section 73.4170, Obscene broadcasts.
(xl) Section 73.4180, Payment disclosure: Payola, plugola, kickbacks.
(xli) Section 73.4185, Political broadcasting and telecasting, the law of.
(xlii) Section 73.4190, Political candidate authorization notice and sponsorship identification.
(xliii) Section 73.4215, Program matter: Supplier identification.
(xliv) Section 73.4242, Sponsorship identification rules, applicability of.
(xlv) Section 73.4250, Subliminal perception.
(xlvi) Section 73.4255, Tax certificates: Issuance of.
(xlvii) Section 73.4260, Teaser announcements.
(xlviii) Section 73.4265, Telephone conversation broadcasts (network and like sources).

■ 3. Delayed indefinitely, further amend § 74.790 by adding paragraphs (o)(9) and (10) to read as follows:

§ 74.790 Permissible service of digital TV translator and LPTV stations.

* * * * *

(o) * * *

(9) FM6 LPTV stations must notify the Media Bureau within 30 days of permanently ceasing FM6 operations. Such notification hall be made by written letter and mailed to the FCC Office of the Secretary, Attention: Chief, Video Division, Media Bureau. If an FM6 LPTV station permanently ceases FM6 operations, FM6 operations may not resume.

(10) FM6 LPTV stations must certify in an attachment to their license renewal application that they have continued to provide FM6 service in accordance with the FM6 rules in this section during the prior license term.

* * * * *

[FR Doc. 2023–17414 Filed 8–28–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 221215–0272; RTID 0648–XD279]

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Quota Transfers From NJ to NC and RI

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

ACTION: Notification of quota transfers.

SUMMARY: NMFS announces that the State of New Jersey is transferring a portion of its 2023 commercial bluefish quota to the States of North Carolina and Rhode Island. These adjustments to the 2023 fishing year quotas are necessary to comply with the Atlantic Bluefish Fishery Management Plan quota transfer provisions. This announcement informs the public of the revised 2023 commercial bluefish quotas for New Jersey, North Carolina, and Rhode Island.

DATES: Effective August 28, 2023, through December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Laura Deighan, Fishery Management Specialist, (978) 281–9184.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic bluefish fishery are found in 50 CFR 648.160 through 648.167. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through Florida. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.162, and the final 2023 allocations were published on December 21, 2022 (87 FR 78011).

The final rule implementing Amendment 1 to the Bluefish Fishery Management Plan (FMP), as published in the **Federal Register** on July 26, 2000 (65 FR 45844), provided a mechanism for transferring bluefish commercial quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can request approval to transfer or combine bluefish commercial quota under § 648.162(e)(1)(i) through (iii). The Regional Administrator must approve any such transfer based on the criteria in § 648.162(e). In evaluating requests to transfer a quota or combine quotas, the Regional Administrator shall consider whether: the transfer or combinations would preclude the overall annual quota from being fully harvested; the transfer addresses an unforeseen variation or contingency in the fishery; and the transfer is consistent with the objectives of the FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Regional Administrator has determined these three criteria have been met for the transfers approved in this notification.

New Jersey is transferring 45,000 pounds (lb) (20,412 kilograms (kg)) to North Carolina and 15,000 lb (6,804 kg) to Rhode Island, through mutual

agreements of the states. These transfers were requested to ensure that North Carolina and Rhode Island would not exceed their 2023 state quotas. The revised bluefish quotas for 2023 are: New Jersey, 563,295 lb (255,506 kg); North Carolina, 1,474,077 lb (668,630 kg); and Rhode Island 366,165 lb (166,090 kg).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 648.162(e)(1)(i) through (iii), which was issued pursuant to section 304(b), and is exempted from review under Executive Order 12866.

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

Dated: August 24, 2023.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–18616 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 166
Tuesday, August 29, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[NRC–2018–0289]

RIN 3150–AK21

American Society of Mechanical Engineers 2021–2022 Code Editions

Correction

In Proposed Rule document, 2023–16686, appearing on pages 53384 through 53402 in the issue of Tuesday August 8, 2023, on page 53402 in lines 15 and 22, the text ''September 7, 2023'' in both instances is corrected to read ''[DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]''.

[FR Doc. C1–2023–16686 Filed 8–28–23; 8:45 am]

BILLING CODE 0099–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1719; Project Identifier 2008–NM–202–AD]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to remove Airworthiness Directive (AD) 2010–26–05, which applies to certain Dassault Aviation Model Falcon 10 airplanes; Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes; Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes; and all Model MYSTERE–FALCON 200 airplanes; Model FALCON 2000 and FALCON 2000EX airplanes; Model MYSTERE–FALCON 50 and MYSTERE–FALCON 900 airplanes; and Model FALCON 900EX airplanes. AD 2010–26–05 requires repetitive inspections for overpressure tightness on the pressurization control regulating valves and, if necessary, replacing the affected valve with a serviceable unit. AD 2010–26–05 is no longer necessary because the FAA has since issued ADs 2021–04–20, 2020–02–13, 2020–03–24, 2020–03–19, 2020–01–13, 2023–05–15, 2023–04–10, 2023–02–13, 2023–04–18, and 2023–04–13 to address the unsafe condition. Accordingly, the FAA proposes to remove AD 2010–26–05.

DATES: The FAA must receive comments on this proposed AD by October 13, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1719; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email: *tom.rodriguez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1719; Project Identifier 2008–NM–202–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposed AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email: *tom.rodriguez@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (AD 2010–26–05), for certain Dassault Aviation Model Falcon 10 airplanes; Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes; Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes; and all Model FALCON 2000 and FALCON 2000EX

airplanes; Model MYSTERE–FALCON 200 airplanes; Model MYSTERE–FALCON 50 and MYSTERE–FALCON 900 airplanes, and Model FALCON 900EX airplanes. AD 2010–26–05 was prompted by an MCAI originated by the European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union. EASA issued AD 2008–0072, dated April 18, 2008 (EASA AD 2008–0072) (also referred to as the MCAI), to identify and correct an unsafe condition.

AD 2010–26–05 requires repetitive inspections for overpressure tightness on the pressurization control regulating valves and, if necessary, replacing the affected valve with a serviceable unit. The FAA issued AD 2010–26–05 to address failure of the pressurization control regulating valve (overpressure capsule), which will affect the aircraft's overpressure protection. Overpressurization can result in injury to the occupants and possible structural failure leading to loss of control of the airplane.

Actions Since AD 2010–26–05 Was Issued

Since the FAA issued AD 2010–26–05, the actions specified in the MCAI have been included in the airworthiness limitations section of the existing maintenance manual. EASA issued EASA AD 2008–0072–CN, dated October 5, 2020, which cancels EASA AD 2008–0072. The FAA issued the following ADs to address the unsafe condition by revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive maintenance requirements and airworthiness limitations, including the actions specified in AD 2010–26–05:

- AD 2021–04–20, Amendment 39–21442 (86 FR 12802, March 5, 2021), which addresses the unsafe condition for Model Falcon 10 airplanes.
- AD 2020–02–13, Amendment 39–19827 (85 FR 6744, February 6, 2020), which addresses the unsafe condition for Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes on which the supplemental structural inspection program (SSIP) has been incorporated into the airplane's maintenance program.
- AD 2020–03–24, Amendment 39–19848 (85 FR 11289, February 27, 2020), which addresses the unsafe condition for Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes on which the SSIP (Dassault Service Bulletin 730) has been embodied into the airplane's existing maintenance or inspection program.
- AD 2020–03–19, Amendment 39–19843 (85 FR 11280, February 27, 2020), which address the unsafe condition for Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes, except those on which the SSIP (Dassault Service Bulletin 730) has been embodied into the airplane's existing maintenance or inspection program.
- AD 2020–01–13, Amendment 39–19819 (85 FR 5313, January 30, 2020), which addresses the unsafe condition for Model MYSTERE–FALCON 200 airplanes.
- AD 2023–05–15, Amendment 39–22384 (88 FR 22374, April 13, 2023), which addresses the unsafe condition for Model MYSTERE–FALCON 50 airplanes.
- AD 2023–04–10, Amendment 39–22357 (88 FR 20743, April 7, 2023), which addresses the unsafe condition for Model MYSTERE–FALCON 900 airplanes.
- AD 2023–02–13, Amendment 39–22320 (88 FR 8740, February 10, 2023), which addresses the unsafe condition for Model FALCON 900EX airplanes.
- AD 2023–04–18, Amendment 39–22365 (88 FR 15607, March 14, 2023), which addresses the unsafe condition for Model FALCON 2000 airplanes.
- AD 2023–04–13, Amendment 39–22360 (88 FR 20741, April 7, 2023), which addresses the unsafe condition for Model FALCON 2000EX airplanes.

FAA's Conclusions

Upon further consideration, the FAA has determined that AD 2010–26–05 is no longer necessary. Accordingly, this proposed AD would remove AD 2010–26–05. Removal of AD 2010–26–05 would not preclude the FAA from issuing another related action or commit the FAA to any course of action in the future. This proposed AD would remove all actions of AD 2010–26–05. Therefore, this proposed AD would terminate all requirements of AD 2010–26–05.

Related Costs of Compliance

This proposed AD would add no cost. This proposed AD would remove AD 2010–26–05 from 14 CFR part 39; therefore, operators would no longer be required to show compliance with that AD.

Authority for This Rulemaking

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority.

Regulatory Findings

The FAA has determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010), and

■ b. Adding the following new AD:

Dassault Aviation: Docket No. FAA–2023–1719; Project Identifier 2008–NM–202–AD.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 13, 2023.

(b) Affected AD

This AD replaces AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (AD 2010–26–05).

(c) Applicability

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

(1) Dassault Aviation Model Falcon 10 airplanes; Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes; and Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes; all serial numbers, equipped with Liebherr or ABG-Semca pressurization outflow valves.

(2) Dassault Aviation Model MYSTERE–FALCON 200 airplanes, Model MYSTERE–FALCON 50 and MYSTERE–FALCON 900 airplanes, and FALCON 900EX airplanes; and Model FALCON 2000 and FALCON 2000EX airplanes; all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 21, Air conditioning.

(e) Terminating Action

This AD terminates all requirements of AD 2010–26–05.

(f) Related Information

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

(g) Material Incorporated by Reference

None.

Issued on August 22, 2023.

Victor Wicklund,

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

[FR Doc. 2023–18519 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1722; Project Identifier MCAI–2023–00493–T]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2023–04–15, which applies to certain Dassault Aviation Model FALCON 7X airplanes. AD 2023–04–15 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2023–04–15, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require the actions in AD 2023–04–15 and would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by October 13, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1722; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2023–1722.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email: *tom.rodriguez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1722; Project Identifier MCAI–2023–00493–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to regulations.gov, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email: *tom.rodriguez@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2023–04–15, Amendment 39–22362 (88 FR 20062, April 5, 2023) (AD 2023–04–15), for

certain Dassault Aviation Model FALCON 7X airplanes. AD 2023–04–15 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2022–0142, dated July 7, 2022 (EASA AD 2022–0142) (which corresponds to FAA AD 2023–04–15), to correct an unsafe condition.

AD 2023–04–15 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2023–04–15 to address reduced structural integrity and reduced control of the airplane due to the failure of system components. AD 2023–04–15 specifies that accomplishing the revision required by that AD terminates the requirements of paragraph (q) of AD 2014–16–23, Amendment 39–17947 (79 FR 52545, September 4, 2014) (AD 2014–16–23). This proposed AD would therefore continue to allow that terminating action.

Actions Since AD 2023–04–15 Was Issued

Since the FAA issued AD 2023–04–15, EASA superseded AD 2022–0142 and issued EASA AD 2023–0063, dated March 20, 2023 (EASA AD 2023–0063) (referred to after this as the MCAI), for all Dassault Aviation Model FALCON 7X airplanes. The MCAI states that new or more restrictive airworthiness limitations have been developed.

Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after September 7, 2022, must comply with the airworthiness limitations specified as part of the approved type design and referenced on the type certificate data sheet; this proposed AD therefore does not include those airplanes in the applicability.

The FAA is proposing this AD to address reduced structural integrity and reduced control of the airplane due to the failure of system components. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1722.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0063. This service information specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This proposed AD would also require EASA AD 2022–0142, which the Director of the Federal Register approved for incorporation by reference as of May 10, 2023 (88 FR 20062, April 5, 2023).

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would retain all requirements of AD 2023–04–15. This proposed AD would also require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, which are specified in EASA AD 2023–0063 already described, as proposed for incorporation by reference. Any differences with EASA AD 2023–0063 are identified as exceptions in the regulatory text of this AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections) and Critical Design Configuration Control Limitations (CDCCLs). Compliance with these actions and CDCCLs is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (n)(1) of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to retain the IBR of EASA AD 2022–0142 and incorporate EASA AD 2023–0063 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0063 and EASA AD 2022–0142 through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0063 or EASA AD 2022–0142 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0063 or EASA AD 2022–0142. Service information required by EASA AD 2023–0063 and EASA AD 2022–0142 for compliance will be available at *regulations.gov* by searching for and locating Docket No. FAA–2023–1722 after the FAA final rule is published.

Airworthiness Limitation ADs Using the New Process

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (*e.g.,* inspections), intervals, or CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an AMOC in accordance with the procedures specified in the AMOCs paragraph under ''Additional AD Provisions.'' This new format includes a ''New Provisions for Alternative Actions, Intervals, and CDCCLs'' paragraph that does not specifically refer to AMOCs, but

operators may still request an AMOC to use an alternative action, interval, or CDCCL.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 122 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA estimates the total cost per operator for the retained actions from AD 2021–09–12 to be $7,650 (90 work-hours × $85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate.

The FAA estimates the total cost per operator for the new proposed actions to be $7,650 (90 work-hours × $85 per work-hour).

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2023–04–15, Amendment 39–22362 (88 FR 20062, April 5, 2023); and

■ b. Adding the following new AD:

Dassault Aviation: Docket No. FAA–2023–1722; Project Identifier MCAI–2023–00493–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 13, 2023.

(b) Affected ADs

(1) This AD replaces AD 2023–04–15, Amendment 39–22362 (88 FR 20062, April 5, 2023) (AD 2023–04–15).

(2) This AD affects AD 2014–16–23, Amendment 39–17947 (79 FR 52545, September 4, 2014) (AD 2014–16–23).

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 7X airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before September 7, 2022.

Note 1 to paragraph (c): Model FALCON 7X airplanes with modification M1000 incorporated are commonly referred to as ''Model FALCON 8X'' airplanes as a marketing designation.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity and reduced control of the airplane due to the failure of system components.

(f) Compliance

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

(g) Retained Revision of the Existing Maintenance or Inspection Program, With No Changes

This paragraph restates the requirements of paragraph (j) of AD 2023–04–15, with no changes. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before June 7, 2021, except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2022–0142, dated July 7, 2022 (EASA AD 2022–0142). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (j) of this AD terminates the requirements of this paragraph.

(h) Retained Exceptions to EASA AD 2022–0142, With No Changes

This paragraph restates the exceptions specified in paragraph (k) of AD 2023–04–15, with no changes.

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2022–0142 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2022–0142 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after May 10, 2023 (the effective date of AD 2023–04–15).

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2022–0142 is at the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2022–0142, or within 90 days after May 10, 2023 (the effective date of this AD 2023–04–15), whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2022–0142 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2022–0142 does not apply to this AD.

(i) Retained Restrictions on Alternative Actions, Intervals, and Critical Design Configuration Control Limitations (CDCCLs), With a New Exception

This paragraph restates the requirements of paragraph (l) of AD 2023–04–15, with a new exception. Except as required by paragraph (j) of this AD, after the maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections), intervals, or CDCCLs are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2022–0142.

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

Except as specified in paragraph (k) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2023–0063, dated March 20, 2023 (EASA AD 2023–0063). Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraph (g) of this AD.

(k) Exceptions to EASA AD 2023–0063

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0063.

(2) Paragraph (3) of EASA AD 2023–0063 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2023–0063 is at the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0063, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) and (5) of EASA AD 2023–0063.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0063.

(l) New Provisions for Alternative Actions, Intervals, and CDCCLs

After the existing maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (*e.g.,* inspections), intervals, and CDCCLs are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0063.

(m) Terminating Action for Certain Requirements in AD 2014–16–23

Accomplishing the actions required by paragraphs (g) or (j) of this AD terminates the requirements of paragraph (q) of AD 2014–16–23.

(n) Additional AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(o) Additional Information

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

(p) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) European Union Aviation Safety Agency (EASA) AD 2023–0063, dated March 20, 2023.

(ii) [Reserved]

(4) The following service information was approved for IBR on May 10, 2023 (88 FR 20062, April 5, 2023.)

(i) European Union Aviation Safety Agency (EASA) AD 2022–0142, dated July 7, 2022.

(ii) [Reserved]

(5) For EASA ADs 2023–0063 and 2022–0142, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find these EASA ADs on the EASA website at *ad.easa.europa.eu.*

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

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

Issued on August 23, 2023.

Victor Wicklund,

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

[FR Doc. 2023–18568 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1721; Project Identifier MCAI–2023–00676–T]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2023–04–13, which applies to certain Dassault Aviation Model FALCON 2000EX airplanes. AD 2023–04–13 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2023–04–13, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require the actions in AD 2023–04–13 and would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by October 13, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1721; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket

contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

• For material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this material on the EASA website: *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2023–1721.

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

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3226; email *Tom.Rodriguez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1721; Project Identifier MCAI–2023–00676–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3226; email *Tom.Rodriguez@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2023–04–13, Amendment 39–22360 (88 FR 20741, April 7, 2023) (AD 2023–04–13), for certain Dassault Aviation Model FALCON 2000EX airplanes. AD 2023–04–13 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2022–0136, dated July 6, 2022 (EASA 2022–0136) (which corresponds to FAA AD 2023–04–13), to correct an unsafe condition.

AD 2023–04–13 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2023–04–13 to address reduced structural integrity of the airplane. AD 2023–04–13 specifies that accomplishing the revision required by paragraph (g) or (j) of that AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010), for Dassault Aviation Model FALCON 2000EX airplanes. This proposed AD would, therefore, continue to allow that terminating action.

Actions Since AD 2023–04–13 Was Issued

Since the FAA issued AD 2023–04–13, EASA superseded AD 2022–0136 and issued EASA AD 2023–0100, dated May 11, 2023 (EASA AD 2023–0100) (also referred to after this as the MCAI), for all Dassault Aviation Model FALCON 2000EX airplanes. The MCAI states that new or more restrictive airworthiness limitations have been developed.

Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after January 15, 2023, must comply with the airworthiness limitations specified as part of the approved type design and referenced on the type certificate data sheet for those airplanes; this AD therefore does not include these airplanes in the applicability.

The FAA is proposing this AD to address reduced structural integrity of the airplane. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1721.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0100. This service information specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This proposed AD would also require EASA AD 2022–0136, which the Director of the Federal Register approved for incorporation by reference as of May 12, 2023 (88 FR 20741, April 7, 2023).

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES** section.

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI described above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would retain the requirements of AD 2023–04–13. This proposed AD would also require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, which are specified in EASA AD 2023–0100 already described, as proposed for incorporation by reference. Any differences with EASA AD 2023–0100 are identified as exceptions in the regulatory text of this AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions is required by 14 CFR

91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (n)(1) of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to retain the IBR of EASA AD 2022–0136 and incorporate EASA AD 2023–0100 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0100 and EASA AD 2022–0136 through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2022–0136 or EASA AD 2023–0100 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2022–0136 or EASA AD 2023–0100. Service information required by EASA AD 2022–0136 and EASA AD 2023–0100 for compliance will be available at *regulations.gov* by searching for and locating Docket No. FAA–2023–1721 after the FAA final rule is published.

Airworthiness Limitation ADs Using the New Process

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions and intervals are approved as an AMOC in accordance with the procedures specified in the AMOCs paragraph under ''Additional AD Provisions.'' This new format includes a ''New Provisions for Alternative Actions and Intervals'' paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action or interval.

Costs of Compliance

The FAA estimates that this proposed AD affects 245 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA estimates the total cost per operator for the retained actions from AD 2023–04–13 to be $7,650 (90 work-hours × $85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. In the past, the agency has estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate.

The FAA estimates the total cost per operator for the new proposed actions to be $7,650 (90 work-hours × $85 per work-hour).

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive 2023–04–13, Amendment 39–22360 (88 FR 20741, April 7, 2023); and

■ b. Adding the following new Airworthiness Directive:

Dassault Aviation: Docket No. FAA–2023–1721; Project Identifier MCAI–2023–00676–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 13, 2023.

(b) Affected ADs

(1) This AD replaces AD 2023–04–13, Amendment 39–22360 (88 FR 20741, April 7, 2023) (AD 2023–04–13).

(2) This AD affects AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (AD 2010–26–05).

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 2000EX airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before January 15, 2023.

(d) Subject

Air Transport Association (ATA) of America Code: 05, Time Limits/Maintenance Checks.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Maintenance or Inspection Program Revision, With No Changes

This paragraph restates the requirements of paragraph (j) of AD 2023–04–13, with no changes. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before January 15, 2022, except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2022–0136, dated July 6, 2022 (EASA AD 2022–0136). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (j) of this AD terminates the requirements of this paragraph.

(h) Retained Exceptions to EASA AD 2022–0136, With No Changes

This paragraph restates the exceptions specified in paragraph (k) of AD 2023–04–13, with no changes.

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2022–0136 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2022–0136 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable within 90 days after May 12, 2023 (the effective date of AD 2023–04–13).

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2022–0136 is at the applicable ''limitation'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2022–0136, or within 90 days after the May 12, 2023 (the effective date of AD 2023–04–13), whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2022–0136 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2022–0136 does not apply to this AD.

(i) Retained Provisions for Alternative Actions or Intervals, With a New Exception

This paragraph restates the requirements of paragraph (l) of AD 2023–04–13, with a new exception. Except as required by paragraph (j) of this AD, after the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2022–0136.

(j) New Maintenance or Inspection Program Revision

Except as specified in paragraph (k) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2023–0100, dated May 11, 2023 (EASA AD 2023–0100). Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraph (g) of this AD.

(k) Exceptions to EASA AD 2023–0100

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0100.

(2) Paragraph (3) of EASA AD 2023–0100 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2023–0100 is at the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0100, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) and (5) of EASA AD 2023–0100.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0100.

(l) New Provisions for Alternative Actions and Intervals

After the maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (*e.g.,* inspections), and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0100.

(m) Terminating Action for Certain Actions in AD 2010–26–05

Accomplishing the actions required by paragraph (g) or (j) of this AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05, for Dassault Aviation Model FALCON 2000EX airplanes only.

(n) Additional AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(o) Additional Information

For more information about this AD, contact Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3226; email *Tom.Rodriguez@faa.gov.*

(p) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) European Union Aviation Safety Agency (EASA) AD 2023–0100, dated May 11, 2023.

(ii) [Reserved]

(4) The following service information was approved for IBR on May 12, 2023 (88 FR 20741, April 7, 2023).

(i) European Union Aviation Safety Agency (EASA) AD 2022–0136, dated July 6, 2022.

(ii) [Reserved]

(5) For EASA ADs 2022–0136 and 2023–0100, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find these EASA ADs on the EASA website: *ad.easa.europa.eu.*

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

(7) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on

the availability of this material at NARA, email *fr.inspection@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on August 23, 2023.

Victor Wicklund,

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

[FR Doc. 2023–18567 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 110

[Docket No. FAA–2023–1857]

RIN 2120–ZA32

Revisions to the Regulatory Definitions of ''On-Demand Operation'', ''Supplemental Operation'' and ''Scheduled Operation''

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

ACTION: Request for comments.

SUMMARY: This document alerts the public that the FAA intends to initiate a rulemaking to address the exception from FAA's domestic, flag, and supplemental operations regulations for public charter operators. To inform this effort, the FAA seeks public comment, data, and other information regarding current and planned public charter flights operated under on-demand rules that appear indistinguishable from flights conducted by air carriers as supplemental or domestic operations. The FAA will review comments received in response to this document to evaluate the need for and, if necessary, scope of any rulemaking.

DATES: Send comments on or before October 13, 2023.

ADDRESSES: Send comments identified by docket number FAA–2023–1857 using any of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: Jackie Clow, Aviation Safety Inspector, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8166; email: *jackie.a.clow@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to provide comments, written data, views, or arguments relating to this document. Send your comments to an address listed under the **ADDRESSES** section. The FAA will consider comments received on or before the closing date. All comments received will be available in the docket for examination by interested persons.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.* You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, see 65 FR 19477, or you may visit *https://www.regulations.gov.*

Background

Title 14 CFR part 380 is an economic regulation administered by the Department of Transportation. Currently, under 14 CFR 110.2 of FAA's safety regulations, public charters operated under the terms of 14 CFR part 380 may be conducted as ''on-demand operations'' if the aircraft operator is using airplanes, including turbo-jet powered airplanes, with 30 or fewer passenger seats. On-demand operations must be conducted under the operating rules in 14 CFR part 135. See, 14 CFR 119.21(a)(5) and 135.1(a)(1). Similarly, public charter operations are excepted from the § 110.2 definition of ''scheduled operation'' and are included in the definition of ''supplemental operation'' regardless of whether such operator offers in advance to the public the departure location, departure time, and arrival location of the flight. But for the part 380 exceptions in § 110.2, public charter operators would be required to comply with the operating rules applicable to their operations based on the same criteria as all other air carriers and commercial operators, *i.e.,* 14 CFR part 121.

The FAA intends to initiate a rulemaking to amend title 14, Code of Federal Regulations (14 CFR), part 110 to address these public charter operations that, in light of recent high-volume operations, appear to be offered to the public as essentially indistinguishable from flights conducted by air carriers as supplemental or domestic operations under 14 CFR part 121. Specifically, the size, scope, frequency, and complexity of charter operations conducted as ''on-demand'' operations under the part 135 operating rules has grown significantly over the past 10 years. While the FAA has adjusted its oversight of these increased operations, the FAA is considering whether a regulatory change may be appropriate to ensure the management of the level of safety necessary for those operations.

The FAA is considering issuing a notice of proposed rulemaking that will seek comment on removing the exceptions for part 380 public charter operators from the definitions in 14 CFR 110.2 and delink FAA's safety regulations from DOT's economic regulations. If the FAA were to remove the exceptions, operators would then conduct public charter flights under the operating part applicable to their operation based on the same criteria that apply to all other non-part 380 operators, including the size and complexity of aircraft they operate and the frequency of flights.

Were FAA to amend its regulatory framework, some operators conducting public charter operations would need to transition from operating under part 135 to part 121. This transition may require affected operators to adjust their service models. As such, this document solicits comment, data, and other information regarding: the effects of any removal of the part 380 exception (including any effect on service to small and underserved communities); potential impacts on competition, innovation, and emerging technologies; alternative regulatory structures that could apply to the provision of commercial passenger services under a regime other than part 121 or part 135; if FAA were to adopt a rule, the reasonable period of time needed to allow affected operators to obtain appropriate certificates and

authorizations to transition their operations to the applicable operating parts of 14 CFR; and any additional topics interested parties believe should be considered.

The FAA will review all comments submitted to inform its planned rulemaking.

Issued on August 24, 2023.

David H. Boulter,

Acting Associate Administrator, Aviation Safety, Federal Aviation Administration.

[FR Doc. 2023–18615 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1120

[Docket No. FDA–2013–N–0227]

RIN 0910–AH91

Proposed Requirements for Tobacco Product Manufacturing Practice; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is extending the comment period for the proposed rule entitled ''Requirements for Tobacco Product Manufacturing Practice'' published in the **Federal Register** of March 10, 2023, by 30 days. The Agency is taking this action in response to a request for an extension to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period on the proposed rule published March 10, 2023 (88 FR 15174), by 30 days. Either electronic or written comments must be submitted by October 6, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of October 6, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov*.
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2013–N–0227 for ''Requirements for Tobacco Product Manufacturing Practice.'' 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: Matthew Brenner, Center for Tobacco Products, Food and Drug Administration, Document Control Center, 10903 New Hampshire Ave., Bldg. 71, Rm. G335, Silver Spring, MD 20993, 877–287–1373, *AskCTPRegulations@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of March 10, 2023 (88 FR 15174), FDA published a proposed rule entitled ''Requirements for Tobacco Product Manufacturing Practice.'' The proposed rule provided a 180-day period for submission of public comments.

The Agency has received a request for an extension of the comment period for the proposed rule. The request conveyed concern that the comment period does not allow sufficient time to develop a meaningful or thoughtful response to the proposed rule.

FDA has considered the request and is extending the comment period for the proposed rule for 30 days, until October 6, 2023. FDA believes this extension is appropriate because of the complexity of the material being posted. The Agency believes that a 30-day extension allows adequate time for interested persons to submit comments.

Dated: August 24, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–18625 Filed 8–28–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–124123–22]

RIN 1545–BQ57

Corporate Bond Yield Curve for Determining Present Value; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of a public hearing on a proposed rulemaking.

SUMMARY: This document cancels a public hearing on proposed regulations specifying the methodology for constructing the corporate bond yield curve that is used to derive the interest rates used in calculating present value and making other calculations under a defined benefit plan, as well as for discounting unpaid losses and estimated salvage recoverable of insurance companies.

DATES: The public hearing scheduled for August 30, 2023, at 10 a.m. ET is cancelled.

FOR FURTHER INFORMATION CONTACT: Vivian Hayes of the Publications and Regulations Branch, Associate Chief Counsel (Procedure and Administration) at (202) 317–6901 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and a notice of public hearing that appeared in the **Federal Register** on June 23, 2023 (88 FR 41047) announced that a public hearing being held in person and by teleconference was scheduled for August 30, 2023, at 10 a.m. ET. The subject of the public hearing is under 26 CFR part 1.

The public comment period for these regulations expired on August 22, 2023. The notice of proposed rulemaking and notice of public hearing instructed those interested in testifying at the public hearing to submit a request to testify and an outline of the topics to be addressed. We did not receive a request to testify at the Public Hearing. Therefore, the public hearing scheduled for August 30, 2023, at 10 a.m. ET is cancelled.

Oluwafunmilayo A. Taylor,

Branch Chief, Publications and Regulations Branch, Associate Chief Counsel, (Procedure & Administration).

[FR Doc. 2023–18622 Filed 8–28–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106228–22]

RIN 1545–BQ61

Malta Personal Retirement Scheme Listed Transaction; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of a notice of public hearing on a proposed rulemaking.

SUMMARY: This document cancels a public hearing on proposed regulations that would identify transactions that are the same as, or substantially similar to, certain Malta personal retirement scheme transactions as listed transactions, a type of reportable transaction.

DATES: The public hearing scheduled for September 21, 2023, at 10 a.m. ET is cancelled.

FOR FURTHER INFORMATION CONTACT: Vivian Hayes of the Publications and Regulations Branch, Associate Chief Counsel (Procedure and Administration) at (202) 317–6901 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and a notice of public hearing that appeared in the **Federal Register** on June 7, 2023 (88 FR 37186) announced that a public hearing being held in person and by teleconference was scheduled for September 21, 2023, at 10 a.m. ET. The subject of the public hearing is under 26 CFR part 1.

The public comment period for these regulations expired on August 7, 2023. The notice of proposed rulemaking and notice of public hearing instructed those interested in testifying at the public hearing to submit a request to testify and an outline of the topics to be addressed. We did not receive a request to testify at the Public Hearing. Therefore, the public hearing scheduled for September 21, 2023, at 10 a.m. ET is cancelled.

Oluwafunmilayo A. Taylor,

Branch Chief, Publications and Regulations Branch, Associate Chief Counsel, (Procedure & Administration).

[FR Doc. 2023–18626 Filed 8–28–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2023–0006; Notice No. 224]

RIN 1513–AD02

Proposed Establishment of the Upper Cumberland Viticultural Area

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes establishing the approximately 2,186,689 acre ''Upper Cumberland'' viticultural area in Middle Tennessee. The proposed viticultural area is not within any other established viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on this proposed addition to its regulations.

DATES: Comments must be received by October 30, 2023.

ADDRESSES: You may electronically submit comments to TTB on this proposal using the comment form for this document posted within Docket No. TTB–2023–0006 on the *Regulations.gov* website at *https://www.regulations.gov.* At the same location, you also may view copies of this document, the related petition and selected supporting materials, and any comments TTB receives on this proposal. A direct link to that docket is available on the TTB website at *https://www.ttb.gov/wine/notices-of-proposed-rulemaking* under Notice No. 224. Alternatively, you may submit comments via postal mail to the Director, Regulations and Ruling Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005. Please see the Public Participation section of this document for further information on the comments requested on this proposal and on the submission, confidentiality, and public disclosure of comments.

FOR FURTHER INFORMATION CONTACT: Karen A. Thornton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; phone 202–453–1039, ext. 175.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). In addition, the Secretary of the Treasury has delegated certain administrative and enforcement authorities to TTB through Treasury Order 120–01.

Part 4 of the TTB regulations (27 CFR part 4) authorizes TTB to establish definitive viticultural areas and regulate the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) sets forth standards for preparing and submitting petitions to establish or modify American viticultural areas (AVAs) and lists the approved AVAs.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features as described in part 9 of the regulations and, once approved, a name and a delineated boundary codified in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to the wine's geographic origin. The establishment of AVAs allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of an AVA is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations (27 CFR 4.25(e)(2)) outlines the procedure for proposing an AVA and allows any interested party to petition TTB to establish a grape-growing region as an AVA. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions to establish or modify AVAs. Petitions to establish an AVA must include the following:

- Evidence that the area within the proposed AVA boundary is nationally or locally known by the AVA name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed AVA;
- A narrative description of the features of the proposed AVA affecting viticulture, such as climate, geology, soils, physical features, and elevation, that make the proposed AVA distinctive and distinguish it from adjacent areas outside the proposed AVA;
- The appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed AVA, with the boundary of the proposed AVA clearly drawn thereon; and
- A detailed narrative description of the proposed AVA boundary based on USGS map markings.

Upper Cumberland Petition

TTB received a petition from the Appalachian Region Wine Producers Association, proposing the establishment of the ''Upper Cumberland'' AVA. The proposed Upper Cumberland AVA covers all or portions of the following eight counties in Middle Tennessee: Cumberland, Fentress, Macon, Putnam, Overton, Smith, Warren, and White. The proposed AVA contains approximately 2,186,689 acres, with 55 vineyards totaling over 71 acres spread throughout the proposed AVA. There are also nine wineries within the proposed AVA. According to the petition, there is at least one vineyard in each of the counties within the proposed AVA, demonstrating that commercial viticulture and winemaking take place throughout the entire proposed AVA.

According to the petition, the distinguishing features of the proposed Upper Cumberland AVA include its geology and elevation, soils, and climate. Unless otherwise noted, all information and data pertaining to the proposed AVA is from the petition and its supporting exhibits.

Name Evidence

The proposed Upper Cumberland AVA is located within the watershed of the Cumberland and Tennessee Rivers or their tributaries, which traditionally includes a total of 14 counties. The proposed Upper Cumberland AVA originally included all 14 of these counties. However, at the request of TTB, the petitioners agreed to exclude those counties that currently lack commercial viticulture, leaving eight counties within the proposed AVA. TTB notes that petition included evidence that the six excluded counties have the same distinguishing features as the remaining eight counties. If the proposed Upper Cumberland AVA is established, TTB may consider future petitions to modify the boundary of the AVA if commercial viticulture develops in those six excluded counties.

The petition includes a map produced by the Upper Cumberland Tourism Association titled ''Upper Cumberland Tennessee.'' [1] The map includes the counties that are entirely or partially within the proposed Upper Cumberland AVA. The maps also show several Tennessee towns that are within the proposed AVA, including Lafayette, Cookeville, Crossville, and McMinnville. The petition included a web page from another tourism site that bears the title ''Welcome to Tennessee's Upper Cumberland'' and encourages readers to click links to learn more information about the ''friendly Chambers of Commerce in The [sic] Upper Cumberland Counties.'' [2] The counties listed as the ''Upper Cumberland Counties'' include the eight counties that are located within the proposed AVA. A website dedicated to forecasting the weather of the region of the proposed AVA is called ''Upper Cumberland Weather.'' [3] The Upper Cumberland Medical Society ''supports personal leadership development of physicians from any of the 14 counties of Upper Cumberland.'' [4] The 14 counties listed by the society include the counties that are within the proposed AVA. The Upper Cumberland Development District provides an array of services to individuals, businesses, and communities within the proposed

[1] See Exhibit 1 to the petition, which is included in Docket No. TTB–2023–0006 at *www.regulations.gov.*

[2] See Exhibit 2 to the petition, which is included in Docket No. TTB–2023–0006 at *www.regulations.gov.*

[3] *Uppercumberlandweather.com.* See Exhibit 6 to the petition, which is included in Docket No. TTB–2023–0006 at *www.regulations.gov.*

[4] See Exhibit 7 to the petition, which is included in Docket No. TTB–2023–0006 at *www.regulations.gov.*

AVA through a variety of organizations, including the Upper Cumberland Area Agency on Aging and Disability.[5] A web page for the 2019 Senior Olympics provides information about events in the ''Upper Cumberland District,'' which also includes all the counties within the proposed AVA.[6] Finally, the Upper Cumberland Genealogical Society serves residents within the proposed AVA.[7]

Boundary Evidence

According to the petition, Tennessee is divided into three main regions: East, Middle, and West. The proposed Upper Cumberland AVA is located entirely within the Middle region, within the watershed of the Cumberland River and its tributaries, as well as a small portion of the Tennessee River watershed. Middle Tennessee includes the western portion of the Cumberland Plateau, the Eastern Highland Rim, and the Inner and Outer Central Basin land regions. The proposed Upper Cumberland AVA encompasses portions of each of these regions, specifically the western portion of the Cumberland Plateau, the Eastern Highland Rim and the eastern portion of the Outer Central Basin.

The Tennessee–Kentucky State line forms the northern boundary of the proposed AVA in order to exclude areas not traditionally or currently associated with the name ''Upper Cumberland.'' The remaining boundaries largely follow county lines to exclude counties associated with the name ''Upper Cumberland'' that do not contain commercial viticulture, as well as any counties that are not associated with the name ''Upper Cumberland'' and have geological and climatic differences, which will be discussed in detail later in this document.

Distinguishing Features

The distinguishing features of the proposed Upper Cumberland AVA include its geology and elevation, soils, and climate.

Geology and Elevation

The proposed Upper Cumberland AVA encompasses portions of three distinct geographic regions. The eastern portion of the proposed AVA is located on the western portion of the Cumberland Plateau. This region was formed from layers of sedimentary rocks, including sandstone, limestone, and shale, that were deposited when an ancient ocean covered the area. As the North American and African protocontinents came together, the sediment and rock stuck between them and the region of what is now the proposed AVA was uplifted, forming the Cumberland Plateau. Average elevations within this portion of the proposed AVA range from 1,500 to 1,800 feet.

The middle portion of the proposed Upper Cumberland AVA is located on the Eastern Highland Rim. The Eastern Highland Rim is a cuesta, which is a ridge where a harder sedimentary rock overlies a softer layer, with the whole ridge being tilted somewhat from the horizontal. The bedrock of the middle portion of the proposed AVA is comprised primarily of Mississippian-aged St. Louis and Warsaw limestones with Fort Payne chert underlain by Chattanooga shale. Elevations within this portion of the proposed AVA range from 600 to 1,000 feet.

The western portion of the proposed AVA lies on the Outer Central Basin. This region is mostly an escarpment, which the petition defines as a long, steep slope, especially one at the edge of a plateau or a slope separating areas of land at different heights. Underlying rocks in this region are limestone, chert, and shale. The Outer Central Basin gradually descends to the lower, flatter elevations of the Inner Central Basin, which is not within the proposed AVA. The petition did not include a range of elevations for this portion of the proposed AVA but noted that the elevations are higher than the average elevations of the Inner Central Basin region, located to the west.

According to the petition, the uplifted elevations of the proposed AVA allow vineyards to receive more direct and concentrated sunlight—the level of UV rays increases between 10 and 20 percent for every 1,000 feet of elevation—than vineyards at lower elevations. As a result of the greater levels of UV rays, grapes develop thicker skins, which increases the color concentration and tannins in the resulting wines.

To the north and south of the proposed AVA are continuations of the same geological features found within the proposed AVA. These areas were excluded from the proposed AVA primarily because they are not considered to be part of the region known as ''Upper Cumberland.'' The petition did not provide information on elevations within the regions to the north and south of the proposed AVA. To the east of the proposed AVA is the Valley and Ridge Province of Tennessee, where the sediment and rock was folded and faulted by the collision of the ancient protocontinents, rather than being uplifted into a plateau. Elevations in the Valley and Ridge Province range from 1,100 to 1,500 feet in the ridges and from 700 to 1,000 feet in the valleys. To the west of the proposed AVA is the Inner Central Basin region, which formed when the collision of the continental plates pushed the sediment and rock into a bulging dome. Over time, the dome eroded and became lower and flatter. When the overlying rocks eroded, the softer underlying limestone began to erode quickly, forming a basin. Elevations within the Inner Central Basin are 300 to 400 feet lower than elevations within the adjacent Eastern Highland Rim portion of the proposed AVA.

Soils

According to the petition, the soils of the proposed Upper Cumberland AVA differ according to the physiographic region. Soils of the eastern portion of the proposed AVA, within the Cumberland Plateau region, are from the Inceptisols and Ultisols soil orders. Ultisols are defined as ''strongly leached, acid forest soils with relatively low fertility.'' Inceptisols ''exhibit minimal horizon development'' and ''lack features characteristic of other soil orders.'' They are often found in mountainous regions. The petition describes the soils as moderately deep, dominantly well-drained, and strongly acidic. They have a mesic soil temperature regime, meaning that soil temperatures at a depth of 20 inches generally range from 47 to 59 degrees Fahrenheit (F). The soils also have an udic soil moisture regime, meaning that water moves down through the soil at some time in most years, and the amount of soil moisture plus rainfall is approximately equal to or exceeds the amount of evapotranspiration.

The middle portion of the proposed AVA, within the Eastern Highland Rim region, has soils of the Ultisols and Inceptisols soil orders, as well as Alfisols soils. Alfisols soils are moderately-leached soils with relatively high native fertility. Soils in this region are in the udic soil moisture regime and are also predominantly in the thermic soil temperature regime, meaning that soil temperatures at a depth of 20 inches range from 59 to 72 degrees F. The petition describes the soils of this region of the proposed AVA as moderately-to-very deep, moderately well-drained, and loamy or clayey.

[5] See Exhibit 3 to the petition, which is included in Docket No. TTB–2023–0006 at *www.regulations.gov*.

[6] *Tnseniorolympics.com/upper-cumberland-district*. See Exhibit 5 to the petition, which is included in Docket No. TTB–2023–0006 at *www.regulations.gov*.

[7] See Exhibit 4 to the petition, which is included in Docket No. TTB–2023–0006 at *www.regulations.gov*.

The western portion of the proposed AVA, within the Outer Central Basin region, also has Ultisols, Inceptisols, and Alfisols soils. The soils have a thermic soil temperature regime and udic soil moisture regime, similar to portion of the proposed AVA that is within the Eastern Highland Rim region.

According to the petition, the acidic soils of the proposed Upper Cumberland AVA generally have better nutrient balance for vine growth than alkaline soils. The well-drained soils of the proposed AVA also provide the vines with enough water to thrive, but not so much that the roots become waterlogged and more prone to disease and rot. The petition also states that the characteristics of the proposed AVA's soils allow grapes to retain acidity as they ripen, resulting ''brighter, more acidic finished wines.''

To the north and south, the soils are similar to those within the proposed AVA. To the east of the proposed AVA, within the Valley and Ridge Province, the soils are almost exclusively Ultisols soils. The soils generally have a thermic soil temperature regime and an udic soil moisture regime. To the west of the proposed AVA, in the Inner Central Basin region, the soils include Mollisols, which are not found in the proposed AVA. Mollisols soils are found in grassland ecosystems and are characterized by a thick, dark surface horizon. The Inner Central Basin also does not contain as many Ultisols soils as the proposed Upper Cumberland AVA.

Climate

The petition provided data on the average maximum and minimum annual temperatures, growing season mean temperatures, growing season length, growing degree days [8] (GDDs), USDA plant hardiness zones, and annual precipitation amounts for the proposed Upper Cumberland AVA and the surrounding regions. The data came from the PRISM Climate Group [9] and was calculated using 1981–2010 climate normals, the most recent climate normals data available at the time the petition was drafted. The following tables summarize the climate data from the petition.

TABLE 1—AVERAGE MAXIMUM AND MINIMUM ANNUAL AND AVERAGE MEAN GROWING SEASON TEMPERATURES

[Degrees Fahrenheit]

Location	Average maximum annual temperature	Average minimum annual temperature	Mean growing season temperature
Proposed AVA	68.7	45.4	67.5
Northeast	67.5	43.3	65.8
East	68.6	45.2	67.7
Southeast	70	47	69
South	70.6	48.5	69.8
Southwest	69.8	45.8	68
West	70.5	46	69.2
Northwest	69	46.8	69

TABLE 2—MEAN GROWING SEASON LENGTH IN DAYS [10]

Location	Days
Proposed AVA	212
Northeast	194
East	208.25
Southeast	219
South	242
Southwest	222
West	210
Northwest	215

TABLE 3—AVERAGE GROWING DEGREE DAYS AND WINKLER REGIONS [11]

Location (direction from proposed AVA) [12]	GDDs	Winkler region
Allardt (within)	3,134.4	III
Crossville (within)	3,462	III
Cookeville (within)	3,700.8	IV
Lafayette (within)	4,266.2	V
McMinnville (within)	4,228.95	V
Sparta Water Plant (within)	3,941.7	IV
Carthage (within)	4,111.9	V
Newcomb (northeast)	3,599.85	IV
Oneida (northeast)	3,252.85	III
Kingston (east)	4,096.5	V

[8] *See* Albert J. Winkler, *General Viticulture* (Berkeley: University of California Press, 1974), pages 61–64. In the Winkler climate classification system, annual heat accumulation during the growing season, measured in annual Growing Degree Days (GDDs), defines climatic regions. One GDD accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees F, the minimum temperature required for grapevine growth. The Winkler scale regions are as follows: Region Ia: 1,500–2,000 GDDs; Region Ib: 2,000–2,500 GDDs; Region II: 2,500–3,000 GDDs; Region III: 3,000–3,500 GDDs; Region IV: 3,500–4,000 GDDs; Region V: 4,000–4,900 GDDs.

[9] The PRISM Climate Group gathers climate observations from a wide range of monitoring networks including weather stations, global positioning systems, and remote sensing equipment. Other factors used include elevation, longitude, and slope angles.

[10] See Table 6 to the petition in Docket No. TTB–2023–0006 at *https://www.regulations.gov*.

TABLE 3—AVERAGE GROWING DEGREE DAYS AND WINKLER REGIONS [11]—Continued

Location (direction from proposed AVA) [12]	GDDs	Winkler region
Norris (east)	3,545.9	IV
Oak Ridge (east)	4,114.75	V
Rockwood (east)	3,750.7	IV
Tazewell (east)	3,418.05	III
Cleveland (southeast)	4,088.8	V
Dayton (southeast)	4,047.05	V
Chattanooga (south)	4,556.45	V
Winchester (south)	3,923.15	IV
Lebanon (west)	4,145.85	V
Murfreesboro (west)	4,099.75	V
Clarksville (northwest)	4,101.3	V
Clarksville Outlaw Field Airport (northwest)	4,060.1	V
Clarksville Water Treatment Plant (northwest)	4,376.45	V
Springfield (northwest)	4,032.4	V

TABLE 4—USDA PLANT HARDINESS ZONES [13]

Location	Plant hardiness zone
Proposed AVA	6b–7a
Northeast	6b
East	7a
Southeast	7a–7b
South	7a–7b
Southwest	7a
West	7a
Northwest	6b–7a

TABLE 5—AVERAGE ANNUAL PRECIPITATION AMOUNTS

Location	Precipitation (inches)
Proposed AVA	50.02
Northeast	52.45
East	54.36
Southeast	54.67
South	52.69
Southwest	56.17
West	53.12
Northwest	51.02

According to the petition, the climate of the proposed Upper Cumberland AVA is suitable for growing a wide variety of wine grapes, including *vinifera,* hybrid, native, and muscadine varietals, which are all currently growing within the proposed AVA. Bud break generally occurs from the second week of April through the second week of May, and harvest generally occurs from the last week of July through the end of August.

Summary of Distinguishing Features

In summary, the geology and elevation, soils, and climate of the proposed Upper Cumberland AVA distinguish it from the surrounding regions. The proposed AVA contains portions of three of the major geographic features of Tennessee: the Cumberland Plateau, which is an uplifted region of sandstone, limestone, and shale with elevations between 1,500 and 1,800 feet; the Eastern Highland Rim, a slightly-tilted cuesta of limestone, chert, and shale with elevations between 600 and 1,000 feet; and the Outer Central Basin, an escarpment of limestone, chert, and shale that has elevations that are typically 300 to 400 feet higher than in the adjacent Inner Central Basin region. Soils within the proposed AVA consist of Inceptisols, Ultisols, and Alfisols that are generally well-drained, acidic, and moderately-to-strongly leached. The average growing season length is 212 days, with a mean growing season temperature of 67.5 degrees F and USDA Plant Hardiness Zones ranging from 6b to 7a. GDD accumulations range from 3,134.4 to 4,226.2, and Winkler Regions range from Zone III to Zone V. The average annual precipitation amount is 50.02 inches.

To the north and south of the proposed AVA, the geology, elevations, and soils are similar to those of the proposed AVA. However, these areas were excluded because they are not part of the region that is known as ''Upper Cumberland.'' The region to the south also has a generally warmer climate, with a mean growing season temperature of 69.8 degrees F, a 242-day growing season, USDA Plant Hardiness Zones ranging from 7a to 7b, and

[11] See Tables 1 and 7 to the petition in Docket No. TTB–2023–0006 at *https://www.regulations.gov.*

[12] Tables 1 and 7 in the petition include locations that are not within the revised boundary of the proposed AVA. Those locations have been excluded from the tables in this document.

[13] Plant Hardiness Zones are based on the average annual extreme minimum temperature for a region from the period of 1976–2005. Zone 6b = −5 to 0 degrees F; Zone 7a = 0 to 5 degrees F; Zone 7b = 5 to 10 degrees F. See Figure 12 to the petition in Docket No. TTB–2023–0006 at *https://www.regulations.gov.*

regions in Winkler Regions IV and V. The region to the south also has higher annual precipitation amounts.

To the east of the proposed AVA is the Valley and Ridge Province, which is comprised of folded and faulted rocks and sediments and has elevations from 700 to 1,000 feet in the valleys and 1,100 to 1,500 feet in the ridges. Soils in this region are almost exclusively Ultisols. The mean growing season temperature and USDA Plant Hardiness Zones are similar to that of the proposed AVA, but the growing season is slightly shorter, and GDD accumulations are slightly lower. Annual precipitation amounts are also higher in the region to the east of the proposed AVA.

To the west of the proposed AVA is the Inner Central Basin, which was formed by the erosion of a large, bulging dome of sediment and rocks. Soils in this region include Molisols, which are not found in the proposed AVA, and fewer Ultisols than the proposed AVA. The region is categorized as a Winkler Region V, with a higher mean growing season temperature than the proposed AVA and a USDA Plant Hardiness Zone rating of 7a. Due west of the proposed AVA, the growing season is shorter, but the regions to the northwest and southwest have longer growing seasons. Average annual precipitation amounts are also higher to the west of the proposed AVA.

TTB Determination

TTB concludes that the petition to establish the proposed Upper Cumberland AVA merits consideration and public comment, as invited in this notice of proposed rulemaking.

Boundary Description

See the narrative description of the boundary of the petitioned-for AVA in the proposed regulatory text published at the end of this proposed rule.

Maps

The petitioner provided the required maps, and TTB lists them below in the proposed regulatory text. You may also view the proposed Upper Cumberland AVA boundary on the AVA Map Explorer on the TTB website, at *https://www.ttb.gov/wine/ava-map-explorer*.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. For a wine to be labeled with an AVA name, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name, and the wine must meet the other conditions listed in § 4.25(e)(3) of the TTB regulations (27 CFR 4.25(e)(3)). If the wine is not eligible for labeling with an AVA name and that name appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the AVA name appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label. Different rules apply if a wine has a brand name containing an AVA name that was used as a brand name on a label approved before July 7, 1986. See § 4.39(i)(2) of the TTB regulations (27 CFR 4.39(i)(2)) for details.

If TTB establishes this proposed AVA, its name, ''Upper Cumberland,'' will be recognized as a name of viticultural significance under § 4.39(i)(3) of the TTB regulations (27 CFR 4.39(i)(3)). The text of the proposed regulation clarifies this point. Consequently, wine bottlers using the name ''Upper Cumberland'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, would have to ensure that the product is eligible to use the AVA name as an appellation of origin if TTB adopts this proposed rule as a final rule.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on whether it should establish the proposed Upper Cumberland AVA. TTB is also interested in receiving comments on the sufficiency and accuracy of required information submitted in support of the petition. Please provide specific information in support of your comments.

Because of the potential impact of the establishment of the proposed Upper Cumberland AVA on wine labels that include the term ''Upper Cumberland'' as discussed above under Impact on Current Wine Labels, TTB is particularly interested in comments regarding whether there will be a conflict between the proposed AVA name and currently used brand names. If a commenter believes that a conflict will arise, the comment should describe the nature of that conflict, including any anticipated negative economic impact that approval of the proposed AVA will have on an existing viticultural enterprise. TTB is also interested in receiving suggestions for ways to avoid conflicts, for example, by adopting a modified or different name for the proposed AVA.

Submitting Comments

You may submit comments on this proposal as an individual or on behalf of a business or other organization via the *Regulations.gov* website or via postal mail, as described in the **ADDRESSES** section of this document. Your comment must reference Notice No. 224 and must be submitted or postmarked by the closing date shown in the **DATES** section of this document. You may upload or include attachments with your comment. You also may request a public hearing on this proposal. The TTB Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality and Disclosure of Comments

All submitted comments and attachments are part of the rulemaking record and are subject to public disclosure. Do not enclose any material in your comments that you consider confidential or that is inappropriate for disclosure.

TTB will post, and you may view, copies of this document, the related petition and selected supporting materials, and any comments TTB receives about this proposal within the related *Regulations.gov* docket. In general, TTB will post comments as submitted, and it will not redact any identifying or contact information from the body of a comment or attachment.

Please contact TTB's Regulations and Rulings division by email using the web form available at *https://www.ttb.gov/contact-rrd,* or by telephone at 202–453–2265, if you have any questions about commenting on this proposal or to request copies of this document, the related petition and its supporting materials, or any comments received.

Regulatory Flexibility Act

TTB certifies that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

It has been determined that this proposed rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, no regulatory assessment is required.

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

For the reasons discussed in the preamble, TTB proposes to amend title 27, chapter I, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9. ____ to read as follows:

§ 9. ____ Upper Cumberland.

(a) *Name.* The name of the viticultural area described in this section is ''Upper Cumberland''. For purposes of part 4 of this chapter, ''Upper Cumberland'' is a term of viticultural significance.

(b) *Approved maps.* The 8 United States Geological Survey (USGS) 1:100,000 scale topographic maps used to determine the boundary of the Upper Cumberland viticultural area are:

(1) Bowling Green, 1985;

(2) Tompkinsville, 1985; photoinspected 1992;

(3) Corbin, 1981;

(4) Nashville, 1984;

(5) Cookeville, 1982;

(6) Oak Ridge, 1979;

(7) McMinnville, 1981; and

(8) Watts Bar Lake, 1981.

(c) *Boundary.* The Upper Cumberland viticultural area is located in Cumberland, Fentress, Macon, Overton, Putnam, Smith, Warren, and White Counties, in Tennessee. The boundary of the viticultural area is as described as follows:

(1) The beginning point is on the Bowling Green map at the intersection of the shared Macon–Sumner County line and the shared Kentucky–Tennessee State line. From the beginning point, proceed south along the shared Macon–Sumner County line, crossing onto the Nashville map and continuing along the shared Macon–Sumner County line to its intersection with the Trousdale County line; then

(2) Proceed east, then southeast, then east along the shared Trousdale–Macon County line, crossing onto the Cookeville map and continuing east along the shared Trousdale–Macon County line to its intersection with the Smith County line; then

(3) Proceed southwesterly along the shared Smith–Trousdale County line, crossing back onto the Nashville map and continuing southwesterly, then westerly along the shared Smith–Trousdale County line to its intersection with the Wilson County line; then

(4) Proceed southeasterly along the shared Wilson–Smith County line to its intersection with the DeKalb County line; then

(5) Proceed east along the shared Smith–DeKalb County line, crossing onto the Cookeville map and continuing east along the Smith–DeKalb County line to its intersection with the Putnam County line; then

(6) Proceed southeast along the shared DeKalb–Putnam County line to its intersection with the White County line; then

(7) Proceed southeast along the shared Dekalb–White County line, crossing onto the McMinnville map and continuing south along the DeKalb–White County line to its intersection with the Warren County line; then

(8) Proceed west along the shared DeKalb–Warren County line to its intersection with the Cannon County line; then

(9) Proceed southwesterly along the shared Warren–Cannon County line to its intersection with the Coffee County line; then

(10) Proceed southeast along the shared Warren–Coffee County line to its intersection with the Grundy County line; then

(11) Proceed east along the shared Warren–Grundy County line to its intersection with the Sequatchie County line; then

(12) Proceed east along the shared Warren–Sequatchie County line to its intersection with the Van Buren County line; then

(13) Proceed northwest, then north along the shared Warren–Van Buren County line to its intersection with the White County line; then

(14) Proceed east, then southerly along the shared White–Van Buren County line to its intersection with the shared Cumberland–Bledsoe County line; then

(15) Proceed east along the shared Bledsoe–Cumberland County line to its intersection with U.S. Highway 127/State Road 29; then

(16) Proceed northeast in a straight line for a total of 21.81 miles, crossing over the Watts Bar Lake map and onto the Oak Ridge map to the intersection of the straight line with the shared Cumberland–Morgan County line east of Hebbertsburg; then

(17) Proceed northwesterly, then westerly, then northwesterly along the shared Cumberland–Morgan County line to its intersection with the Fentress County line; then

(18) Proceed north, then northeast along the shared Fentress–Morgan County line to its intersection with the Scott County line; then

(19) Proceed northeast, then northwest along the shared Scott–Fentress County line, crossing onto the Corbin map and continuing along the shared Scott–Fentress County line to its intersection with the Pickett County line; then

(20) Proceed west, then northwesterly along the shared Fentress–Pickett County line, crossing over the Tompkinsville map and onto the Cookeville map and continuing along the shared Fentress–Pickett County line to its intersection with the Overton County line; then

(21) Proceed west, then northwesterly along the shared Pickett–Overton County line, crossing onto the Tompkinsville map and continuing along the shares Pickett–Overton County line to its intersection with the Clay County line; then

(22) Proceed southwesterly along the shared Overton–Clay County line, crossing onto the Cookeville map and continuing south along the shared Overton–Clay County line to its intersection with the Jackson County line; then

(23) Proceed southerly along the shared Overton–Jackson County line to its intersection with the Putnam County line; then

(24) Proceed westerly along the shared Putnam–Jackson County line to its intersection with the Smith County line; then

(25) Proceed westerly, then northerly along the shared Smith–Jackson County line to its intersection with the Macon County line; then

(26) Proceed north along the shared Macon–Jackson County line, crossing onto the Tompkinsville map and continuing along the shared Macon–Jackson County line to its intersection with the Clay County line; then

(27) Proceed north along the shared Macon–Clay County line to its intersection with the shared Tennessee–Kentucky State line; then

(28) Proceed west along the Tennessee–Kentucky State line, crossing onto the Bowling Green map and returning to the beginning point.

Signed: August 21, 2023.

Mary G. Ryan,

Administrator.

Approved: August 22, 2023.

Thomas C. West, Jr.,

Deputy Assistant Secretary (Tax Policy).

[FR Doc. 2023–18590 Filed 8–28–23; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 350, 365, 385, 386, 387, and 395

[Docket No. FMCSA–2022–0003]

RIN 2126–AC52

Safety Fitness Determinations

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Advance notice of proposed rulemaking and request for comments.

SUMMARY: FMCSA is interested in developing a new methodology to determine when a motor carrier is not fit to operate commercial motor vehicles (CMVs) in or affecting interstate commerce. FMCSA requests public comment on the need for a rulemaking to revise the regulations prescribing the safety fitness determination process; the available science or technical information to analyze regulatory alternatives for determining the safety fitness of motor carriers; feedback on the Agency's current safety fitness determination (SFD) regulations, including the process and impacts; the available data and costs for regulatory alternatives reasonably likely to be considered as part of this rulemaking; and responses to specific questions in this advance notice of proposed rulemaking (ANPRM).

DATES: Comments on this notice must be received on or before October 30, 2023.

ADDRESSES: You may submit comments identified by Docket Number FMCSA–2022–0003 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov/docket/FMCSA-2022-0003/document.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Stacy Ropp, (609) 661–2062, *SafetyFitnessDetermination@dot.gov.* FMCSA office hours are from 7:30 a.m. to 4 p.m., Monday through Friday, except Federal holidays. If you have questions on viewing or submitting material to the docket, call Dockets Operations at (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

A. Submitting Comments

If you submit a comment, please include the docket number for this ANPRM (FMCSA–2022–0003), indicate the specific section of this document to which your comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *https://www.regulations.gov/docket/FMCSA-2022-0003/document,* click on this ANPRM, click ''Comment,'' and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

Confidential Business Information (CBI)

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to the ANPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to the ANPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as ''PROPIN'' to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the Freedom of Information Act, and they will not be placed in the public docket of the ANPRM. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Evaluation Division, Office of Policy, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any comments FMCSA receives not specifically designated as CBI will be placed in the public docket for this rulemaking.

B. Viewing Comments and Documents

To view any documents mentioned as being available in the docket, go to *https://www.regulations.gov/docket/FMCSA-2022-0003/document* and choose the document to review. To view comments, click this ANPRM, then click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy

DOT solicits comments from the public to better inform its regulatory process, in accordance with 5 U.S.C. 553(c). DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL 14—Federal Docket Management System (FDMS)), which can be reviewed at *www.transportation.gov/privacy.*

II. Legal Basis for the Rulemaking

This rulemaking is based primarily on 49 U.S.C. 31144(a) and (b) [1] which

[1] Enacted by Motor Carrier Safety Act of 1984 (1984 Act), sec. 215, Public Law 98–554, Title II, Continued

direct the Secretary of Transportation (Secretary) to determine whether an owner or operator is fit to operate safely CMVs and to maintain by regulation a procedure for determining the safety fitness of an owner or operator. FMCSA's authority to determine the safety fitness of owners or operators of CMVs was broadened with major amendments in 1998 [2] and 2005,[3] and another amendment in 2012.[4]

As amended, section 31144(a) now requires the Secretary to: (1) determine whether an owner or operator is fit to operate CMVs safely, utilizing among other things the crash record of an owner or operator operating in interstate commerce and the crash record and safety inspection record of such owner or operator—(A) in operations that affect interstate commerce within the United States; and (B) in operations in Canada and Mexico if the owner or operator also conducts operations within the United States; (2) periodically update such SFDs; (3) make such final SFDs readily available to the public; and (4) prescribe by regulation penalties for violations of 49 U.S.C. 31144 consistent with 49 U.S.C. 521.[5]

Section 31144(b) provides that the Secretary shall maintain by regulation a procedure for determining the safety fitness of an owner or operator. The procedure shall include, at a minimum, the following elements: (1) specific initial and continuing requirements with which an owner or operator must comply to demonstrate safety fitness; (2) a methodology the Secretary will use to determine whether an owner or operator is fit; and (3) specific time frames within which the Secretary will determine whether an owner or operator is fit.[6]

This rulemaking also relies on 49 U.S.C. 31133, which gives the Secretary broad administrative powers to assist in the implementation of the provisions of subchapter III of chapter 311 of 49 U.S.C. These powers include, among others, authority to conduct inspections and investigations, compile statistics, require production of records and property, prescribe recordkeeping and reporting requirements, and perform other acts considered appropriate.[7] The Agency also has broad authority to conduct investigations and inspect equipment, lands, buildings, and other property.[8] These powers are exercised to obtain the data used to issue SFDs.

FMCSA has authority to revoke the operating authority registration of any motor carrier that has been prohibited from operating as the result of a final unfit SFD.[9] FMCSA has the authority to take similar action to revoke or suspend a motor carrier's safety registration on the same grounds.[10] FMCSA also has statutory authority to adopt a requirement that States receiving Motor Carrier Safety Assistance Program (MCSAP) grants enforce orders issued by FMCSA related to CMV safety and hazardous materials (HM) transportation safety. States receiving MCSAP funds therefore must enforce FMCSA orders to cease operation for lack of operating authority registration as the result of a final unfit SFD.[11]

The Secretary has delegated the authority to carry out all these functions to the FMCSA Administrator.[12]

III. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), AND E.O. 14094 (Modernizing Regulatory Review)

This ANPRM is a significant regulatory action under section 3(f) of E.O. 12866, as supplemented by E.O. 13563 and amended by E.O. 14094. Accordingly, the Office of Information and Regulatory Affairs within the Office of Management and Budget has reviewed it under these E.O.s.

E.O.s 12866, 13563, and 14094 require agencies to provide a meaningful opportunity for public participation. Accordingly, FMCSA has asked commenters to answer a variety of questions to elicit practical information about alternative approaches for safety fitness determinations, including the associated costs and benefits of those approaches, and relevant scientific, technical, and economic data.

IV. Background

History of SFDs

The Federal Highway Administration (FHWA), the predecessor of FMCSA, first promulgated Safety Fitness Procedures in 1988 [13] to determine the safety fitness of motor carriers through an investigation generally conducted at the motor carrier's premises and to establish procedures to resolve safety fitness disputes with motor carriers, as required by the 1984 Act.[14] In 1991, FHWA issued an interim final rule,[15] based on provisions in the Motor Carrier Safety Act of 1990 (1990 Act).[16] This interim final rule prohibited certain motor carriers rated Unsatisfactory (*i.e.,* Unfit) from operating CMVs in interstate commerce by transporting more than 15 passengers or placardable quantities of HM starting on the 46th day after being found unfit. This regulation went into effect on the date of publication in August 1991. FHWA stated that it would use a safety-rating formula to determine safety ratings, but the formula, while publicly available, was not included in the safety fitness regulation.

In March 1997, in *MST Express* v. *Department of Transportation,*[17] the U.S. Court of Appeals for the District of Columbia Circuit ruled in favor of a motor carrier that had appealed its conditional safety fitness rating. The court found that FHWA did not carry out its statutory obligation to establish, by regulation, a means of determining whether a carrier has complied with the safety fitness requirements of the 1984 Act. Because the carrier's conditional safety rating was based, in part, upon the formula that was publicly available, but was not included in the promulgated 1988 final rule or 1991 interim final rule, the court vacated the petitioner's conditional safety rating and remanded the matter to FHWA for further action.

In response, FHWA issued a second interim final rule in May 1997 [18] incorporating the safety fitness rating methodology into the safety fitness regulations, and a companion notice of proposed rulemaking (NPRM) published the same day [19] proposed to adopt the formula or methodology for use in assigning safety fitness ratings to all classes of motor carriers. This companion NPRM discussed the public comments received in response to the 1991 interim final rule.

98 Stat. 2829, 2844–2845 (Oct. 30, 1984), now codified at 49 U.S.C. 31144.

[2] Sec. 4009(a) of the Transportation Equity Act for the 21st Century (TEA–21), Public Law 105–178, 112 Stat. 107, 405 (June 12, 1998).

[3] Sec. 4114(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1144, 1725 (Aug. 10, 2005).

[4] Sec. 32707(a), Div. C., Title II of the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, 126 Stat. 813 (July 6, 2012).

[5] 49 U.S.C. 31144(a).

[6] 49 U.S.C. 31144(b).

[7] See Sen. Report No. 98–424 at 9 (May 2, 1984).

[8] 49 U.S.C. 502, 504(c), 506, 5121 (as to persons subject to 49 U.S.C. Chapter 51), 14122 (as to brokers and motor carriers providing motor vehicle transportation for compensation).

[9] 49 U.S.C. 13905(f)(1)(B).

[10] 49 U.S.C. 31134(c).

[11] 49 U.S.C. 31102(a) and (b).

[12] 49 CFR 1.87(a)(5), (f), and (j).

[13] 53 FR 50961 (Dec. 19, 1988).

[14] Sec. 215, Public Law 98–554, 98 Stat. 2829, 2844–2845, now codified, as amended, at 49 U.S.C. 31144.

[15] 56 FR 40802 (Aug. 16, 1991).

[16] Sec. 15(b), Public Law 101–500, 104 Stat. 1213, 1218 (Nov. 3, 1990).

[17] 108 F.3d 401 (D.C. Cir. 1997).

[18] 62 FR 28807 (May 28, 1997).

[19] 62 FR 28826 (May 28, 1997).

In November 1997, FHWA published a final rule [20] incorporating the Agency's revised safety fitness rating methodology in appendix B to 49 CFR part 385, Safety Fitness Procedures. In November 1998, FHWA published amendments to the rule that corrected several minor errors.[21] These changes withstood judicial review in 1999 in *American Trucking Associations, Inc.* v. *U.S. DOT*.[22] The court in the American Trucking Associations case gave deference to FHWA's interpretation of its statutory directive as it related to the level of specificity required in regulation and related interpretive guidance. Regarding FHWA's reason for using interpretive guidance rather than notice and comment rulemaking to implement aspects of the methodology, the court noted: ''It is easy to imagine an affirmative reason for the agency's decision not to subject the sampling procedure to notice and comment rulemaking—the desire to be able to vary these technical elements of the process without excessive delay as experience accrues.''

In 1998, TEA–21 added a prohibition [23] applicable to all owners and operators of CMVs not previously subject to the 1990 Act's prohibition—that is, those CMV owners and operators not transporting more than 15 passengers or HM in quantities requiring placarding. Following that change, starting on the 61st day after being found unfit, all owners and operators, including those not transporting more than 15 passengers or HM in quantities requiring placarding, were prohibited from operating CMVs in interstate commerce. It also prohibited Federal agencies from using any unfit owner or operator to provide any transportation service. FHWA proposed the regulations implementing the TEA–21 amendments in 1999, and FMCSA, which was established in 2000, published the final rule on August 22, 2000.[24]

FMCSA published several additional amendments earlier in 2000.[25] These changes updated the list of acute and critical regulations to conform with changes in FMCSA and the Pipeline and Hazardous Materials Safety Administration regulations. In 2007,[26] the Agency further revised the safety fitness procedures regulations and appendix B to implement SAFETEA–LU statutory amendments.[27]

In 2007, in response to a motorcoach fire with numerous fatalities, the National Transportation Safety Board (NTSB) recommended that FMCSA use all motor carrier violations when assessing a carrier's safety fitness. (See NTSB recommendation H–07–003 in ''Highway Accident Report: Motorcoach Fire on Interstate 45 During Hurricane Rita Evacuation Near Wilmer, Texas, September 23, 2005.''). A copy of the NTSB report and a related Motor Carrier Safety Advisory Committee (MCSAC) report have been placed in the docket. The MCSAC recommended unanimously to FMCSA that it implement the NTSB proposal to use all motor carrier violations when assessing a carrier's safety fitness. NTSB closed the recommendation on September 15, 2015, after NTSB accepted FMCSA's alternative action of including severity weights for violations of the regulations and including them in its Safety Measurement System (SMS). A copy of NTSB's letter closing the recommendation is also in the docket.

Current SFD Process

SFDs are currently determined based on an analysis of existing motor carrier data and data collected during an investigation (referred to as a ''compliance review'' (CR) in § 385.3). The CR may be conducted on-site at the motor carrier's place of business and/or remotely through a review of its records using a secure portal. The existing SFD process analyzes six factors to assign a carrier's safety fitness rating. Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs) with similar characteristics are grouped together in the six factors as follows:

- Factor 1 General—Parts 387 and 390
- Factor 2 Driver—Parts 382, 383, and 391
- Factor 3 Operational—Parts 392 and 395
- Factor 4 Vehicle—Parts 393 and 396
- Factor 5 HM—Parts 171, 177, 180, and 397
- Factor 6 Accident factor—Recordable accident rate per million miles

FMCSA calculates a vehicle out-of-service rate, reviews crash involvement, and conducts an in-depth examination of the motor carrier's compliance with the acute and critical regulations of the FMCSRs and HMRs, currently listed in 49 CFR part 385, appendix B, part VII.

''Acute regulations'' are those where noncompliance is so severe as to require immediate corrective action, regardless of the overall safety management controls of the motor carrier.

''Critical regulations'' are related to management or operational systems controls. Overall noncompliance is calculated and rated on a point system within the six factors. During the investigation, for each instance of noncompliance with an acute regulation or each pattern of noncompliance with a critical regulation one point is assessed. Each pattern of noncompliance with a critical regulation in part 395, Hours of Service of Drivers, is assessed two points. For a critical regulation, the number of violations required to meet the threshold for a pattern is equal to at least 10 percent of those sampled, and more than one violation must be found to establish a pattern. In addition, on-road safety data is used in calculating the vehicle and crash factors.[28]

If any factor is assessed one point, that factor is rated as ''conditional.'' If any factor is assessed two points, that factor is rated as ''unsatisfactory.'' Two or more individual factors rated as ''unsatisfactory'' will result in an overall rating of ''Unsatisfactory.'' One individual factor rated as ''unsatisfactory'' and more than two individual factors rated as ''conditional'' will also result in an ''Unsatisfactory'' rating overall (see Table 1 below).

TABLE 1—CURRENT SFD RATING TABLE

Factor ratings		Overall safety rating
Unsatisfactory	Conditional	
0	2 or fewer	Satisfactory.
0	More than 2	Conditional.

[20] 62 FR 60035 (Nov. 6, 1997).

[21] 63 FR 62957 (Nov. 10, 1998).

[22] 166 F.3d 374 (D.C. Cir. 1999).

[23] Sec. 4009(a), Public Law 105–178, 112 Stat. 107, 405, codified in amended 49 U.S.C. 31144.

[24] 65 FR 50919 (Aug. 22, 2000).

[25] 65 FR 11904 (Mar. 7, 2000).

[26] 72 FR 36760 (July 5, 2007).

[27] Sec. 4114(a), Public Law 109–59, 119 Stat. 1144, 1725, codified in amended 49 U.S.C. 31144.

[28] This is referred to as the *Accident Factor* in 49 CFR part 385 appendix B. Under § 390.5, *Accident* and *Crash* have the same meaning.

TABLE 1—CURRENT SFD RATING TABLE—Continued

Factor ratings		Overall safety rating
Unsatisfactory	Conditional	
1	2 or fewer	Conditional.
1	More than 2	Unsatisfactory.
2 or more	0 or more	Unsatisfactory.

The Agency's current SFD process is resource-intensive and reaches only a small percentage of motor carriers. In fiscal year (FY) 2019,[29] FMCSA and its State partners conducted 11,671 CRs out of a population of more than 567,000 active interstate motor carriers.[30] The Agency conducts CRs that are either comprehensive, reviewing all regulatory factors in full, or focused, reviewing fewer than all of the factors. A comprehensive CR may result in a satisfactory, conditional, or unsatisfactory safety rating. A focused CR may result in a conditional or unsatisfactory safety rating or may not result in a safety rating.

Of the CRs conducted in FY 2019, 306 resulted in a final safety rating of Unsatisfactory, 1,842 resulted in a final safety rating of Conditional, and 2,701 resulted in a final safety rating of Satisfactory.[31] Only a small percentage of carriers with safety management control deficiencies are required to submit corrective action to continue operating and avoid a final unfit determination based on an unsatisfactory rating.

FMCSA's SMS currently is not used in any way to generate SFDs. SMS is FMCSA's prioritization system to identify motor carriers for investigation that demonstrate through safety data that they pose safety risk. SMS organizes inspection and crash data into seven categories of violations known as Behavior Analysis and Safety Improvement Categories (BASICs). SMS generates absolute measures of a carrier's safety performance and then creates percentile rankings within each BASIC that compare carriers' safety performance to similarly sized carriers. Carriers whose relative percentiles exceed established intervention thresholds are considered to be in ''alert'' status and may receive an FMCSA intervention, such as a warning letter or investigation.

2016 NPRM

On January 21, 2016, FMCSA published an NPRM titled ''Carrier Safety Fitness Determination'' (81 FR 3562, available at *https://www.regulations.gov/document/FMCSA-2015-0001-0076*). That NPRM proposed SFDs based on the carrier's on-road safety data; an investigation; or a combination of on-road safety data and investigation information.

The 2016 NPRM proposed SFD methodology would have used a carrier's absolute measure, but not its relative percentile ranking, in SMS to generate unfit SFDs. The intended effect of that proposal was to more effectively use FMCSA data and resources to identify unfit motor carriers and to remove them from the Nation's roads. The previous NPRM also proposed eliminating the current rating terms of Satisfactory, Unsatisfactory, and Conditional and transitioning to a single determination of Unfit.

The Agency concluded that many reasons supported changing the SFD. First, the current SFD methodology evaluates a motor carrier's compliance using only a limited range of roadside and other inspection data. Additionally, the current process does not integrate all the data available in the Motor Carrier Management Information System (MCMIS). Approximately 3.5 million inspections are conducted each year, and this information is not effectively used to remove unsafe operators from our Nation's roadways.

Second, the safety rating is a snapshot of a company's safety performance at the time of the investigation. Because the Agency has resources to issue safety ratings to only a small percentage of motor carriers each year, a safety rating does not necessarily reflect the current safety posture of a motor carrier.

Third, the current SFD process is not designed to continually monitor motor carrier on-road safety data.

Fourth, the assignment and perpetual existence of a Satisfactory safety rating (until the rating is replaced after a subsequent CR), may be misconstrued as an FMCSA approval of the current operations of a motor carrier, when instead, it reflects FMCSA's evaluation of a motor carrier's operations at the time of the investigation.

Fifth, under the current SFD process, a motor carrier is not prohibited from operating with a Conditional rating even though a ratable review reveals breakdowns in safety management controls in multiple areas. For example, a motor carrier with documented noncompliance in areas such as vehicle maintenance (factor 4) and controlled substances and alcohol testing (factor 2) would receive only a proposed Conditional rating, which, if it became final, would still allow the motor carrier to continue operating.

Sixth, under present and foreseeable staffing levels, the current regulations allow the Agency and its State partners to assess or rate the safety fitness of only a small population of motor carriers on an annual basis. The 2016 proposal would have expanded the number of assessed and rated carriers.

Lastly, FMCSA has agreed to take action on an NTSB recommendation related to changing the safety fitness methodology, H–12–017: Include SMS rating scores in the methodology used to determine a carrier's fitness to operate in the safety fitness rating rulemaking for the new Compliance, Safety, Accountability initiative.

The Agency received 153 initial comment period submissions and 17 reply comment period submissions in response to the 2016 NPRM. While many commenters favored the proposal, including most safety advocacy and State law enforcement groups, others opposed it, including large and small motor carriers and some trade associations. More information about this rulemaking action can be found in the docket for the 2016 NPRM.

FAST Act Impacts

Section 5221 of the Fixing America's Surface Transportation (FAST) Act[32] required the National Academy of Sciences (NAS) to conduct an independent study of SMS. In 2017 FMCSA withdrew the 2016 NPRM to

[29] FY 2019 was the last year prior to the COVID–19 pandemic. In FY 2020 and FY 2021, the pandemic limited the number of CRs conducted due to restrictions on travel and safety concerns.

[30] This does not include intrastate HM motor carriers. *https://ai.fmcsa.dot.gov/registrationstatistics/CustomReports,* last accessed April 26, 2022.

[31] *https://ai.fmcsa.dot.gov/SafetyProgram/spRptReview.aspx?rpt=RVFR,* last accessed April 26, 2022.

[32] Public Law 114–94, div. A, title V, subtitle B, part II, 129 Stat. 1538 (Dec. 4, 2015), 49 U.S.C. 31100 note.

await the completion of the correlation study by NAS, and an analysis of any corrective actions.[33]

On June 27, 2017, NAS published the report titled, ''Improving Motor Carrier Safety Measurement.'' The report is available in the docket for this ANPRM and also available at *https://www.nap.edu/catalog/24818/improving-motor-carrier-safety-measurement.*

The NAS report concluded that SMS, in its current form, is structured in a reasonable way and its method of identifying motor carriers for alert status is defensible. The NAS agreed that FMCSA's overall approach, based on crash prevention rather than prediction, is sound. The NAS provided six recommendations. The primary recommendation was for FMCSA to develop a complex statistical model known as item response theory (IRT) and ''[i]f it is then demonstrated to perform well in identifying motor carriers for alerts, FMCSA should use it to replace SMS in a manner akin to the way SMS replaced SafeStat.'' FMCSA accepted all the NAS recommendations and developed an implementation plan, as required by the FAST Act. A copy of the action plan is available in the docket of this ANPRM.

In addition, section 5223 of the FAST Act (49 U.S.C. 31100 note) prohibits FMCSA from using information regarding the SMS percentiles and alerts for SFDs until the DOT's Office of the Inspector General makes five certifications required by the FAST Act. The OIG has not issued the five certifications, and this statutory limitation therefore currently prevents FMCSA from using SMS percentiles or alerts for SFDs, as was recommended by the NTSB.

Current Status of SMS

This ANPRM does not make any specific proposals but asks for input on the potential use of the SMS methodology to issue SFDs in a manner similar to the 2016 FMCSA proposed rule.[34] To inform that input, FMCSA provides an update on its work related to SMS here and in the Agency's **Federal Register** notice titled, ''New Carrier Safety Assessment System,'' which was published at 88 FR 9954 (February 15, 2023). As recommended by NAS, FMCSA developed and tested an IRT model. To do so, FMCSA contracted with NAS for the establishment and operation of a standing committee of experts, as well as with subject matter experts from academia with experience in large-scale IRT modeling, to provide advice and guidance to the Agency during the development and testing of the IRT model. The IRT model was designed and tested using inspection data from FMCSA's MCMIS database. The full modeling report titled, ''Development and Evaluation of an Item Response Theory (IRT) Model for Motor Carrier Prioritization,'' which details the statistical methodologies applied in developing and testing the IRT model, is available in the docket of the February 15, 2023, notice regarding SMS.

The Agency's IRT modeling work revealed many complications of using an IRT model. As a result, the Agency has concluded that IRT modeling does not perform well for FMCSA's use in identifying motor carriers for safety interventions and thus is not a useful tool for improving safety through FMCSA's safety fitness authority. First, the IRT model developed by FMCSA is heavily biased towards identifying smaller carriers that have few inspections with violations and limited on-road exposure to crash risk. When the safety event groups and data sufficiency standards used in SMS were applied to the IRT model, the IRT produced similar results to SMS.

Second, the IRT does not use vehicle miles traveled or power units to adjust for on-road exposure in the Unsafe Driving BASIC. As a result, the IRT identified carriers with much lower crash rates in that BASIC compared to SMS.

Third, IRT modeling is not understandable by most stakeholders or the public. IRT's inherent complexity makes it challenging for the industry and public to replicate and interpret results. While SMS results using FMCSA's existing processes can be reproduced and explained using mathematical calculations, IRT requires an advanced understanding of statistical modeling and analysis.

Fourth, a motor carrier could not independently compute its IRT results. IRT results can be computed only for the entire carrier population. A carrier would not be able to identify how specific violations or areas of regulatory noncompliance impacted its prioritization status or how it could improve its status.

Finally, IRT's runtime is incompatible with FMCSA's operational needs for monthly updates. The FMCSA IRT model takes 4 weeks to run as compared to 2 days for SMS. The long runtime would make it difficult to make even minor changes to the system.

Because IRT is overly complex and adopting the IRT model would reduce transparency and does not improve overall safety, FMCSA will not replace SMS with an IRT model. Instead, as noted in the notice, FMCSA is committed to continuously improving SMS to identify motor carriers that present the highest crash risk through a transparent and effective system. Those improvements include reorganizing the BASICs to better identify specific safety problems, combining the 958 violations used in SMS in 116 violation groups, simplifying violation and crash severity weights, removing percentile jumps that occur when carriers move into a new safety event group, and adjusting the intervention thresholds to improve SMS.

V. Discussion

This ANPRM seeks input regarding new methodologies that would determine when a motor carrier is not fit to operate CMVs in or affecting interstate commerce. The intended effect of this action is to more effectively use FMCSA data and resources to identify unfit motor carriers and to remove them from the Nation's roadways. A successful SFD methodology may: target metrics that are most directly connected to safety outcomes; provide for accurate identification of unsafe motor carriers; and incentivize the adoption of safety-improving practices.

Though FMCSA is not making any proposals at this time, the Agency is seeking input on several of the topics discussed in the 2016 NPRM.

Questions

FMCSA specifically requests responses to the following questions:

1. Should FMCSA retain the current three-tiered rating system of Satisfactory, Unsatisfactory, and Conditional? Why or why not?

A. In the 2016 NPRM, FMCSA proposed replacing the three-tiered structure with a single rating of Unfit. Under such a structure, carriers that completed safety fitness reviews successfully would continue operating and not appear different, in terms of their SFD, from carriers that had not yet been reviewed. Would this approach be sufficient to ensure safety? Please explain your views.

B. What are the costs and/or benefits to a motor carrier associated with each current possible rating? Please provide data or information relating to the costs and/or benefits for motor carriers who are issued final ratings for each of the ratings listed below:

- Unsatisfactory rating (Unfit)

[33] (82 FR 14848), March 23, 2017.

[34] SMS methodology is a generalized motor carrier assessment tool and differs from the use of SMS percentiles and alerts. The use of SMS methodology for SFDs, as previously proposed in 2016, is not prohibited by statute.

- Conditional rating
- Satisfactory rating

2. Should FMCSA include additional HM regulatory requirements in appendix B to part 385 (Explanation of Safety Rating Process) in the SFD calculation?

3. Currently, the table of regulatory factors in appendix B to part 385 (at II(C)(b)) excludes parts 172 and 173. However, there are violations in these parts included in the list of critical and acute violations in appendix B. Should they be included in the SFD calculations?

4. Should motor carriers of passengers be subject to higher standards than other motor carriers in terms of safety fitness rating methodology? If yes, what should these higher safety standards or thresholds be, and why are they appropriate? If no, why not?

5. Is there a specific aspect of safety management, such as driver training, driver fatigue management and mitigation, vehicular maintenance and repair, etc., that is so fundamentally different in passenger transportation, relative to CMVs transporting property, that FMCSA's safety fitness rating methodology should take this aspect into special consideration? If yes, what is this specific aspect of safety management, and how do you recommend FMCSA handle the matter within its safety fitness rating methodology? If no, why are the safety management aspects the same?

6. How will States be affected if the Agency changes the SFD? What resources might be needed to accommodate any changes, and how long would it take to incorporate any proposed changes?

7. The current SFD does not use all available safety data, such as all inspection-based data. Should the SMS methodology be used to issue SFDs, in a manner similar to what was proposed in the 2016 NPRM? If so, what adjustments, if any, should be made to that proposal? If not, should the Agency include more safety data in the SFD process in other ways and, if so, how? The Agency is interested in comments specifically on whether the integration of on-road safety data into the SFD process would improve the assessment of motor carriers' safety posture and the identification of unfit motor carriers.

8. Given the importance of driver behavior in preventing crashes, how would you recommend the Agency incorporate driver behavior data into the SFD? What data should the agency use? How should this methodology distinguish between data resulting in a conviction and data without a conviction?

9. What changes, additions, or deletions, from the current list of critical and acute violations should be included in the NPRM, and why? Should the list be retained? Why or why not?

10. Should SFD consider motor carriers' adoption and use of safety technologies in a carrier's rating? How should this fit into the SFD methodology?

11. Should the Agency revise the current administrative review procedures in §§ 385.15 and 385.17(j) related to administrative review and corrective action? Which of those procedures should be changed or discarded? Please give the reasons for your views.

12. Given that unsafe driving behaviors, such as speeding and texting while driving, are highly correlated with crash risk, should the safety fitness rating methodology give more weight to unsafe driving violations of § 392.2? For example, each pattern of noncompliance with a critical regulation relative to part 395, Hours of Service of Drivers, is assessed double the points in the safety fitness rating methodology. Should violations of § 392.2, or a subset of those violations, be treated in a similar manner?

Robin Hutcheson,

Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 230810–0189; RTID 0648–XR126]

Endangered and Threatened Wildlife and Plants: Proposed Reclassification of Pillar Coral (*Dendrogyra cylindrus*) From Threatened to Endangered

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

ACTION: Proposed rule; request for comments.

SUMMARY: We, NMFS, are issuing a proposed rule to change the status of pillar coral (*Dendrogyra cylindrus*) on the Federal List of Threatened and Endangered Species from threatened to endangered as recommended in the recent 5-year review of the species under the Endangered Species Act (ESA) of 1973. We propose this action based on population declines and susceptibility to a recently emerged coral disease.

DATES: Written comments must be received on or before October 30, 2023.

Public hearings: A public hearing on the proposed rule will be held online on September 26, 2023, from 1 to 3 p.m. Eastern Daylight Time. Members of the public can join by internet or phone, regardless of location. Instructions for joining the hearing are provided under **ADDRESSES**. Requests for additional public hearings must be received by October 13, 2023.

ADDRESSES: The public hearing will be conducted as a virtual meeting. You may join the virtual public hearing using a web browser, a mobile app on a phone (app installation required), or by phone (for audio only) as specified on this website: *https://www.fisheries.noaa.gov/species/pillar-coral#conservation-management.*

You may submit comments on the proposed rule verbally at the public hearing or in writing, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov* and enter NOAA–NMFS–2023–0002 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments; or
- *Email:* Submit written comments to *alison.moulding@noaa.gov.*

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Alison Moulding, 727–551–5607, *alison.moulding@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On September 10, 2014, we published a final rule listing pillar coral (*Dendrogyra cylindrus*), along with 4 other Caribbean coral species and 15 Indo-Pacific coral species, as threatened under the ESA (79 FR 53851). In early 2021, we announced a 5-year review of

7 threatened Caribbean coral species, including *D. cylindrus* (86 FR 1091, January 7, 2021). A 5-year review is intended to ensure that the listing classification of a species is accurate, and this review must be based on the best scientific and commercial data available.

Section 3 of the ESA defines an endangered species as any species which is in danger of extinction throughout all or a significant portion of its range and a threatened species as one which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The statute requires us to determine whether a species is threatened or endangered as a result of any of the factors listed in section 4(a)(1) of the ESA: (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. Changes to a listed species' status must be determined on the basis of these factors using solely the best scientific and commercial data available (16 U.S.C. 1533(c)(2)(B)). Implementing regulations in 50 CFR 424.11(b) reiterate the requirement that changes in a species' classifications must be based solely on the best available scientific and commercial information regarding a species' status. Recently proposed revisions to the regulations in 50 CFR 424.11(b) would restore the phrase ''without reference to possible economic or other impacts of such determination'' to the end of the provision, which was removed in 2019 (see 88 FR 40764, June 22, 2023). This clarification, if finalized, would not affect the existing requirements for making classification determinations, nor would it affect the proposed reclassification for the pillar coral.

Biology and Life History

Dendrogyra cylindrus is a colonial coral that can form large pillars (up to 3 meters (m)) upon an encrusting base. The final listing rule (79 FR 53851, September 10, 2014) described *D. cylindrus* as a gonochoric (separate sexes), broadcast spawning coral species that can also reproduce asexually through fragmentation and reattachment to the substrate. It has a relatively low annual egg production and low sexual recruitment (no reports of observed sexual recruitment in the wild).

Since the listing, new evidence of hermaphroditism (presence of both male and female gametes) and plasticity in reproductive mode has been observed in histological samples (Kabay, 2016) and in spawning colonies observed over several seasons in Florida (Neely *et al.,* 2018; Neely *et al.,* 2020a; O'Neil *et al.,* 2021). Histological samples from Florida revealed some hermaphroditic colonies that produced eggs and sperm within the same polyp and within the same mesentery while most colonies only produced eggs or sperm (Kabay, 2016). *Dendrogyra cylindrus* colonies have been observed to spawn as different genders on different nights of the same year, as different genders in different years, and as hermaphrodites spawning eggs and sperm simultaneously (Neely *et al.,* 2018; Neely *et al.,* 2020a; O'Neil *et al.,* 2021). Also, separate colonies of the same genotype (genetically identical colonies) have been observed to spawn either male or female gametes, and some colonies produced both eggs and sperm within separate regions of the same colony (Neely *et al.,* 2018). Spawning observations have also suggested that eggs may be fertilized within female colonies prior to release (Marhaver *et al.,* 2015). This flexibility in reproductive mode may be a strategy to improve the chances of successful reproduction for a species that is naturally rare and whose potential mates are scarce (Neely *et al.,* 2018).

Abundance, Trends, and Distribution

Dendrogyra cylindrus is present in the western Atlantic and throughout the greater Caribbean. It is absent in the Flower Garden Banks in the Gulf of Mexico and from the southwest Gulf of Mexico. It inhabits most reef environments in water depths ranging from 1 to 25 m and is most common in reef environments in water depths between 5 and 15 m. It has a naturally uncommon to rare occurrence, appearing as scattered, isolated colonies; it is sometimes found in highly clonal aggregations, likely resulting from fragmentation events (Chan *et al.,* 2019).

At the time of listing (79 FR 53851, September 10, 2014), available information indicated that colony density and cover were low (generally less than 1 colony per 10 square meters (m^2) and less than 1 percent cover). Estimates of frequency of occurrence of *D. cylindrus* ranged from 1 percent of sites in Florida to a high of 30 percent in the U.S. Virgin Islands. Based on extrapolations of abundance from stratified random samples, abundance in Florida was estimated at tens of thousands of colonies. There was no available population trend information at the time of listing.

Since the listing, there has been a new survey of *D. cylindrus* abundance in Los Roques National Park, Venezuela (Cavada-Blanco *et al.,* 2020). Surveys were conducted between 2014 and 2015 at 106 sites where the species had been reported by the local community. A total of 1,490 *D. cylindrus* colonies were located within 49 percent of the sites surveyed, and colony abundance ranged between 1 and 68 colonies per site. Average height of colonies was 72 centimeters (cm) (range 5–290 cm), though most of the colonies were below 60 cm in height. Disease presence was low overall (0.2 and 0.3 percent of colonies with white plague and black band disease, respectively) and 29 percent of the 1,490 colonies exhibited partial mortality (Cavada-Blanco *et al.,* 2020).

New studies published since the listing provide some population trend information. Surveys of *D. cylindrus* were conducted in 2012 in Old Providence and St. Catalina Islands, which host more than 90 percent of the *D. cylindrus* population in Colombia (Bernal-Sotelo *et al.,* 2019). Results were compared to surveys of the same area conducted in 2002 to discern population trends. The surveys revealed that *D. cylindrus* was present in 2012 in 3 of the 4 reef areas where it was present in 2002, but its spatial extent was reduced (*i.e., D. cylindrus* occupied a smaller amount of the reef areas in 2012 relative to 2002). Half of the radial plots (60 m diameter) that contained more than 4 colonies of *D. cylindrus* in 2002 contained no living colonies of *D. cylindrus* 10 years later. The number of colonies and fragments (*i.e.,* tissue remnants on standing colonies) observed in 2002 were 213 and 70, respectively, versus 261 colonies and 585 fragments in 2012. Almost 97 percent of the fragments observed in 2012 were produced as a result of partial colony mortality. Average colony and fragment size was also smaller in 2012, and the number of colonies with partial mortality and the amount of partial mortality were higher. Larger colonies (≥115 cm) had higher partial and total mortality. In summary, compared to 2002, in 2012 there were more *D. cylindrus* colonies and fragments that likely resulted from partial mortality. Colonies and fragments in 2012 were smaller in size, had a higher prevalence of partial mortality, and had higher amounts of partial mortality within individual colonies. The authors concluded that the reduced amount of living tissue, dominance of asexually produced

fragments, and smaller fragment size limit the potential for population growth, making this population vulnerable and at risk of local extinction (Bernal-Sotelo *et al.,* 2019).

Beginning in 2013, all known colonies of *D. cylindrus* in Florida (n = 819 colonies) were tracked in an effort to monitor colony health and status (Neely *et al.,* 2021a). There were consecutive thermal bleaching events in 2014 and 2015, as well as ongoing and emerging disease events, which affected the monitored *D. cylindrus* colonies. Recovery from bleaching was calculated to take 11 years (in the absence of additional severe stressors) based on colony growth rates (~4 percent annual increase in live tissue) observed after bleaching but before disease affected the colonies (Neely *et al.,* 2021a). In a separate study using the same tracked colonies, demographic modeling of *D. cylindrus* was conducted to examine the effects of thermal stress events on population persistence. The model used different survival scenarios of 80, 50, and 20 percent of the population after the 2014 and 2015 thermally-induced bleaching and disease outbreak and assumed no sexual reproduction, no establishment of asexual recruits, and no successful restoration (Chan *et al.,* 2019). The model predicted that the number of thermal stress events before local extinction occurred was 31 for the 80 percent survival scenario, 11 for the 50 percent survival scenario, and 6 for the 20 percent survival scenario (Chan *et al.,* 2019). Assuming 2 stress events per decade until 2042 when thermal stress events are predicted to become annual, local extinction of *D. cylindrus* in Florida was predicted to occur in 2066 for the 80 percent survival scenario, in 2046 for the 50 percent survival scenario, and in 2039 for the 20 percent survival scenario (Chan *et al.,* 2019). These modeling predictions did not account for disease, which, as described below, caused near extirpation from Florida much sooner than the model's predicted dates for local extinction (Neely *et al.,* 2021a).

The Florida *D. cylindrus* colonies that were monitored between 2013 and 2020 included 819 colonies of an assumed 190 genotypes based on genetic testing or colony distances from each other (Neely *et al.,* 2021a). Distances between genotypes on average was about 1 kilometer (km), ranging from 2.5 m to 6.6 km. Half of the colonies represented clones of only five genotypes, and 62 percent of the genotypes were represented by a single colony. Asexual reproduction accounted for 77 percent of the colonies. During baseline surveys in 2013–2014 (542 colonies, 533 alive), average tissue mortality was 30 percent (n = 542), and 22 percent of the colonies exhibited low (2.2 percent) recent mortality. During the monitoring period, there were chronic stressors that occurred on about 1 percent of colonies and caused minor damage (on average less than 1 percent tissue loss), including damselfish gardens/nests, predation by the corallivorous snail (*Coralliophila abbreviata),* competition with other benthic organisms, and abrasion and burial. However, acute stressors, including the 2014 and 2015 bleaching events, ongoing outbreaks of white plague and black band disease, and the outbreak of a novel, particularly devastating disease, termed stony coral tissue loss disease (SCTLD), resulted in extremely high mortality (Lewis, 2018; Lewis *et al.,* 2017; Neely *et al.,* 2021a). By the end of the monitoring period in 2020, there had been a 94 percent loss of coral tissue, 93 percent loss of colonies, and 86 percent loss of genotypes due primarily to disease. At the end of 2020, there were 25 known genotypes remaining (out of the 190 genotypes assumed at the beginning of the study), half of which had declined to less than 2 percent live tissue, and the other half were actively experiencing rapid tissue loss due to SCTLD. Only two genotypes remained unaffected and were located in the Dry Tortugas where SCTLD had not yet reached at the time of the study (but has now). Based on the extreme loss of colonies and live tissue, *D. cylindrus* is now considered functionally extinct along the Florida reef tract (Neely *et al.,* 2021a).

Although quantitative population trend data are only available from Florida and Colombia, we assume the species is in decline throughout most of its range based on the evidence from these regions (northern and southwestern portions of its range) and the more widespread evidence of severe disease impacts described in the ''Threats'' section below.

Threats

The ESA requires us to determine whether a species is endangered or threatened as a result of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. The final listing rule (79 FR 53851, September 10, 2014) identified and described the susceptibility of *D. cylindrus* to multiple threats including ocean warming (Factor E), ocean acidification (Factor E), disease (Factor C), nutrient enrichment (Factors A and E), sedimentation (Factors A and E), and trophic effects of fishing (Factor A). In addition, *D. cylindrus* was determined to be at heightened extinction risk due to inadequate regulatory mechanisms to address global threats (*i.e.,* climate change that results in ocean warming and acidification and has been linked to increasing coral disease; Factor D).

Since the listing of *D. cylindrus* as threatened (79 FR 53851, September 10, 2014), SCTLD has emerged as a new and deadly disease, impacting at least 24 Caribbean coral species, including *D. cylindrus* (Florida Coral Disease Response Research & Epidemiology Team, 2018). SCTLD was first observed in Miami, Florida, in 2014 and then spread throughout the Florida reef tract over the next several years (Neely, 2018; Precht *et al.,* 2016). SCTLD has continued to spread throughout much of the Caribbean and has been observed along the Mesoamerican Reef, Bahamas, Greater Antilles, and in the Lesser Antilles as far south as Grenada (see *https://www.agrra.org/coral-disease-outbreak/* for a map of confirmed sightings of SCTLD in the greater Caribbean). The disease is unprecedented in temporal and geographic scope as well as the number of susceptible species, prevalence, and rates of mortality (Neely, 2018; Precht *et al.,* 2016). In almost all affected species, tissue loss occurs rapidly and leads to full colony mortality. The disease appears to be both waterborne and transmissible through direct contact (Aeby *et al.,* 2019). In addition, sediment can act as a SCTLD vector by transmitting SCTLD in the absence of direct contact between diseased and healthy corals Studivan *et al.,* 2022). SCTLD does not appear to be seasonal like many other coral diseases that will ramp up during higher temperatures but then decrease as water temperatures cool.

Dendrogyra cylindrus is highly susceptible to SCTLD and is often one of the first species to become infected (Florida Coral Disease Response Research & Epidemiology Team, 2018). Surveys of the progression and impact of SCTLD have shown that *D. cylindrus* exhibits high disease prevalence and colony mortality. As previously described, between 2014 and 2020 the Florida population of *D. cylindrus* was heavily impacted by SCTLD; there was a loss of 93 percent of colonies and 94 percent of live tissue (Neely *et al.,* 2021a). In surveys of the Bahamas, 67 percent of *D. cylindrus* colonies (n = 15,

March 2020) were infected with SCTLD in Grand Bahama, and 13 percent of *D. cylindrus* colonies (n = 8, June 2020) were infected in New Providence (Dahlgren *et al.,* 2021). In surveys across Mexico, 71 percent of *D. cylindrus* colonies (n = 7) surveyed in 2018 to 2019 were infected with SCTLD, and *D. cylindrus* was extirpated from several mainland coastal sites (Alvarez-Filip *et al.,* 2019). In separate surveys conducted in Cozumel, Mexico, between 2018 and 2020, surveyors observed that *D. cylindrus* colonies were heavily affected by SCTLD, though no quantitative prevalence data are available because no *D. cylindrus* colonies occurred in the survey transects (Estrada-Saldivar *et al.,* 2021). In 54 sites surveyed in 2020 around St. Thomas, U.S. Virgin Islands, 67 percent of the *D. cylindrus* colonies (n = 3) were infected with SCTLD, and *D. cylindrus* was the species with the highest prevalence of SCTLD within the epidemic zone (Costa *et al.,* 2021). In long-term monitoring transects in the U.S. Virgin Islands, 50 percent of *D. cylindrus* colonies (n = 2) surveyed in February 2019 were infected, and by July 2020, no *D. cylindrus* colonies remained alive in the transects (Brandt *et al.,* 2021). Prior to the documentation of SCTLD in the U.S. Virgin Islands, there were 11 colonies of *D. cylindrus* present in the monitoring transects between 2005 and 2018, suggesting loss of nine colonies from unknown causes (Brandt *et al.,* 2021). The study also noted that numerous recently dead colonies of *D. cylindrus,* presumably from SCTLD, were observed and that it was increasingly rare to find live colonies, even in locations where the species previously had been relatively abundant (Brandt *et al.,* 2021).

SCTLD has spread from Florida, where it was initially documented, to the eastern and western Caribbean. Although it has not yet been confirmed in all areas of the Caribbean (*i.e.,* the most southern part), we assume SCTLD will eventually reach all areas of the range of *D. cylindrus* based on its previous spread and the fact that it is waterborne.

Conservation Measures

Coral colonies infected with SCTLD have been effectively treated to stop the progression of the disease. Initial ex situ (in aquaria) treatment of *D. cylindrus* consisted of amputation of diseased tissue and dipping the corals (13 fragments from 6 colonies) in a Lugol's iodide solution, which is commonly used in the aquarium industry as a treatment for bacterial infections. After repeated treatments, this method was effective in arresting disease progression about 53 percent of the time (O'Neil *et al.,* 2018). Additional ex situ treatment with the antibiotic amoxicillin applied directly to the diseased tissue margin in a custom-made paste formulation (modified from a dental paste) increased survival of infected *D. cylindrus* to about 97 percent (Miller *et al.,* 2020). However, this antibiotic dental paste has to be applied to corals out of water (corals were placed back in the water after antibiotic paste application). To treat corals in situ (in the ocean), slow-release antibiotic pastes were developed that could be applied underwater (O'Neil *et al.,* 2018). Antibiotics pastes have been successfully applied in situ to coral species infected with SCTLD in Florida (67 to 95 percent effectiveness, Neely *et al.,* 2020b; Neely *et al.,* 2021c; Shilling *et al.,* 2021; Walker *et al.* 2021), though no reports of effectiveness on in situ *D. cylindrus* colonies have been published, likely because most of these studies have been performed in Florida after the near-extirpation of the species. The treatment only has the ability to stop progression of the disease lesion, but it does not prevent new lesions from forming (Neely *et al.,* 2020b; Shilling *et al.,* 2021; Walker *et al.,* 2021).

During the widespread and severe decline of *D. cylindrus* in Florida, a rescue effort was undertaken to collect fragments of live colonies and bring them under human care to preserve the remaining genetic diversity. From November 2015 to November 2019, fragments were collected from most remaining *D. cylindrus* genotypes (Kabay, 2016; Neely *et al.,* 2021b; O'Neil *et al.,* 2021). A total of 574 fragments representing 128 genotypes were collected between 2015 and 2019 (Neely *et al.,* 2021b), and an additional 4 fragments were collected in August 2021 from newly found colonies in the Dry Tortugas (K.L. Neely, Nova Southeastern University, personal communication). Fragments were brought under human care in both land-based and ocean-based nurseries for preservation and to aid in propagation and future restoration (Kabay, 2016; Neely *et al.,* 2021b; O'Neil *et al.,* 2021). As of the end of 2020, 543 fragments of 123 Florida genotypes of *D. cylindrus* were being held in nurseries (Neely *et al.,* 2021a).

Increased understanding of the reproductive biology and early life history of *D. cylindrus* has contributed to attempts to sexually propagate *D. cylindrus* for use in conservation efforts (Marhaver *et al.,* 2015; Neely *et al.,* 2020a; O'Neil *et al.,* 2021; Villalpando *et al.,* 2021). The first report of successful settlement from larval propagation resulted from collection and fertilization of gametes in Curaçao (Marhaver *et al.,* 2015). The resulting *D. cylindrus* larvae were settled and maintained in the lab and reached the primary polyp stage (Marhaver *et al.,* 2015). However, settlers did not survive longer than 7 months and showed no formation of new polyps through budding (Marhaver *et al.,* 2015). Subsequent larval propagation efforts in Florida produced a small number of longer-surviving settlers. Gamete collections from wild colonies in 2016 produced 3 settlers that survived to at least 3 years of age. In 2018, gamete collections from colonies maintained ex situ produced 10 settlers that survived to at least 1 year old (Neely, 2019). In another attempt at sexual propagation, larvae of *D. cylindrus* were produced from gamete collections from wild colonies, settled in the lab, and transferred to an offshore coral nursery in the Dominican Republic 1 month after settlement (Villalpando *et al.,* 2021). An estimated 380 corals were transferred to the nursery, and 1 year after they were transferred,1 surviving coral was observed (Villalpando *et al.,* 2021). The following year (2020), gametes were again collected from wild colonies, settled in the lab, and transferred to an in situ nursery after settlement; 28 settlers have survived from this cohort for more than two years (M. F. Villalpando, FUNDEMAR, personal communication).

Dendrogyra cylindrus has also successfully reproduced in captivity in Florida in an induced spawning system designed to mimic natural environmental light and temperature regimes (O'Neil *et al.,* 2021). In 2020, the induced spawning tanks held 21 *D. cylindrus* genotypes, and over 50,000 viable *D. cylindrus* larvae were produced from only a fraction of the spawn that was collected (O'Neil *et al.,* 2021). A total of 4,330 larvae settled, and as of February 2022, 38 small colonies (1–3 cm in diameter) were alive and remained in captivity (K.L. O'Neil, The Florida Aquarium, personal communication). In 2021, colonies in the induced spawning tanks produced 150 surviving *D. cylindrus* recruits (<1 cm in diameter) that are also being held in captivity (K.L. O'Neil, the Florida Aquarium, personal communication). These advances in propagation methods have the potential to benefit the species.

Risk of Extinction

As noted above, *D. cylindrus* was listed as threatened because of its susceptibility to multiple threats, including ocean warming, ocean acidification, disease, nutrient

enrichment, sedimentation, trophic effects of fishing, and inadequate regulatory mechanisms to address global threats. Future projections of these threats indicate the species is likely to be in danger of extinction within the foreseeable future throughout its range. Circumstances and demographic risks that contributed to our assessment of the species' risk of extinction in 2014 were: (1) geographic location in the Caribbean where localized human impacts were high and threats were predicted to increase, exposing a high proportion of the population to threats over the foreseeable future; (2) uncommon to rare occurrence of the species, which heightened the potential effect of mortality events and made the species vulnerable to becoming of such low abundance within the foreseeable future that it could be at risk from depensatory processes, environmental stochasticity, or catastrophic events, and (3) low sexual recruitment which limited the species' capacity for recovery from threat-induced mortality events throughout its range over the foreseeable future.

The final listing rule (79 FR 53851, September 10, 2014) also explained that *D. cylindrus* was not in danger of extinction at the time and did not warrant listing as an endangered species because: (1) there was little evidence of population declines, (2) *D. cylindrus* showed evidence of resistance to bleaching from warmer temperatures in some portions of its range under some circumstances (*e.g.,* Roatan, Honduras), and (3) while its distribution within the Caribbean increased its risk of exposure to threats, its occurrence in numerous reef environments that would experience highly variable thermal regimes and ocean chemistry on local and regional scales at any given point in time moderated its vulnerability to extinction.

We are now proposing to change the status of *D. cylindrus* from threatened to endangered. We make this determination based on the best scientific and commercial information available since the original listing of *D. cylindrus* that indicates that there have been declines in the abundance and distribution of *D. cylindrus* in multiple locations with the most severe in the northern portions of its range and that *D. cylindrus* is highly susceptible to SCTLD, which has emerged as a devastating and deadly new disease. Though SCTLD is not yet present in all areas of the Caribbean, the disease spread between 2014 and 2021 from Florida throughout the northern, western, and eastern Caribbean including the Mesoamerican Reef System, the Bahamas, the Greater Antilles, and as far south as Grenada in the Lesser Antilles. We expect SCTLD to continue to spread throughout the species' range based on the previous spread and the fact that it is waterborne. In locations where SCTLD has been observed, *D. cylindrus* has experienced high disease prevalence, fast disease progression within infected colonies, and high mortality rates from the disease. The distribution of *D. cylindrus* has diminished with the loss of almost all wild colonies in Florida, and though the occurrence of *D. cylindrus* has historically been uncommon to rare, the species has become even more rare as a result of SCTLD, disappearing from individual sites in Florida, Mexico, and the U.S. Virgin Islands. Furthermore, no observed sexual recruitment has been reported in the wild, and reductions in population size and local extinctions will further inhibit the species' ability to persist and replenish diminished populations through asexual and sexual reproduction.

In conclusion, *D. cylindrus* continues to be susceptible to multiple threats such as ocean warming (ESA Factor E), disease (C), acidification (E), nutrient enrichment (A and E), sedimentation (A and E), trophic effects of fishing (A), and inadequate existing regulatory mechanisms to address global threats (D). In addition, the following characteristics contribute to its risk of extinction:

(1) It is geographically located in the highly disturbed Caribbean where localized human impacts are high and threats are predicted to increase. A range constrained to this particular geographic area that is likely to experience severe and increasing threats indicates that a high proportion of the population of this species is likely to be exposed to those threats;

(2) It has an uncommon to rare occurrence throughout its range, which heightens the potential effect of localized mortality events and leaves the species vulnerable to becoming of such low abundance that it may be at risk from depensatory processes, environmental stochasticity, or catastrophic events;

(3) Its low sexual recruitment limits its capacity for recovery from threat-induced mortality events throughout its range; and

(4) It has experienced population declines, primarily due to SCTLD, in multiple locations throughout its range, including severe declines in the northern portion of its range, which has resulted in diminished distribution and local extirpation.

The combination of these characteristics indicates that *D. cylindrus* is in danger of extinction throughout its range and warrants listing as an endangered species due to factors A, C, D, and E.

Conservation actions include treatment of individual colonies for SCTLD, ex situ banking, and propagation of *D. cylindrus* for future restoration. The conservation actions will no doubt have benefits to the species, but we do not find that the current conservation efforts will affect the status of *D. cylindrus* to the point at which listing as endangered is not warranted. Further, because current conservation actions do not directly address the root causes of threats such as disease, they are insufficient to protect the species from the risk of extinction.

Effects of Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include recovery plans (16 U.S.C. 1553(f)), critical habitat designations, Federal agency consultation requirements (16 U.S.C. 1536), and prohibitions of certain acts under the ESA (16 U.S.C. 1538). Because *D. cylindrus* is currently listed as threatened, Federal agency consultation requirements are already in effect, and a recovery outline has been developed to guide recovery until a full recovery plan has been finalized. Critical Habitat has been proposed for *D. cylindrus* (85 FR 76302), and the bases for any final designation of critical habitat would not be affected should the status of *D. cylindrus* be changed from threatened to endangered. The ESA section 9 prohibitions do not currently apply to *D. cylindrus* because those protections are automatically applied only to endangered species and NMFS has not promulgated protective regulations for *D. cylindrus* pursuant to ESA section 4(d).

All of the prohibitions in section 9(a)(1) of the ESA will apply to *D. cylindrus* if it becomes listed as an endangered species. Section 9(a)(1) includes prohibitions on importing, exporting, engaging in foreign or interstate commerce, or ''taking'' of the species. ''Take'' is defined under the ESA as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or an attempt to engage in any such conduct.'' These prohibitions apply to all persons subject to the jurisdiction of the United States, including in the United States, its territorial sea, or on the high seas. Upon up-listing pillar coral to endangered

status, section 9 of the ESA would expressly prohibit:

(1) Taking of pillar coral within the U.S. or its territorial sea, or upon the high seas;

(2) Possessing, selling, delivering, carrying, transporting, or shipping any pillar coral that was illegally taken;

(3) Delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce any pillar coral in the course of a commercial activity;

(4) Selling or offering pillar coral for sale in interstate or foreign commerce; or

(5) Importing pillar coral into, or exporting pillar coral from, the United States.

On July 1, 1994, NMFS and FWS published a policy (59 FR 34272) that requires us to identify, to the extent known at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within a species' range. Based on available information, we believe the following categories of activities are likely to meet the ESA's definition of ''take'' and therefore result in a violation of the ESA section 9 prohibitions. We emphasize that whether a violation results from a particular activity is entirely dependent upon the facts and circumstances of each incident. The mere fact that an activity may fall within 1 of these categories does not mean that the specific activity will cause a violation. Further, an activity not listed may in fact result in a violation. Activities that are likely to result in a violation of section 9 prohibitions include, but are not limited to, the following:

(1) Collection of pillar coral, including colonies, fragments, tissue samples, and gametes, from the wild;

(2) Harming captive pillar coral by, among other means, injuring or killing captive pillar coral, through potentially injurious research outside the bounds of normal animal husbandry practices;

(3) Removing, relocating, reattaching, damaging, poisoning, or contaminating pillar coral;

(4) Scientific research activities on wild pillar coral, involving the manipulation of the coral or its environment;

(5) Release of captive pillar coral into the wild. Release of a captive coral could have the potential to injure or kill the coral or to affect wild populations of pillar coral through introduction of disease;

(6) Harm to pillar coral habitat resulting in injury or death of the species, such as removing or altering substrate or altering water quality;

(7) Discharging pollutants, such as oil, toxic chemicals, radioactive matter, carcinogens, mutagens, teratogens, or organic nutrient-laden water, including sewage water, into pillar corals' habitat to an extent that harms or kills pillar coral;

(8) Shoreline and riparian disturbances (whether in the riverine, estuarine, marine, or floodplain environment) that may harm or kill pillar coral, for instance by disrupting or preventing the reproduction, settlement, reattachment, development, or normal physiology of pillar coral. Such disturbances could include land development, run-off, dredging, and disposal activities that result in direct deposition of sediment on pillar coral, shading, or covering of substrate for fragment reattachment or larval settlement; and

(9) Activities that modify water chemistry in pillar coral habitat to an extent that disrupts or prevents the reproduction, development, or normal physiology of pillar coral.

Some categories of activities are unlikely to constitute a violation of the section 9 prohibitions should the proposed listing become finalized. We consider the following activities to be ones that are unlikely to violate the ESA section 9 prohibitions:

(1) Taking of wild pillar coral, including collection of colonies, fragments, tissue samples, and gametes, authorized by a 10(a)(1)(A) permit issued by NMFS for the purposes of scientific research or the enhancement of propagation or survival of the species and carried out in accordance with the terms and conditions of the permit;

(2) Incidental taking of pillar coral resulting from federally authorized, funded, or conducted projects for which consultation under section 7 of the ESA has been completed and when the project is conducted in accordance with any terms and conditions set forth by NMFS in an incidental take statement in a biological opinion pursuant to section 7 of the ESA;

(3) Import or export of pillar coral authorized by a Convention on International Trade in Endangered Species (CITES) permit and an ESA section 10(a)(1)(A) permit issued by NMFS;

(4) Continued possession of pillar coral parts or live pillar coral that were in captivity at the time of up-listing to an endangered species, including any progeny produced from captive corals after the rule is finalized, so long as the prohibitions of ESA section 9(a)(1) are not violated. Corals are considered to be in captivity if they are maintained in a controlled environment or under human care in ocean-based coral nurseries. Individuals or organizations should be able to provide evidence that pillar coral or pillar coral parts were in captivity prior to its listing as an endangered species. We suggest such individuals or organizations submit information to us on the pillar coral in their possession (*e.g.,* type, number, size, source, date of acquisition), to establish their claim of possession (see **FOR FURTHER INFORMATION CONTACT**);

(5) Providing normal care for captive pillar coral. Captive corals are still protected under the ESA and may not be killed or injured, or otherwise harmed and must receive proper care. Normal husbandry care of captive corals includes handling, cleaning, maintaining water quality within an acceptable range, extracting tissue samples for the purposes of diagnosis of condition or genetics, treating of maladies such as disease or parasites using established methods proven to be effective, propagating corals by sexual or asexual means (*i.e.,* fragmenting larger coral colonies into smaller colonies to increase the number of corals, maintain corals of manageable size, or accelerate their growth rate) within the bounds of normal husbandry practices, attaching to artificial surfaces, and removing dead skeleton;

(6) Interstate and intrastate transportation of legally-obtained captive pillar coral and pillar coral parts provided it is not in the course of a commercial activity. If captive corals or pillar coral parts are to be moved to a different holding location, records documenting transfer of corals must be maintained;

(7) Stabilization of loose pillar coral, including fragments, in the wild by experienced individuals and as authorized by a 10(a)(1)(A) permit issued by NMFS;

(8) Relocation of wild pillar coral from one site to another under the authorization of an ESA section 10(a)(1)(A) permit issued by NMFS;

(9) Use of captive pillar coral for scientific studies under the authorization of an ESA Section 10(a)(1)(A) permit issued by NMFS. Scientific studies that have the potential to injure or harm captive pillar coral (*e.g.,* altered temperature outside of ideal range, exposure to contaminants, potentially harmful chemicals, or disease, introduction of coral predators) require an ESA section 10(a)(1)(A) permit. Scientific studies that are intended to improve the husbandry practices of caring for captive pillar coral, where there is a reasonable

expectation that they would not cause harm to pillar coral (*e.g.,* trialing new food supplements, comparing different lighting systems, testing different attachment substrates), would not require an ESA permit;

(10) Research activities on pillar coral in the wild under the authorization of an ESA section 10(a)(1)(A) permit. Research activities, such as observational studies, on pillar coral in the wild that do not involve collections of pillar corals or manipulation of pillar corals or of their environment do not require an ESA section 10(a)(1)(A) permit;

(11) Release of captive pillar coral into the wild, as authorized by an ESA section 10(a)(1)(A) permit issued by NMFS; and

(12) Treatment of wild pillar coral for disease by experienced individuals using non-experimental methods proven to be effective and as authorized by state and territorial permits.

Information Quality Act and Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Peer Review Bulletin (the Bulletin), implemented under the Information Quality Act (Pub. L. 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the Bulletin, this proposed rule was subject to peer review. A peer review plan was posted on the NOAA peer review agenda and can be found at the following website: *https://www.noaa.gov/information-technology/endangered-species-act-proposed-rule-for-pillar-coral-dendrogyra-cylindrus-id432*. Our synthesis and assessment of scientific information supporting this proposed action was peer reviewed via individual letters soliciting the expert opinions of three qualified specialists selected from the academic and scientific community. The charge to the peer reviewers and the peer review report have been placed in the administrative record and posted on the agency's peer review agenda. In meeting the OMB Peer Review Bulletin requirements, we have also satisfied the requirements of the 1994 joint U.S. Fish and Wildlife Service/NMFS peer review policy (59 FR 34270; July 1, 1994).

Public Comments Solicited

To ensure that any final action resulting from this proposal will be as accurate and effective as possible, we are soliciting comments from the public, other concerned governmental agencies, the scientific community, industry, and any other interested parties. We must base our final determination on the best available scientific and commercial data when making listing determinations. We cannot, for example, consider the economic effects of a listing determination. Final promulgation of any regulation on this species or withdrawal of this listing proposal will take into consideration the comments and any additional information we receive, and such communications may lead to a final regulation that differs from this proposal or result in a withdrawal of this reclassification proposal.

Public Hearing

A public hearing will be conducted online as a virtual meeting, as specified under **ADDRESSES**. More detailed instructions for joining the virtual meeting are provided on our web page: *https://www.fisheries.noaa.gov/species/pillar-coral#conservation-management*. The hearing will begin with a brief presentation by NMFS that will give an overview of the proposed rule under the ESA. After the presentation, but before public comments, there will be a question-and-answer session during which members of the public may ask NMFS staff clarifying questions about the proposed rule. Following the question-and-answer session, members of the public will have the opportunity to provide oral comments on the record regarding the proposed rule. In the event there is a large attendance, the time allotted per individual for oral comments may be limited. Therefore, anyone wishing to make an oral comment at the public hearing for the record is also encouraged to submit a written comment during the relevant public comment period as described under **ADDRESSES** and **DATES**. All oral comments will be recorded, transcribed, and added to the public comment record for this proposed rule.

References

A complete list of the references used in this proposed rule is available online (see *www.fisheries.noaa.gov/species/pillar-coral#conservation-management*) and upon request (see **FOR FURTHER INFORMATION CONTACT**).

Classification

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act), we have concluded that ESA listing actions are not subject to requirements of the National Environmental Policy Act.

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this proposed rule is exempt from review under Executive Order 12866. This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13132, Federalism

In accordance with E.O. 13132, we have made a preliminary determination that this proposed rule does not have significant federalism effects and that a federalism assessment is not required. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this proposed rule will be given to the relevant state agencies in each state in which the species is believed to occur, and those states will be invited to comment on this proposal. As we proceed, we intend to continue engaging in informal and formal contacts with the state, and other affected local or regional entities, giving careful consideration to all written and oral comments received.

Executive Order 12898, Environmental Justice

Executive Order 12898 requires that Federal actions address environmental justice in the decision-making process. In particular, the environmental effects of the actions should not have a disproportionate effect on minority and low-income communities. This proposed rule is not expected to have a disproportionately high effect on minority populations or low-income populations.

List of Subjects

50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

50 CFR Part 224

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: August 14, 2023.

Samuel D. Rauch, III,

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

For the reason set out in the preamble, NMFS proposes to amend 50 CFR parts 223 and 224 as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, amend the table in paragraph (e), under the subheading ''Corals'', by removing the entry for ''Coral, pillar (*Dendrogyra cylindrus*)''.

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 3. The authority citation of part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq*.

■ 4. In § 224.101, amend the table in paragraph (h), under the subheading ''Corals'', by adding the following entry to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(h) The endangered species under the jurisdiction of the Secretary of Commerce are:

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	*	* * *		*
CORALS					
Coral, pillar	*Dendrogyra cylindrus*	Entire species	[Insert FR Citation & Date When Published As A Final Rule].	NA	NA
*	*	*	* * *		*

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

[FR Doc. 2023–17769 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 88, No. 166
Tuesday, August 29, 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.

COMMISSION ON CIVIL RIGHTS

Notice of Public Briefing of the West Virginia Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of public briefing.

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 West Virginia Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public briefing via Zoom. The purpose of the briefing is to hear testimony from officials and staff from the WV Department of Education on the civil rights impacts that exclusionary and punitive disciplinary policies, practices, and procedures may have on students of color, students with disabilities and LGBTQ+ students in West Virginia public schools.

DATES: Friday, September 29, 2023, from 10:00 a.m.–12:00 p.m. Eastern Time.

ADDRESSES: The meeting will be held via Zoom.

Meeting Link (Audio/Visual): https://www.zoomgov.com/j/1602346859.

Join by Phone (Audio Only): 1–833–435–1820 USA Toll-Free; Meeting ID: 160 234 6859#.

FOR FURTHER INFORMATION CONTACT: Ivy Davis, Director of Eastern Regional Office and Designated Federal Officer, at *ero@usccr.gov* or 1–202–539–8468.

SUPPLEMENTARY INFORMATION: This Committee meeting is available to the public through the meeting link above. Any interested member of the public may attend this meeting. Immediately after the briefing concludes the Committee Chair will recognize members of the public to make a brief statement to the Committee on the panel topic—not to exceed five minutes—as time allows. Pursuant to the Federal Advisory Committee Act, public minutes of this meeting will include a list of persons who attended the meeting. If joining via phone, callers can expect to incur regular charges for calls initiated 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 is available by selecting ''CC'' in the meeting platform. To request additional accommodations, please email *svillanueva@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 emailed within 30 days following the scheduled meeting. Written comments may be emailed to Ivy Davis at *ero@usccr.gov*. Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–202–809–9618.

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, West Virginia Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *svillanueva@usccr.gov*.

Agenda

I. Welcome and Roll Call
II. Welcome
III. Panel Briefing—WV Department of Education (WVDE) Officials
—Michele L. Blatt, Superintendent, WVDE—Invited
—Names of Other Officials & Staff to be Provided
IV. Public Comments
V. Closing Remarks
VI. Adjourn

Dated: August 24, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–18620 Filed 8–28–23; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Regulations and Procedures Technical Advisory Committee; Notice of Partially Closed Meeting—Hybrid

The Regulations and Procedures Technical Advisory Committee (RPTAC) will meet September 12, 2023, 9:00 a.m., Eastern Daylight Time, in the Herbert C. Hoover Building, Room 3884, 1401 Constitution Avenue NW, Washington, DC (enter through Main Entrance on 14th Street between Constitution and Pennsylvania Avenues). The Committee advises the Office of the Assistant Secretary for Export Administration on implementation of the Export Administration Regulations (EAR) and provides for continuing review to update the EAR as needed.

Agenda

Public Session

1. Opening remarks by the Chairman
2. Opening remarks by the Bureau of Industry and Security
3. Presentations of Papers by the Public
4. Regulations Update
5. Automated Export System Update
6. Working Group Reports

Closed Session

7. Discussion of matters determined to be exempt from the open meeting and public participation requirements found in sections 1009(a)(1) and 1009(a)(3) of the Federal Advisory Committee Act (FACA) (5 U.S.C. 1001–1014). The exemption is authorized by section 1009(d) of the FACA, which permits the closure of advisory committee meetings, or portions thereof, if the head of the agency to which the advisory committee reports determines such meetings may be closed to the public in accordance with subsection (c) of the Government in the Sunshine Act (5 U.S.C. 552b(c)). In this case, the applicable provisions of 5 U.S.C. 552b(c) are subsection 552b(c)(4), which permits closure to protect trade secrets and commercial or financial information that is privileged or confidential, and subsection 552b(c)(9)(B), which permits closure to protect information that would be likely to significantly frustrate implementation of a proposed agency action were it to be disclosed

prematurely. The closed session of the meeting will involve committee discussions and guidance regarding U.S. Government strategies and policies.

The open session will be accessible via teleconference. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than September 5, 2023. A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on April 24, 2023, pursuant to 5 U.S.C. 1009(d) of the FACA, that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and the U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. 1009(a)(1) and 1009(a)(3). The remaining portions of the meeting will be open to the public.

For more information, contact Ms. Springer via email.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2023–18628 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–008]

Gas Powered Pressure Washers From the Socialist Republic of Vietnam: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that certain gas-powered pressure washers (pressure washers) from the Socialist Republic of Vietnam (Vietnam) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2022, through September 30, 2022.

DATES: Applicable August 29, 2023.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita or Matthew Palmer, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4243 or (202) 482–1678, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 15, 2023, Commerce published in the **Federal Register** its preliminary determination in the LTFV investigation of pressure washers from Vietnam.[1] Commerce invited interested parties to comment on the *Preliminary Determination.*

For a complete description of the events that followed the *Preliminary Determination, see* the Issues and Decision Memorandum.[2] The Issues and Decision Memorandum is a public document and is on file electronically *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at https://access.trade.gov/public/FRNoticesListLayout.aspx.

Scope of the Investigation

The products covered by this investigation are gas powered pressure washers from Vietnam. For a complete description of the scope of this investigation, *see* Appendix I.

Analysis of Comments Received

All issues raised in case and rebuttal briefs are discussed in the Issues and Decision Memorandum. A list of the issues raised in the Issues and Decision Memorandum is attached to Appendix II of this notice.

Scope Comments

During the course of this investigation and the concurrent LTFV and countervailing duty investigations of pressure washers from the People's Republic of China, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[3] We received comments from interested parties on the Preliminary Scope Memorandum, which we address in the Final Scope Memorandum.[4] We did not make any changes to the scope of these investigations from the scope published in the *Preliminary Determination,* as noted in Appendix I.

Final Affirmative Determination of Critical Circumstances

In accordance with sections 735(a)(3)(B) and 776(a) and (b) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.206, as well as our analysis of comments received regarding our affirmative preliminary determination of critical circumstances,[5] Commerce continues to find that critical circumstances exist with respect to imports of pressure washers from Vietnam for the Vietnam-Wide Entity. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Issues and Decision Memorandum.

Vietnam-Wide Entity and Use of Adverse Facts Available (AFA)

In this final determination, consistent with the *Preliminary Determination,*[6] we relied solely on the application of AFA for the Vietnam-wide entity, pursuant to sections 776(a) and (b) of the Act. Further, because we continue to find that all exporters of pressure washers from Vietnam are part of the Vietnam-wide entity, no companies are eligible for a separate rate. There is no new information on the record that would cause us to reconsider our decision in the *Preliminary Determination.* Thus, we made no changes to our analysis or to the Vietnam-wide entity's dumping margin for the final determination. For a full description of the methodology

[1] *See Gas Powered Pressure Washers from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Determination of Critical Circumstances,* 88 FR 39221 (June 15, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstance in the Investigation of Gas Powered Pressure Washers from the Socialist Republic of Vietnam,'' dated concurrently with, and hereby adopted by this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated June 8, 2023.

[4] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this notice.

[5] *See* MWE Investments' Letter, ''Case Brief,'' dated July 20, 2023 (MWE Investments' Case Brief); *see also* Petitioner's Letter, ''Rebuttal Brief,'' dated July 27, 2023 (Petitioner's Rebuttal Brief).

[6] *See Preliminary Determination* PDM at 4–9.

underlying Commerce's determination, *see* the Issues and Decision Memorandum.

Combination Rates

In the *Initiation Notice,*[7] Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation. Policy Bulletin 05.1 describes this practice.[8] In this case, because no respondent qualified for a separate rate, producer/exporter combination rates continue to not be calculated for this final determination.

Final Determination

Commerce determines that the following estimated weighted-average dumping margin exists for the period, April 1, 2022, through September 30, 2022:

Producer/exporter	Estimated weighted-average dumping margin (percent)
Vietnam-Wide Entity[9]	225.65

Continuation of Suspension of Liquidation

In accordance with 735(c)(4) of the Act, because we continue to find that critical circumstances exist, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of subject merchandise, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after March 17, 2023, which is 90 days before the date of publication of the *Preliminary Determination* in the **Federal Register**. These suspension of liquidation instructions will remain in effect until further notice.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), upon the publication of this notice, we will instruct CBP to require a cash deposit for estimated antidumping duties for all entries from Vietnam at the rate indicated above.

[7] *See Initiation Notice,* 88 FR at 4811.

[8] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' (April 5, 2005) (Policy Bulletin 05.1), available on Commerce's website at *https://access.trade.gov/Resources/policy/bull05-1.pdf.*

[9] *See* Issues and Decision Memorandum at section VIII., ''Application of Facts Available and Adverse Inferences.''

Disclosure

Normally, Commerce discloses to interested parties the calculations performed in connection with a final determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). However, because Commerce relied entirely on facts available with adverse inferences for the Vietnam-Wide Entity in accordance with section 776 of the Act, and the applied AFA rate is based solely on the petition, there are no calculations to disclose.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its final affirmative determination of sales at LTFV. Because the final determination in this investigation is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured or threatened with material injury by reason of imports of pressure washers from Vietnam no later than 45 days after our final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated, and all cash deposits posted will be refunded. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise entered or withdrawn from warehouse for consumption on or after the effective date of the suspension of liquidation, as discussed in the ''Continuation of Suspension of Liquidation'' section.

Administrative Protective Order

This notice serves as a final reminder to the parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: August 22, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is cold water gas powered pressure washers (also commonly known as power washers), which are machines that clean surfaces using water pressure that are powered by an internal combustion engine, air-cooled with a power take-off shaft, in combination with a positive displacement pump. This combination of components (*i.e.,* the internal combustion engine, the power take-off shaft, and the positive displacement pump) is defined as the ''power unit.'' The scope of this investigation covers cold water gas powered pressure washers, whether finished or unfinished, whether assembled or unassembled, and whether or not containing any additional parts or accessories to assist in the function of the ''power unit,'' including, but not limited to, spray guns, hoses, lances, and nozzles. The scope of this investigation covers cold water gas powered pressure washers, whether or not assembled or packaged with a frame, cart, or trolley, with or without wheels attached.

For purposes of this investigation, an unfinished and/or unassembled cold water gas powered pressure washer consists of, at a minimum, the power unit or components of the power unit, packaged or imported together. Importation of the power unit whether or not accompanied by, or attached to, additional components including, but not limited to a frame, spray guns, hoses, lances, and nozzles constitutes an unfinished cold water gas powered pressure washer for purposes of this scope. The inclusion in a third country of any components other than the power unit does not remove the cold water gas powered pressure washer from the scope. A cold water gas powered pressure washer is within the scope of this investigation regardless of the origin of its engine. Subject merchandise also includes finished and unfinished cold water gas powered pressure washers that are further processed in a third country or in the United States, including, but not limited to, assembly or any other processing that would not otherwise remove the merchandise from the scope of this investigation if performed in the country of manufacture of the in-scope cold water gas powered pressure washers.

The scope excludes hot water gas powered pressure washers, which are pressure washers that include a heating element used to heat the water sprayed from the machine.

Also specifically excluded from the scope of this investigation is merchandise covered by the scope of the antidumping and countervailing duty orders on certain vertical shaft engines between 99cc and up to 225cc, and parts thereof from the People's Republic of China. *See Certain Vertical Shaft Engines Between 99 cc and Up to 225cc, and Parts Thereof from the People's Republic of China: Antidumping and Countervailing Duty Orders,* 86 FR 023675 (May 4, 2021).

The cold water gas powered pressure washers subject to this investigation are

classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 8424.30.9000 and 8424.90.9040. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2023–18575 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–842]

Certain Uncoated Paper From Brazil: Notice of Court Decision Not in Harmony With the Results of Antidumping Duty Administrative Review; Notice of Amended Final Results

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On August 18, 2023, the U.S. Court of International Trade (CIT) issued its final judgment in *Suzano S.A.* v. *United States,* Court No. 21–00069, sustaining the U.S. Department of Commerce (Commerce)'s second remand results pertaining to the review of the antidumping duty (AD) order on certain uncoated paper (paper) from Brazil covering the period March 1, 2018, through February 28, 2019. Commerce is notifying the public that the CIT's final judgment is not in harmony with Commerce's final results of the administrative review, and that Commerce is amending the final results with respect to the dumping margin assigned to Suzano S.A. (Suzano).

DATES: Applicable August 28, 2023.

FOR FURTHER INFORMATION CONTACT: Rachel Jennings, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1110.

SUPPLEMENTARY INFORMATION:

Background

On January 27, 2021, Commerce published its final results in the 2018–2019 AD administrative review of paper from Brazil. Commerce declined to rely on Suzano's proposed financial expense ratio calculation that excluded the derivative losses associated with its acquisition of Fibria Celulose S.A. (Fibria), a pulp producer in Brazil, for calculating Suzano's cost of production (COP).[1] In the *Final Results,* Commerce calculated a weighted-average dumping margin of 32.31.[2]

Suzano appealed Commerce's *Final Results.* On August 16, 2022, the CIT remanded the *Final Results* to Commerce, holding that Commerce's rationale [3] for declining to rely on Suzano's proposed financial expense ratio calculation was unsupported by substantial evidence.[4] Accordingly, the CIT instructed Commerce to provide further explanation, and, if appropriate, to reconsider the agency's cost analysis pursuant to section 773(f)(1)(A) of the Tariff Act of 1930, as amended (the Act).[5]

In its first remand redetermination, issued in November 2022, Commerce made no changes to the *Final Results,* but provided additional explanation regarding its decision not to modify Suzano's COP to exclude the derivative losses from the financial expense ratio.[6] The CIT remanded for a second time, holding that, while Commerce's determination that Suzano's derivative losses were not investment-related costs was supported by substantial evidence and in accordance with the CIT's remand instructions, the determination that Suzano's derivative losses were not extraordinary was not supported by substantial evidence.[7] Therefore, the CIT remanded to Commerce for further explanation, and if appropriate, reconsideration, of the determination that Suzano's derivative expenses were not extraordinary for purposes for the COP calculation.[8]

In its final remand redetermination, issued in July 2023, Commerce further explained why it considers Suzano's derivative losses to be a result of an expansion of the company's normal operations, and, therefore, not extraordinary.[9] However, upon further review of the facts at issue, Commerce determined that it was appropriate to revise Suzano's financial expense ratio to include Fibria's financial expenses and cost of sales.[10] Therefore, Commerce calculated a weighted-average dumping margin of 8.63 percent.[11] The CIT sustained Commerce's final redetermination.[12]

Timken Notice

In its decision in *Timken,*[13] as clarified by *Diamond Sawblades,*[14] the U.S. Court of Appeals for the Federal Circuit held that, pursuant to sections 516A(c) and (e) of the Act, Commerce must publish a notice of court decision that is not ''in harmony'' with a Commerce determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's August 18, 2023, judgment constitutes a final decision of the CIT that is not in harmony with Commerce's *Final Results.* Thus, this notice is published in fulfillment of the publication requirements of *Timken.*

Amended Final Results

Because there is now a final court judgment, Commerce is amending its *Final Results* with respect to Suzano as follows:

[1] *See Certain Uncoated Paper from Brazil: Final Results of Antidumping Duty Administrative Review; 2018–2019,* 86 FR 7254 (January 27, 2021) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM) at Comment 1.

[2] *Id.* 86 FR 7254.

[3] In the *Final Results,* we explained: ''While it is Commerce's practice to exclude only investment-related gains or losses from the calculation of cost of production, the capital management mechanisms practiced by Suzano by way of these derivative transactions are reasonably associated with the company's cost of borrowing. . . . Moreover, we disagree with Suzano's claim that these derivative expenses are extraordinary and stem from an isolated event. . . . Here, the auditors who issued an unqualified opinion on Suzano's financial statements did not classify the derivative expenses as extraordinary.'' *See Final Results* IDM at 5 (internal citations omitted).

[4] *See Suzano S.A.* v. *United States,* 589 F. Supp. 3d 1225, 1233 (CIT 2022).

[5] *Id.* at 1237.

[6] *See Final Results of Redetermination Pursuant to Court Remand, Suzano S.A.* v. *United States,* Court No. 21–00069, Slip-Op 22–95, dated November 14, 2022, available at *https://access.trade.gov/Resources/remands/22-95.pdf.*

[7] *See Suzano S.A.* v. *United States,* 633 F.Supp.3d 1232, 1238 (CIT 2023).

[8] *Id.* at 1243.

[9] *See Final Results of Redetermination Pursuant to Court Remand, Suzano S.A.* v. *United States,* Court No. 21–00069, Slip Op. 23–56, dated July 20, 2023, at 5–11.

[10] *Id.* at 10.

[11] *Id.* at 24–25.

[12] *See Suzano S.A.* v. *United States,* Court No. 21–00069, Slip Op. 23–117 (CIT August 18, 2023).

[13] *See Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

[14] *See Diamond Sawblades Manufacturers Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond* Sawblades).

Exporter/producer	Final results of redetermination weighted-average dumping margin (percent)
Suzano S.A	8.63

Cash Deposit Requirements

Because Suzano has a superseding cash deposit rate, *i.e.,* there have been final results published in a subsequent administrative review, we will not issue revised cash deposit instructions to U.S. Customs and Border Protection (CBP). This notice will not affect the current cash deposit rate.

Liquidation of Suspended Entries

At this time, Commerce remains enjoined by CIT order from liquidating entries that: were produced and exported by Suzano, and were entered, or withdrawn from warehouse, for consumption during the period March 1, 2018, through February 28, 2019. These entries will remain enjoined pursuant to the terms of the injunction during the pendency of any appeals process.

In the event the CIT's ruling is not appealed, or, if appealed, upheld by a final and conclusive court decision, Commerce intends to instruct CBP to assess antidumping duties on unliquidated entries of subject merchandise produced and exported by Suzano in accordance with 19 CFR 351.212(b). We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific *ad valorem* assessment rate is not zero or *de minimis.* Where an importer-specific *ad valorem* assessment rate is zero or *de minimis,*[15] we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c) and (e) and 777(i)(1) of the Act.

Dated: August 23, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–18573 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–DS–P

[15] *See* 19 CFR 351.106(c)(2).

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 230816–0196]

National Cybersecurity Center of Excellence (NCCoE) Accelerate Adoption of Digital Identities on Mobile Devices

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) invites organizations to provide letters of interest describing technical expertise and products to support and demonstrate International Organization for Standardization/International Electrotechnical Commission (ISO/IEC) 18013–5 and ISO/IEC 18013–7 standards capabilities for the *Accelerate Adoption of Digital Identities on Mobile Devices* project. This notice is the initial step for the National Cybersecurity Center of Excellence (NCCoE) in collaborating with technology companies to address cybersecurity challenges identified under the *Accelerate Adoption of Digital Identities on Mobile Devices* project. Participation in the project is open to all interested organizations.

DATES: Collaborative activities will commence as soon as enough completed and signed letters of interest have been returned to address all the necessary components and capabilities, but no earlier than September 28, 2023.

ADDRESSES: The NCCoE is located at 9700 Great Seneca Highway, Rockville, MD 20850. Letters of interest must be submitted to *mdl-nccoe@nist.gov* or via hardcopy to National Institute of Standards and Technology, NCCoE; 9700 Great Seneca Highway, Rockville, MD 20850. Interested parties can access the letter of interest request by visiting *https://www.nccoe.nist.gov/projects/digital-identities-mdl* and completing the letter of interest webform. NIST will announce the completion of the selection of participants and inform the public that it is no longer accepting letters of interest for this project at *https://www.nccoe.nist.gov/projects/digital-identities-mdl.* Organizations whose letters of interest are accepted in accordance with the process set forth in the **SUPPLEMENTARY INFORMATION** section of this notice will be asked to sign an NCCoE consortium Cooperative Research and Development Agreement (CRADA) with NIST. An NCCoE consortium CRADA template can be found at: *https://www.nccoe.nist.gov/publications/other/nccoe-consortium-crada-example.*

FOR FURTHER INFORMATION CONTACT: Ketan Mehta via email at *mdl-nccoe@nist.gov;* by phone at (301) 975–8405; or by mail to National Institute of Standards and Technology, NCCoE; 9700 Great Seneca Highway, Rockville, MD 20850. Additional details about the *Accelerate Adoption of Digital Identities on Mobile Devices* project are available at *https://www.nccoe.nist.gov/projects/digital-identities-mdl.*

SUPPLEMENTARY INFORMATION:

Background: The NCCoE, part of NIST, is a public-private collaboration for accelerating the widespread adoption of integrated cybersecurity tools and technologies. The NCCoE brings together experts from industry, government, and academia under one roof to develop practical, interoperable cybersecurity approaches that address the real-world needs of complex Information Technology (IT) and Operational Technology (OT) systems. By accelerating dissemination and use of these integrated tools and technologies for protecting IT and OT assets, the NCCoE will enhance trust in U.S. IT and OT communications, data, and storage systems; reduce risk for companies and individuals using IT and OT systems; and encourage development of innovative, job-creating cybersecurity products and services.

Process: NIST is soliciting responses from all sources of relevant security capabilities (see below) to enter into an NCCoE Cooperative Research and Development Agreement (CRADA) to provide technical expertise and products to support and demonstrate ISO/IEC 18013–5 and ISO/IEC 18013–7 standards capabilities for the *Accelerate Adoption of Digital Identities on Mobile Devices* project. The full project can be viewed at: *https://www.nccoe.nist.gov/projects/digital-identities-mdl.*

Interested parties can access the request for a letter of interest template by visiting the project website at *https://www.nccoe.nist.gov/projects/digital-identities-mdl* and completing the letter of interest webform. On completion of the webform, interested parties will receive access to the letter of interest template, which the party must complete, certify as accurate, and submit to NIST by email or hardcopy. NIST will contact interested parties if there are questions regarding the responsiveness of the letters of interest to the project objective or requirements identified below. NIST will select participants who have submitted

complete letters of interest on a first come, first served basis. The selection of participants who are Verifiers (aka, Relying Parties) will also be on a first come, first served basis; however, NIST will only select up to two Verifiers per transaction type. There are five transaction types which are described in Section 4 of the project description. Moreover, NIST may give preference to Verifiers that propose use of mobile driver's license (mDL) as well as other documents. Participants who are Verifiers may submit multiple use cases. Organizations may partner to propose a single use case; however, each organization must submit a letter of interest. There may be continuing opportunity to participate even after initial activity commences for participants who were not selected initially or have submitted the letter of interest after the selection process. When the project has been completed, NIST will post a notice on the *Accelerate Adoption of Digital Identities on Mobile Devices* project website at *https://www.nccoe.nist.gov/projects/digital-identities-mdl* announcing the next phase of the project and informing the public that it will no longer accept letters of interest for this project. Selected participants will be required to enter into an NCCoE consortium CRADA with NIST (for reference, see **ADDRESSES** section above).

Project Objective: Digital identities are supplementing and supplanting traditional physical identity cards. Customers, consumers of services, law enforcement, vendors, suppliers, businesses, and health care entities may require a method of verifying a person via a mobile device. If these digital identities on mobile devices are to meet the demands of varying use cases, there must be technological interoperability, security, and cross-domain trust. The nascent nature of this technology leaves many challenges to be addressed, including but not limited to:

- Lack of guidance and governance for identities on devices.
- Limited capability to evaluate and validate compliant, standards-based deployments.
- Limited understanding of the privacy and usability considerations.

The goal of this project is to define and facilitate a reference architecture(s) for digital identities that protects privacy, is implemented in a secure way, enables equity, is widely adoptable, interoperable, and easy to use. The concepts of cybersecurity, privacy, and adoptability are critically important to this overall effort and will be interweaved into the work of this project from the beginning. The NCCoE intends to help accelerate the adoption of the standards, investigate what works and what does not based upon current efforts being performed by various entities, and provide a forum/environment to discuss and resolve challenges in implementing ISO/IEC 18013–5 (attended) and ISO/IEC 18013–7 (over-the-internet) standards.

The scope of this project will include developing an implementable reference architecture for the ISO/IEC 18013–5 and ISO/IEC 18013–7 standard and provide opportunities for validation of use cases. This effort may also consider other standards-based initiatives, such as emerging efforts around W3C's Mobile Document Request API (GitHub—WICG/mobile-document-request-api) for mobile document (mdoc) presentation. Specific outcomes of this project will be:

1. Open-Source Reader Reference Implementation—This will be a freely available tool for testing and evaluating compliance of mDL implementations with international standards and will be used as part of the demonstration efforts to confirm interoperability of mDL and mdoc applications for use in the lab.

2. Demonstrations of mDL Use Cases—These will demonstrate end-to-end uses of mDL in attended and over-the-internet use cases. This will include multiple parties such as issuers of mDL, mdoc App providers, digital identity service providers and verifiers (aka, relying parties) that consume mDLs, all collaborating to bring practical uses to life. NCCoE plans to build up to two demonstrations per transaction type. There are five transaction types which are described in Section 4 of the project description.

3. Practice Guide—This will capture the lessons of the demonstrations to provide a usable guide for implementing mDLs in attended and over-the-internet scenarios. This will include design, architecture, integration information inclusive of leading practice for security, usability, and privacy based on the work with our collaborators.

While these standards address the needs of mDLs, many parts of these standards apply to mobile documents in general. Accordingly, this effort will include presentation of documents other than mDLs using the mdoc data model defined in these standards.

Requirements for Letters of Interest

Each responding organization's letter of interest should include the following information in the description:

1. The organization's role(s) in the project. The choices are:
   a. Verifier (aka, Relying Party),
   b. mDL and mdoc App Provider,
   c. State DMVs or Other Issuing Authority,
   d. Digital Identity Service Provider, and/or
   e. Third Party Trust Service Provider.
2. Verifiers should provide a brief description of each use case being proposed.
3. Document Type(s) the product supports.

Letters of interest should not include company proprietary information, and all components and capabilities must be commercially available.

The NCCoE is inviting organizations who have implemented or are planning to implement ISO/IEC 18013–5 and ISO/IEC 18013–7 (draft) standards to collaborate and contribute toward building mDL (also other document types) demonstrations in the NCCoE lab. The following are NCCoE expectations of different types of participants:

- Verifiers are expected to bring use cases and business processes with use cases that
  - Already support mDL/mdoc functionality,
  - Are willing to work and integrate with digital identity service providers to mDL/mdoc-enable their use case, or
  - Are willing to integrate NIST open-source reader reference implementation to mDL/mdoc-enable their use case.
- mDL/mdoc App providers are expected to meet the minimum requirements as specified in Section 2 of the project description.
- mDL/mdoc Issuers are expected to provide Test mDLs/mdocs.
- Digital Identity service providers are expected to provide integration services.
- Third-Party Trust Service Providers are expected to provide Verified Issuer Certificate Authority List (VICAL).

Additional details about the *Accelerate Adoption of Digital Identities on Mobile Devices* project are available at *https://www.nccoe.nist.gov/projects/digital-identities-mdl.* NIST cannot guarantee that all submissions will be used, or that the products proposed by respondents will be used in a demonstration. Each prospective participant will be expected to work collaboratively with NIST staff and other project participants under the terms of the NCCoE consortium CRADA in the development of the *Accelerate Adoption of Digital Identities on Mobile Devices* project. Prospective participants' contributions to the collaborative effort will include assistance in establishing the necessary interface functionality, connection and set-up capabilities and procedures, demonstration harnesses, environmental and safety conditions for use, integrated platform user instructions, and demonstration plans and scripts necessary to demonstrate a use case. Each participant will work with NIST

personnel and other participants, as necessary, to integrate their solution into a demonstration of a use case. Following successful demonstration, NIST will publish a description of each demonstration that includes information such as server architecture, device architecture, usability considerations, performance characteristics, and lessons learned that meets the security and privacy objectives of the *Accelerate Adoption of Digital Identities on Mobile Devices* project. These descriptions will be public information.

Under the terms of the NCCoE consortium CRADA, NIST will support development of interfaces among participants' products by providing IT infrastructure, laboratory facilities, office facilities, collaboration facilities, and staff support to component composition, security platform documentation, and demonstration activities.

The dates of the demonstration of *Accelerate Adoption of Digital Identities on Mobile Devices* project capability will be announced on the NCCoE website at least two weeks in advance at *https://www.nccoe.nist.gov/projects/digital-identities-mdl.* The expected outcome will demonstrate how the components of the *Accelerate Adoption of Digital Identities on Mobile Devices* project architecture can provide security and privacy capabilities to mitigate potential risks to digital identities throughout their lifecycle. Participating organizations will gain from the knowledge that their products are interoperable with other participants' offerings.

For additional information on the NCCoE governance, business processes, and NCCoE operational structure, visit the NCCoE website *https://nccoe.nist.gov/.*

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–18591 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Artificial Intelligence Advisory Committee

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Institute of Standards and Technology (NIST) announces that the National Artificial Intelligence Advisory Committee (NAIAC or Committee) will hold an open meeting via web conference on September 12, 2023, from 2:00–3:30 p.m. Eastern time. The primary purpose of this meeting is for the Committee members to share and discuss updates on each working group's goals and deliverables, including those of the NAIAC Law Enforcement Subcommittee. The final agenda will be posted to the NAIAC website: *ai.gov/naiac/.*

DATES: The meeting will be held on Tuesday, September 12, 2023 from 2:00–3:30 p.m. Eastern time.

ADDRESSES: The meeting will be held via web conference. Please see the **SUPPLEMENTARY INFORMATION** section of this notice for instructions on how to attend.

FOR FURTHER INFORMATION CONTACT: Alicia Chambers, Committee Liaison Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899, *alicia.chambers@nist.gov* or 301–975–5333, or Melissa Banner, Designated Federal Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899, *melissa.banner@nist.gov* or 301–975–5245. Please direct any inquiries to *naiac@nist.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C 1001 *et seq.,* notice is hereby given that the NAIAC will meet on Tuesday, September 12, 2023 from 2:00–3:30 p.m. Eastern time. The meeting will be open to the public and will be held virtually via web conference. The primary purpose of this meeting is for the Committee members to share and discuss updates on each working group's goals and deliverables, including those of the NAIAC Law Enforcement Subcommittee. The final agenda will be posted to the NAIAC website: *ai.gov/naiac/.*

The NAIAC is authorized by Section 5104 of the National Artificial Intelligence Initiative Act of 2020 (Pub. L. 116–283), in accordance with the provisions of the Federal Advisory Committee Act, as amended (FACA), 5 U.S.C. 1001 *et seq.* The Committee advises the President and the National Artificial Intelligence Initiative Office on matters related to the National Artificial Intelligence Initiative. Additional information on the NAIAC is available at *ai.gov/naiac/.*

Comments: Individuals and representatives of organizations who would like to offer comments and suggestions related to items on the Committee's agenda for this meeting are invited to submit comments in advance of the meeting. Approximately ten minutes will be reserved for public comments, which will be read on a first-come, first-served basis. Please note that all comments submitted via email will be treated as public documents and will be made available for public inspection. All comments must be submitted via email with the subject line ''September 12, 2023, NAIAC Meeting Comments'' to *naiac@nist.gov* by 5:00 p.m. Eastern Time, Monday, September 11, 2023. NIST will not accept comments accompanied by a request that part or all of the comment be treated confidentially because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive, protected, or personal information, such as account numbers, Social Security numbers, or names of other individuals.

Virtual Admittance Instructions: The meeting will be broadcast via web conference. Registration is required to view the web conference. Instructions to register will be made available on *ai.gov/naiac/#MEETINGS.* Registration will remain open until the conclusion of the meeting.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–18542 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Artificial Intelligence Advisory Committee Law Enforcement Subcommittee

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Institute of Standards and Technology (NIST) announces that the National Artificial Intelligence Advisory Committee's Law Enforcement Subcommittee (NAIAC–LE or Subcommittee) will hold an open meeting via web conference on September 12, 2023, from 12:30 to 1:30 p.m. Eastern time. The primary purpose of this meeting is for the Subcommittee members to share and discuss updates on goals and deliverables. The final agenda will be posted to the NAIAC website: *ai.gov/naiac/.*

DATES: The meeting will be held on Tuesday, September 12, 2023 from 12:30–1:30 p.m. Eastern time.

ADDRESSES: The meeting will be held via web conference. Please see the **SUPPLEMENTARY INFORMATION** section of this notice for instructions on how to attend.

FOR FURTHER INFORMATION CONTACT: Alicia Chambers, Committee Liaison Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899, *alicia.chambers@nist.gov* or 301–975–5333, or Melissa Banner, Designated Federal Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899, *melissa.banner@nist.gov* or 301–975–5245. Please direct any inquiries to *naiac@nist.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C 1001 *et seq.,* notice is hereby given that the NAIAC–LE will meet on Tuesday, September 12, 2023 from 12:30–1:30 p.m. Eastern time. The meeting will be open to the public and will be held virtually via web conference. The primary purpose of this meeting is for the Subcommittee members to share and discuss updates on goals and deliverables. The final agenda will be posted to the NAIAC website: *ai.gov/naiac/.*

The NAIAC–LE is authorized by Section 5104 of the National Artificial Intelligence Initiative Act of 2020 (Pub. L. 116–283). The Subcommittee advises the President through NAIAC on matters related to the development of artificial intelligence relating to law enforcement. Additional information on the NAIAC–LE is available at *ai.gov/naiac/.*

Comments: Individuals and representatives of organizations who would like to offer comments and suggestions related to items on the Subcommittee's agenda for this meeting are invited to submit comments in advance of the meeting. Approximately ten minutes will be reserved for public comments, which will be read on a first-come, first-served basis. Please note that all comments submitted via email will be treated as public documents and will be made available for public inspection. All comments must be submitted via email with the subject line ''September 12, 2023, NAIAC–LE Meeting Comments'' to *naiac@nist.gov* by 5:00 p.m. Eastern Time, Monday, September 11, 2023. NIST will not accept comments accompanied by a request that part or all of the comment be treated confidentially because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive, protected, or personal information, such as account numbers, Social Security numbers, or names of other individuals.

Virtual Admittance Instructions: The meeting will be broadcast via web conference. Registration is required to view the web conference. Instructions to register will be made available on *ai.gov/naiac/#MEETINGS.* Registration will remain open until the conclusion of the meeting.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–18541 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD205]

Pacific Fishery Management Council; Public Meeting; Correction

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

ACTION: Notice of correction of public meeting.

SUMMARY: The Pacific Fishery Management Council (Pacific Council, Council) will convene webinar meetings of its Groundfish Advisory Subpanel (GAP), Groundfish Management Team (GMT), and Marine Planning Committee (MPC) to discuss items on the Pacific Council's September Council meeting agenda as detailed in the **SUPPLEMENTARY INFORMATION** below. These meetings are open to the public.

DATES: The GAP's webinar meeting, including a joint session with the MPC, to discuss the Council's September 2023 meeting agenda will be held on Friday, September 1, 2023, from 8:30 a.m. to 3:30 p.m. Pacific Time.

The GMT's webinar meeting to discuss the Council's September 2023 meeting agenda will be held on Friday, September 1, 2023, from 12:30 p.m. to 4:30 p.m. Pacific Time.

ADDRESSES: These meetings will be held online. Specific meeting information, including directions on how to join the meeting and system requirements, will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Todd Phillips, Staff Officer, Pacific Council; *todd.phillips@noaa.gov,* telephone: (503) 820–2426.

SUPPLEMENTARY INFORMATION: The original notice published in the **Federal Register** on August 1, 2023 (88 FR 50113). This notice changes the time of the GAP meeting which is now a joint meeting with the MPC and agenda of the meetings.

The primary purpose of the GAP, MPC, and GMT webinar meetings is to prepare for the Pacific Council's September 2023 meeting agenda items. The GAP, MPC, and GMT will discuss items related to the advisory body's particular management items and administrative matters on the Pacific Council's agenda, including the recently announced draft Wind Energy Areas off the Oregon Coast. The GAP, MPC, and GMT may also address other assignments as directed by the Pacific Council. No management actions will be decided by the GAP, MPC, and GMT. The advisory body recommendations will be considered by the Council at their September Council meeting. A detailed agenda for each of the GAP, MPC, and GMT webinars will be available on the Pacific Council's website prior to the meeting.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*); (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: August 23, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–18557 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Trademark Trial and Appeal Board (TTAB) Actions

The United States Patent and Trademark Office (USPTO) 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. The USPTO invites comments on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on June 5, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comment.

Agency: United States Patent and Trademark Office, Department of Commerce.

Title: Trademark Trial and Appeal Board (TTAB) Actions.

OMB Control Number: 0651–0040.

Needs and Uses: The USPTO administers the Trademark Act of 1946, 15 U.S.C. 1051 *et seq.,* as amended, which provides for the Federal registration of trademarks, service marks, collective marks and certification marks. Individuals and businesses that use or intend to use such marks in commerce may file an application to register their marks with the USPTO.

Section 13 of the Trademark Act, 15 U.S.C. 1063, allows individuals and entities who believe that they would be damaged by the registration of a mark to file an opposition, or an extension of time to file an opposition, to the registration of the mark. Section 14 of the Trademark Act, 15 U.S.C. 1064, allows individuals and entities to file a petition to cancel a registration of a mark. Section 20 of the Trademark Act, 15 U.S.C. 1070, allows individuals and entities to appeal any final decision of the examiner in charge of the registration of marks or a final decision by an examiner in an ex parte expungement proceeding or ex parte reexamination proceeding.

The USPTO administers certain provisions of the Trademark Act of 1946 through the regulations at 37 CFR part 2, which contains the various rules that govern the filings identified above and other submissions filed in connection with inter partes and ex parte proceedings. These petitions, notices, extensions, and additional papers are filed with the Trademark Trial and Appeal Board (TTAB), an administrative tribunal empowered to determine the right to register and subsequently determine the validity of a trademark. The information in this collection must be submitted electronically through the TTAB's electronic filing system. If applicants or entities wish to submit the petitions, notices, extensions, and additional papers in inter partes and ex parte cases, they may use the forms provided through the TTAB's electronic filing system.

This information collection includes the items needed for individuals or entities to file inter partes and ex parte proceedings regarding federal registration of their trademarks or service marks. Information is collected in view of the provisions of the Trademark Act of 1946. The responses in this information collection are a matter of public record, and are used by the public for a variety of private business purposes related to establishing and enforcing trademark rights. This information is important to the public, as both common law trademark owners and federal trademark registrants must actively protect their own rights.

Form Number(s):

- PTO 2120 (Notice of Opposition)
- PTO 2151 (Papers in Inter Partes Cases)
- PTO 2153 (Request for Extension of Time to File an Opposition)
- PTO 2188 (Petition for Cancellation)
- PTO 2189 (Ex Parte Appeal General Filing)
- PTO 2190 (Notice of Appeal)

Type of Review: Extension and revision of a currently approved information collection.

Affected Public: Private sector.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency: On occasion.

Estimated Number of Annual Respondents: 41,300 respondents.

Estimated Number of Annual Responses: 76,650 responses.

Estimated Time per Response: The USPTO estimates that it will take the public from 10 minutes (0.17 hours) to 21 hours to complete, depending on the complexity of the situation and item, to gather the necessary information, prepare the appropriate documents, and submit them to the USPTO.

Estimated Total Annual Respondent Burden Hours: 1,038,747 hours.

Estimated Total Annual Respondent Non-Hourly Cost Burden: $9,080,047.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website, *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection of the OMB Control Number, 0651–0040.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0040 information request'' in the subject line of the message.
- *Mail:* Justin Isaac, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Justin Isaac,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2023–18545 Filed 8–28–23; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent To Extend Collection 3038–0091: Disclosure and Retention of Certain Information Relating to Cleared Swaps Customer Collateral

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is announcing an opportunity for public comment on the proposed renewal of a collection of certain information by the agency. Under the Paperwork Reduction Act (''PRA''), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including proposed extension of an existing collection of information, and to allow 60 days for public comment. This notice solicits comments on the proposed extension of the existing collection of information

relating to Cleared Swaps Customer Collateral.

DATES: Comments must be submitted on or before October 30, 2023.

ADDRESSES: You may submit comments, identified by ''OMB Control No. 3038–0091'' by any of the following methods:

- *CFTC Website: https://comments.cftc.gov/.* Follow the instructions for submitting comments through the website.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail, above.

Please submit your comments using only one method and identify that it is for the renewal of Collection Number 3038–0091. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: Maria Aguilar-Rocha, Attorney Advisor, Market Participants Division, Commodity Futures Trading Commission, (202) 418–5840, *maguilar-rocha@cftc.gov,* and refer to OMB Control No. 3038–0091.

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501 *et seq.,* Federal agencies must obtain approval from the Office of Management and Budget (''OMB'') for each collection of information they conduct or sponsor. ''Collection of Information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed extension of an existing collection of information listed below. 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.

Title: Disclosure and Retention of Certain Information Relating to Cleared Swaps Customer Collateral (OMB Control No. 3038–0091). This is a request for an extension of a currently approved information collection.

Abstract: Section 724(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–023, 124 stat. 1376, amended the Commodity Exchange Act (''CEA''), 7 U.S.C. 1 *et seq.,* to add, as section 4d(f) thereof, provisions concerning the protection of collateral provided by a Cleared Swaps Customer to margin, guaranty, or secure a swap cleared by or through a derivatives clearing organization (''DCO''). Broadly speaking, in cleared swaps transactions customers provide collateral to futures commission merchants (''FCMs'') through whom they clear their transactions. FCMs, in turn, may provide customer collateral to DCOs, through which FCMs clear transactions for their customers. 17 CFR part 22 is intended to implement CEA section 4d(f). Several of the sections of part 22 require collections of information.

Section 22.2(g) requires each FCM with Cleared Swaps Customer Accounts to compute daily the amount of Cleared Swaps Customer Collateral on deposit in Cleared Swaps Customer Accounts, the amount of such collateral required to be on deposit in such accounts and the amount of the FCM's residual financial interest in such accounts. The purpose of this collection of information is to help ensure that FCMs' Cleared Swaps Customer Accounts are in compliance at all times with statutory and regulatory requirements for such accounts.

Section 22.5(a) requires an FCM or DCO to obtain, from each depository with which it deposits cleared swaps customer funds, a letter acknowledging that such funds belong to the Cleared Swaps Customers of the FCM, and not the FCM itself or any other person. The purpose of this collection of information is to confirm that the depository understands its responsibilities with respect to protection of cleared swaps customer funds.

Section 22.11 requires each FCM that intermediates cleared swaps for customers on or subject to the rules of a DCO, whether directly as a clearing member or indirectly through a Collecting FCM, to provide the DCO with information sufficient to identify each customer of the FCM whose swaps are cleared by the FCM. Section 22.11 also requires the FCM, at least once daily, to provide the DCO with information sufficient to identify each customer's portfolio of rights and obligations arising out of cleared swaps intermediated by the FCM. The purpose of this collection of information is to facilitate risk management by DCOs in the event of default by the FCM, to enable DCOs to perform their duty, pursuant to § 22.15, to treat the collateral attributed to each customer of the FCM on an individual basis.

Section 22.12 requires that each DCO and FCM, on a daily basis, calculate, based on information received pursuant to § 22.11 and on information generated and used in the ordinary course of business by the DCO or FCM, and record certain information about the amount of collateral required for each Cleared Swaps Customer and the sum of these amounts. As with § 22.11, the purpose of this collection of information is to facilitate risk management by DCOs and in the event of default by the FCM, to enable DCOs to perform their duty, pursuant to § 22.15, to treat the collateral attributed to each customer of the FCM on an individual basis.

Section 22.16 requires that each FCM who has Cleared Swaps Customers disclose to each of such customers the governing provisions, as established by DCO rules or customer agreements between collecting and depositing FCMs, relating to use of customer collateral, transfer, neutralization of the risks, or liquidation of cleared swaps in the event of a default by a Depositing FCM relating to a Cleared Swaps Customer Account. The purpose of this collection of information is to ensure that Cleared Swaps Customers are informed of the procedures to which accounts containing their swaps collateral may be subject in the event of a default by their FCM.

Section 22.17 requires that each FCM produce a written notice of the reasons and the details concerning withdrawals from a Cleared Swaps Customers Account not for the benefit of Cleared Swap Customers if such withdrawal will exceed 25% of the FCMs residual interest in such account.

With respect to the collection of information, the CFTC invites comments on:

- Whether the proposed extension of collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic,

mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Burden Statement: The Commission is revising its estimate of the burden for this collection for 75 respondents (60 FCMs and 15 DCOs). The respondent burden for this collection is estimated to be as follows:

Estimated Number of Respondents: 75.

Estimated Average Burden Hours per Respondent: 334.

Estimated Total Annual Burden Hours: 25,050.

Frequency of Collection: Section 22.2(g)—Daily. Section 22.5(a)—Once. Section 22.11—Daily. Section 22.12—Daily. Section 22.16—Once. Section 22.17—On occasion.

There is no capital cost associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: August 24, 2023.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2023–18592 Filed 8–28–23; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 88 FR 56607, August 18, 2023.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 9:00 a.m. EDT, Friday, August 25, 2023.

CHANGES IN THE MEETING: The meeting has been canceled.

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, Secretary of the Commission, 202–418–5964.

Authority: 5 U.S.C. 552b.

Dated: August 24, 2023.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2023–18685 Filed 8–25–23; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[AFD 2216]

Notice of Intent To Grant an Exclusive Patent License

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Notice of intent.

SUMMARY: Pursuant to the Bayh-Dole Act and implementing regulations, the Department of the Air Force hereby gives notice of its intent to grant an exclusive patent license to University of Florida Research Foundation, Inc. (''UFRF'') having a place of business at 310 Walker Hall, Gainesville, Florida 32611.

DATES: Written objections must be filed no later than fifteen (15) calendar days after the date of publication of this Notice.

ADDRESSES: Submit written objections to Karleine M. Justice, Office of Research and Technical Applications, Air Force Institute of Technology, 2950 Hobson Way, Bldg 641, Rm 101C, Wright-Patterson AFB OH 45433–7765; Phone: (937) 255–3636 x4396; or Email: *afit.cz.orta@us.af.mil.* Include Docket No. AFD 2216 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Karleine M. Justice, Office of Research and Technical Applications, Air Force Institute of Technology, 2950 Hobson Way, Bldg 641, Rm 101C, Wright-Patterson AFB OH 45433–7765; Phone: (937) 255–3636 x4396; or Email: *afit.cz.orta@us.af.mil.*

Abstract of patent application(s):

Tethered Alkylidynes and Methods of Making the same. Such compounds can be used as a catalyst to form cyclic polymers.

Intellectual property:

PCT Application PCT/US2022/043643, filed September 15, 2022.

The Department of the Air Force may grant the prospective license unless a timely objection is received that sufficiently shows the grant of the license would be inconsistent with the Bayh-Dole Act or implementing regulations. A competing application for a patent license agreement, completed in compliance with 37 CFR 404.8 and received by the Air Force within the period for timely objections, will be treated as an objection and may be considered as an alternative to the proposed license.

Authority: 35 U.S.C. 209; 37 CFR 404.

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–18559 Filed 8–28–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Advisory Committee for the Prevention of Sexual Misconduct; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal advisory committee meeting of the Defense Advisory Committee for the Prevention of Sexual Misconduct (DAC–PSM) will take place.

DATES: DAC–PSM will hold a meeting open to the public on Thursday, September 21, 2023, from 9:00 a.m. to 12:30 p.m. (EST).

ADDRESSES: The meeting may be accessed by videoconference. Information for accessing the videoconference will be provided after registering. (Pre-meeting registration is required. See guidance in **SUPPLEMENTARY INFORMATION**, ''Meeting Accessibility''.)

FOR FURTHER INFORMATION CONTACT: Dr. Suzanne Holroyd, Designated Federal Officer (DFO), (571) 372–2652 (voice), *osd.mc-alex.ousd-p-r.mbx.DAC-PSM@mail.mil* (email). Website: *www.sapr.mil/DAC-PSM.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of chapter 10 of title 5 United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), section 552b of title 5, U.S.C. (commonly known as the ''Government in the Sunshine Act''),

[1] 17 CFR 145.9.

and 41 Code of Federal Regulations (CFR) 102–3.140 and 102–3.150.

Availability of Materials for the Meeting: Additional information, including the agenda or any updates to the agenda, is available on the DAC–PSM website (*www.sapr.mil/DAC-PSM*). Materials presented in the meeting may also be obtained on the DAC–PSM website.

Purpose of the Meeting: The purpose of the meeting is for the DAC–PSM to receive briefings and have discussions on topics related to the prevention of sexual misconduct within the Armed Forces of the United States.

Agenda: Thursday, September 21, 2023, from 9:00 a.m. to 12:30 p.m. (EST)—Meeting Open (Roll Call and Opening Remarks by Chair, the Honorable Gina Grosso); Brief: DoD Prevention Updates; Brief: DoD Annual Report on Sexual Harassment and Violence at the Military Service Academies (Academic Program Year 2021–2022); Break; Panel: Overview of ROTC Policy and Service Programs.

Meeting Accessibility: Pursuant to Federal statutes and regulations (5 U.S.C. appendix, 5 U.S.C. 552b, and 41 CFR 102–3.140 through 102–3.165), this meeting is open to the public from 9:00 a.m. to 12:30 p.m. (EST) on September 21, 2023. The meeting will be held by videoconference. All members of the public who wish to attend must register by contacting DAC–PSM at *osd.mc-alex.ousd-p-r.mbx.DAC-PSM@mail.mil* or by contacting Dr. Suzanne Holroyd at (571) 372–2652 no later than Friday, September 15, 2023 (by 5:00 p.m. EST). Once registered, the web address and/or audio number will be provided.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Dr. Suzanne Holroyd at *osd.mc-alex.ousd-p-r.mbx.DAC-PSM@mail.mil* or (571) 372–2652 no later than Friday, September 15, 2023 (by 5:00 p.m. EST) so that appropriate arrangements can be made.

Written Statements: Pursuant to 41 CFR 102–3.140 and 5 U.S.C. 1009(a)(3), interested persons may submit a written statement to the DAC–PSM. Individuals submitting a statement must submit their statement no later than 5:00 p.m. EST, Friday, September 15, 2023 to Dr. Suzanne Holroyd at (571) 372–2652 (voice) or to *osd.mc-alex.ousd-p-r.mbx.DAC-PSM@mail.mil* (email). If a statement pertaining to a specific topic being discussed at the planned meeting is not received by Friday, September 15, 2023, prior to the meeting, then it may not be provided to, or considered by, the Committee during the September 21, 2023, meeting. The DFO will review all timely submissions with the DAC–PSM Chair and ensure such submissions are provided to the members of the DAC–PSM before the meeting. Any comments received by the DAC–PSM will be posted on the DAC–PSM website (*www.sapr.mil/DAC-PSM*).

Dated: August 24, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–18583 Filed 8–28–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Grant an Exclusive License for a U.S. Army Owned Invention to necoTECH, LLC

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice.

SUMMARY: The Department of the Army announces that, unless there is an objection, after 15 days it intends to grant an exclusive license to necoTECH, LLC., a corporation having a place of business in Culpepper, VA on United States Patent No. 10,954,161 entitled ''Performance Grade Asphalt Repair Composition,'' filed September 14, 2016, and United States Patent Pub No. 2021/0380480 filed March 22, 2021.

DATES: Written objections must be filed by September 13, 2023.

ADDRESSES: Send written objections to U.S. Army Engineer Research and Development Center, ATTN: CEERD–ZBT–C (Mr. Eric L. Fox), 3909 Halls Ferry Road, Vicksburg, MS 39180–61996, or by email to: *Eric.L.Fox@usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: U.S. Army Engineer Research and Development Center, ATTN: CEERD–ZBT–C (Mr. Eric L. Fox), 3909 Halls Ferry Road, Vicksburg, MS 39180–61996, Voice: 601–634–4113, Email: *Eric.L.Fox@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Any license granted shall comply with 35 U.S.C. 209 and 37 CFR part 404.

Eric L. Fox,

Senior Technology Transfer Officer, U.S. Army Engineer Research and Development Center.

[FR Doc. 2023–18578 Filed 8–28–23; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0150]

Agency Information Collection Activities; Comment Request; Charter Online Management and Performance System (COMPS) CMO Grant Profile

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 30, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0150. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov*. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Stephanie Jones, 202–453–7835.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the

Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Charter Online Management and Performance System (COMPS) CMO Grant Profile.

OMB Control Number: 1810–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 45.

Total Estimated Number of Annual Burden Hours: 360.

Abstract: This request is for a new OMB approval to collect the Grant Profile data from Charter School Programs (CSP) Replication and Expansion of High-Quality Charter Schools (CMO) grantees. The Charter School Programs (CSP) was originally authorized under title V, part B, subpart 1, sections 5201 through 5211 of the Elementary and Secondary Education Act (ESEA) of 1965, as amended by the No Child Left Behind (NCLB) Act of 2001. For fiscal year 2017 and thereafter, ESEA has been amended by the Every Student Succeeds Act (ESSA), (20 U.S.C. 7221–7221i), which reserves funds to improve education by supporting innovation in public education and to: (2) provide financial assistance for the planning, program design, and initial implementation of charter schools; (3) increase the number of high-quality charter schools available to students across the United States; (4) evaluate the impact of charter schools on student achievement, families, and communities, and share best practices between charter schools and other public schools; (5) encourage States to provide support to charter schools for facilities financing in an amount more nearly commensurate to the amount States typically provide for traditional public schools; (6) expand opportunities for children with disabilities, English learners, and other traditionally underserved students to attend charter schools and meet the challenging State academic standards; (7) support efforts to strengthen the charter school authorizing process to improve performance management, including transparency, oversight and monitoring (including financial audits), and evaluation of such schools; and (8) support quality, accountability, and transparency in the operational performance of all authorized public chartering agencies, including State educational agencies, local educational agencies, and other authorizing entities.

The U.S. Department of Education (ED) is requesting authorization to collect data from CSP grantees within the CMO program through a new online platform. In 2022, ED began development of a new data collection system, the Charter Online Management and Performance System (COMPS), designed specifically to reduce the burden of reporting for users and increase validity of the overall data. This new collection consists of questions responsive to the actions established in the program's final rule published in the **Federal Register** on July 6, 2022, as well as the CMO program Notice Inviting Applications (NIA). This collection request is a consolidation of all previously established program data collection efforts and provides a more comprehensive representation of grantee performance.

Dated: August 24, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–18618 Filed 8–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0091]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Statewide Longitudinal Data System (SLDS) Survey 2023–2025

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before September 28, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Statewide Longitudinal Data System (SLDS) Survey 2023–2025.

OMB Control Number: 1850–0933.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 75.

Total Estimated Number of Annual Burden Hours: 94.

Abstract: The National Center for Education Statistics (NCES), of the Institute of Education Sciences (IES), within the U.S. Department of Education, is requesting clearance to continue the Statewide Longitudinal Data System (SLDS) Survey collection, which is intended to provide insight on State and U.S. territory SLDS capacity

for automated linking of K–12, teacher, postsecondary, workforce, career and technical education (CTE), adult education, and early childhood data. Historically, SLDS has collected information annually from State Education Agencies (SEAs) and has helped inform NCES ongoing evaluation and targeted technical assistance efforts to enhance the quality of the SLDS Program's support to States regarding systems development, enhancement, and use. The request to conduct all activities related to SLDS 2021–2023, including materials and procedures, was approved by OMB in October 2021 (OMB #1859–0933 v.10),

This new request is to conduct all activities related to SLDS 2023–25, continuing usage of the Qualtrics information collection tool initiated in the 2023 collection. The appendices include updated communications, webinars, and Qualtrics instrument screenshots related to the SLDS 2023–25 collection. While minor adjustments were made to questions and language, the primary change proposed in this package is a shift from an annual to a biennial collection. Nationwide, SLDS system capacity changes frequently (ex. Infrastructure enhancements, evolving P20W agency collaborations, State legislation impacts, etc.), but analysis demonstrates that the COVID–19 pandemic stagnated the work to some extent. The 2019–20 Statistics in Brief and accompanying data file (anticipated May 2023 publication release) indicate very little change in results over the two-year period, indicating that shifting to an every-other-year collection would allow for more timely releases of data, with no adverse effect on the integrity of the information.

Dated: August 23, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–18538 Filed 8–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0152]

Agency Information Collection Activities; Comment Request; Annual Performance Report for Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) Program

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 30, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0152. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Nicole Josemans, 202–452–7111.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Annual Performance Report for Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) Program.

OMB Control Number: 1840–0777.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments; private sector.

Total Estimated Number of Annual Responses: 159.

Total Estimated Number of Annual Burden Hours: 3,180.

Abstract: Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP), created in the Higher Education Act Amendments of 1998 (title IV, section 404A–404H), is a discretionary grant program which encourages applicants to provide support and maintain a commitment to eligible low-income students, including students with disabilities, to assist the students in obtaining a secondary school diploma and preparing for and succeeding in postsecondary education. GEAR UP provides grants to states and partnerships to provide services at high-poverty middle and high schools. GEAR UP grantees serve an entire cohort of students beginning no later than the seventh grade and follow them through graduation and, optionally, the first year of college.

Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP), created in the Higher Education Act Amendments of 1998 (title IV, section 404A–404H), is a discretionary grant program which encourages applicants to provide support and maintain a commitment to eligible low-income students, including students with disabilities, to assist the students in obtaining a secondary school diploma and preparing for and succeeding in postsecondary education. GEAR UP provides grants to states and partnerships to provide services at high-poverty middle and high schools. GEAR UP grantees serve an entire cohort of students beginning no later than the seventh grade and follow them through graduation and, optionally, the first year of college.

The Annual Performance Report (APR) for Partnership and State Projects for GEAR UP is a required report that grant recipients must submit annually. The purpose of this information collection is for accountability. The data is used to report on progress in meeting the performance objectives of GEAR UP, program implementation, and student outcomes. The data collected includes budget data on Federal funds and match contributions, demographic data, and data regarding services provided to students.

This submission requests to revise the APR in several places. New questions were added regarding the grant's scholarship component and student postsecondary participation outcomes, and changes were made to questions about project financial status, participant demographics, and project services.

Dated: August 24, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–18627 Filed 8–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0151]

Agency Information Collection Activities; Comment Request; Charter Online Management and Performance System (COMPS) Developer Annual Performance Report

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 30, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0151. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov*. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Stephanie Jones, 202–453–7835.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Charter Online Management and Performance System (COMPS) Developer Annual Performance Report.

OMB Control Number: 1810–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 80.

Total Estimated Number of Annual Burden Hours: 2,000.

Abstract: This request is for a new OMB approval to collect the Annual Performance Report (APR) data from Charter School Programs (CSP) Developer grantees. The Charter School Programs (CSP) was originally authorized under title V, part B, subpart 1, sections 5201 through 5211 of the Elementary and Secondary Education Act (ESEA) of 1965, as amended by the No Child Left Behind (NCLB) Act of 2001. For fiscal year 2017 and thereafter, ESEA has been amended by the Every Student Succeeds Act (ESSA), (20 U.S.C. 7221–7221i), which reserves funds to improve education by supporting innovation in public education and to: (2) provide financial assistance for the planning, program design, and initial implementation of charter schools; (3) increase the number of high-quality charter schools available to students across the United States; (4) evaluate the impact of charter schools on student achievement, families, and communities, and share best practices between charter schools and other public schools; (5) encourage States to provide support to charter schools for facilities financing in an amount more nearly commensurate to the amount States typically provide for traditional public schools; (6) expand opportunities for children with disabilities, English learners, and other traditionally underserved students to attend charter schools and meet the challenging State academic standards; (7) support efforts to strengthen the charter school authorizing process to improve performance management, including transparency, oversight and monitoring (including financial audits), and evaluation of such schools; and (8) support quality, accountability, and transparency in the operational performance of all authorized public chartering agencies, including State educational agencies, local educational agencies, and other authorizing entities.

The U.S. Department of Education (ED) is requesting authorization to collect data from CSP grantees within the Developer program through a new online platform. In 2022, ED began development of a new data collection system, the Charter Online Management and Performance System (COMPS), designed specifically to reduce the burden of reporting for users and increase validity of the overall data. This new collection consists of questions responsive to the actions established in the program's final rule published in the **Federal Register** on July 6, 2022, as well as the Developer program Notice Inviting Applications

(NIA). This collection request is a consolidation of all previously established program data collection efforts and provides a more comprehensive representation of grantee performance.

Dated: August 24, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–18619 Filed 8–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0090]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Special Education-Individual Reporting on Regulatory Compliance Related to the Personnel Development Program's Service Obligation

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before September 28, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Celia Rosenquist, 202–245–7373.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Special Education-Individual Reporting on Regulatory Compliance Related to the Personnel Development Program's Service Obligation.

OMB Control Number: 1820–0686.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments; Individuals and Households.

Total Estimated Number of Annual Responses: 73,368.

Total Estimated Number of Annual Burden Hours: 10,874.

Abstract: The Office of Special Education Program's Personnel Development Program aims to increase the supply of qualified personnel in the field of special education. The program awards competitive grants to Institutions of Higher Education to support scholars who are preparing to provide special education and related services to children and youth with disabilities. Scholars who receive funding agree to work in the field of special education or related services for two years for each year of support they receive.

The Personnel Development Program Data Collection System collects data from grantees, scholars, and employers who verify that scholars are employed in the field of special education or related services. This data collection serves three program needs. First, data from grantees, scholars, and employers are necessary to assess the performance of the Personnel Development Program on its performance measures. Second, data from all three sources are necessary to determine if scholars comply with the service obligation requirements. Finally, project-specific performance data are collected from grantees for project monitoring and program improvement.

Dated: August 24, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–18572 Filed 8–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0105]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Teacher Education Assistance for College and Higher Education Grant Program Obligation To Repay Grant Regulations

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before September 28, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be

processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Teacher Education Assistance for College and Higher Education Grant Program Obligation to Repay Grant Regulations.

OMB Control Number: 1845–0157.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 77,109.

Total Estimated Number of Annual Burden Hours: 13,131.

Abstract: The College Cost Reduction and Access Act (Pub. L. 110–84) (the CCRAA) established the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program under Part A of the Higher Education Act of 1965, as amended (the HEA). The regulations governing the TEACH Grant Program are in 34 CFR 686. The Department of Education (the Department) is requesting extension without change of this information collection for the TEACH Grant regulations under 34 CFR 686.43.

The TEACH Grant Program provides grants of up to $4,000 per year to undergraduate and graduate students who are completing, or who intend to complete, coursework necessary to begin a career in teaching. In exchange for receiving a TEACH Grant, a grant recipient must agree to complete a teaching service obligation and must regularly provide documentation of his or her progress toward satisfying the service obligation. If a grant recipient fails to complete the service obligation or does not meet requirements for documenting the service obligation, the TEACH Grants that the individual received are converted to a Direct Unsubsidized Loan that must be repaid, with interest charged from the date of each TEACH Grant disbursement.

The regulations govern when a TEACH Grant will be converted to a Direct Unsubsidized Loan, as well as provide for annual notifications from the Secretary to the recipient regarding the status of a recipient's TEACH Grant service obligation. Under the regulations, a TEACH Grant recipient can request conversion if the recipient decides not to fulfill the TEACH Grant obligations for any reason or if the recipient fails to begin or maintain qualifying teaching service within a timeframe to complete the service obligation in the requisite eight-year period. Additionally, the regulations describe the notifications the Secretary will annually send to all TEACH Grant recipients regarding the service obligation requirements.

Dated: August 24, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–18596 Filed 8–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0107]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; School Ambassador Fellowship Application

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before September 28, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Orman Feres, (202) 453–6921.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: School Ambassador Fellowship Application.

OMB Control Number: 1810–NEW.

Type of Review: New ICR.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 6,000.

Total Estimated Number of Annual Burden Hours: 14,250.

Abstract: The Office of Elementary and Secondary Education (OESE) in the US Department of Education (ED) requests clearance for a new information collection for the School Ambassador Fellowship program. The U.S. Department of Education established the School Ambassador Fellowship to enable outstanding teachers, administrators, and other school leaders, such as school counselors, psychologists, social workers, and librarians to bring their school and classroom expertise to the Department and to expand their knowledge of the national dialogue about education. The School Ambassador Fellowship is a professional learning community designed to improve educational outcomes for students by leveraging the expertise of school-based practitioners in the creation, evaluation, and dissemination of information around national education initiatives. The Intergovernmental Personnel Act (IPA) mobility program regulations (5 CFR part 334), revised effective May 29, 1997, allow federal agencies to facilitate cooperation between the Federal Government and the non-Federal entity through the temporary assignment of skilled personnel. In order to identify the most skilled personnel for the position of Ambassador Fellow we are requesting OMB approval to collect School Ambassador Fellowship applications.

Dated: August 23, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–18537 Filed 8–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0086]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and approval; Comment Request; Written Application for the Independent Living Services for Older Individuals Who Are Blind Program

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before September 28, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Nicole Jeffords, 202–245–6387.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Written Application for the Independent Living Services for Older Individuals Who Are Blind Program.

OMB Control Number: 1820–0660.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 19.

Total Estimated Number of Annual Burden Hours: 3.

Abstract: This application is used by States to request funds to administer the Independent Living Services for Older Individuals Who Are Blind (IL–OIB) program. The IL–OIB program is provided under title VII, chapter 2, section 752 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by title IV of the Workforce Innovation and Opportunity Act (WIOA), to assist individuals who are age 55 or older whose significant visual impairment makes competitive integrated employment difficult to attain, but for whom independent living goals are feasible.

Dated: August 24, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–18571 Filed 8–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–262–000.

Applicants: Steel Solar, LLC.

Description: Steel Solar, LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.

Filed Date: 8/22/23.

Accession Number: 20230822–5167.

Comment Date: 5 p.m. ET 9/12/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–2146–001.

Applicants: SunZia Transmission, LLC.

Description: Tariff Amendment: Deficiency Letter Response of SunZia Transmission, LLC (ER23–2146–) to be effective 8/15/2023.

Filed Date: 8/22/23.

Accession Number: 20230822–5141.

Comment Date: 5 p.m. ET 9/5/23.

Docket Numbers: ER23–2344–001.

Applicants: MidAmerican Energy Company.

Description: Tariff Amendment: Amendment to Concurrence Filed in ER23–2344 to be effective 9/4/2023.

Filed Date: 8/22/23.

Accession Number: 20230822–5143.

Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: ER23–2429–001.

Applicants: Stonepeak Kestrel Energy Marketing LLC.

Description: Tariff Amendment: IROL–CIP Rate Schedule Amendment to be effective 9/29/2023.

Filed Date: 8/22/23.

Accession Number: 20230822–5145.

Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: ER23–2441–000.

Applicants: Chevelon Butte RE II LLC.

Description: Supplement to July 20, 2023, Chevelon Butte RE II LLC tariff filing.

Filed Date: 8/22/23.

Accession Number: 20230822–5175.

Comment Date: 5 p.m. ET 9/1/23.

Docket Numbers: ER23–2447–001.

Applicants: Desert Peak Energy Center, LLC.

Description: Tariff Amendment: Desert Peak Energy Center, LLC Amendment to the Shared Facilities Agreement to be effective 7/21/2023.

Filed Date: 8/23/23.

Accession Number: 20230823–5100.

Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: ER23–2451–000.

Applicants: Great Cove Solar II LLC.

Description: Supplement to July 20, 2023, Great Cove Solar II LLC tariff filing.

Filed Date: 8/22/23.

Accession Number: 20230822–5173.

Comment Date: 5 p.m. ET 9/1/23.

Docket Numbers: ER23–2684–000.

Applicants: Steel Solar, LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authority to be effective 10/22/2023.

Filed Date: 8/22/23.

Accession Number: 20230822–5138.

Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: ER23–2685–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2023–08–22–SA 3371 Termination of Orion Renewable-SIGE GIA (J856) to be effective 6/7/2023.

Filed Date: 8/22/23.

Accession Number: 20230822–5147.

Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: ER23–2687–000.

Applicants: MidAmerican Energy Company.

Description: Notice of Termination of Assignment Agreements of MidAmerican Energy Company.

Filed Date: 8/22/23.

Accession Number: 20230822–5180.

Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: ER23–2688–000.

Applicants: NRG Business Marketing LLC.

Description: Compliance filing: Notice of Succession and Request for Waiver to be effective 8/23/2023.

Filed Date: 8/23/23.

Accession Number: 20230823–5045.

Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: ER23–2689–000.

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: CED Timberland Solar 2 LGIA Amendment Filing to be effective 8/11/2023.

Filed Date: 8/23/23.

Accession Number: 20230823–5051.

Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: ER23–2690–000.

Applicants: MidAmerican Energy Company.

Description: § 205(d) Rate Filing: Concurrence with IPL (RLBAA) to be effective 9/6/2023.

Filed Date: 8/23/23.

Accession Number: 20230823–5076.

Comment Date: 5 p.m. ET 9/13/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, 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 23, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–18594 Filed 8–28–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2684–000]

Steel Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Steel Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 12, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: August 23, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–18595 Filed 8–28–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas and

Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–968–000.

Applicants: Elwood Energy LLC v. *ANR Pipeline Company.*

Description: Complaint of *Elwood Energy LLC* v. *ANR Pipeline Company.*

Filed Date: 8/14/23.

Accession Number: 20230814–5283.

Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–972–000.

Applicants: ExxonMobil Oil Corporation, Nesson Gathering System LLC, XTO Energy Inc.

Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et al. of ExxonMobil Oil Corporation, et al.

Filed Date: 8/18/23.

Accession Number: 20230818–5216.

Comment Date: 5 p.m. ET 8/30/23.

Docket Numbers: RP23–976–000.

Applicants: Gulfstream Natural Gas System, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rate and Non-Conforming—Tampa Electric 9211892 to be effective 12/1/2022.

Filed Date: 8/23/23.

Accession Number: 20230823–5005.

Comment Date: 5 p.m. ET 9/5/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP23–967–001.

Applicants: Big Sandy Pipeline, LLC, Bobcat Gas Storage, East Tennessee Natural Gas, LLC, Egan Hub Storage, LLC, Garden Banks Gas Pipeline, LLC, Mississippi Canyon Gas Pipeline, L.L.C., Moss Bluff Hub, LLC, Nautilus Pipeline Company, L.L.C., NEXUS Gas Transmission, LLC, Sabal Trail Transmission, LLC, Saltville Gas Storage Company L.L.C., Southeast Supply Header, LLC, Steckman Ridge, LP, Texas Eastern Transmission, LP, Maritimes & Northeast Pipeline, L.L.C., Algonquin Gas Transmission, LLC.

Description: Compliance filing: Big Sandy Pipeline, LLC submits tariff filing per 154.203: Amendment Filing—LINK System Maintenance—Request for Waivers to be effective N/A.

Filed Date: 8/23/23.

Accession Number: 20230823–5003.

Comment Date: 5 p.m. ET 8/30/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: August 23, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–18593 Filed 8–28–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2022–0223; FRL–11357–01–OCSPP]

Chlorpyrifos; Notice Receipt of Request To Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by Loveland Products, Inc. (hereafter referred to as Loveland) to voluntarily cancel registrations of certain products containing the pesticide chlorpyrifos. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or the registrant withdraws their request. If these requests are granted, any sale, distribution, or use of the products listed in this notice after the registrations have been cancelled would need to be consistent with the terms as described in the final cancellation order.

DATES: Comments must be received on or before September 28, 2023.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2022–0223, is available at *https://www.regulations.gov.* Additional instructions on visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.* For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Patricia Biggio, Pesticide Re-Evaluation Division (7508M), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0700; email address: *OPPChlorpyrifosInquiries@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *https://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked

will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. What action is the Agency taking?

This notice announces receipt by the Agency of requests from Loveland to cancel certain pesticide product registrations. These affected registrations are listed in sequence by registration number in Table 1 of this Unit. Table 2 of this Unit includes the address of record for Loveland and the company number. This number corresponds to the first part of the EPA registration number of the products listed in Table 1 of this Unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or Loveland withdraws the requests, EPA intends to issue a final order in the **Federal Register** cancelling the affected registrations.

TABLE 1—CHLORPYRIFOS PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

EPA registration No.	Product name	Company	Active ingredients
34704–857	Warhawk	Loveland Products, Inc	Chlorpyrifos.
34704–1077	Warhawk Clearform	Loveland Products, Inc	Chlorpyrifos.
34704–1086	Match-Up Insecticide	Loveland Products, Inc	Chlorpyrifos Bifenthrin.

TABLE 2—REGISTRANT REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
34704	Loveland Products, Inc., Agent name: Pyxis Regulatory Consulting, 4110 136th St. Ct. NW, Gig Harbor, WA 98332.

III. What is the Agency's authority for taking these actions?

FIFRA section 6(f)(1) (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be cancelled or amended to terminate one or more registered uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

FIFRA section 6(f)(1)(B) (7 U.S.C. 136d(f)(1)(B)) requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) (7 U.S.C. 136d(f)(1)(C)) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrant requests a waiver of the comment period, or

2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

Loveland has requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation or withdraw a request for a use termination should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action.

If the requests for voluntary cancellation are granted, the Agency intends to publish a final cancellation order in the **Federal Register**. In any order issued in response to these requests for cancellation of product registrations, EPA proposes to include the following provisions for the treatment of any existing stocks of the products listed in Table 1 of Unit II.

All chlorpyrifos tolerances expired on February 28, 2022. *See* 87 FR 11222 (Feb. 28, 2022). Therefore, any food or animal feed treated with chlorpyrifos after February 28, 2022, is considered adulterated and cannot be delivered into interstate commerce. Consequently, EPA plans to prohibit existing stocks of chlorpyrifos products identified in Table 1 for food uses. Use of the products identified in Table 1 is permitted on non-food use sites, as long as such use is consistent with the label. EPA proposes prohibiting all sale and distribution of existing stocks of the chlorpyrifos products identified in Table 1, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal in accordance with state regulations.

Authority: 7 U.S.C. 136 *et seq.*

Dated: August 22, 2023.

Mary Elissa Reaves,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2023–18544 Filed 8–28–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket Id: EPA–HQ–OPP–2022–0337; FRL–10497–03–OCSPP]

Pesticides; Antimicrobial Product Efficacy Claims on Soft Surface Textiles in Non-Residential Settings; Guidance, Methods, and Response to Comments; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of revised guidance and methods for adding efficacy claims to antimicrobial products for use on soft surface textiles in non-residential settings. Revisions to the guidance document and associated methods were made based on the Agency's consideration of public comments

received. Specifically, EPA is announcing the availability of a guidance document that describes efficacy testing for antimicrobial products to support claims for use on soft surface textiles in clinical and institutional (non-residential) settings and how to prepare an application for registration, a quantitative method for evaluating the efficacy of antimicrobial products on soft surface textiles against viruses, and a quantitative method for evaluating the efficacy of antimicrobial products on soft surface textiles against bacteria. The guidance does not address residential use sites, clothing, frequently laundered items, untreated wood, concrete and other hard porous materials, carpet or rugs, or the backing material/stuffing under the soft surface textile (*e.g.,* beyond what can be visibly observed).

DATES: This guidance is effective on August 29, 2023.

FOR FURTHER INFORMATION CONTACT: Marc Carpenter, Microbiology Laboratory Branch (7503M), Biological and Economic Analysis Division, Office of Pesticide Programs, Environmental Protection Agency, Environmental Science Center, 701 Mapes Road, Ft. Meade, MD 20755–5350; telephone number: (410) 305–2927; email address: *carpenter.marc@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general; although this action may be of particular interest to those persons who are or may be required to conduct testing of chemical substances under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

A copy of the documents are available in the docket under docket identification (ID) number EPA–HQ–OPP–2022–0337 at *https://www.regulations.gov.*

II. Background

EPA received requests to develop test methods, guidance, and an associated registration process for antimicrobial products intended to treat bacterial and viral public health pathogens for use on soft surface textiles in non-residential settings. There is significant interest from stakeholders and the public in the availability of antimicrobial products with these public health claims, particularly in institutional, clinical, and health-care settings.

EPA announced the availability and sought public comments on an interim guidance document and test methods (87 FR 78105, December 21, 2022 (FRL–10497–01–OCSPP)). EPA received approximately 160 public comments, including comments regarding claim nomenclature, clarifications to the methods and revisions to the guidance. After considering the public comments, EPA is releasing revised test methods and guidance document, as well as a response to comments document.

The final guidance document and test methods describe efficacy testing for antimicrobial products to support claims for use on soft surface textiles in clinical and institutional (non-residential) settings and how to prepare an application for registration, a quantitative method for evaluating the efficacy of antimicrobial products on soft surface textiles against viruses, and a quantitative method for evaluating the efficacy of antimicrobial products on soft surface textiles against bacteria. This guidance does not address residential use sites, clothing, frequently laundered items, untreated wood, concrete and other hard porous materials, carpet or rugs, or the backing material/stuffing under the soft surface textile (*e.g.,* beyond what can be visibly observed).

III. Do guidance documents contain binding requirements?

As guidance, these documents are not binding on the Agency or any outside parties, and the Agency may depart from it where circumstances warrant and without prior notice. While EPA has made every effort to ensure the accuracy of the discussion in the guidance, the obligations of EPA and the regulated community are determined by statutes, regulations, or other legally binding documents. In the event of a conflict between the discussion in the guidance documents and any statute, regulation, or other legally binding document, the guidance documents will not be controlling.

Authority: 7 U.S.C. 136 *et seq.*

Dated: August 23, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023–18549 Filed 8–28–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 167038]

Privacy Act of 1974; Matching Program

AGENCY: Federal Communications Commission.

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (''Privacy Act''), this document announces a new computer matching program the Federal Communications Commission (''FCC'' or ''Commission'' or ''Agency'') and the Universal Service Administrative Company (USAC) will conduct with the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS). The purpose of this matching program is to verify the eligibility of applicants to and subscribers of Lifeline, and the Affordable Connectivity Program (ACP), both of which are administered by USAC under the direction of the FCC. More information about these programs is provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments are due on or before September 28, 2023. This computer matching program will commence on September 28, 2023, and will conclude 18 months after the effective date.

ADDRESSES: Send comments to Elliot S. Tarloff, FCC, 45 L Street NE, Washington, DC 20554, or to *Privacy@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Elliot S. Tarloff at 202–418–0886 or *Privacy@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Lifeline program provides support for discounted broadband and voice services to low-income consumers. Lifeline is administered by the Universal Service Administrative Company (USAC) under FCC direction. Consumers qualify for Lifeline through proof of income or participation in a qualifying program, such as Medicaid, the Supplemental Nutritional Assistance Program (SNAP), Federal Public Housing Assistance, Supplemental Security Income (SSI), Veterans and Survivors Pension Benefit, or various Tribal-specific federal assistance programs.

In the Consolidated Appropriations Act, 2021, Public Law 116–260, 134 Stat. 1182, 2129–36 (2020), Congress created the Emergency Broadband Benefit Program, and directed use of the National Verifier to determine eligibility based on various criteria, including the

qualifications for Lifeline (Medicaid, SNAP, etc.). EBBP provided $3.2 billion in monthly consumer discounts for broadband service and one-time provider reimbursement for a connected device (laptop, desktop computer or tablet). In the Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429, 1238–44 (2021) (codified at 47 U.S.C. 1751–52), Congress modified and extended EBBP, provided an additional $14.2 billion, and renamed it the Affordable Connectivity Program (ACP). A household may qualify for the ACP benefit under various criteria, including an individual qualifying for the FCC's Lifeline program.

In a Report and Order adopted on March 31, 2016, (81 FR 33026, May 24, 2016) (*2016 Lifeline Modernization Order*), the Commission ordered USAC to create a National Lifeline Eligibility Verifier (''National Verifier''), including the National Lifeline Eligibility Database (LED), that would match data about Lifeline applicants and subscribers with other data sources to verify the eligibility of an applicant or subscriber. The Commission found that the National Verifier would reduce compliance costs for Lifeline service providers, improve service for Lifeline subscribers, and reduce waste, fraud, and abuse in the program.

The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for ACP. The purpose of this matching program is to verify the eligibility of Lifeline and ACP applicants and subscribers by determining whether they receive Medicaid benefits administered by the Department of Health and Human Services, Centers for Medicare and Medicaid Services.

Participating Agencies

Department of Health and Human Services, Centers for Medicare and Medicaid Services; Federal Communications Commission.

Authority for Conducting the Matching Program

The authority for the FCC's ACP is Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429, 1238–44 (2021) (codified at 47 U.S.C. 1751–52); 47 CFR part 54. The authority for the FCC's Lifeline program is 47 U.S.C. 254; 47 CFR 54.400 through 54.423; Lifeline and Link Up Reform and Modernization, *et al.,* Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4006–21, paras. 126–66 (2016) (*2016 Lifeline Modernization Order*).

Purpose(s)

The purpose of this modified matching agreement is to verify the eligibility of applicants and subscribers to Lifeline, as well as to ACP and other Federal programs that use qualification for Lifeline as an eligibility criterion. This new agreement will permit eligibility verification for the Lifeline program and ACP by checking an applicant's/subscriber's participation in Medicaid. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for ACP benefits.

Categories of Individuals

The categories of individuals whose information is involved in the matching program include, but are not limited to, those individuals who have applied for Lifeline and/or ACP benefits; are currently receiving Lifeline and/or ACP benefits; are individuals who enable another individual in their household to qualify for Lifeline and/or ACP benefits; are minors whose status qualifies a parent or guardian for Lifeline and/or ACP benefits; or are individuals who have received Lifeline and/or ACP benefits.

Categories of Records

The categories of records involved in the matching program include, but are not limited to, the last four digits of the applicant's Social Security Number, date of birth, first and last name, and state of residence. The National Verifier will transfer these data elements to the Department of Health and Human Services, Centers for Medicare and Medicaid Services, which will respond either ''yes'' or ''no'' that the individual is enrolled in a qualifying assistance program: Medicaid administered by the Department of Health and Human Services, Centers for Medicare and Medicaid Services.

System(s) of Records

The CMS System of Records Notice (SORN) that supports this matching program is ''Transformed—Medicaid Statistical Information System (T–MSIS)'', System No. 09–07–0541, last published in full at 84 FR 2230 (February 16, 2019).

The FCC SORNs that support this matching program are: (1) ''FCC/WCB–1,'' Lifeline, which was published in the **Federal Register** at 86 FR 11526 (Feb. 25, 2021); and (2) ''FCC/WCB–3,'' Affordable Connectivity Program, which was published in the **Federal Register** at 86 FR 71494 (Dec. 16, 2021).

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–18540 Filed 8–28–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1167; FR ID 166669]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before September 28, 2023.

ADDRESSES: Comments should be sent to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called

''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–1167.

Title: Accessible Telecommunications and Advanced Communications Services and Equipment.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households; businesses or other for-profit entities; not-for-profit institutions.

Number of Respondents and Responses: 3,541 respondents; 42,106 responses.

Estimated Time per Response: .50 hours (30 minutes) to 40 hours.

Frequency of Response: Annual, one-time, and on occasion reporting requirements; recordkeeping requirement; third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in sections 1–4, 255, 303(r), 403, 503, 716, 717, and 718 of the Communications Act, as amended, 47 U.S.C. 151–154, 255, 303(r), 403, 503, 617, 618, and 619.

Total Annual Burden: 120,999 hours.

Total Annual Cost: $17,800.

Needs and Uses: In 2011, in document FCC 11–151, published at 76 FR 82354, December 30, 2011, the FCC adopted rules to implement sections 716 and 717 of the Communications Act of 1934 (the Act), as amended, which were added to the Act by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA). See Public Law 111–260, 104. Section 716 of the Act requires providers of advanced communications services and manufacturers of equipment used for advanced communications services to make their services and equipment accessible to individuals with disabilities, unless doing so is not achievable. 47 U.S.C. 617. Section 717 of the Act established new recordkeeping requirements and enforcement procedures for service providers and equipment manufacturers that are subject to sections 255, 716, and 718 of the Act. 47 U.S.C. 618. Section 255 of the Act requires telecommunications and interconnected VoIP services and equipment to be accessible to individuals with disabilities, if readily achievable. 47 U.S.C. 255. Section 718 of the Act requires internet browsers built into mobile phones to be accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable. 47 U.S.C. 619.

In document FCC 11–151, the Commission adopted rules relating to the following:

(a) Service providers and equipment manufacturers that are subject to sections 255, 716, and 718 of the Act must ensure that the information and documentation that they provide is accessible to individuals with disabilities.

(b) Service providers and equipment manufacturers may seek waivers from the accessibility obligations of section 716 of the Act for services or equipment that are designed for multiple purposes, including advanced communications services, but are designed primarily for purposes other than using advanced communications services.

(c) Service providers and equipment manufacturers that are subject to sections 255, 716, and 718 of the Act must maintain records of their efforts to implement those sections.

(d) Service providers and equipment manufacturers that are subject to sections 255, 716, and 718 of the Act must certify annually to the Commission that records are kept in accordance with the recordkeeping requirements. The certification must include contact details of the person(s) authorized to resolve accessibility complaints and the agent designated for service of process.

(e) The Commission established procedures to facilitate the filing of formal and informal complaints alleging violations of sections 255, 716, or 718 of the Act. Those procedures include a nondiscretionary pre-filing notice procedure to facilitate dispute resolution, that is, as a prerequisite to filing an informal complaint, complainants must first request dispute assistance from the Consumer and Governmental Affairs Bureau's Disability Rights Office.

In 2013, in document FCC 13–57, published at 78 FR 30226, May 22, 2013, the FCC adopted rules to implement section 718 of the Act.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–18649 Filed 8–28–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Institutional Research Training Grant (Parent T32).

Date: September 27, 2023.

Time: 10:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6001 Executive Blvd., Neuroscience Center, Bethesda, MD 20892, 301–435–1260, *jasenka.borzan@nih.gov*.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; R25 Applications.

Date: September 28, 2023.

Time: 11:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: EMMA Perez-Costas, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6001 Executive Blvd., Rockville, MD 20892, 240–936–6720, *emma.perez-costas@nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: August 24, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–18614 Filed 8–28–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0293]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number 1625–0066

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

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0066, Vessel and Facility Response Plans (Domestic and Int'l), and Additional Response Requirements for Prince William Sound; without change.

Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: You may submit comments to the Coast Guard and OIRA on or before September 28, 2023.

ADDRESSES: Comments to the Coast Guard should be submitted using the Federal eRulemaking Portal at *https://www.regulations.gov.* Search for docket number [USCG–2023–0293]. Written comments and recommendations to OIRA for the proposed information collection should be sent within 30 days of publication of this notice to *https://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.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave SE, Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. 3501 *et seq.,* chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) the practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2023–0293], and must be received by September 28, 2023.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments to the Coast Guard will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions to the Coast Guard in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). For more about privacy and submissions to OIRA in response to this document, see the *https://www.reginfo.gov,* comment-submission web page. OIRA posts its decisions on ICRs online at *https://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0066.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (88 FR 29918, May 9, 2023) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments. Accordingly, no changes have been made to the Collection.

Information Collection Request

Title: Vessel and Facility Response Plans (Domestic and Int'l), and Additional Response Requirements for Prince William Sound.

OMB Control Number: 1625–0066.

Summary: The Oil Pollution Act of 1990 (OPA 90) required the development of Vessel and Facility Response Plans to minimize the impact of oil spills. OPA 90 also required additional response requirements for Prince William Sound. Shipboard Oil Pollution Emergency Plans and Shipboard Marine Pollution Emergency Plans are required of other vessels to minimize impacts of oil spills.

Need: This information is needed to ensure that vessels and facilities are prepared to respond in event of a spill incident. The information is reviewed by the Coast Guard to assess the effectiveness of the response plan.

Forms: N/A.

Respondents: Owners and operators of vessels and facilities.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden remains 88,381 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. *et seq.,* chapter 35, as amended.

Dated: August 3, 2023.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2023–18599 Filed 8–28–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0294]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number 1625–0100

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

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0100, Advanced Notice of Vessel Arrival; without change.

Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: You may submit comments to the Coast Guard and OIRA on or before September 28, 2023.

ADDRESSES: Comments to the Coast Guard should be submitted using the Federal eRulemaking Portal at *https://www.regulations.gov.* Search for docket number [USCG–2023–0294]. Written comments and recommendations to OIRA for the proposed information collection should be sent within 30 days of publication of this notice to *https://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.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave SE, Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. 3501 *et seq.,* chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) the practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2023–0294], and must be received by September 28, 2023.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments to the Coast Guard will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions to the Coast Guard in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). For more about privacy and submissions to OIRA in response to this document, see the *https://www.reginfo.gov,* comment-submission web page. OIRA posts its decisions on ICRs online at *https://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0100.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (88 FR 29921, May 9, 2022) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments. Accordingly, no changes have been made to the Collection.

Information Collection Request

Title: Advance Notice of Vessel Arrival.

OMB Control Number: 1625–0100.

Summary: The statute 46 U.S.C. 70001 authorizes the Coast Guard to require pre-arrival messages from any vessel entering a port or place in the United States.

Need: This information is required under 33 CFR 146 and 33 CFR 160 subpart C to control vessel traffic, develop contingency plans, and enforce regulations.

Forms: None.

Respondents: Owners and operators of vessels and facilities.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has increased from 104,560 hours to 202,021 hours a year; due to an increase in the estimated annual number of responses.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: August 3, 2023.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2023–18597 Filed 8–28–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0248]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number 1625–0118

AGENCY: Coast Guard, Department of Homeland Security.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0118, Various International Agreement Certificates and Documents; without change. Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: You may submit comments to the Coast Guard and OIRA on or before September 28, 2023.

ADDRESSES: Comments to the Coast Guard should be submitted using the Federal eRulemaking Portal at *https://www.regulations.gov.* Search for docket number [USCG–2023–0248]. Written comments and recommendations to OIRA for the proposed information collection should be sent within 30 days of publication of this notice to *https://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.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–6P), ATTN: PAPERWORK REDUCTION ACT MANAGER, U.S. COAST GUARD, 2703 MARTIN LUTHER KING JR. AVE SE, STOP 7710, WASHINGTON, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. 3501 *et seq.,* chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) the practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2023–0248], and must be received by September 28, 2023.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments to the Coast Guard will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions to the Coast Guard in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). For more about privacy and submissions to OIRA in response to this document, see the *https://www.reginfo.gov,* comment-submission web page. OIRA posts its decisions on ICRs online at *https://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0118.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (88 FR 33621, May 24, 2023) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments. Accordingly, no changes have been made to the Collection.

Information Collection Request

Title: Various International Agreement Certificates and Documents.

OMB Control Number: 1625–0118.

Summary: This information collection is associated with the Maritime Labour Convention (MLC), 2006. The Coast Guard established a voluntary inspection program for vessels who wish to document compliance with the requirements of the MLC. U.S. commercial vessels that operate on international routes are eligible to

participate. The Coast Guard issues voluntary compliance certificates as proof of compliance with the MLC.

Need: This information is needed to determine if a vessel is in compliance with the Maritime Labour Convention, 2006.

Forms:

- CG–16450, Maritime Labour Certificate (Statement of Voluntary Compliance).
- CG–16450A, Interim Maritime Labour Certificate (Statement of Voluntary Compliance).
- CG–16450B, Declaration of Maritime Labour Compliance—Part I (Statement of Voluntary Compliance).
- CG–16450C, United States Coast Guard, Maritime Labour Convention, 2006 Inspection Report

Respondents: Vessel owners and operators.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has decreased from 653 hours a year to 561 hours a year, due to a decrease in the estimated annual number of respondents.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: August 3, 2023.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2023–18629 Filed 8–28–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0295]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number 1625–0079

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

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0079, Standards of Training, Certification and Watchkeeping for Seafarers (STCW), International Convention; without change.

Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: You may submit comments to the Coast Guard and OIRA on or before September 28, 2023.

ADDRESSES: Comments to the Coast Guard should be submitted using the Federal eRulemaking Portal at *https://www.regulations.gov.* Search for docket number [USCG–2023–0295]. Written comments and recommendations to OIRA for the proposed information collection should be sent within 30 days of publication of this notice to *https://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.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave SE, Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. 3501 *et seq.,* chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) the practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2023–0295], and must be received by September 28, 2023.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments to the Coast Guard will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions to the Coast Guard in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). For more about privacy and submissions to OIRA in response to this document, see the *https://www.reginfo.gov,* comment-submission web page. OIRA posts its decisions on ICRs online at *https://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0079.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (88 FR 29919, May 9, 2023) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments. Accordingly, no changes have been made to the Collection.

Information Collection Request

Title: Standards of Training, Certification and Watchkeeping for

Seafarers (STCW), International Convention.

OMB Control Number: 1625–0079.

Summary: This information is necessary to ensure compliance with the international requirements of the STCW Convention, and to maintain an acceptable level of quality in activities associated with training and assessment of merchant mariners.

Need: 46 U.S.C. chapter 71 authorizes the Coast Guard to issue regulations related to licensing of merchant mariners. These regulations are contained in 46 CFR chapter I, subchapter B.

Forms: None.

Respondents: Owners and operators of vessels, training institutions, and mariners.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has decreased from 29,234 hours to 23,200 hours a year, due to a decrease in the estimated annual number of respondents.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. *et seq.,* chapter 35, as amended.

Dated: August 3, 2023.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2023–18598 Filed 8–28–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0012; OMB No. 1660–0113]

Agency Information Collection Activities: Submission for OMB Review, Comment Request; FEMA Preparedness Grants: Tribal Homeland Security Grant Program (THSGP)

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice of renewal and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission seeks comments concerning the FEMA Preparedness Grants: Tribal Homeland Security Grant Program (THSGP). The THSGP investment justification allows Indian Tribes to apply for Federal funding to support efforts to achieve target capabilities related to preventing, preparing for, protecting against, or responding to acts of terrorism.

DATES: Comments must be submitted on or before September 28, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C St. SW, Washington, DC 20472, email address: *FEMA-Information-Collections-Management@fema.dhs.gov* or Cornelius Jackson, Preparedness Officer, FEMA Grant Programs Directorate, at (202) 786–9508 or *Cornelius.Jackson@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the THSGP is to make grants available to Federally-recognized ''directly eligible tribes'', as defined by the Homeland Security Act, and to provide Tribes with the ability to develop and deliver core capabilities using the combined efforts of the whole community, rather than the exclusive effort of any single organization or level of government. The THSGP's allowable costs support efforts of Tribes to build and sustain core capabilities to prepare for, prevent, protect against, and respond to acts of terrorism. The THSGP also plays an important role in the implementation of the National Preparedness System by supporting the building, sustainment, and delivery of core capabilities essential to achieving FEMA's National Preparedness Goal of a secure and resilient Nation. Federally-recognized Tribes are those Tribes appearing on the list published by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994 (Pub. L. 103–454) (25 U.S.C. 5131). ''Directly eligible tribes'' are defined in Section 2001 of the Homeland Security Act of 2002, as amended (Pub. L. 107–296) (6 U.S.C. 601).

This proposed information collection previously published in the **Federal Register** on May 23, 2023, at 88 FR 33626 with a 60-day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Tribal Homeland Security Grant Program (THSGP) Investment Justification Template.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0113.

FEMA Forms: FEMA Form FF–207–FY–22–118 (formerly 089–22), Tribal Homeland Security Grant Program (THSGP) Investment Justification Template.

Abstract: This information is being collected for the primary purpose of facilitating correspondence between the grant applicant and FEMA and for determining eligibility and administration of FEMA Preparedness Grant Programs, specifically the Tribal Homeland Security Grant Program. The THSGP provides supplemental funding to directly eligible Tribes to help strengthen the nation against risks associated with potential terrorist attacks. This program provides funds to build capabilities at the State, Local, Territorial and Tribal levels and implement goals and objectives included in state homeland security strategies.

Affected Public: State, local, or Tribal government.

Estimated Number of Respondents: 120.

Estimated Number of Responses: 120.

Estimated Total Annual Burden Hours: 18,010.

Estimated Total Annual Respondent Cost: $962,454.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $482,186.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those

who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Maile Rasco-Arthur,

Deputy Director for Information Management, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–18586 Filed 8–28–23; 8:45 am]

BILLING CODE 9111–78–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2023–0021]

Agency Information Collection Activities: Gratuitous Services Agreement, Volunteer Release and Hold Harmless, and OBP Interest Sign-Up Sheet

AGENCY: Cybersecurity and Infrastructure Security Agency, DHS.

ACTION: 60-Day notice and request for comments; Extension without changes, 1670–0031.

SUMMARY: The Office for Bombing Prevention (OBP) within Cybersecurity and Infrastructure Security Agency (CISA) will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The following forms of information collection to include the Voluntary Participation Release of Liability Agreement, the Gratuitous Services Agreement and the OBP interest sign-up sheet are renewals of an existing collection and no changes were made to the collection instruments.

DATES: Comments are encouraged and will be accepted until October 30, 2023.

ADDRESSES: You may submit comments, identified by docket number Docket # CISA–2023–0021, at:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Please follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number Docket # CISA–2023–0021. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

SUPPLEMENTARY INFORMATION: Under the Homeland Security Presidential Directive-19: Combating Terrorist Use of Explosives in the United States, the Department of Homeland Security (DHS) was mandated to educate private sector security providers about IED threats, including tactics, techniques, and procedures relevant to their usage, so they are knowledgeable about terrorist use of explosives and contribute to a layered security approach.

The President's Policy Directive-17: Countering Improvised Explosive Devices (PPD–17) reaffirms the 2007 Strategy for Combating Terrorist Use of Explosives in the United States. It provides guidance to update and gives momentum to our ability to counter threats involving impro-vised explosive devices (IEDs). DHS was mandated to deliver standardized IED awareness and familiarization training for federal, state and local responders and public safety personnel.

Over the past 10 years, incidents involving IEDs has increased worldwide. This highlights the existing threat of IED attacks by terrorists, transnational criminal organizations, and individuals domestically that have radical political, environmental, or international viewpoints. IEDs have been used in the theater of war, mass transit systems overseas (London, Spain), in global aviation plots (December 2009), assignation attempts against political leaders, and other attempts here within the United States (Portland, Times Square, Boston Marathon 2013). They have also been used to threaten our ability in the secure movement of goods in accordance with the National Strategy for Global Supply Chain Security (print cartridge).

The Office for Bombing Prevention (OBP) must collect this information to effectively deliver training without concern that an individual who acts as a volunteer role player in support of official OBP training sustains an injury or death during the performance of his or her supporting role. Additionally, OBP must collect conference attendee information to properly identify key stakeholder segments and to ensure ongoing engagement and dissemination of OBP products to those who desire them.

The purpose of the Volunteer Participant Release of Liability Agreement is to collect necessary information in case an individual who acts as a volunteer role player in support of official OBP training sustains an injury or death during the performance of his or her supporting role. If legal action is taken, this information can serve as a ''hold harmless'' statement/agreement by the Government. In the unlikely event that an injury or death is sustained in the performance of support for training, this information will be used by CISA/IP/PSCD/OBP to protect against legal action by the volunteer or their family. If legal action is taken, this information can serve as a ''hold harmless'' statement/agreement by the Government.

The purpose of the Gratuitous Services Agreement is to establish that no monies, favors or other compensation will be given or received by either party involved. The information from the Gratuitous Services Agreement will be used by CISA/IP/PSCD/OBP in the event that questions arise regarding remuneration or payment for volunteer participation in training events.

The purpose of the OBP interest sign-up sheet is to collect basic contact information, on a voluntary basis, of those who attend the OBP conference booth and desire further engagement or additional products from OBP. The information is used by OBP to follow-up with the individuals who provide their contact information.

Additional considerations for these forms:

- The two training forms are best delivered as hard copies to volunteer participants that attend the courses to ensure the right audiences are targeted in an environment where last-minute changes to the participant list are common. However, it is feasible that these forms will transition to a Learning Management System (LMS) enabling participants to complete online.
- The OBP interest sheet is a hard copy form laid on OBP's booth table for attendees to provide their contact information. There has been some consideration to shifting this to an electronic format, but current booth technology does not fully support this transition.
- These forms do not negatively affect small businesses.
- Failure to collect this information could result in questions of liability and/or remuneration for volunteers in IP/OBP and reluctance to seek volunteer involvement as a result. This would negatively affect the overall quality of the program in delivering these trainings to private sector security providers, federal, state and local responders, and public safety personnel.
- Failure to collect contact information from those who visit the

OBP booth would greatly limit OBP's ability to stay engaged with or grow its stakeholder base or provide the most relevant products/services to those stakeholders.

• This collection does not include a pledge of confidentiality that is not supported by established authority in statute or regulation. This collection of information is covered by PIA DHS/ALL/PIA–006 DHS General Contact List.

• This is a renewal of an existing collection. No changes were made to the collection instruments.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Analysis

Agency: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

Title: Gratuitous Services Agreement, Volunteer Release and Hold Harmless, and OBP Interest Sign-up Sheet.

OMB Number: 1670–0031.

Frequency: Annually.

Affected Public: STATE, LOCAL, TRIBAL, AND TERRITORIAL GOVERNMENTS AND PRIVATE SECTOR INDIVIDUALS.

Number of Respondents: 950.

Estimated Time per Respondent: 15 MIN.

Total Burden Hours: 160.

Total Annualized Respondent Cost: $6,812.

Total Annualized Respondent Out-of-Pocket Cost: $0.

Total Annualized Government Cost: $21,204.

Robert J. Costello,

Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2023–18556 Filed 8–28–23; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2023–0010]

Agency Information Collection Activities: Sector Outreach and Programs Online Meeting Registration Tool

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: 30-Day notice and request for comments; revision; 1670–0019.

SUMMARY: The Infrastructure Security Division (ISD) within Cybersecurity and Infrastructure Security Agency (CISA) will submit the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The submission proposes to renew the information collection for an additional three years and update the burden estimates associated with collecting information for the purposes of registration for meetings and events. CISA previously published this information collection request (ICR) in the **Federal Register** on April 5, 2023 for a 60-day public comment period. No comments were received by CISA. The purpose of this notice is to allow additional 30-days for public comments.

DATES: The comment period for the information collection request published on April, 05, 2023 at 88 FR 20176. Comments are encouraged and will be accepted until September 28, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Annie Hunziker Boyer, 703–603–5000, *CISARegulations@cisa.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Critical Infrastructure Protection Act of 2001, 42 U.S.C. 5195c, states that any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States; and that actions necessary to achieve the policy stated be carried out in a public-private partnership involving corporate and non-governmental organizations. On behalf of the DHS, the Cybersecurity and Infrastructure Security Agency's Infrastructure Security Division (CISA ISD) manages the Department's program to protect the Nation's 16 critical infrastructure sectors by implementing the National Infrastructure Protection Plan (NIPP) 2013, Partnering for Critical Infrastructure Security and Resilience. Pursuant to Presidential Policy Directive 21 on Critical Infrastructure Security and Resilience (February 2013), each sector is assigned a Sector-Specific Agency (SSA) to oversee Federal interaction with the array of sector security partners, both public and private. An SSA is responsible for leading a unified public-private sector effort to develop, coordinate, and implement a comprehensive physical, human, and cyber security strategy for its assigned sector. There are six critical infrastructure sectors assigned to CISA ISD, including the Chemical sector. In addition to fulfilling the regulatory obligations set forth by Congress, the CISA Office of Chemical Security coordinates with the builds sustainable partnerships with its public and private sector stakeholders to enable more effective coordination, information sharing, and program development and implementation. These partnerships are sustained through the NIPP Sector Partnership Model.[1]

Information sharing is a key component of the NIPP Partnership Model, and DHS sponsored conferences are one mechanism for information sharing. To facilitate conference planning and organization. This voluntary information collection tool for online event registration is maintained and leveraged by the Office of Chemical Security within CISA ISD. The information collected with this tool is used to register public and private sector stakeholders for meetings hosted by the Office of Chemical Security, principally the annual Chemical Security Summit. This tool is also used for private sector stakeholders to register their interest in being contacted by

[1] NIPP 2013 Partnering for Critical Infrastructure Security and Resilience, pp 10–12.

chemical security personnel regarding services provided under the voluntary ChemLock security program. The Office of Chemical Security uses the information collected to ensure that sufficient space and resources are available at meetings; to follow up with registrants when required; to develop meeting materials for attendees; and efficiently generate attendee and speaker nametags. Additionally, it enables the Office of Chemical Security to gain a better understanding of the organizations participating in chemical security events, and subsequently also identify which segments of the sector are underrepresented. This then allows for the Office to target these underrepresented sector elements through outreach and awareness initiatives.

The changes to the collection include: changes to the burden costs, annual government costs, and revised and added data fields. In addition to the removal of historically retained fields that collect redundant or unnecessary information, and updating existing fields for accuracy and ease of use, two additional fields has been added:

- 'How did you hear of this event,' a field which was included in the original instrument for this collection, and removed in a previous revision, has now been re-added to the instrument.
- A field for the registrant's company website has been added.

The annual burden cost for the collection has increased by $5,751, from $1,802 to $7,553, largely due to an increase in the number of respondents associated with the shift to a hybrid event and updated compensation rates. Additionally, the scope of the collection has increased twofold: (1) the annual Chemical Security Summit, the event with which the calculations for this collection have been historically based, has moved to a hybrid format that allows for a dramatic increase in estimated registration numbers (from 400 previously to 1400), and (2) the utilization of this collection for the voluntary ChemLock program which adds an estimated 200 users per year. The annual government cost for the collection has increased by $53,757, from $8,347 to $62,104, due to the shift to a hybrid event format and the associated increase in the number of registrations, which increased from 1,000 to 7,106.

This is a revision and renewal of an information collection.

OMB is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information,
3. including the validity of the methodology and assumptions used;
4. Enhance the quality, utility, and clarity of the information to be collected; and
5. 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
6. other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Analysis

Agency: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

Title: Sector Outreach and Programs Online Meeting Registration Tool.

OMB Number: 1670–0019.

Frequency: Annually.

Affected Public: State, Local, Tribal, and Territorial Governments and Private Sector Individuals.

Number of Annualized Respondents: 1,600.

Estimated Time per Respondent: 0.05 hours.

Total Burden Hours: 80 hours.

Total Annualized Respondent Opportunity Cost: $7,553.33.

Total Annualized Respondent Out-of-Pocket Cost: $0.

Total Annualized Government Cost: $62,103.77.

Robert J. Costello,

Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2023–18554 Filed 8–28–23; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2023–0012]

Notice of President's National Infrastructure Advisory Council Meeting

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: Notice of Federal Advisory Committee Act (FACA) meeting; request for comments.

SUMMARY: CISA is publishing this notice to announce the following President's National Infrastructure Advisory Council (NIAC) meeting.

DATES:

Meeting Registration: Registration is required to attend the meeting and must be received no later than 5 p.m. Eastern Time (ET) on September 13, 2023. For more information on how to participate, please contact *NIAC@cisa.dhs.gov.*

Speaker Registration: Registration to speak during the meeting's public comment period must be received no later than 5 p.m. ET on September 13, 2023.

Written Comments: Written comments must be received no later than 5 p.m. ET on September 13, 2023.

Meeting Date: The NIAC will meet on September 19, 2023, from 1 to 5 p.m. ET. The meeting may close early if the council has completed its business.

ADDRESSES: The National Infrastructure Advisory Council's open session will be held in-person at 1650 Pennsylvania Ave NW, Washington, DC; however, members of the public may participate via teleconference only. Requests to participate will be accepted and processed in the order in which they are received. For access to the conference call bridge, information on services for individuals with disabilities, or to request special assistance, please email *NIAC@cisa.dhs.gov* by 5 p.m. ET on September 13, 2023. The NIAC is committed to ensuring all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Celinda Moening at *NIAC@cisa.dhs.gov* as soon as possible.

Comments: The council will consider public comments on issues as listed in the **SUPPLEMENTARY INFORMATION** section below. Associated materials for potential discussions during the meeting will be available for review at *https://www.cisa.gov/niac* by September 12, 2023. Comments should be submitted by 5 p.m. ET on September 13, 2023 and must be identified by Docket Number CISA–2023–0012. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Please follow the instructions for submitting written comments.
- *Email: NIAC@cisa.dhs.gov.* Include the Docket Number CISA–2023–0012 in the subject line of the email.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the Docket Number for this action. Comments received will be posted without alteration to *www.regulations.gov,*

including any personal information provided. You may wish to read the Privacy & Security Notice which is available via a link on the homepage of *www.regulations.gov.*

Docket: For access to the docket and comments received by the National Infrastructure Advisory Council, please go to *www.regulations.gov* and enter docket number CISA–2023–0012.

A public comment period will take place from 2:45 to 2:55 p.m. Speakers who wish to participate in the public comment period must email *NIAC@cisa.dhs.gov* to register. Speakers should limit their comments to 3 minutes and will speak in order of registration. Please note that the public comment period may end before the time indicated, depending on the number of speakers who register to participate.

FOR FURTHER INFORMATION CONTACT: Celinda Moening, 571–532–4119, *NIAC@cisa.dhs.gov.*

SUPPLEMENTARY INFORMATION: The NIAC is established under Section 10 of E.O. 13231 issued on October 16, 2001, continued and amended under the authority of E.O. 14048, dated September 30, 2021. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. ch. 10 (Pub. L. 117–286). The NIAC provides the President, through the Secretary of Homeland Security, advice on the security and resilience of the Nation's critical infrastructure sectors.

Agenda: The National Infrastructure Advisory Council will meet in an open session on Tuesday, September 19, 2023, from 1 to 5 p.m. ET to discuss NIAC activities. The open session will include: (1) a period for public comment; (2) a keynote address on critical infrastructure security and resilience; (3) an overview on the National Cybersecurity Implementation Plan and cyber regulatory harmonization; (4) a report to the Council from the NIAC's Electrification Subcommittee; (5) deliberation and vote on Electrification Subcommittee recommendations; and (5) Additional Topics Discussion.

Dated: August 22, 2023.

Celinda E Moening,

Alternate Designated Federal Officer, National Infrastructure Advisory Council, Cybersecurity and Infrastructure Security Agency, Department of Homeland Security.

[FR Doc. 2023–18553 Filed 8–28–23; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–51]

30-Day Notice of Proposed Information Collection: HUD Certified Housing Counselor Registration; OMB Control No.: 2502–0614

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* September 28, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; email *PaperworkReductionActOffice@hud.gov*.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 7th Street SW, Room 8210, Washington, DC 20410; email; *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on November 11, 2022 at 87 FR 71349.

A. Overview of Information Collection

Title of Information Collection: HUD Certified Housing Counselor Registration.

OMB Approval Number: 2502–0614.

OMB Expiration Date: 8–31–2023.

Type of Request: Revision of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: The information will be collected on the Office of Housing Counseling, HUD Housing Counselor Certification Training and Examination website, *www.HUDHousingCounselors.com,* and with the housing counselor's completion and electronic submission of their information through the website, it will be transferred to the HUD Federal Housing Administration Connection system. The information collected will be used to certify housing counselors.

Respondents: Individuals or households.

Estimated Number of Respondents: 3,900.

Estimated Number of Responses: 3,900.

Frequency of Response: Once.

Average Hours per Response: 0.25 hours.

Total Estimated Burden: 975 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) 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.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–18577 Filed 8–28–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–50]

30-Day Notice of Proposed Information Collection; Comment Request Fair Housing Initiatives Program Grant Application and Monitoring Reports, OMB Control No.: 2529–0033

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* September 28, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; email *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email; *Colette.Pollard@HUD.gov* or telephone 202–402–3400. This not a toll free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on April 3, 2023, at 88 FR 19659.

A. Overview of Information Collection

Title of Information Collection: Fair Housing Initiatives Program.

OMB Approval Number: 2529–0033.

Type of Request: Extension of currently approved collection.

Form Number: HUD 904 A, B and C, SF–425, SF–424, SF–LLL, HUD–2880, HUD–2990, HUD–2993, HUD–424CB, HUD–424–CBW, HUD2994–A, HUD–96010, and HUD–27061.

Description of the need for the information and proposed use: The collection is needed to allow the Fair Housing Initiatives Program (FHIP) to request information necessary to complete a grant application package during the Notice of Funding Opportunity (NOFO) grant application process. The collection is used to assist the Department in effectively evaluating grant application packages to select the highest ranked applications for funding to carry out fair housing enforcement and/or education and outreach activities under the following FHIP initiatives: Private Enforcement, Education and Outreach, and Fair Housing Organization. The collection is also needed for the collection of post-award reports and other information used to monitor grants and report grant outcomes. Information collected from quarterly and final progress reports and enforcement logs will enable the Department to evaluate the performance of agencies that receive funding and determine the impact of the program on preventing and eliminating discriminatory housing practices.

Respondents: Fair Housing Enforcement Organizations, Fair Housing organizations, non-profit and other organizations eligible to apply for FHIP funding.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Application Development	400	1	400	71.20	28,480	$30.00	$854,400
Quarterly Report	142	4	568	19	10,792	30.00	323,760
Supplemental Outcome Report	142	1	142	19	2,698	30.00	80,940
Enforcement Log	98	4	392	7	2,744	30.00	82,320
Final Report	142	1	142	20	2,840	30.00	85,200
Recordkeeping	142	1	142	21	2,982	30.00	89,460
Total	1,066	12	1,786	157.20	50,536	30.00	1,516,080

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of

information technology, *e.g.,* permitting electronic submission of responses.

(5) 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 formation technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–18576 Filed 8–28–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7071–N–08]

60-Day Notice of Proposed Reinstatement of Expired Information Collection Home Equity Conversion Mortgage (HECM) Counseling Standardization, Application for Certificate of HECM Counseling and HECM Counselor Roster OMB Control No.: 2502–0586

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the reinstatement of the expired information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date: October 30, 2023.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be submitted within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Home Equity Conversion Mortgage (HECM) Counseling Standardization, Application for HECM Counselor Roster, and Certificate of HECM Counseling.

OMB Approval Number: 2502–0586.

OMB Expiration Date: August 31, 2018.

Type of Request: Reinstatement, with change, of previously approved collection for which approval has expired.

Form Numbers: HUD–92902 and HUD–92904.

Description of the need for the information and proposed use: Reinstatement of previously approved collection to provide and maintain a current HUD approved HECM counselor roster. Counseling is required for all borrowers seeking to obtain an HUD insured HECM. The HECM Counselor examination and the HECM Roster application, HUD Form 92904, assist HUD in evaluating the knowledge and capacity of individuals interested in providing HECM counseling to potential HECM borrowers, thereby satisfying statutory requirements and reducing the risk to the insurance fund. The addition of the Certificate of HECM Counseling, HUD Form 92902, which is currently part of OMB Collection 2502–0524, to this collection is appropriate because the Office of Housing Counseling regulates all items pertinent to the roles of HUD-approved housing counselors, which includes HECM Roster Counselors. OMB Collection 2502–0524 was recently approved by OMB and has an expiration date of 4/30/2024. Revisions to HUD Form 92902 were necessary as per recommendations made by HUD OGC to ensure compliance with the Paperwork Reduction Act burden statement as required in 5 CFR 1320.8(b)(3) and the Privacy Act Notice requirements in 5 U.S.C. 552a(e)(3).

Respondents: Individuals or households; Not-for-profit institutions; State, Local or Tribal Government.

Estimated Number of Respondents: 28,459.

Estimated Number of Responses: 28,459.

Frequency of Response:

HECM Counseling Standardization—14,000

HUD–92902, Certification of HECM Counseling—14,000

HUD–92904, Application for HECM Roster Counselor—305

Reporting continuing education for HECM Roster counselor biennial recertification –152

Termination of an HECM Roster Counselor—Once

Average Hours per Response: 1 hour.

Total Estimated Burden: 45,943 hours.

Information collection 2502–0586/type of respondent	Form name/form number collection tool	Number of respondents	Frequency of response	Responses per year	Average burden hours per response	Annual burden hours	Hourly cost per response (hourly wage rate)	Total annual respondent cost
Non-profit (National and Regional Intermediaries, Multi-State Organizations, Local HUD- approved HCAs).	Counseling Standardization	13,125	1	13,125	1.25	16,406.25	$53.74	$881,671.88

Information collection 2502–0586/type of respondent	Form name/form number collection tool	Number of respondents	Frequency of response	Responses per year	Average burden hours per response	Annual burden hours	Hourly cost per response (hourly wage rate)	Total annual respondent cost
State, Local, or Tribal Government HCAs.	Counseling Standardization	875	1	875	1.25	1,093.75	53.74	58,778.13
Non-profit (Intermediaries, Multi-State Organizations, Local HCAs).	''Certificate of HECM Counseling''/HUD–92902.	13,125	1	13,125	2	26,250	53.74	1,410,675.00
State, Local, or Tribal Govt	''Certificate of HECM Counseling''/HUD–92902.	875	1	875	2	1,750	53.74	94,045.00
Non-profit (Intermediaries, Multi-State Organizations, Local HCAs).	''Application for HECM Counselor Roster'' HUD–92904 and establishing counseling ID in FHA Connection system.	244	1	244	1.30	317.20	53.74	17,046.33
State, Local, or Tribal Govt	''Application for HECM Counselor Roster'' HUD–92904 and establishing counselor ID in FHA Connection system.	61	1	61	1.30	79.30	53.74	4,261.58
Non-profit (Intermediaries, Multi-State Organizations, Local HCAs).	Reporting HECM Roster Counselor Continuing Education course for Biennial Recertification.	122	1	122	.30.	36.60	53.74	1,966.88
State, Local, or Tribal Govt	Reporting HECM Roster Counselor Continuing Education course for Biennial Recertification.	30	1	30	.30	9	53.74	483.66
Non-profit (Intermediaries, Multi-State Organizations, Local HCAs).	Written request for Terminating a HECM Roster Counselor a HECM Roster Counselor.	1	1	1	.25	.25	53.74	13.44
State, Local, or Tribal Govt	Written request for Terminating a HECM Roster Counselor.	1	1	1	.25	.25	53.74	13.44
Totals		28,459		28,459		45,943		2,468,955.34

* **Note:** The total annual burden hours has been rounded up to 45,943 hours to be consistent with OMB's system ROCIS.*

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority:

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Jeffrey D. Little,

General Deputy Assistant Secretary for Housing.

[FR Doc. 2023–18570 Filed 8–28–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2023–0159; FXIA16710900000–234–FF09A30000]

Foreign Endangered Species; Receipt of Permit Application

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit application; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on an application to conduct certain activities with a foreign species that is listed as endangered under the Endangered Species Act (ESA). With some exceptions, the ESA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The ESA also requires that we invite public comment before issuing permits for any activity otherwise prohibited by the ESA with respect to any endangered species.

DATES: We must receive comments by September 28, 2023.

ADDRESSES:

Obtaining Documents: The application, application supporting materials, and any comments and other materials that we receive will be available for public inspection at *https://www.regulations.gov* in Docket No. FWS–HQ–IA–2023–0159.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- *Internet: https://www.regulations.gov.* Search for and submit comments on Docket No. FWS–HQ–IA–2023–0159.
- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2023–0159; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, by phone at 703–358–2185 or via email at *DMAFR@fws.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. 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:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on this application. Before issuing the requested permit, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at *https://www.regulations.gov* unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at *https://www.regulations.gov,* your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(c) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the ESA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities. Permits issued under section 10(a)(1)(A) of the ESA allow otherwise prohibited activities for scientific purposes or to enhance the propagation or survival of the affected species. Service regulations regarding prohibited activities with endangered species, captive-bred wildlife registrations, and permits for any activity otherwise prohibited by the ESA with respect to any endangered species are available in title 50 of the Code of Federal Regulations in part 17.

III. Permit Application

We invite comments on the following application.

Applicant: Smithsonian National Zoo and Conservation Biology Institute, Washington, DC; Permit No. PER4095187

The applicant requests a permit to export three captive-born giant pandas (*Ailuropoda melanoleuca*) from the Smithsonian National Zoo and Conservation Biology Institute to the China Conservation and Research Center for Giant Panda in Sichuan, People's Republic of China, for the purpose of enhancing the propagation or survival of the species. This notification is for a single export.

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue a permit to the applicant listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching *https://www.regulations.gov* for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to *regulations.gov* and search for ''12345A''.

V. Authority

We issue this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations.

Brenda Tapia,

Supervisory Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2023–18574 Filed 8–28–23; 8:45 am]

BILLING CODE 4333–15–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1104 (Third Review)]

Certain Polyester Staple Fiber From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty order on certain polyester staple fiber from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on March 1, 2023 (88 FR 12987) and determined on June 5, 2023 that it would conduct an expedited review (88 FR 44399, July 12, 2023).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on August 24, 2023. The views of the Commission are contained in USITC Publication 5456 (August 2023), entitled *Certain Polyester Staple Fiber from China: Investigation No. 731–TA–1104 (Third Review).*

By order of the Commission.

Issued: August 24, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–18589 Filed 8–28–23; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

DEPARTMENT OF JUSTICE

[OMB Number 1140–0018]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Application for Federal Firearms License and Part B—Responsible Person Questionnaire

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

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on June 12, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until September 28, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Leslie Anderson, by email at *Leslie.anderson@atf.gov,* or telephone at 304–616–4634.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/*PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1140–0018. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *Title of the Form/Collection:* Application for Federal Firearms License and Part B—Responsible Person Questionnaire.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number:* ATF Form 7 (5310.12)/7CR (5310.16). *Component:* Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals or households, Private Sector—businesses or other for-profit institutions. *Abstract:* Section 922 of Chapter 44 of Title 18 requires persons wishing to be licensed to complete ATF Form 7 (5310.12A)/7CR (5310.16) and for persons wishing to be added as a responsible person to complete Part B of ATF Form 7 (5310.12A)/7CR (5310.16) to certify compliance with provisions of the law for the FFL business. The information collection (IC) OMB #1140–0018 is being revised to include material and non-material changes to the form, such as formatting changes to include an added header (added ''Part B—Responsible Person Questionnaire'' to the top of the page), spelling corrections, added verbiage, added references, grammatical changes (sentence rephrasing/statement modification), and updated definitions.

5. *Obligation to Respond:* The obligation to respond is mandatory per section 922 of Chapter 44 of Title 18.

6. *Total Estimated Number of Respondents:* 25,000 respondents.

7. *Estimated Time per Respondent:* 1 hour.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 25,000 hours.

10. *Total Estimated Annual Other Costs Burden:* The annual cost has increased due to a change in the postal rate from $0.55 during the last renewal in 2020, to $0.63 in 2023. Consequently, the new public cost burden will be reported as $15,750.00, which is equal to .63 (mailing cost per respondent) * 25,000 (# of respondents).

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC 20530.

Dated: August 23, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–18563 Filed 8–28–23; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0039]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Federal Firearms Licensee Firearms Inventory/ Firearms in Transit Theft/Loss Report

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

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on June 14, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until September 28, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the

estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Neil Troppman, by email at *neil.troppman@atf.gov,* or telephone at 304–260–3643.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/*PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1140–0039. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Federal Firearms Licensee Firearms Inventory/Firearms in Transit Theft/Loss Report.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number*: ATF Form 3310.11/3310.11A. Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public: Private Sector—business or other for-profit institutions, Federal Government. Abstract: Thefts or losses of firearms from the inventory of a Federal Firearms Licensee and from the collection of a licensed collector must be reported to the Attorney General and the appropriate local authorities within 48 hours of discovery.

5. *Obligation to Respond:* The obligation to respond is mandatory per Title 18 U.S.C. 923 (g)(6).

6. *Total Estimated Number of Respondents:* 4,000 respondents.

7. *Estimated Time per Respondent*: 24 minutes.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 1,600 hours.

10. *Total Estimated Annual Other Costs Burden:* There is no startup cost to the respondent. Respondents can electronically submit their responses or mail them to the National Tracing Center. The cost of postage is now $.63 cents. Therefore, the total cost is $2,520, which is equal to 4,000 (# of respondents) × $.63 cents (mailing cost per respondent).

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218 Washington, DC 20530.

Dated: August 23, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–18566 Filed 8–28–23; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Long-Term Suitability Request—ATF Form 3252.13

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

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on May 24, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until September 28, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Renee Reid by email at *Renee.Reid@atf.gov,* or by telephone at 202–648–9255.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* New Collection.

2. *Title of the Form/Collection:* Long-Term Suitability Request.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number:* ATF Form 3252.13. *Component:* Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract: Affected Public:* Individuals or households. *Abstract:* Any individual currently serving a confidential informant (CI) for ATF must provide their personally identifiable information. ATF will utilize the information to verify the identity of the individual.

5. *Obligation to Respond:* Obligation to respond is mandatory.

6. *Total Estimated Number of Respondents:* 40 respondents.

7. *Estimated Time per Respondent:* 180 minutes (3 hours).

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 120 hours.

10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC 20530.

Dated: August 23, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–18561 Filed 8–28–23; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0049]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Application for National Firearms Examiner Academy—ATF Form 6330.1

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

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on Monday, June 12, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until September 28, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Jodi Marsanpoli by email at *Jodi.Marsanopoli@atf.gov,* or telephone at 202–527–5078.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/*PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1140–0049. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Application for National Firearms Examiner Academy.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number:* ATF Form 6330.1. *Component:* Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract: Affected Public:* Federal Government, State, local and tribal governments. *Abstract:* The information requested on this form is necessary to process requests for prospective students to attend the ATF National Firearms Examiner Academy and to acquire firearms, toolmark examiner training and determine applicant eligibility.

5. *Obligation to Respond:* Required to obtain or retain benefits.

6. *Total Estimated Number of Respondents:* 75 respondents.

7. *Estimated Time per Respondent:* 12 minutes.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 15 hours.

10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC 20530.

Dated: August 23, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–18565 Filed 8–28–23; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0099]

Agency Information Collection Activities; Proposed eCollection eComments Requested; ATF Adjunct Instructor Data Form—ATF Form 6140.3

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

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on June 12, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until September 28, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Elaine Wilson Harrison, by email at *elaine.wilson@atf.gov,* or by telephone at 912–258–6445.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/*PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1140–0099. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* ATF Adjunct Instructor Data Form.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number:* ATF Form 6140.3. *Component:* Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public: Individuals or households, Private Sector—businesses or other for-profit and not-for-profit institutions and State, Local or Tribal Governments and colleges and universities. *Abstract:* ATF uses the adjunct instructor data form to collect information from prospective non-ATF instructors.

5. *Obligation to Respond:* The obligation to respond is required to obtain/retain a benefit.

6. *Total Estimated Number of Respondents:* 20 respondents.

7. *Estimated Time per Respondent:* Time per response 30 minutes.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 10 hours.

10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC 20530.

Dated: August 23, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–18562 Filed 8–28–23; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

[OMB 1140–0NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Semiannual Suitability Request—ATF Form 3252.8

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

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on May 24, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until September 28, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information

collection instrument with instructions or additional information, please contact: Renee Reid, by email at *Renee.Reid@atf.gov,* or by telephone at 202–648–9255.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and/or
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/*PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* New Collection.
2. *Title of the Form/Collection:* Semiannual Suitability Request.
3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number:* ATF Form 3252.8. *Component:* Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.
4. *Affected public who will be asked or required to respond, as well as a brief abstract: Affected Public:* Individuals or households. *Abstract:* Individuals currently serving as a confidential informant (CI) for ATF must provide their personally identifiable information. ATF will utilize the information to verify the identity of the individual.
5. *Obligation to Respond:* The obligation to respond is mandatory.
6. *Total Estimated Number of Respondents:* 800 respondents.
7. *Estimated Time per Respondent:* 120 minutes (2 hours).
8. *Frequency:* Twice annually.
9. *Total Estimated Annual Time Burden:* 3,200 hours.
10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC 20530.

Dated: August 23, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–18560 Filed 8–28–23; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0028]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Inventories: Licensed Explosives Importers, Manufacturers, Dealers and Permittees

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

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on June 12, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until September 28, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Michael O'Lena, by email at *eipb-informationcollection@atf.gov,* or by telephone at 202–648–7120.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and/or
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/*PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1140–0028. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs

receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.

2. *Title of the Form/Collection: Inventories:* Licensed Explosives Importers, Manufacturers, Dealers and Permittees.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number:* None.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract: Affected Public:* Private Sector—businesses or other for-profit institutions. *Abstract:* These records show the explosive material inventories of those persons engaged in various activities within the explosives industry and are used by the government as initial figures from which an audit trail can be developed during a compliance inspection or criminal investigation.

5. *Obligation to Respond:* Mandatory per Title 27 CFR 555.121, 27 CFR 555.122, 27 CFR 555.123, 27 CFR 555.124, 27 CFR 555.125, and 27 CFR 555.127.

6. *Total Estimated Number of Respondents:* 9,219 of respondents.

7. *Estimated Time per Respondent:* 2 hours.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 18,438 hours.

10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218 Washington, DC 20530.

Dated: August 23, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–18564 Filed 8–28–23; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF LABOR

Employment and Training Administration

Labor Surplus Area Classification

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The purpose of this notice is to announce the annual Labor Surplus Area (LSA) list for fiscal year (FY) 2024.

DATES: The annual LSA list is effective October 1, 2023, for all states, the District of Columbia, and Puerto Rico.

FOR FURTHER INFORMATION CONTACT: Samuel Wright or Donald Haughton, Office of Workforce Investment, Employment and Training Administration, 200 Constitution Avenue NW, Room C–4514, Washington, DC 20210. Telephone: Samuel Wright (202) 693–2870 (this is not a toll-free number), or Donald Haughton (202) 693–2784 (this is not a toll-free number), or email *wright.samuel.e@dol.gov,* or *haughton.donald.w@dol.gov.*

SUPPLEMENTARY INFORMATION: The Department of Labor's regulations implementing Executive Orders 12073 and 10582 are set forth at 20 CFR part 654, subpart A. These regulations require the Employment and Training Administration (ETA) to classify jurisdictions as LSAs pursuant to the criteria specified in the regulations, and to publish annually a list of LSAs. Pursuant to those regulations, ETA is hereby publishing the annual LSA list.

In addition, the regulations provide exceptional circumstance criteria for classifying LSAs when catastrophic events, such as natural disasters, plant closings, and contract cancellations are expected to have a long-term impact on labor market area conditions, discounting temporary or seasonal factors.

Eligible Labor Surplus Areas

A LSA is a civil jurisdiction that has a civilian average annual unemployment rate during the previous two calendar years of 20 percent or more above the average annual civilian unemployment rate for all states during the same 24-month reference period. ETA uses only official unemployment estimates provided by the Bureau of Labor Statistics in making these classifications. The average unemployment rate for all states includes data for the Commonwealth of Puerto Rico. The LSA classification criteria stipulate a civil jurisdiction must have a ''floor unemployment rate'' of 6 percent or higher to be classified an LSA. Any civil jurisdiction that has a ''ceiling unemployment rate'' of 10 percent or higher is classified an LSA.

Civil jurisdictions are defined as follows:

1. A city of at least 25,000 population on the basis of the most recently available estimates from the Bureau of the Census; or

2. A town or township in the States of Michigan, New Jersey, New York, or Pennsylvania of 25,000 or more population and which possess powers and functions similar to those of cities; or

3. All counties, except for those counties which contain any type of civil jurisdictions defined in ''1'' or ''2'' above; or

4. A ''balance of county'' consisting of a county less any component cities and townships identified in ''1'' or ''2'' above; or

5. A county equivalent which is a town in the States of Connecticut, Massachusetts, and Rhode Island, or a municipio in the Commonwealth of Puerto Rico.

Procedures for Classifying Labor Surplus Areas

The Department of Labor (DOL) issues the LSA list on a fiscal year basis. The list becomes effective each October 1, and remains in effect through the following September 30. The reference period used in preparing the current list was January 2021 through December 2022. The national average unemployment rate (including Puerto Rico) during this period is rounded to 4.51 percent. Twenty percent higher than the national unemployment rate during this period is rounded to 5.41 percent. Since this is below the floor rate, the qualifying rate is 6 percent.

To ensure that all areas classified as labor surplus meet the requirements, when a city is part of a county and meets the unemployment qualifier as a LSA, that city is identified in the LSA list, the balance of county, not the entire county, will be identified as a LSA if the balance of county also meets the LSA unemployment criteria. The data on the current and previous years' LSAs are available at *www.dol.gov/agencies/eta/lsa.*

Petition for Exceptional Circumstance Consideration

The classification procedures also provide criteria for the designation of LSAs under exceptional circumstances criteria. These procedures permit the regular classification criteria to be waived when an area experiences a significant increase in unemployment which is not temporary or seasonal and which was not reflected in the data for the 2-year reference period. Under the program's exceptional circumstance procedures, LSA classifications can be made for civil jurisdictions, Metropolitan Statistical Areas or Combined Statistical Areas, as defined

by the U.S. Office of Management and Budget. In order for an area to be classified as a LSA under the exceptional circumstance criteria, the state workforce agency must submit a petition requesting such classification to the Department of Labor's ETA. The current criteria for an exceptional circumstance classification are:

1. An area's unemployment rate is at least 6 percent for each of the three most recent months; and

2. A projected unemployment rate of at least 6 percent for each of the next 12 months because of an event.

When submitting such a petition, the state workforce agency must provide documentation that the exceptional circumstance event has occurred. The state workforce agency may file petitions on behalf of civil jurisdictions, Metropolitan Statistical Areas, or Micropolitan Statistical Areas.

State Workforce Agencies may submit petitions in electronic format to *wright.samuel.e@dol.gov, haughton.donald.w@dol.gov,* or in hard copy to the U.S. Department of Labor, Employment and Training Administration, Office of Workforce Investment, 200 Constitution Avenue NW, Room C–4514, Washington, DC 20210, Attention Samuel Wright. Data collection for the petition is approved under OMB 1205–0207, expiration date May 31, 2026.

Signed at Washington, DC.

Brent Parton,

Principal Deputy Assistant Secretary for Employment and Training.

[FR Doc. 2023–18536 Filed 8–28–23; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

74th Meeting of the President's Committee on the Arts and the Humanities

AGENCY: Institute of Museum and Library Services (IMLS), National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given that the President's Committee on the Arts and the Humanities. On September 13, 2023, the Committee will meet to carry out administrative functions and to consider preliminary recommendations for agency action. On September 14, 2023, the Committee will meet to deliberate on recommendations for agency action.

DATES: The meeting will be held on September 13, 2023, 11:00 a.m. EST until 3 p.m. EST and on September 14, 2023 at 9:00 a.m. EST until adjourned.

ADDRESSES: On September 13, 2023, the meeting will convene at 1200 Pennsylvania Avenue NW, Washington, DC 20001. On September 14, 2023, the meeting will convene at 1100 Pennsylvania Avenue NW, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Jasmine Jennings, Assistant General Counsel and Alternate Designated Federal Officer, Institute of Museum and Library Services, Suite 4000, 955 L'Enfant Plaza North SW, Washington, DC 20024; (202) 653–4653; *jjennings@imls.gov*.

SUPPLEMENTARY INFORMATION: The President's Committee on the Arts and the Humanities is meeting pursuant Executive Order 14084 and the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. app. The meeting of the President's Committee on the Arts and Humanities will convene at 11 a.m. EST on September 13, 2013. This meeting with be an executive session (closed to the public and agency personnel). The meeting of the President's Committee on the Arts and the Humanities will convene at 9 a.m. EST on September 14, 2023. This meeting will be open to the public.

Agenda: On September 13, the Committee will meet to carry out administrative functions and to consider preliminary recommendations for agency action.

As identified above, the September 13, 2023 meeting of the President's Committee on the Arts and the Humanities will be closed to the public and personnel pursuant to subsections (c)(6) and (c)(9)(B) of section 552b of Title 5, United States Code, as amended. The closed session will consider information of a personal nature where disclosure would constitute a clearly unwarranted invasion of privacy and will consider information which if prematurely disclosed would be likely to significantly frustrate implementation of proposed agency action.

On September 14, 2023, the Committee will meet to deliberate on recommendations for agency action. Any interested persons may attend as observers, subject to limited seating availability. Individuals wishing to attend are advised to contact Alexandra Piper of the Institute of Museum and Library Services seven (7) working days in advance of the September 13 meeting at *apiper@imls.gov* or write to the Committee at the Institute of Museum and Library Services, 955 L'Enfant Plaza SW, Suite 4000, Washington, DC 20024.

If you need special accommodations due to disability or would like to obtain further information in reference to the meeting, please contact Alexandra Piper at *apiper@imls.gov*.

Dated: August 23, 2023.

Connie Cox Bodner,

Director, Office of Grants Policy and Management.

[FR Doc. 2023–18534 Filed 8–28–23; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Information Collection; Improving Customer Experience (OMB Circular A–11, Section 280 Implementation)

AGENCY: National Science Foundation.

ACTION: Notice; request for comment.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register**, and no comments were received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAmain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314, or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

Copies of the submission may be obtained by calling 703–292–7556.

SUPPLEMENTARY INFORMATION: NSF 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.

Title: Improving Customer Experience (OMB Circular A–11, Section 280 Implementation).

OMB Clearance Number: 3145–0254.

Abstract: A modern, streamlined and responsive customer experience means: raising government-wide customer experience to the average of the private sector service industry; developing indicators for high-impact Federal programs to monitor progress towards excellent customer experience and mature digital services; and providing the structure (including increasing transparency) and resources to ensure customer experience is a focal point for agency leadership.

This proposed information collection activity provides a means to garner customer and stakeholder feedback in an efficient, timely manner in accordance with the Administration's commitment to improving customer service delivery as discussed in Section 280 of OMB Circular A–11 at *https://www.performance.gov/cx/a11-280.pdf.*

As discussed in OMB guidance, agencies should identify their highest-impact customer journeys (using customer volume, annual program cost, and/or knowledge of customer priority as weighting factors) and select touchpoints/transactions within those journeys to collect feedback.

These results will be used to improve the delivery of Federal services and programs. It will also provide government-wide data on customer experience that can be displayed on *www.performance.gov* to help build transparency and accountability of Federal programs to the customers they serve.

As a general matter, these information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

NSF will only submit collections if they meet the following criteria.

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered is intended to be used for general service improvement and program management purposes;
- Upon agreement between OMB and the agency all or a subset of information may be released as part of A–11, Section 280 requirements only on *performance.gov.* Summaries of customer research and user testing activities may be included in public-facing customer journey maps or summaries.
- Additional release of data must be done coordinated with OMB.

These collections will allow for ongoing, collaborative and actionable communications between the Agency, its customers and stakeholders, and OMB as it monitors agency compliance on Section 280. These responses will inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on services will be unavailable.

Current Action: New Collection of Information.

Type of Review: New.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Estimated Number of Respondents: Below is a preliminary estimate of the aggregate burden hours for this new collection. NSF will provide refined estimates of burden in subsequent notices.

Average Expected Annual Number of Activities: Approximately five types of customer experience activities such as feedback surveys, focus groups, user testing, and interviews.

Average Number of Respondents per Activity: 1 response per respondent per activity.

Annual Responses: 2,001,550.

Average Minutes per Response: 2 minutes–60 minutes, dependent upon activity.

Burden Hours: NSF requests approximately 101,125 burden hours.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a hFederal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Dated: August 23, 2023.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2023–18539 Filed 8–28–23; 8:45 am]

BILLING CODE 7555–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–237 and CP2023–240; MC2023–239 and CP2023–242; MC2023–240 and CP2023–243; MC2023–241 and CP2023–244; MC2023–242 and CP2023–245; MC2023–243 and CP2023–246]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* August 30, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER**

INFORMATION CONTACT section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–237 and CP2023–240; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 6 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 22, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* August 30, 2023.

2. *Docket No(s).:* MC2023–239 and CP2023–242; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 32 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 22, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* August 30, 2023.

3. *Docket No(s).:* MC2023–240 and CP2023–243; *Filing Title:* USPS Request to Add Priority Mail Contract 785 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 22, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* August 30, 2023.

4. *Docket No(s).:* MC2023–241 and CP2023–244; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 33 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 22, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* August 30, 2023.

5. *Docket No(s).:* MC2023–242 and CP2023–245; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 34 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 22, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* August 30, 2023.

6. *Docket No(s).:* MC2023–243 and CP2023–246; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 35 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 22, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* August 30, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–18548 Filed 8–28–23; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98207; File No. SR–ICEEU–2023–022]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the Clearing Membership Policy and Clearing Membership Procedures

August 23, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 8, 2023, ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I, II and III below, which Items have been primarily prepared by ICE Clear Europe. On August 22, 2023, ICE Clear Europe filed Amendment No. 1 to the proposed rule change to make certain changes to the Exhibits 5A and 5B.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 (hereafter ''the proposed rule change''), from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') proposes to (i) modify its Clearing Membership Policy (''Policy'') [4] to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 amends the Exhibit 5A and Exhibit 5B to correctly reflect the addition of the Document Handling subsection to each document's Table of Contents. The proposed rule change includes an Exhibit 4A and Exhibit 4B. Exhibit 4A shows the change that Amendment No. 1 makes to Exhibit 5A, and Exhibit 4B does the same with respect to attit 5B.

[4] Capitalized terms used but not defined herein have the meanings specified in the Policy and Procedures or, if not defined therein, the ICE Clear Europe Clearing Rules.

update certain monitoring and document review procedures and to make certain drafting clarifications and (ii) amend its Clearing Membership Procedures (''Procedures'') to clarify the Clearing House's discretion with respect to certain requirements and to add notification requirements, among other changes. The updates would also make certain other non-substantive amendments.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

I. Clearing Membership Policy

In the discussion of the purpose of the Policy, the amendments would change an incorrect reference to ''model documents'' to ''parameter documents'' (reflecting that relevant parameters will be set out in parameter documents). Further changes would clarify that Clearing Members are required to notify the Clearing House promptly when there is any change to its business which would have an impact on meeting the membership criteria. Additionally, the monitoring of membership criteria would be revised to reflect that the Clearing House conducts ongoing (rather than only quarterly or other periodic) monitoring of compliance with membership criteria. Ongoing monitoring for this purpose consists of continuous monitoring and additional trigger-based reviews, including relating to credit and AML/KYC risk and to daily operational matters (such as margin calls). References to quarterly reviews of financial position through Audited Annual Accounts, quarterly review of financial information, quarterly updates of the Counterparty Rating System (''CRS''), and the requirement to maintain a watch list would be removed (as such matters relate to credit issues that are addressed in the Clearing House's Counterparty Credit Risk Policy,[5] and do not need to be referenced in this policy). A cross reference to the Clearing Membership Procedures and the Counterparty Credit Risk Policy for monitoring information would also be removed as unnecessary.

The amendments would also update document governance requirements, consistent with other ICE Clear Europe policies.[6] Document review would be conducted by the document owner or relevant staff, with approval of the head of department (or their delegate) and the Chief Risk Officer (or their delegate). The amendments would specify that document review, at a minimum, would encompass regulatory compliance, documentation and purpose, implementation, use and open items from prior reviews. The results of the review would be reported to the Executive Risk Committee (and in certain cases, to the Model Oversight Committee). The document owner would aim to remediate any findings, complete internal governance and obtain regulatory approvals (as applicable) before the next annual review. The amendments would also state explicitly that changes to the Policy would need to be approved in accordance with the Clearing House governance process and take effect after completion of all necessary internal and regulatory approvals.

Certain other non-substantive typographical and similar corrections would also be made in the Policy, such as using the correct name of the Clearing Membership Policy.

II. Clearing Membership Procedures

ICE Clear Europe is proposing to amend its Clearing Membership Procedures to make certain clarifications and updates, including for consistency with the amendments to the Policy described above. Under the discussion of the application process, the amendments would specifically require notifications by Clearing Members of changes to their business that may impact the membership criteria, consistent with the change to the Policy described above. Additionally, under the diligence process, the amendments would clarify that the applicant would be required to provide sufficient evidence, details and information as required by the Rules. The proposed amendment would also state that the membership team would ensure that all applicants would be added to the applicable schedule of insured entities by the ICE Group insurer.

The amendments would remove a provision that the Product Risk Committee would be notified of new applications, after approval of an application by the Executive Risk Committee. ICE Clear Europe does not believe notification of applications to the Product Risk Committee is necessary in light of the duties and functions of those committees. The proposed amendments would also clarify that the Circular confirming approval is issued once the application is approved. In addition, the amendments would make non-substantive clarifications concerning the requirement for Clearing Members to respond in a timely manner to any additional information requested by the Clearing House.

The proposed changes would also clarify and make consistent throughout the Procedures certain provisions relating to decisions that may be taken or requirements that may be imposed by the Clearing House in its discretion. Specifically, the amendments would clarify ICE Clear Europe's absolute legal discretion in making certain determinations, imposing additional requirements and granting exceptions relating to the minimum capital requirement, acceptability of subordinated loans, acceptability of controller guarantee, requirements for additional cash or collateral and the size of additional guaranty fund assessments. The amendments would similarly clarify that the Clearing House will define the maximum period between in-depth counterparty reviews and the threshold for taking further action on negative changes in Clearing Member financial condition in its absolute discretion. ICE Clear Europe does not believe these amendments change its existing authority, but rather state more explicitly the scope of its discretion, which remains subject to the Rules and applicable law.

The discussion of document governance and oversight in the Policy and Procedures would be replaced with a new Document Governance and Exception Handling section that is substantially the same as that described above for the Policy, and is consistent

[5] See Exchange Act Release No. 34–97169 (SR–ICEEU–2023–004) (March 20, 2023), 88 FR 17886 (March 24, 2023).

[6] *See, e.g.,* The Counterparty Credit Risk Policy and Procedures as described in Exchange Act Release No. 34–97169, SR ICEEU–2023–004 (March 20, 2023) 88 FR 17886 (March 24, 2023); the Investment Management Procedures as described in Exchange Act Release No. 34–97528, SR ICEEU–2023–009 (May 19, 2023) 88 FR 33949 (May 25, 2023); the Futures and Options Default Management Policy as described in Exchange Act Release No. 34–97383, SR ICEEU–2023–012 (Apr. 26, 2023) 88 FR 27539 (May 2, 2023).

with other Clearing House policies recently adopted or modified.[7]

(b) Statutory Basis

ICE Clear Europe believes that the proposed amendments to the Clearing Membership Policy and Procedures are consistent with the requirements of section 17A of the Act[8] and the regulations thereunder applicable to it. In particular, section 17A(b)(3)(F) of the Act[9] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest.

The proposed changes to the Clearing Membership Policy and Procedures are intended to update and more clearly document the Clearing House's procedures for reviewing applications for clearing membership, criteria for membership, and on-going monitoring of membership of ICE Clear Europe. The amendments update the Policy to better reflect the ongoing monitoring of Clearing Members and to update document governance processes. The amendments to the Procedures clarify the discretion that ICE Clear Europe has to make certain determinations, clarify certain notification requirements, and make other drafting improvements. The amendments would therefore facilitate the prompt and accurate clearing of cleared contracts and protect investors and the public interest in the sound operations of the Clearing House, consistent with the requirements of section 17A(b)(3)(F).[10] Further, the amendments will not affect the safeguarding of securities and funds in the custody or control of the Clearing House or for which it is responsible, within the meaning section 17A(b)(3)(F).[11]

The amendments to the Procedures are also consistent with relevant provisions of Rule 17Ad–22.[12] Rule 17Ad–22(e)(18) provides that ''[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonable designed to, as applicable [. . .] establish objective, risk-based and publicly disclosed criteria for participation, which permit fair and open access by direct . . . participants . . . require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency, and monitor compliance with such participation requirements on an ongoing basis''.[13] As set forth above, the amendments to the Clearing Membership Procedures are intended to clarify and enhance the Clearing House's procedures and policies as they relate to Clearing Membership application and monitoring processes. The amendments do not substantively change the requirements for membership or the related Rules, but rather update the Policy and Procedures to reflect the Clearing House's current practices, and make other updates to improve clarity, including to state more clearly the Clearing House's discretion to make certain determinations as part of the application process. The amendments will facilitate the Clearing House's ability to implement and monitor its participation requirements. In ICE Clear Europe's view, the amendments are therefore consistent with the requirements of Rule 17Ad–22(e)(18).[14]

Rule 17Ad–22(e)(2) further provides that ''[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonable designed to, as applicable [. . .] provide for governance arrangements that are (i) clear and transparent, (ii) clearly prioritize the safety and efficiency of the covered clearing agency; and (iii) support the public interest requirement in section 17A of the Act''[15] among other requirements. As set forth above, the amendments update the documentation governance, review and approval provisions, in a manner consistent with other ICE Clear Europe policies and procedures. As such, in ICE Clear Europe's view, the amendments are consistent with the requirements of Rule 17Ad–22(e)(2).[16]

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The amendments are being adopted to update and clarify the Clearing Membership Policy and Procedures, which relates to the Clearing House's internal processes for implementation, reviewing and ongoing monitoring of its membership requirements and criteria. No substantive changes are being made to the membership requirements themselves or the Rules. Accordingly, ICE Clear Europe does not believe the amendments would affect the ability of an applicant to become a Clearing Member, the costs of clearing, the ability of market participants to access clearing, or the market for clearing services generally. Therefore, ICE Clear Europe does not believe the proposed rule change imposes any burden on competition that is inappropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed amendments have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any written comments received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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:

[7] *See, e.g.,* The Counterparty Credit Risk Policy and Procedures as described in Exchange Act Release No. 34–97169, SR ICEEU–2023–004 (March 20, 2023) 88 FR 17886 (March 24, 2023); the Investment Management Procedures as described in Exchange Act Release No. 34–97528, SR ICEEU–2023–009 (May 19, 2023) 88 FR 33949 (May 25, 2023); the Futures and Options Default Management Policy as described in Exchange Act Release No. 34–97383, SR ICEEU–2023–012 (Apr. 26, 2023) 88 FR 27539 (May 2, 2023).

[8] 15 U.S.C. 78q–1.

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 15 U.S.C. 78q–1(b)(3)(F).

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 17 CFR 240.17 Ad–22.

[13] 17 CFR 240.17 Ad–22(e)(18).

[14] 17 CFR 240.17Ad–22(e)(18).

[15] 17 CFR 240.17Ad–22(e)(2).

[16] 17 CFR 240.17Ad–22(e)(2).

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–ICEEU–2023–022 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–ICEEU–2023–022. 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 such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/clear-europe/regulation.*

Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–ICEEU–2023–022 and should be submitted on or before September 19, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–18551 Filed 8–28–23; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98208]

Notice of Intention To Cancel Registration of Certain Municipal Advisors Pursuant to Section 15b(c)(3) of the Securities Exchange Act of 1934

August 23, 2023.

Notice is given that the Securities and Exchange Commission (the ''Commission'') intends to issue an order or orders, pursuant to section 15B(c)(3) of the Securities Exchange Act of 1934 (the ''Act''), cancelling the registrations of the municipal advisors whose names appear in the attached Appendix (hereinafter referred to as the ''registrants'').

Section 15B(c)(3) of the Act provides, in pertinent part, that if the Commission finds that any municipal advisor registered under section 15B is no longer in existence or has ceased to do business as a municipal advisor, the Commission, by order, shall cancel the registration of such municipal advisor.

The Commission finds that each registrant listed in the attached Appendix:

(i) has not filed any municipal advisor form submissions with the Commission through the Commission's Electronic Data Gathering and Retrieval (''EDGAR'') system since February 2022 (including but not limited to the annual amendments (form MA–A) required by 17 CFR 240.15Ba1–5(a)(1)); and/or

(ii) based on information available from the Municipal Securities Rulemaking Board (the ''MSRB''), (a) is not registered as a municipal advisor with the MSRB under MSRB Rule A–12(a) and/or (b) does not have an associated person who is qualified as a municipal advisor representative under MSRB Rule G–3(d) and for whom there is a Form MA–I required by 17 CFR 240.15Ba1–2(b) available on EDGAR, and/or (c) has not, since February 2022, filed with the MSRB any Form A–12 annual affirmation as required by MSRB Rule A–12(k); and/or withdrew its registration from the MSRB without first withdrawing its registration from the Commission.

Accordingly, the Commission finds that each of the registrants listed in the attached Appendix either is no longer in existence or has ceased to do business as a municipal advisor.

Notice is also given that any interested person may, by September 25, 2023 at 5:30 p.m. Eastern Time, submit to the Commission in writing a request for a hearing on the cancellation of the registration of any registrant listed in the attached Appendix, accompanied by a statement as to the nature of such person's interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, and such person may request to be notified if the Commission should order a hearing thereon. Any such communication should be addressed to the Commission's Secretary at the address below. All comments or requests received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

At any time after September 25, 2023, the Commission may issue an order or orders cancelling the registrations of any or all of the registrants listed in the attached Appendix, upon the basis of the information stated above, unless an order or orders for a hearing on the cancellation shall be issued upon request or upon the Commission's own motion. Persons who requested a hearing, or to be advised as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof. Any registrant whose registration is cancelled under delegated authority may appeal that decision directly to the Commission in accordance with Rules 430 and 431 of the Commission's rules of practice (17 CFR 201.430 and 431).

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Mark Elion, Senior Counsel, Office of Municipal Securities, 100 F Street NE, Washington, DC 20549, or at (202) 551–5680.

For the Commission, by the Office of Municipal Securities, pursuant to delegated authority.[1]

Sherry R. Haywood,

Assistant Secretary.

Appendix

Registrant name	SEC ID No.
Betnun Nathan S	867–02495
Christen Group, Inc	867–02467
Southern Cross Financial Group LLC	867–02544
TLHocking & Associates LLC	867–01054
OCONNOR & Co SECURITIES, INC	867–01245
Capital Alaska LLC	867–02604
Fray Municipal Securities	867–02064
Massena Associates LLC	867–02569
SUMMERS, CARROLL, WHISLER LLC	867–01938

[FR Doc. 2023–18552 Filed 8–28–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 17 CFR 200.30–3a(a)(1)(ii).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98206]

Order Granting Application of NYSE National, Inc. for a Limited Exemption From Rule 602 of Regulation NMS for Its Retail Liquidity Program

August 23, 2023.

By letter dated August 18, 2023 (the ''Application''),[1] NYSE National, Inc. (''NYSE National'' or the ''Exchange'') requests a limited exemption from the requirements of Rule 602 of Regulation NMS [2] (the ''Quote Rule'') for its planned dissemination of a Retail Liquidity Identifier (''RLI'') that would contain certain information regarding non-displayed Retail Price Improvement Orders (''RPI Orders'') pursuant to the NYSE National's Retail Liquidity Program (the ''Program'').[3]

The purpose of the Program is to attract retail order flow to the Exchange by allowing ETP Holders to provide potential price improvement to retail investor orders (''Retail Orders'') [4] in the form of an RPI Order. An RPI Order is defined as ''an MPL Order that is eligible to trade only with incoming Retail Orders submitted by an RMO.'' [5] An MPL or Mid-Point Liquidity Order is defined as ''[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 [protected bid and protected offer] PBBO or its limit price.'' [6]

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 the RLI through proprietary data feeds and through the Consolidated Quotation System or the UTP Quote Data Feed, as applicable.[7] The RLI 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.[8]

When the Commission adopted the Quote Rule (then Rule 11Ac1–1) it sought to facilitate the establishment of a comprehensive composite quotation system across market centers as an integral component of a national market system.[9] The Quote Rule requires national securities exchanges and national securities associations to, among other things, collect, process, and make available to vendors the best bid, the best offer, and aggregate quotation sizes for each subject security listed or admitted to unlisted trading privileges that is communicated on any national securities exchange by any responsible broker or dealer.[10] Regulation NMS defines a ''bid'' or ''offer'' as the bid price or the offer price communicated by a member of a national securities exchange or member of a national securities association to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as either principal or agent, but shall not include indications of interest.

Other exchanges that operate retail liquidity programs also disseminate retail liquidity identifiers in order to attract retail order flow.[11] NYSE National's RLI would serve a similar purpose to the identifiers currently disseminated by other exchanges operating retail liquidity programs,[12] including one that likewise indicates the availability of potentially price-improving interest at the midpoint,[13] as it would inform market participants about the availability of potential price improvement opportunities for Retail Orders The NYSE National RLI will indicate the availability of RPI Orders priced at the midpoint, which can potentially benefit retail investors by offering price improvement opportunities. NYSE National's Program, like other exchanges' retail liquidity programs, allows for the limited segmentation of retail order flow for the express purpose of allowing NYSE National to compete with other exchanges and off-exchange market makers to provide price improvement to retail customers, thus ensuring that retail customers can benefit from the willingness of liquidity providers to give their orders better prices.

Under Rule 602(d) of Regulation NMS, the Commission may exempt from the provisions of the Quote Rule, either unconditionally or on specified terms and conditions, a national securities exchange (among others) if it determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system.[14]

The Commission hereby grants the Exchange a limited exemption from the Quote Rule to operate the Program and disseminate the RLI without having to include RPI Order interest in NYSE National's best bid or offer. For the reasons discussed below, the Commission has determined that it is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system to provide a limited exemption from Rule 602 of Regulation NMS with respect to NYSE National's RLI disseminated under the Program.

In light of the opportunity for retail customers to obtain potentially substantial price improvement at midpoint prices under NYSE National's Program, and in the interests of facilitating the ability of NYSE National to compete to be able to provide that opportunity to Retail Orders in the limited context of the Program, providing a limited exemption should promote competition between

[1] *See* Letter from Hope M. Jarkowski, General Counsel, New York Stock Exchange to Vanessa Countryman, Secretary, Commission, dated August 18, 2023.

[2] 17 CFR 242.602.

[3] *See* Securities Exchange Act Release No. 98169 (August 18, 2023) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7.44) (''Notice'').

[4] NYSE National Rule 7.44(a)(3) defines a Retail Order as ''an agency order or a riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted by an RMO provided that no change is made to the terms of the order with respect to price or side of market and that the order does not originate from a trading algorithm or other computerized methodology.''

[5] NYSE National Rule 7.44(a)(3). This section of the NYSE National Rule also defines an RMO or Retail Member Organization as ''an ETP Holder that is approved by the Exchange under this rule to submit Retail Orders.'' 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. The segmentation in the Program would allow retail order flow to receive potential price improvement. *See* Notice at 2.

[6] NYSE National Rule 7.31(d)(3).

[7] NYSE National Rule 7.44(e).

[8] *Id.*

[9] *See* Securities Exchange Act Release No. 14415 (January 26, 1978), 43 FR 4342 (February 1, 1978). Regulation NMS redesignated Rule 11Ac1–1 as Regulation NMS Rule 602, but left the substance of the rule largely intact. *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37570 (June 29, 2005) (File No. S7–10–04).

[10] *See* 17 CFR 242.602(a)(1). The Quote Rule further provides that nothing shall preclude any national securities exchange from making available to vendors indications of interest or bids and offers for a subject security at any time such exchange is not required to do so. *See* 17 CFR 242.602(a)(4).

[11] *See, e.g.,* Cboe BYX Exchange, Inc. Rule 11.24(e); Nasdaq BX, Inc. Rule 4780(e); Investors Exchange LLC (''IEX'') Rule Rule 11.232(f); New York Stock Exchange LLC Rule 7.44(j). The Commission previously granted IEX an exemption from the Quote Rule in connection with the dissemination of a similar liquidity indicator pursuant to its retail price improvement program. *See* Securities Exchange Act Release No. 93217 (September 30, 2021), 86 FR 55663 (October 6, 2021) (Order Granting Application of Investors Exchange LLC for a Limited Exemption from Rule 602 of Regulation NMS for its Retail Price Improvement Program).

[12] *See e.g.,* Cboe BYX Exchange, Inc. Rule 11.24(e); Nasdaq BX, Inc. Rule 4780(e); and New York Stock Exchange LLC Rule 7.44(j).

[13] *See, e.g.,* IEX Rule 11.232(f); and New York Stock Exchange LLC Rule 7.44(j).

[14] 17 CFR 242.602(d).

exchanges and between NYSE National and off-exchange market makers.

Broad dissemination of the RLI through the Consolidated Quotation System or the UTP Quote Data Feed, as applicable, should benefit retail customers by providing broker-dealers that route Retail Orders with limited supplemental information about the availability of price improvement opportunities for Retail Orders under the Program.[15] To the extent the RLI is successful in attracting Retail Orders to the Program, the increased competition should benefit retail customers by providing a mechanism through which they can receive the better prices for their orders from willing liquidity providers. This exemption also should benefit market participants that seek the opportunity to interact directly with Retail Orders, as any liquidity provider may submit RPI Orders to provide better prices to retail customers on the Exchange. Quotations that Rule 602 requires to be included in an exchange's best bid and offer are used to establish the national best bid and offer for an NMS stock and are eligible for protection against trade-throughs under Rule 611 of Regulation NMS.[16] Such quotations therefore must be accessible to all market participants on terms that are not unfair or unreasonably discriminatory. In contrast, access to RPI Order interest is limited to Retail Orders because many market participants may be willing to offer liquidity to retail investors at better prices than they would be willing to offer all market participants. RPI Order interest thereby can benefit retail investors by giving them an opportunity to receive better prices on exchanges, but it is unsuitable for other purposes, including establishing a national best bid and offer and eligibility for Rule 611 protection.

Accordingly, *it is ordered,* pursuant to Rule 602(d) of Regulation NMS, that NYSE National is exempt from Rule 602 of Regulation NMS with respect to NYSE National's Program specifically concerning the dissemination of the RLI to advertise the presence of RPI Order interest under the Program without including RPI Orders in the Exchange's quotation. This exemption is conditioned on the Exchange continuing to conduct the Program substantially as described in the Exchange's request for exemptive relief and the current applicable Exchange rules, including the dissemination of the RLI through the Consolidated Quotation System or the UTP Quote Data Feed, as applicable. Any changes thereto may cause the Commission to reconsider this exemption. The foregoing exemption is subject to modification or revocation at any time if the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act.

For the Commission, by the Division of Trading and Markets pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–18550 Filed 8–28–23; 8:45 am]

BILLING CODE 8011–01–P

[15] The RLI will not reveal the presence of other midpoint interest. Non-displayed midpoint interest could be present on NYSE National outside of the Program, and Retail Orders will be able to trade with that interest.

[16] *See* 17 CFR 242.611.

[17] 17 CFR 200.30–3(a)(28).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18096 and #18097; ILLINOIS Disaster Number IL–00087]

Administrative Declaration of a Disaster for the State of Illinois

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Illinois dated 08/23/2023.

Incident: Emerald Village Senior Living Facility Fire.

Incident Period: 07/14/2023.

DATES: Issued on 08/23/2023.

Physical Loan Application Deadline Date: 10/23/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 05/23/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Cook.

Contiguous Counties:

Illinois: DuPage, Kane, Lake, McHenry, Will.

Indiana: Lake.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	5.000
Homeowners without Credit Available Elsewhere	2.500
Businesses with Credit Available Elsewhere	8.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 18096 5 and for economic injury is 18097 0.

The States which received an EIDL Declaration # are Illinois, Indiana.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2023–18580 Filed 8–28–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18098 and #18099; ILLINOIS Disaster Number IL–00088]

Administrative Declaration of a Disaster for the State of Illinois

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Illinois dated 08/23/2023.

Incident: Arden Apartment Complex Fire.

Incident Period: 07/28/2023.

DATES: Issued on 08/23/2023.

Physical Loan Application Deadline Date: 10/23/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 05/23/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: DuPage.

Contiguous Counties:

Illinois: Cook, Kane, Kendall, Will.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	5.000
Homeowners without Credit Available Elsewhere	2.500
Businesses with Credit Available Elsewhere	8.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 18098 5 and for economic injury is 18099 0.

The State which received an EIDL Declaration # is Illinois.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2023–18579 Filed 8–28–23; 8:45 am]

BILLING CODE 8026–09–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2023–0033]

Notice of Senior Executive Service Performance Review Board Membership

AGENCY: Social Security Administration.

ACTION: Notice of Senior Executive Service Performance Review Board Membership.

Authority: Title 5, U.S. Code, 4314 (c)(4), requires that the appointment of Performance Review Board members be published in the **Federal Register** before service on said Board begins.

The following persons will serve on the Performance Review Board which oversees the evaluation of performance appraisals of Senior Executive Service members of the Social Security Administration:

Florence Felix-Lawson, Chair
Antoinette Amrhein
Jeffrey Buckner
Djimy Chapron
Vikash Chhagan
Daniel Callahan *
Doris Diaz
Christopher Harris *
Jose (Joe) Lopez
Kristen Medley-Proctor
Jatin (Jim) Parikh
Claudia Postell*
Dawn Wiggins
* New Member

Darlynda K. Bogle,

Deputy Commissioner for Human Resources.

[FR Doc. 2023–18613 Filed 8–28–23; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0185]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Barbie Doll (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 28, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0185 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0185 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0185, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Barbie Doll is:

—*Intended Commercial Use of Vessel:* ''Sportfishing charter and harbor cruise.''
—*Geographic Region Including Base of Operations:* ''California (Base of Operations: San Diego, CA)''
—*Vessel Length and Type:* 46′ Sportfisher

The complete application is available for review identified in the DOT docket as MARAD 2023–0185 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an

approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0185 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–18602 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0183]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Blondie (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 28, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0183 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0183 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0183, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Blondie is:

—*Intended Commercial Use of Vessel:* ''Vessel will be used for OUPV charter fishing and sightseeing trips, initially in Puerto Rico and later, North and South Carolina.''

—*Geographic Region Including Base of Operations:* ''Puerto Rico, North Carolina, South Carolina (Base of Operations: Fajardo, PR)''

—*Vessel Length and Type:* 33′ Powerboat

The complete application is available for review identified in the DOT docket as MARAD 2023–0183 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given

in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0183 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–18603 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0184]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Khaleesi (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 28, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0184 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0184 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0184, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, D.C. 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov*.

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Khaleesi is:

—*Intended Commercial Use of Vessel:* ''I would like to explore the local areas of Beaufort, NC with passengers for pleasure cruising. The Axopar allows a more upscale cabin all weather experience than any cruises currently on the market in my area.''

—*Geographic Region Including Base of Operations:* ''North Carolina (Base of Operations: Beaufort, NC)''

—*Vessel Length and Type:* 30′ 2″ Powerboat

The complete application is available for review identified in the DOT docket as MARAD 2023–0184 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0184 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–18605 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0179]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Seaquester (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 28, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023-xxxx by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0179 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0179, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Seaquester is:

—*Intended Commercial Use of Vessel:* ''Chartering passengers on overnight trips.''

—*Geographic Region Including Base of Operations:* ''Florida, North Carolina, South Carolina, Georgia, Alabama, Mississippi (Base of Operations: Key West, FL)''

—*Vessel Length and Type:* 66′ Motor Yacht

The complete application is available for review identified in the DOT docket as MARAD 2023–0179 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even

days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0179 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–18606 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Decommissioning and Disposition of the National Historic Landmark Nuclear Ship Savannah; Notice of Public Meeting

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: The Maritime Administration (MARAD) announces a public meeting of the Peer Review Group (PRG) which will be held online and by phone only. The PRG was established pursuant to the requirements of the National Historic Preservation Act (NHPA) and its implementing regulations to plan for the decommissioning and disposition of the Nuclear Ship Savannah (NSS). PRG membership is comprised of officials from the U.S. Department of Transportation, MARAD, the U.S. Nuclear Regulatory Commission (NRC), the Advisory Council on Historic Preservation (ACHP), and the Maryland State Historic Preservation Officer (SHPO) and other consulting parties. The public meeting affords the public an opportunity to participate in PRG activities, including reviewing and providing comments on draft deliverables. MARAD encourages public participation and provides the PRG meeting information below.

DATES: The meeting will be held on Tuesday, September 19, 2023, from 2:30 p.m. to 4:00 p.m. Eastern Daylight Time (EDT). Requests to attend the meeting virtually must be received by 5:00 p.m. EDT, Tuesday, September 12, 2023, to receive instructions to participate online. Requests for accommodations for a disability must also be received by Tuesday, September 12, 2023.

ADDRESSES: The meeting will be held online and by phone.

FOR FURTHER INFORMATION CONTACT: Erhard W. Koehler, (202) 680–2066 or via email at *marad.history@dot.gov.* You may send mail to N.S. Savannah/Savannah Technical Staff, Pier 13 Canton Marine Terminal, 4601 Newgate Avenue, Baltimore, MD 21224, ATTN: Erhard Koehler.

SUPPLEMENTARY INFORMATION:

I. Background

The decommissioning and disposition of the NSS is an Undertaking under section 106 of the NHPA. Section 106 requires that Federal agencies consider views of the public regarding their Undertakings; therefore, in 2020, MARAD established a Federal docket at *https://www.regulations.gov/docket/MARAD-2020-0133* to provide public notice about the NSS Undertaking. The Federal docket was also used in 2021 to solicit public comments on the future uses of the NSS. MARAD is continuing to use this same docket to take in public comment, share information, and post agency actions.

The NHPA Programmatic Agreement (PA) for the Decommissioning and Disposition of the NSS is available on the MARAD docket located at *www.regulations.gov* under docket id ''MARAD–2020–0133.'' The PA stipulates a deliberative process by which MARAD will consider the disposition of the NSS. This process requires MARAD to make an affirmative, good-faith effort to preserve the NSS. The PA also establishes the PRG in Stipulation II. The PRG is the mechanism for continuing consultation during the effective period of the PA and its members consist of the signatories and concurring parties to the PA, as well as other consulting parties. The PRG members will provide individual input and guidance to MARAD regarding the implementation of stipulations in the PA. PRG members and members of the public are invited to provide input by attending bi-monthly meetings and reviewing and commenting on deliverables developed as part of the PA.

II. Agenda

The agenda will include (1) welcome and introductions; (2) program update; (3) status of PA stipulations; (4) other business; and (5) date of next meeting. The agenda topic titled PA stipulations involve deliverables identified in the PA. MARAD will provide status updates for the following items: the Disposition Alternatives Study; the Notice of Availability/Request for Information; the License Termination Plan; and the PRG charter and schedule. The agenda will also be posted on MARAD's website at *https://www.maritime.dot.gov/outreach/history/maritime-administration-history-program* and on the MARAD docket located at *www.regulations.gov* under docket id ''MARAD–2020–0133.''

III. Public Participation

The meeting will be open to the public. Members of the public who wish to attend online must RSVP to the person listed in the **FOR FURTHER INFORMATION CONTACT** section with your name and affiliation. Members of the public may also call-in using the following number: 312–600–3163 and conference ID: 930 866 814#.

Special services. The U.S. Department of Transportation is committed to providing all participants equal access to this meeting. If you need alternative formats or services such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

(Authority: 49 CFR 1.81 and 1.93; 36 CFR part 800; 5 U.S.C. 552b.)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–18584 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0180]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Yallah (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 28, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0180 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0180 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0180, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Yallah is:

—*Intended Commercial Use of Vessel:* ''For charter use in the Miami area.''

—*Geographic Region Including Base of Operations:* ''Florida (Base of Operations: Miami, FL)''

—*Vessel Length and Type:* 54′ Flybridge Motor yacht

The complete application is available for review identified in the DOT docket as MARAD 2023–0180 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0180 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or

signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–18608 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0181]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Dos Abogados IV (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 28, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0181 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0181 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0181, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov*.

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Dos Abogados IV is:

—*Intended Commercial Use of Vessel:* ''Charter.''

—*Geographic Region Including Base of Operations:* ''Alaska, Washington, Oregon, California (Base of Operations: Auke Bay, AK)''

—*Vessel Length and Type:* 48′ 7″ Motor

The complete application is available for review identified in the DOT docket as MARAD 2023–0181 at *https://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0181 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov*. Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy*.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–18604 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0182]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Uncles Toy (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 28, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0182 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0182 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0182, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Uncles Toy is:

—*Intended Commercial Use of Vessel:* ''charter.''

—*Geographic Region Including Base of Operations:* ''Florida (Base of Operations: Punta Gorda, FL)''

—*Vessel Length and Type:* 32′ Motor

The complete application is available for review identified in the DOT docket as MARAD 2023–0182 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0182 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–18607 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2023–0007 (Notice No. 2023–08)]

Hazardous Materials: Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on information collections pertaining to hazardous materials transportation for which PHMSA intends to request renewal and extension from the Office of Management and Budget. PHMSA published a 60-day comment period soliciting comments on these information collections in the **Federal Register** on March 22, 2023, and did not receive any comments.

DATES: Interested persons are invited to submit comments on or before September 28, 2023.

ADDRESSES: Written comments and recommendations for the information collections should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.*

Information collections can be found by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

We invite comments on: (1) whether the collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the Department's estimate of the burden of the information collections; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Docket: For access to the Dockets to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Steven Andrews or Nina Vore, Standards and Rulemaking Division, (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), title 5, Code of Federal Regulations (CFR) requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies information collection requests that PHMSA previously published on March 22, 2023,[1] in a 60-day **Federal Register** notice seeking comments and is now submitting to the Office of Management and Budget (OMB) for renewal and extension. These information collections are contained in 49 CFR 171.6 of the Hazardous Materials Regulations (HMR; 49 CFR parts 171 through 180). PHMSA has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on changes in proposed or final rules published since the information collections were last approved. The following information is provided for each information collection: (1) title of the information collection, including former title if a change is being made; (2) OMB control number; (3) summary of the information collection activity; (4) description of affected public; (5) estimate of total annual reporting and recordkeeping burden; and (6) frequency of collection. PHMSA will request a 3-year term of approval for the information collection activity and will publish a notice in the **Federal Register** alerting the public upon OMB's approval. PHMSA requests comments on the following information collections:

Title: Inspection and Testing of Portable Tanks and Intermediate Bulk Containers.

OMB Control Number: 2137–0018.

Summary: This OMB control number describes the information collections in parts 173, 178, and 180 of the HMR pertaining to the documenting of design qualifications, inspections, tests, and approvals pertaining to the manufacture and use of portable tanks and intermediate bulk containers (IBCs) under various provisions of the HMR. Information collections under this OMB control number include:

(1) *Design Qualification Testing for IBCs:* This information collection consists of the minimum requirements for testing procedures to ensure that IBCs containing hazardous materials can withstand normal conditions of transportation. Each packaging must pass the prescribed tests and conform to § 173.24 while in transportation. The testing requirements in § 178.801(d) ensure that the packaging manufacturer achieves successful test results for the design qualification testing at the start of production of each new or different IBC design type.

(2) *Periodic Design Requalification Testing of IBCs:* This information collection consists of the requirements for periodic design re-qualification of each qualified IBC design type to maintain authorization for continued production. IBC manufacturers must conduct successful tests at sufficient frequency to ensure each packaging produced is capable of passing the design qualification tests, which must be conducted at least once every 12 months.

(3) *Applications for Approval of Equivalent Packaging:* This information collection consists of the requirements for approval of equivalent packaging applications submitted by the regulated community to PHMSA, which allows the use of an IBC differing from the standards outlined in the HMR if it is shown to be equally effective and if the testing methods used are equivalent.

(4) *Reporting Requirements for Retest and Inspection of IBCs:* This information collection consists of the requirements for the continuing qualification, maintenance, or periodic retesting of an IBC by any person responsible for it. Each IBC constructed in accordance with a United Nations (UN) standard for which a test or inspection is required may not be filled and offered for transportation or transported until the testing and inspection have been successfully completed. The information collection also reflects the creation of a report that identifies the testing and inspection of IBCs.

(5) *Recordkeeping for IBC Testing:* This information collection consists of the recordkeeping requirements associated with IBC testing specified in §§ 178.801 and 180.352. The IBC owner or lessee must keep records of periodic retests, initial and periodic inspections, and test performance on the IBC if it has been repaired. Records must be kept for each packaging at each location where periodic tests are conducted and must be available for inspection by a DOT representative upon request.

(6) *Manufacturers Data Report (ASME) for Portable Tanks:* This information collection consists of the requirements for tanks designed and constructed in accordance with, and that fulfill all the requirements of, the American Society of Mechanical Engineers (ASME) Code. In addition to the markings required by the ASME Code, every tank must bear permanent

[1] 88 FR 17295.

marks that include the information specified in § 178.255–14, which must be stamped into the metal near the center of one of the tank heads or stamped into a plate permanently attached to the tank by means of brazing or welding or other suitable means.

(7) *Approval Applications for Specification UN Portable Tank Design:* This information collection requires an owner or manufacturer of a portable tank to apply for an approval to a designated approval agency authorized to approve new portable tanks designs.

(8) *Applications for Modifications to Portable Tank Designs:* This information collection requires an owner or manufacturer of a portable tank to apply for an approval to a designated approval agency authorized to approve the modifications to portable tanks designs.

(9) *Portable Tanks—Approval Agency Retention of Documents:* This information collection consists of the requirement for approval agencies to review all drawings and calculations to ensure that the design is compliant with the relevant specification. The approval agency must maintain the drawings and approval records for as long as the portable tank remains in service and provide this information to the DOT upon request.

(10) *Portable Tanks—Manufacturers Retention of Documents:* This information collection requires that qualification records for specification portable tanks be retained for at least five (5) years by the tank manufacturer and made available to duly identified representatives of the DOT or the owner of the tank.

(11) *Recordkeeping for the Testing of Portable Tank:* This information collection requires that the owner of the portable tank or his/her authorized agent will retain a written record indicating the date and results of all required tests, as well as the name and address of the tester, until the next retest has been satisfactorily completed and recorded. This information must be provided to the DOT upon request.

The following is a list of the information collections and burden estimates associated with this OMB Control Number:

Information collection	Respondents	Total annual responses	Hours per response	Total annual burden hours
Design Qualification Testing for IBCs—Applications for the Certification Mark	13	494	3	1,482
Periodic Design Requalification Testing of IBCs—Submission of Changes to Test Frequency to the Associate Administrator	13	494	3	1,482
Applications for Approval of Equivalent Packaging—IBCs	5	5	3	15
Reporting Requirements for Retest and Inspection of IBCs	1000	100,000	0.25	25,000
Recordkeeping for IBC Testing	150	150	0.25	38
Manufacturers Data Report (ASME) for Portable Tanks	50	50,000	0.25	12,500
Approval Applications for Specification UN Portable Tank Design	13	494	3	1,482
Applications for Modifications to Portable Tank Designs	13	494	3	1,482
Portable Tanks—Approval Agency Retention of Documents	13	494	0.25	124
Portable Tanks—Manufacturers Retention of Documents	50	50,000	0.25	12,500
Recordkeeping for the Testing of Portable Tanks	150	150	0.25	38

Affected Public: Manufacturers and owners of portable tanks and intermediate bulk containers.

Annual Reporting and Recordkeeping Burden:

Number of Respondents: 1,470.

Total Annual Responses: 202,775.

Total Annual Burden Hours: 56,143.

Frequency of Collection: On occasion.

Title: Hazardous Materials Shipping Papers & Emergency Response Information.

OMB Control Number: 2137–0034.

Summary: This OMB control number describes the information collections in parts 172, 173, 174, 175, 176 and 177 of the HMR pertaining to the requirement to provide a shipping paper and emergency response information with shipments of hazardous materials. Shipping papers are considered to be a basic communication tool relative to the transportation of hazardous materials. The definition of a shipping paper in § 171.8 includes a shipping order, bill of lading, manifest, or other shipping document serving a similar purpose and containing the information required by §§ 172.202, 172.203, and 172.204 of the HMR. A shipping paper with emergency response information must accompany most hazardous materials shipments and be readily available at all times during transportation.

Shipping papers serve as the principal source of information regarding the presence of hazardous materials, identification, quantity, and emergency response procedures. They also serve as the source of information for compliance with other requirements, such as the placement of rail cars containing different hazardous materials in trains; prevent the loading of poisons with foodstuffs; maintain the separation of incompatible hazardous materials; and limit the amount of radioactive materials that may be transported in a vehicle or aircraft. Shipping papers and emergency response information also serve as a means of notifying transport workers that hazardous materials are present. Most importantly, shipping papers serve as a principal means of identifying hazardous materials during transportation emergencies. Firefighters, police, and other emergency response personnel are trained to obtain the DOT shipping papers and emergency response information when responding to hazardous materials transportation emergencies. The availability of accurate information concerning hazardous materials being transported significantly improves response efforts in these types of emergencies. In addition to the shipping paper and emergency response information, this OMB control number also includes the following information collections:

(1) *Notice of Pilot in Command:* This information collection consists of the additional time required for the pilot-in-command to complete the confirmation process for the loading of hazardous materials on aircraft. The confirmation process includes obtaining a signature or other appropriate indication from the person responsible for loading the aircraft and from the pilot-in-command.

(2) *Lithium Battery Test Summary Document:* This information collection requires the creation of a lithium battery test summary document for lithium cells and batteries manufactured after January 1, 2008. This information collection includes both a reporting and recordkeeping component.

(3) *Air Transportation Discrepancy Reports:* This information collection

requires that each person who discovers an improperly described, certified, labeled, marked, or packaged hazardous material during air transportation, including passenger baggage (known as a passenger (PAX) discrepancy), must notify the nearest Federal Aviation Administration (FAA) Regional Office by telephone or electronically. Electronic notifications may be submitted by email or through the Safety Assurance System (SAS) External Portal.

The following is a list of the information collections and burden estimates associated with this OMB Control Number:

Information collection	Respondents	Total annual responses	Hours per response	Total annual burden hours
Hazardous Materials Shipping Papers & Emergency Response Information	260,000	175,262,735	.03	4,599,426
Notice of Pilot in Command	150	2,004,717	.003	5,961
Lithium Battery Test Summary—Reporting	73	2,336	0.5	1,168
Lithium Battery Test Summary—Recordkeeping	5,790	19,596	0.116	2,286
Air Transportation Discrepancy Reports	58	15,529	.0833	1,294

Affected Public: Shippers and carriers of hazardous materials in commerce.

Annual Reporting and Recordkeeping Burden:

Total Number of Respondents: 266,071.

Total Annual Responses: 177,304,913.

Total Annual Burden Hours: 4,610,135.

Frequency of Collection: On occasion.

Title: Approval for Hazardous Materials.

OMB Control Number: 2137–0557.

Summary: This OMB control number describes the information collections in parts 107, 173, 175, 176, 178, and 180 of the HMR pertaining to approvals issued by the Office of Hazardous Materials Safety (OHMS) within PHMSA. Without these requirements there is no means to: (1) determine whether applicants who apply to become designated approval agencies are qualified to evaluate package design, test packages, classify hazardous materials, etc.; (2) verify that various containers and special loading requirements for vessels meet the requirements of the HMR; and (3) assure that regulated hazardous materials pose no danger to life and property during transportation.

There are several approval provisions contained in the HMR and associated procedural regulations. Responses to these collections of information are required to obtain benefits, such as becoming an approval or certification agency, or to obtain a variance from packaging or handling requirements based on information provided by the respondent. These benefits and variances involve areas, for example, such as UN third-party certification; authorization to examine and test lighters; authorization to examine and test explosives; and authorization to re-qualify DOT cylinders. Specifically, the information collections under this OMB control number include:

(1) *Designated approval agencies, independent cylinder testing agencies, and prospective foreign manufacturers of cylinders:* This information collection consists of the requirement for parties to obtain approval from the Associate Administrator in order to become designated approval agencies, independent cylinder testing agencies, or prospective foreign manufacturers of cylinders. These designated approval agencies evaluate the design of packagings used for the shipments of hazardous materials.

(2) *Approval of Cylinder and Pressure Receptacle Requalifiers:* This information collection pertains to the requirement for approval by the Associate Administrator to inspect, test, certify, repair, or rebuild a DOT specification cylinder or a UN pressure receptacle under certain circumstances. These circumstances include a special permit issued under this part or a cylinder manufactured in accordance with Transport Canada's Transportation of Dangerous Good (TDG) Regulations.

(3) *M-Numbers:* This information collection consists of assigning M-numbers to companies involved in the manufacturing, reconditioning, repairing, or testing of DOT specification containers or cylinders used for transporting hazardous materials.

(4) *RIN Approval for Cylinders (International Shipments):* This information collection consists of an application that RIN holders can submit under § 107.805(f)(2), which includes required information and certifications related to the inspection and requalification of certain cylinder specifications.

(5) *Competent Authority Approvals:* This information collection consists of additional approval and classification requirements for transporting certain hazardous materials, such as tear gas devices and certain organic peroxides. Tear gas devices require additional approval for transport in closed environments, while certain organic peroxides require special refrigeration and PHMSA approval to prevent self-accelerated decomposition.

(6) *Lithium Battery State of Charge Approval:* This information collection consists of an approval process that allows for the transportation of lithium-ion cells and batteries on cargo aircraft with a state of charge exceeding 30 percent of their rated capacity. This is in contrast to the general requirement that such transportation must occur with a state of charge not exceeding 30 percent of their rated capacity.

(7) *Alternative Packagings or Test Methods:* This information collection consists of an approval process that allows a person to offer a hazardous material in transportation with alternative packaging or test methods, which are not currently authorized in the HMR. The approvals provide flexibility to the industry by allowing packagings that are not constructed as per the HMR and permitting specific testing, test methods, and intervals.

(8) *Infectious Substances:* This information collection consists of a requirement to obtain approval for the transportation of live animals containing or contaminated with genetically modified micro-organisms, including those that also meet the Division 6.2 material definition, to comply with approved terms and conditions set by the Associate Administrator for Hazardous Materials Safety.

(9) *Testing and Assignment of the Classification of Explosive Materials:* This information collection consists of an approval process for the testing and assignment of hazard classifications for the transportation of explosives and explosive devices, including fireworks, which pose significant technical difficulties and hazards. Proper hazard classification is crucial for the safe packaging and handling of these materials during transportation via all modes, as an incorrect classification could result in improper packaging or

handling and cause damage to property, loss of life, or both.

(10) *Packaging Exception/Exceptions for Division 1.4G Consumer Fireworks:* This information collection consists of an application process for manufacturers of consumer fireworks to obtain approval and classification of their products. The process requires the submission of a complete application containing all relevant information, test results, and certifications.

The following is a list of the information collections and burden estimates associated with this OMB Control Number:

Information collection	Respondents	Total annual responses	Hours per response	Total annual burden hours
Designated approval agencies, independent cylinder testing agencies, and prospective foreign manufacturers of cylinders	15	15	4.75	71
Approval of Cylinder and Pressure Receptacle Requalifiers	3,000	3,000	1.105	3,315
M Numbers (New Application)	30	30	4.75	143
M Numbers (Modifications/Renewals)	150	150	1	150
RIN Approval for Cylinders (International Shipments)	3,500	3,500	0.852	2,982
Competent Authority Approvals—Safety Determinations as to the Adequacy of the Packagings for Materials with Special Hazards (New Applications)	50	250	4.75	1,188
Competent Authority Approvals—Safety Determinations as to the Adequacy of the Packagings for Materials with Special Hazards—(Renewals/Modifications/Corrections)	120	480	1	480
Lithium Battery State of Charge Approval	10	10	40	400
Alternative Packagings or Test Methods	24	24	4.75	114
Infectious Substances	5	5	4.75	24
Testing and Assignment of the Classification of Explosive Materials—New Applications	330	330	4.75	1,568
Testing and Assignment of the Classification of Explosive Materials—Modifications	700	700	1	700
Packaging Exception/Exceptions for Division 1.4G Consumer Fireworks	3,200	6,400	4.75	30,400

Affected Public: Business and other entities who must meet the approval requirements in the HMR.

Annual Reporting and Recordkeeping Burden:

Total Number of Respondents: 11,134.

Total Annual Responses: 14,894.

Total Annual Burden Hours: 41,535.

Frequency of Collection: On occasion.

Title: Rail Carrier and Tank Car Tanks Requirements, Rail Tank Car Tanks—Transportation of Hazardous Materials by Rail.

OMB Control Number: 2137–0559.

Summary: This information collection consolidates and describes the information provisions in parts 172, 173, 174, 179, and 180 of the HMR pertaining to the transportation of hazardous materials by rail and the manufacture, qualification, maintenance, and use of tank cars. The types of information collected include:

(1) *Tank Car Approvals:* This information collection consists of special provisions that mandate the approval of the Associate Administrator or the Association of American Railroads (AAR) Committee on Tank Cars before certain hazardous material packaging or packaging components can be used for transportation of hazardous materials by rail.

(2) *AAR approval required when a tank car is proposed for commodity service other than specified on a certificate of construction:* This information collection consists of requirements for obtaining AAR Tank Car Committee approval for the use of a tank car for commodities other than those specified in part 173 and the certificate of construction. It also includes requirements for AAR approval of tank car design, materials, construction, conversion, alteration, or construction to a new specification. This information is used to ensure that tank cars are suitable for transporting specific commodities and that tank car design, construction, and modification comply with the relevant regulations.

(3) *Annual tank car owner progress report to FRA:* This information collection consists of the requirement for tank car owners to submit progress reports to the Federal Railroad Administration (FRA) if their tank cars need to be modified to meet the requirements specified in § 173.31. The FRA uses this information to track progress and ensure that all affected tank cars are modified before the regulatory compliance date.

(4) *Compressed Gases and Cryogenic Liquids in Tank Cars and Multi Unit Tank Cars Reporting:* This information collection requires the shipper to notify the FRA whenever a tank car transporting hydrogen chloride, refrigerated liquids, or vinyl fluoride, stabilized is not received by the consignee within 20 days from the date of shipment.

(5) *Reporting to the Bureau of Explosives regarding any restrictions over any portion of its lines:* This information collection requires each rail carrier to report to the Bureau of Explosives (BOE), for publication, all information as to any restrictions which it imposes against the acceptance, delivery, or transportation of any hazardous materials, over any portion of its lines.

(6) *Nonconforming bulk packages must be repaired or approved from movement by the FRA:* This information collection requires that a bulk packaging, such as a tank car tank, that no longer conforms to applicable HMR requirements may not be forwarded by rail unless repaired or approved for movement by the Associate Administrator for Safety, FRA. Notification and approval must be furnished in writing or through telephonic or electronic means, with subsequent written confirmation provided within two weeks.

(7) *FRA Approval for transportation of bulk packages containing a hazardous material in COFC or TOFC service:* This information collection requires that the Associate Administrator for Safety, FRA approve the transportation of bulk packages, such as portable tanks and cargo tanks, containing a hazardous material in container-on-flatcar (COFC) or trailer-on-flatcar (TOFC) service if not otherwise authorized for transportation.

(8) *Division 1.1 or 1.2 explosive material inspection and Car Certificate requirements:* This information collection requires that before a Division 1.1 or 1.2 explosive materials may be loaded into a rail car, the car must have

been inspected and certified to be in compliance with the requirements of § 174.104(b) by a qualified person designated under 49 CFR 215.11.

(9) *Initial marking, requalification marking, and requalification reporting requirements:* This information collection consist of the requirements for the detail marking of a newly manufactured tank car, requalification tank car marking requirements, and reporting of details for a requalified tank car.

(10) *Quality Assurance Program:* This information collection requires facilities that build, repair, and ensure the structural integrity of tank cars are required to develop and implement a quality assurance program. This information is used by the facility and DOT compliance personnel to ensure that each tank car is constructed or repaired in accordance with the applicable requirements.

The following is a list of the information collections and burden estimates associated with this OMB Control Number:

Information collection	Respondents	Total annual responses	Hours per response	Total annual burden hours
Tank Car Approvals	2	2	6.5	13
AAR approval required when a tank car is proposed for commodity service other than specified on a certificate of construction	25	1200	0.167	200
Annual tank car owner progress report to FRA	100	100	1	100
Compressed Gases and Cryogenic Liquids in Tank Cars and Multi Unit Tank Cars Reporting	6	141	0.25	35
Reporting to the Bureau of Explosives regarding any restrictions over any portion of its lines	34	51	0.333	17
Nonconforming bulk packages must be repaired or approved from movement by the FRA	388	4,308	0.4	1,695
FRA Approval for transportation of bulk packages containing a hazardous material in COFC or TOFC service	6	6	0.5	3
Division 1.1 or 1.2 explosive material inspection and Car Certificate requirements	25	600	0.333	200
Record when a car seal is changed when the car is placarded with Division 1.1 or 1.2 explosive materials	34	170	0.166	28
Initial marking, requalification marking, and requalification reporting requirements	100	15,000	0.116	1,768
Quality assurance program	75	75	5.5	413

Affected Public: Manufacturers, owners, and rail carriers of tank.

Annual Reporting and Recordkeeping Burden:

Total Number of Respondents: 795.

Total Annual Responses: 21,653.

Total Annual Burden Hours: 4,472.

Frequency of Collection: Annually.

Title: Testing Requirements for Non-Bulk Packaging.

OMB Control Number: 2137–0572.

Summary: These OMB control number describes the information collections in parts 173 and 180 of the HMR pertaining to the testing requirements for non-bulk packagings. This OMB control number covers performance-oriented packaging standards and allows packaging manufacturers and shippers more flexibility in selecting more economical packagings for their products. These information collections also allow customizing the design of packagings to better suit the transportation environment that they will encounter and encourages technological innovations, decreases packaging costs, and significantly reduces the need for special permits. These information collections specifically include:

(1) *Testing Requirements for Non-Bulk Packaging (Reporting):* This information collection consists of various testing requirements that must be met by non-bulk packaging, depending on the type of material it will contain. These include thermal resistance tests for packaging transporting oxygen cylinders, leakproofness tests for liquid hazardous materials, hydrostatic pressure tests for metal, plastic, and composite containers, cooperage tests for bung-type wooden barrels, and additional testing for packaging intended to contain infectious substances. The specific tests required may vary based on the outer and inner packaging material used.

(2) *Additional Test Reports (Reporting):* This information collection consists of the requirement to prepare and maintain a test report after each design qualification test or periodic retest of a packaging. The test report must be available to the user of the packaging or a representative of the DOT upon request and includes details such as the date, name, and address of the testing facility, packaging design type, maximum capacity, characteristics of test contents, and test descriptions and results.

(3) *Test Reports (Recordkeeping):* This information collection requires that test report must be made available to a user of a packaging or a representative of the DOT, upon request. The test report includes information such as the date, name, and address of the testing facility, a description of the packaging design type, the maximum capacity, characteristics of test contents, and test descriptions and results.

(4) *Closure Instructions (Reporting):* This information collection consists of the requirement for the manufacturer or certifier of non-bulk packaging to create closure instructions in accordance with § 178.2(c). These instructions indicate the means of closure with which the package was tested and ensure that any subsequent shipper maintains the same level of safety when the package is closed for transportation of hazardous materials.

(5) *Closure Instructions (Recordkeeping):* This information collection requires that the manufacturer or other person certifying compliance, along each subsequent distributor of the packaging, provide closure instructions to each person to whom the packaging is transferred, as well as any representative of the DOT, for inspection.

The following is a list of the information collections and burden estimates associated with this OMB Control Number:

Information collection	Respondents	Total annual responses	Hours per response	Total annual burden hours
Testing Requirements for Non-Bulk Packaging—Reporting	5,000	15,000	2.016	30,250
Additional Test Reports—Reporting	10	30	2	60
Test Reports—Recordkeeping	100	1,000	0.1	100
Closure Instructions—Reporting	500	500	2	1,000
Closure Instructions—Recordkeeping	16,080	16,080	0.083	1,340

Affected Public: Each non-bulk packaging manufacturer that tests packagings to ensure compliance with the HMR.

Annual Reporting and Recordkeeping Burden:

Total Number of Respondents: 21,690.

Total Annual Responses: 32,610.

Total Annual Burden Hours: 32,750.

Frequency of Collection: On occasion.

Title: Hazardous Materials Public Sector Training and Planning Grants.

OMB Control Number: 2137–0586.

Summary: This OMB control number describes the information collections in parts 110 of the HMR pertaining to the procedures for reimbursable grants for public sector planning and training in support of the emergency planning and training efforts of States, Indian tribes, and local communities to manage hazardous materials emergencies, particularly those involving transportation. Sections in this part address information collection and recordkeeping with regard to applying for grants, monitoring expenditures, and reporting and requesting modifications.

The following is a list of the information collections and burden estimates associated with this OMB Control Number:

Information collection	Respondents	Total annual responses	Hours per response	Total annual burden hours
Hazardous Materials Grants Applications	62	62	83.26	5,162

Affected Public: State and local governments, Indian Tribes.

Annual Reporting and Recordkeeping Burden:

Total Annual Respondents: 62.

Annual Responses: 62.

Annual Burden Hours: 5,162.

Frequency of Collection: On occasion.

Issued in Washington, DC, on August 23, 2023.

T. Glenn Foster,

Chief, Regulatory Review and Reinvention Branch, Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2023–18617 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST– 2023–0069]

Privacy Act of 1974; System of Records

AGENCY: Office of the Departmental Chief Information Officer, Office of the Secretary of Transportation, DOT.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the United States Department of Transportation proposes to rename, update and reissue a Department of Transportation (DOT) system of records notice titled, ''Department of Transportation, Federal Aviation Administration; DOT/FAA 854 Small Unmanned Aircraft Systems (sUAS) Waivers and Authorizations.'' The name of the SORN will be changed to ''Unmanned Aircraft System (UAS) Waivers and Authorizations''. The modification of the system of records notice (hereafter referred to as ''Notice'') allows the Federal Aviation Administration (FAA) to collect and maintain records on individuals operating small unmanned aircraft systems (hereinafter ''sUAS'') who request and receive authorizations to fly their sUAS in controlled airspace or waivers to fly their sUAS outside of the requirements of the Code of Federal Regulations (CFR) and to review and approve Certificate of Waiver or Authorizations (COA) applications.

DATES: Submit comments on or before September 28, 2023. The Department may publish an amended Systems of Records Notice (hereafter ''Notice'') in light of any comments received. This modified system will be effective immediately and the modified routine uses will be effective September 28, 2023.

ADDRESSES: You may submit comments, identified by docket number DOT–OST–2023–0069 by any of the following methods:

- *Federal e-Rulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

Instructions: You must include the agency name and docket number DOT–OST–2023–0069. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: For questions, please contact: Karyn Gorman, Departmental Chief Privacy Officer, Privacy Office, Department of Transportation, Washington, DC 20590; *privacy@dot.gov;* or 202–366–3140.

SUPPLEMENTARY INFORMATION:

Notice Update

This Notice update includes substantive changes to the following sections: system name, system location, system manager, authority, purpose, routine uses, policies and practices for retrieval of records, and policies and practices for retention and disposal of records.

Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Transportation (DOT)/Federal Aviation Administration (FAA) proposes to rename, update and reissue a DOT system of records titled, ''DOT/FAA 854, Small Unmanned Aircraft Systems (sUAS) Waivers and Authorizations.'' This update results from the FAA Reauthorization Act of 2018, Public Law 115–254 section 44807, *Special Rules for Certain Unmanned Aircraft Systems,* which directs the FAA to integrate unmanned aircraft systems (UAS) safely into the National Airspace System (NAS). Individuals operating UAS civil aircraft under 14 CFR part 91, which meet the requirements established in 49 U.S.C. 44807, can request and receive a special airworthiness certificate, restricted category aircraft (21.25), Type Certificate, or a Section 44807 exemption with Certificate of Waiver or Authorization. The FAA issues a Certificate of Waiver or Authorization (COA) that permits persons, public agencies, organizations, and commercial entities to operate unmanned aircraft, for a particular purpose, in a particular area of the NAS as an exception to FAA Regulations. Consequently, this update expands the Notice's scope to cover individuals operating UAS under the provisions of 14 CFR part 91. The previous version of this Notice only applied to persons flying sUAS under the provisions of 14 CFR part 107 or flying sUAS in limited recreational operations pursuant to 49 U.S.C. 44809(a).

Under current law, persons flying sUAS under the provisions of 14 CFR part 107 or flying sUAS in limited recreational operations pursuant to 49 U.S.C. 44809(a) may not operate sUAS in Class B, Class C, or Class D airspace or within the lateral boundaries of the surface area of Class E airspace designated for an airport unless the person has received authorization to operate from the FAA. sUAS operators under 14 CFR part 107, who are also referred to as remote pilots in command, may request waivers of airspace and operational rules applicable to sUAS requirements under 14 CFR part 107.

The FAA uses two systems to process the waiver and airspace authorization requests subject to this notice. The first is a web-based system where sUAS operators who seek a waiver or an authorization may request one by electronically completing a form on the FAA website.[1] The FAA reviews the information the applicant provides and determines whether it can ensure safety in the national airspace when granting the waiver or authorization. Often, such grants will include provisions to which the requestor must adhere, to mitigate the risk associated with the waiver or authorization.

sUAS operators may also request authorization through third parties qualified to offer services by the FAA under the Low Altitude Authorization and Notification Capability (hereinafter ''LAANC''). These third parties, called UAS Service Suppliers (hereinafter ''USS''), enter into agreements with the FAA to automate and expedite the process by which sUAS operators receive authorization from the FAA to fly in the aforementioned airspace. The USS develop applications that enable sUAS operators to submit requests for authorization to the FAA where the requests are evaluated against predetermined criteria contained in LAANC. This enables sUAS operators to quickly and efficiently obtain authorizations to operate in Class B, C, D and within the lateral boundaries of surface area E designated for an airport. The number of USS available to the public, and the locations where LAANC is available, are updated on the FAA website located at *https://www.faa.gov/uas/programs_partnerships/data_exchange/.*

Additionally, under current law, persons flying UAS under the provisions of 14 CFR part 91 that cannot comply with all regulatory requirements may not operate UAS in the NAS unless the person has received authorization to operate from the FAA. UAS operators may request a COA under 14 CFR part 91 using web-based systems or they can use a PDF version of the Form 7711–2. The COA is issued by the FAA to a UAS operator for a specific unmanned aircraft (UA) activity.

The FAA uses a web-based application to process the COA. After the submission of a COA application, the FAA conducts a comprehensive operational and technical review. Additionally, the applicant can also apply for the COA using a PDF version of the Form 7711–2, Application for Certificate of Waiver or Authorization.[2] If necessary, provisions or limitations may be imposed as part of the approval to ensure the UAS can operate safely with other airspace users. In most cases, the FAA will provide a formal response within 60 business days from the time of submission.

Specifically, FAA is updating this Notice to make the following substantive changes:

1. The Notice title is being changed to Unmanned Aircraft System (UAS) Waivers and Authorizations, since the scope of the records has expanded to include individuals operating UAS under the provisions of 14 CFR part 91.

2. The system location is being updated to include and update the location of all systems covered by this Notice.

3. The system manager is being updated to include the system managers and contact information for all systems covered by this Notice.

4. The purpose is being updated to include an explanation that the system that will be used to facilitate review and approval of COA applications submitted under 14 CFR part 91 for all classes of airspace and ensure the operator is able to operate in a safe manner. The purpose is also being updated to clarify that the system will also be used to assist other government agencies in investigating or prosecuting violations or potential violations of law. UAS operators who operate their UAS in certain airspace without the proper authorization or waiver may be subject to a variety of civil, criminal, or regulatory penalties depending on the circumstances. Therefore, it is critical for law enforcement to understand whether a UAS flying in certain airspace has sought and received an authorization or waiver from the FAA if there is an indication of a violation of law.

5. The authority for maintenance of the system is being updated to remove § 333, Special Rules for Certain Unmanned Aircraft Systems, which has been repealed, and add its replacement, 49 U.S.C. 44807 *Special Rules for Certain Unmanned Aircraft Systems.* This section is also being updated to include 14 CFR part 91, ''General Operating and Flight Rules'', since the scope of this Notice is being expanded to include COA operations under these authorities.

6. The routine use section is being updated to add the following new system specific routine use: Disclosure of information to government agencies, whether Federal, State, Tribal, local or

[1] OMB Numbers 2120–0768, 2120–0776, and 2120–0796.

[2] OMB Number 2120–0027.

foreign, information necessary or relevant to an investigation of a violation or potential violation of law, whether civil, criminal, or regulatory, that the agency is charged with investigating or enforcing; as well as to government agencies responsible for threat detection in connection with critical infrastructure protection. This use is compatible with the purpose of this system as this system is intended to ensure that sUAS operators are operating their sUAS in accordance with the requirements of 14 CFR part 107 and 49 U.S.C. 44809 and to ensure that UAS operators are operating their UAS in accordance with the requirements of 14 CFR part 91. In addition, this routine use is compatible with the system's oversight purpose and its purpose for assisting other government agencies investigate or prosecute violations or potential violations of law.

7. The retrieval section is being updated to include that records can be retrieved by a unique generated number (including, but not limited to, application number and COA number).

8. The records retention and disposal section is being updated to include the retention schedule for airspace authorization records maintained by LAANC. The records were previously maintained indefinitely until the FAA's records schedule was approved by the National Archives and Records Administration (NARA). NARA has since approved the FAA's schedule, DAA–0237–2019–0011, and therefore LAANC records will be destroyed three years after authorization is revoked or canceled. This notice also adds NARA retention schedule DAA–0237–2023–0004 for COA Applications (COA Application Processing System [CAPS] and COA Application in DroneZone [CADZ]). The retention schedule is with NARA for approval and the FAA is proposing to retain the records for three years after authorization is revoked or canceled. FAA will maintain the records indefinitely until NARA has approved the schedule.

A. Description of Records

The FAA's regulations at 14 CFR part 107 governing operation of sUAS permits operators to apply for certificates of waiver to allow a sUAS operation to deviate from certain provisions of 14 CFR part 107, if the FAA Administrator finds the operator can safely conduct the proposed operation under the terms of a certificate of waiver. Operators flying under 14 CFR part 107 or flying limited recreational operations under 49 U.S.C. 44809(a) may request authorization to enter controlled airspace (Class B, Class C, or Class D airspace, or within the lateral boundaries of the surface area of Class E airspace designated for an airport). The FAA assesses requests for waivers on a case-specific basis that considers the proposed sUAS operation, the unique operating environment, and the safety mitigations provided by that operating environment. Accordingly, this Notice covers documents relevant to both waivers of certain provisions of 14 CFR part 107 as well as authorizations to fly in controlled airspace.

Additionally, the FAA's regulations governing operations under 14 CFR part 91 permit operators to apply for a COA to allow a UAS operation to deviate from certain provisions of 14 CFR part 91 if the FAA Administrator finds the operator can safely conduct the proposed operation under the terms of a COA. Operators flying under 14 CFR part 91 may request authorization to operate in the NAS. The FAA assesses requests for waivers on a case-specific basis that considers the proposed UAS operation, the unique operating environment, and the safety mitigations provided by that operating environment. Accordingly, this Notice covers documents relevant to both waivers and authorizations of certain provisions of 14 CFR part 91.

At times, operators requesting waivers and authorizations under the regulations described above are companies or other non-person entities, rather than individuals. Because the Privacy Act applies only to individuals, this Notice applies only to waiver and authorization records where the owner or operator requesting the waiver is an individual, and does not apply to records pertaining to non-person entities.

1. Waivers

To obtain a certificate of waiver, an applicant must submit a request containing a complete description of the proposed operation and a justification, including supporting data and documentation as necessary, to establish the proposed operation can be conducted safely under the terms of the requested certificate of waiver. The FAA expects that the time and effort the operator will put into the analysis and data collection for the waiver application will be proportional to the specific relief requested. The FAA will analyze all requests for a certificate of waiver and will provide responses as timely as possible with more complex waivers requiring more time than less complex ones. If a certificate of waiver is granted, that certificate may include additional conditions and limitations designed to ensure that the sUAS operation can be conducted safely. While all decisions are made against the same criteria, decisions are made on a situation specific basis.

For airspace authorization requests to operate a sUAS in Class B, information collected relevant to waivers includes: name of person requesting the waiver; contact information for person applying for the waiver (telephone number, mailing address, and email address); remote pilot in command name; remote pilot in command airmen certification number and rating; remote pilot in command' contact information; aircraft registration number; aircraft manufacturer name and model; submission reference code; regulations subject to waiver; requested date and time operations will commence and conclude under the waiver; flight path information, including but not limited to altitude and coordinates; safety justification; and description of proposed operations.

2. Airspace Authorizations

For Class C, Class D or within the lateral boundaries of the surface area of Class E airspace designated for an airport, a remote pilot in command may seek either automatic approval or a request for further coordination from the FAA. Automatic approvals are completed by checking against pre-determined FAA-approved altitude values and locations within the aforementioned airspace. Requests sent through the FAA website are manually checked against the pre-determined values to either approve or deny the request. As this method requires manual approval and is not scalable to the increasing numbers of requests for authorization, the time for the sUAS operator to receive a response is variable.

Requests sent through the LAANC are approved or denied via an automated process and operators receive near real time notice of either an approval or denial of the authorization request. ''Requests for further coordination'' are needed for those authorization requests for operations that are within the aforementioned airspace, under 400 feet of altitude, and for a location and altitude that has not been pre-determined by the FAA to be safe without further consideration. These requests for further coordination are sent via either the FAA website or through LAANC for 14 CFR part 107 operations and routed for approval or denial to the local Air Traffic Control (ATC) facility where the requested operation would take place, to make an

approval decision. The ATC facility has the authority to approve or deny aircraft operations based on traffic density, controller workload, communications issues, or any other types of operational issues that could potentially impact the safe and efficient flow of air traffic in that airspace. If necessary to approve a sUAS operation, ATC may require mitigations such as altitude constraints and direct communication. ATC may deny requests that pose an unacceptable risk to the NAS and cannot be mitigated.

Information collected relevant to airspace authorizations requested using the non-automated method includes: aircraft operator name; aircraft owner name; name of person requesting the authorization; contact information for the person applying for the authorization; remote pilot in command name; remote pilot in command contact information; remote pilot in command certificate number; aircraft manufacturer name and model; aircraft registration number; requested date and time operations will commence and conclude; requested altitude applicable to the authorization; and description of proposed operations.

Information collected relevant to airspace authorizations requested using the automated method LAANC includes: name of pilot in command; contact telephone number of remote pilot in command; start date, time, and duration of operation; maximum altitude; geometry; airspace class(es); submission reference code; safety justification for requests for further coordination non-auto-authorized operation; and aircraft registration number.

3. Certificate of Waiver or Authorization Associated With Part 91 Civil UAS Operation

To obtain a certificate of waiver or authorization an applicant completes the FAA Form 7711–2. An applicant can submit a PDF form 7711–2 to *9-AJV-115-UASOrganization@faa.gov* or apply online. The legacy system Certificate of Authorization Application Processing System (CAPS) is currently used for processing of these applications; however, this will eventually be replaced by the Certificate of Authorization (COA) Application in the DroneZone (CADZ) system, which is currently in development. The Application for Certificate of Waiver or Authorization collects the name, address, email address and phone number from the applicant, along with details of the operation needed to evaluate the application. Once the applicant submits the application, the application system (CAPS/CADZ) will automatically generate a unique numerical draft number used to track the application. The applicant must acknowledge several statements called declarations. The declarations section requires Yes or No responses from the applicant that certify or declare their type of operation and associated authorization. CAPS/CADZ also collects information about the requested operation, flight operations area/plan, UAS specifications, and any flight crew qualifications. The application is submitted to a Processor for their review and to ensure the appropriate information is provided to evaluate the application including any attachments that may be needed.

Once the application is submitted, a COA Processor will work with the applicant to clarify or correct inconsistencies in the application. The COA Processor will have the ability to return the application to the applicant for further refinement or submit it to the next reviewer (Air Traffic Control Specialists or Aviation Safety Inspector). This review process is repeated until all necessary parties have approved the application or it is determined that it cannot be approved. Once the COA is granted and the COA becomes active, a signed PDF copy of the COA is sent to the applicant. If disapproved, the COA processor sends a disapproval letter stating the reason for the disapproval.

Privacy Act

The Privacy Act (5 U.S.C. 552a) governs the means by which the Federal Government collects, maintains, and uses personally identifiable information (PII) in a System of Records. A ''System of Records'' is a group of any records under the control of a Federal agency from which information about individuals is retrieved by name or other personal identifier. The Privacy Act requires each agency to publish in the **Federal Register** a System of Records Notice (SORN) identifying and describing each System of Records the agency maintains, including the purposes for which the agency uses PII in the system, the routine uses for which the agency discloses such information outside the agency, and how individuals to whom a Privacy Act record pertains can exercise their rights under the Privacy Act (*e.g.,* to determine if the system contains information about them and to contest inaccurate information). In accordance with 5 U.S.C. 552a(r), DOT has provided a report of this system of records to the Office of Management and Budget and to Congress.

SYSTEM NAME AND NUMBER:

Department of Transportation, Federal Aviation Administration, DOT/FAA—854 Unmanned Aircraft Systems (UAS) Waivers and Authorizations.

SECURITY CLASSIFICATION:

Unclassified

SYSTEM LOCATION:

1. COA Application Processing System (CAPS): [3] Enterprise Data Center (EDC) located within the AIT Network at the Mike Monroney Aeronautical Center (MMAC), Oklahoma City, OK.

2. Low Altitude Authorization and Notification Capability (LAANC) and Part 107 Authorization and Waivers: Amazon Web Services (AWS) US-West and Oregon Region of the AWS East/West Public Cloud.

SYSTEM MANAGER(S) AND ADDRESS:

1. COA Application Processing System (CAPS): [4] Manager, UAS Policy Team (AJV–P22), Air Traffic Organization, Federal Aviation Administration, 600 Independence Avenue SW—Suite #5E21TS Washington, DC 20591 (Wilbur Wright Federal Building—FOB 10B). Contact information is mailbox: *9-AJV-115-UASOrganization@faa.gov.*

2. Low Altitude Authorization and Notification Capability and Part 107 Authorization and Waivers: Manager, Amazon Web Services US East/West Public Cloud. Contact information for system manager is *UAShelp@faa.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

49 U.S.C. 106(g), Duties and powers of Administrator; 49 U.S.C. 40101, Policy; 49 U.S.C. 40103, Sovereignty and use of airspace; 49 U.S.C. 40106, Emergency powers; 49 U.S.C. 40113, Administrative; 49 U.S.C. 44701, General requirements; FAA Modernization and Reform Act of 2012, Public Law 112–95 (''FMRA''); 14 CFR part 91, ''General Operating and Flight Rules''; 14 CFR part 107, subpart D, ''Waivers''; 14 CFR 107.41, ''Operation in certain airspace''; and 49 U.S.C. 44807 and 44809(a).

PURPOSE(S):

The purpose of this system is to receive, evaluate, and respond to requests for authorization to operate a sUAS in Class B, C or D airspace or within the lateral boundaries of the surface area of Class E airspace

[3] CAPS will be replaced by CADZ and the system will be located at Amazon Web Services (AWS) US-West and Oregon Region of the AWS East/West Public Cloud.

[4] CAPS will be replaced by CADZ and the system manager will be the same as LAANC and Part 107 Waivers.

designated for an airport, and evaluate requests for a certificate of waiver to deviate safely from one or more sUAS operational requirements specified in 14 CFR part 107. The system will also be used to facilitate FAA's review and approval of COA applications submitted under 14 CFR part 91 for all classes of airspace and ensure the operator is able to operate in a safe manner. The FAA also will use this system to support FAA safety programs and agency management, including safety studies and assessments. The FAA may use contact information provided with requests for waivers or authorizations to provide owners and operators' information about potential unsafe conditions and educate owners and operators regarding safety requirements for operation. The FAA will also use this system to maintain oversight of FAA issued waivers and authorizations, and records from this system may be used by FAA for enforcement purposes. The FAA will use this system to assist other government agencies with investigating or prosecuting violations or potential violations of law.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Aircraft operators, aircraft owners, and persons requesting a waiver or authorization.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name; contact information to include: mailing address, telephone number, and email address; responses to inquiries concerning the applicant's previous and current waivers; certificate number; aircraft manufacturer name and model; aircraft registration number; unique generated number (including, but not limited to, application number and COA number); regulations subject to waiver or authorization; requested date and time operations will commence and conclude under waiver or authorization; flight path information, including but not limited to the requested altitude and coordinates of the applicable waiver or authorization; description of proposed operations; specifications; geometry (center point with radius or Geo/JSON polygon); airspace class(es); submission reference code; safety justification for non-auto-authorized operations.

RECORD SOURCE CATEGORIES:

Records are obtained from aircraft operators, aircraft owners, persons requesting a waiver or authorization, manufacturers of aircraft, maintenance inspectors, mechanics, and FAA officials. Records are also obtained on behalf of individuals through USS.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to other disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DOT as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

System Specific Routine Uses:

1. To the public, waiver applications and decisions, including any history of previous, pending, existing, or denied requests for waivers applicable to the sUAS at issue for purposes of the waiver, and special provisions applicable to the sUAS operation that is the subject of the request. Email addresses and telephone numbers will not be disclosed pursuant to this Routine Use. Airspace authorizations the FAA issues also will not be disclosed pursuant to this Routine Use, except to the extent that an airspace authorization is listed or summarized in the terms of a waiver.

2. To law enforcement, when necessary and relevant to a FAA enforcement activity.

3. To the National Transportation Safety Board (NTSB) in connection with its investigation responsibilities.

4. To government agencies, whether Federal, State, Tribal, local or foreign, information necessary or relevant to an investigation of a violation or potential violation of law, whether civil, criminal, or regulatory, that the agency is charged with investigating or enforcing; as well as, to government agencies responsible for threat detection in connection with critical infrastructure protection.

Departmental Routine Uses:

5. In the event that a system of records maintained by DOT to carry out its functions indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether Federal, State, local or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto.

6. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to a DOT decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit.

7. A record from this system of records may be disclosed, as a routine use, to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

8a. Routine Use for Disclosure for Use in Litigation. It shall be a routine use of the records in this system of records to disclose them to the Department of Justice or other Federal agency conducting litigation when (a) DOT, or any agency thereof, or (b) Any employee of DOT or any agency thereof (including a member of the Coast Guard), in his/her official capacity, or (c) Any employee of DOT or any agency thereof (including a member of the Coast Guard), in his/her individual capacity where the Department of Justice has agreed to represent the employee, or (d) The United States or any agency thereof, where DOT determines that litigation is likely to affect the United States, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or other Federal agency conducting the litigation is deemed by DOT to be relevant and necessary in the litigation, provided, however, that in each case, DOT determines that disclosure of the records in the litigation is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

8b. Routine Use for Agency Disclosure in Other Proceedings. It shall be a routine use of records in this system to disclose them in proceedings before any court or adjudicative or administrative body before which DOT or any agency thereof, appears, when (a) DOT, or any agency thereof, or (b) Any employee of DOT or any agency thereof in his/her official capacity, or (c) Any employee of DOT or any agency thereof in his/her individual capacity where DOT has agreed to represent the employee, or (d) The United States or any agency thereof, where DOT determines that the proceeding is likely to affect the United States, is a party to the proceeding or has an interest in such proceeding, and DOT determines that use of such records is relevant and necessary in the proceeding, provided, however, that in

each case, DOT determines that disclosure of the records in the proceeding is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

9. The information contained in this system of records will be disclosed to the Office of Management and Budget, OMB in connection with the review of private relief legislation as set forth in OMB Circular No. A–19 at any stage of the legislative coordination and clearance process as set forth in that Circular.

10. Disclosure may be made to a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual. In such cases, however, the Congressional office does not have greater rights to records than the individual. Thus, the disclosure may be withheld from delivery to the individual where the file contains investigative or actual information or other materials which are being used, or are expected to be used, to support prosecution or fines against the individual for alleged violations of a statute, or of regulations of the Department based on statutory authority. No such limitations apply to records requested for Congressional oversight or legislative purposes; release is authorized under 49 CFR 10.35(9).

11. One or more records from a system of records may be disclosed routinely to the National Archives and Records Administration in records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

12. Routine Use for disclosure to the Coast Guard and to Transportation Security Administration. A record from this system of records may be disclosed as a routine use to the Coast Guard and to the Transportation Security Administration if information from this system was shared with either agency when that agency was a component of the Department of Transportation before its transfer to the Department of Homeland Security and such disclosure is necessary to accomplish a DOT, TSA or Coast Guard function related to this system of records.

13. DOT may make available to another agency or instrumentality of any government jurisdiction, including State and local governments, listings of names from any system of records in DOT for use in law enforcement activities, either civil or criminal, or to expose fraudulent claims, regardless of the stated purpose for the collection of the information in the system of records. These enforcement activities are generally referred to as matching programs because two lists of names are checked for match using automated assistance. This routine use is advisory in nature and does not offer unrestricted access to systems of records for such law enforcement and related antifraud activities. Each request will be considered on the basis of its purpose, merits, cost effectiveness and alternatives using Instructions on reporting computer matching programs to the Office of Management and Budget, OMB, Congress, and the public, published by the Director, OMB, dated September 20, 1989.

14. It shall be a routine use of the information in any DOT system of records to provide to the Attorney General of the United States, or his/her designee, information indicating that a person meets any of the disqualifications for receipt, possession, shipment, or transport of a firearm under the Brady Handgun Violence Prevention Act. In case of a dispute concerning the validity of the information provided by DOT to the Attorney General, or his/her designee, it shall be a routine use of the information in any DOT system of records to make any disclosures of such information to the National Background Information Check System, established by the Brady Handgun Violence Prevention Act, as may be necessary to resolve such dispute.

15a. To appropriate agencies, entities, and persons when (1) DOT suspects or has confirmed that there has been a breach of the system of records; (2) DOT has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DOT (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DOT's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

15b. To another Federal agency or Federal entity, when DOT determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

15. DOT may disclose records from this system, as a routine use, to the Office of Government Information Services for the purpose of (a) resolving disputes between FOIA requesters and Federal agencies and (b) reviewing agencies' policies, procedures, and compliance in order to recommend policy changes to Congress and the President.

16. DOT may disclose records from this system, as a routine use, to contractors and their agents, experts, consultants, and others performing or working on a contract, service, cooperative agreement, or other assignment for DOT, when necessary to accomplish an agency function related to this system of records.

17. DOT may disclose records from this system, as a routine use, to an agency, organization, or individual for the purpose of performing audit or oversight operations related to this system of records, but only such records as are necessary and relevant to the audit or oversight activity. This routine use does not apply to intra-agency sharing authorized under Section (b)(1) of the Privacy Act.

18. DOT may disclose from this system, as a routine use, records consisting of, or relating to, terrorism information (6 U.S.C. 485(a)(5)), homeland security information (6 U.S.C. 482(f)(1)), or Law enforcement information (Guideline 2 Report attached to White House Memorandum, ''Information Sharing Environment, November 22, 2006) to a Federal, State, local, tribal, territorial, foreign government and/or multinational agency, either in response to its request or upon the initiative of the Component, for purposes of sharing such information as is necessary and relevant for the agencies to detect, prevent, disrupt, preempt, and mitigate the effects of terrorist activities against the territory, people, and interests of the United States of America, as contemplated by the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108–458) and Executive Order 13388 (October 25, 2005).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Individual records relevant to both waivers and airspace authorizations are maintained in electronic database systems.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records of applications for waivers and authorizations in the electronic database systems may be retrieved by UAS registration number, unique

generated number (including, but not limited to, application number and COA number), the manufacturer's name and model, the name of the current registered owner and/or organization, the name of the applicant and/or organization that submitted the request for waiver or authorization, the special provisions (if any) to which the FAA and the applicant agreed for purposes of the waiver or authorization, and the location and altitude, class of airspace and area of operations that is the subject of the request.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The FAA will retain LAANC waivers and airspace authorization records in this system of records in accordance with DAA–0237–2019–0011 (which covers anyone who wishes to fly a sUAS under the provisions of § 44809 or part 107). The FAA will destroy the records three years after authorization is revoked or canceled. Records Schedule 0237–2023–0004 for records maintained in CAPS and CADZ is currently pending NARA approval. The FAA is proposing to retain these records for three years after authorization is revoked or canceled. FAA will maintain the records indefinitely until NARA has approved the applicable schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records in this system for waivers and airspace authorizations are safeguarded in accordance with applicable rules and policies, including all applicable DOT automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RECORD ACCESS PROCEDURES:

Individuals seeking notification of whether this system of records contains information about them may contact the System Manager at the address provided in the section ''System manager.'' When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 49 CFR part 10. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

CONTESTING RECORDS PROCEDURE:

See ''Record Access Procedures'' above.

NOTIFICATION PROCEDURE:

See ''Records Access Procedures'' above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

A full notice of this system of records, DOT/FAA854 Requests for Waivers and Authorizations was published in the **Federal Register** on August 2, 2016 (81 FR 5078) and July 8, 2019 (84 FR 52512).

Issued in Washington, DC.

Karyn Gorman,

Departmental Chief Privacy Officer.

[FR Doc. 2023–18289 Filed 8–28–23; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the name of one individual that has been placed on OFAC's Specially Designated Nationals and Blocked Persons 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 this individual are blocked, and U.S. persons are generally prohibited from engaging in transactions with the individual.

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 the Assistant Director for Compliance, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://ofac.treasury.gov/*).

Notice of OFAC Action

On August 23, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following individual are blocked under the relevant sanctions authorities listed below.

Individual

1. SEMENOV, Roman (a.k.a. ''POMA''; a.k.a. ''ROMA''), Dubai, United Arab Emirates; DOB 08 Nov 1987; nationality Russia; Email Address *semenov.roma@gmail.com;* alt. Email Address *semenovroma@gmail.com;* alt. Email Address *semenov.roman@mail.ru;* alt. Email Address *poma@tornado.cash*; Gender Male; Digital Currency Address—ETH 0xdcbEfFBECcE100cCE9E4b153C4e15cB885643193; alt. Digital CurrencyA Address—ETH 0x5f48c2a71b2cc96e3f0ccae4e39318ff0dc375b2;a alt. Digital Currency Address—ETH 0x5a7a51bfb49f190e5a6060a5bc6052ac14a3b59f; alt. Digital Currency Address—ETH 0xed6e0a7e4ac94d976eebfb82ccf777a3c6bad921; alt. Digital Currency Address—ETH 0x797d7ae72ebddcdea2a346c1834e04d1f8df102b; alt. Digital Currency Address—ETH 0x931546D9e66836AbF687d2bc64B30407bAc8C568; alt. Digital Currency Address—ETH 0x43fa21d92141BA9db43052492E0DeEE5aa5f0A93; alt. Digital Currency Address—ETH 0x6be0ae71e6c41f2f9d0d1a3b8d0f75e6f6a0b46e; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Passport 731969851 (Russia) (individual) [DPRK3] [CYBER2].

Designated pursuant to section l(a)(iii)(B) of Executive Order 13694 of April 1, 2015, ''Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities,'' 80 FR 18077, 3 CFR, 2015 Comp., p. 297, as amended by Executive Order 13757 of December 28, 2016, ''Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities,'' 82 FR 1, 3 CFR, 2016 Comp., p. 659 (E.O. 13694, as amended) for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, a person whose property and interests in property are blocked pursuant to E.O. 13694, as amended.

Also designated pursuant to section 2(a)(vii) of Executive Order 13722 of March 15, 2016, ''Blocking Property of the Government of North Korea and the Workers' Party of Korea, and Prohibiting Certain Transactions with Respect to North Korea,'' 81 FR 14943, 3 CFR, 2016 Comp., p. 446

(E.O. 13722), for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the Government of North Korea, a person whose property and interests in property are blocked pursuant to E.O. 13722.

Dated: August 23, 2023.

Bradley T. Smith,

Deputy Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–18600 Filed 8–28–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Art Advisory Panel—Notice of Closed Meeting

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of closed meeting of Art Advisory Panel.

SUMMARY: Closed meeting of the Art Advisory Panel will be held in Washington, DC. The entire meeting will be closed.

DATES: The meeting will begin at 9:30 a.m. eastern time. The meeting will be held September 27, 2023.

ADDRESSES: The closed meeting of the Art Advisory Panel will be held at 1111 Constitution Ave., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Robin B. Lawhorn, 400 West Bay Street, Suite 252, Jacksonville, FL 32202. Telephone (904) 661–3198 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. 1009, that a closed meeting of the Art Advisory Panel will be held at 1111 Constitution Ave., Washington, DC 20224.

The agenda will consist of the review and evaluation of the acceptability of fair market value appraisals of works of art involved in Federal income, estate, or gift tax returns. This will involve the discussion of material in individual tax returns made confidential by the provisions of 26 U.S.C. 6103.

A determination as required by section 10(d) of the Federal Advisory Committee Act has been made that this meeting is concerned with matters listed in sections 552b(c)(3), (4), (6), and (7), of the Government in the Sunshine Act, and that the meeting will not be open to the public.

Andrew J. Keyso Jr.,

Chief, Independent Office of Appeals

[FR Doc. 2023–18611 Filed 8–28–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Bureau of Fiscal Service Information Collection Request

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of the Treasury will submit the following information collection requests 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. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before September 28, 2023 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Bureau of the Fiscal Service (BFS)

Title: TreasuryDirect.

OMB Number: 1530–0071.

Abstract: The information collected in the electronic system is requested to establish a new account and process any associated transactions.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or households.

Estimated Number of Respondents: 3,549,700.

Estimated Time per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 151,070.

Authority: 44 U.S.C. 3501 *et seq.*

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2023–18630 Filed 8–28–23; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0160]

Agency Information Collection Activity Under OMB Review: State Home Programs for Veterans

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: 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. Refer to ''OMB Control No. 2900–0160.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Avenue NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0160'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–3521.

Title: State Home Programs for Veterans (VA Forms 10–5588, 10–5588A, and 10–10SH).

OMB Control Number: 2900–0160.

Type of Review: Revision of a currently approved collection.

Abstract: Authority for this information collection can be found in two public laws affecting State homes: Public Law 115–159, the State Veterans Home Adult Day Health Care

Improvement Act of 2017, which requires VA to pay State Veteran Homes (SVHs) for medical model adult day health care provided to certain eligible Veterans; and Public Law 116–315, section 3007, Waiver of Requirements of Department of Veterans Affairs for Receipt of Per Diem Payments for Domiciliary Care at State Homes and Modification of Eligibility for such Payments. This information collection also enables the payment of per diem to State homes that provide care to eligible Veterans in accordance with title 38, CFR part 51. The intended effect of these provisions is to create a safeguard that Veterans are receiving a high quality of care in SVHs.

To ensure that high quality care is furnished to Veterans, VA requires those facilities providing nursing home care, domiciliary care, and adult day health care programs to Veterans to supply various kinds of information. The information required includes an application and justification for payment; records and reports that facility management must maintain regarding payment activities of residents or participants; and records and reports that facilities management and health care professionals must maintain regarding eligible residents or participants. The following three forms are included in this information collection:

a. *VA Form 10–5588:* State Home Report and Statement of Federal Aid Claimed—38 CFR 51, 52 and title 38 U.S.C. 1741, 1742, 1743 and 1745—is used to assess and provide per diem to State homes. This collection instrument is used by the State home employees and VA Staff.

b. *VA Form 10–5588A:* Claim for Increased Per Diem Payment for Veterans Awarded Retroactive Service Connection—38 CFR 51, 52 and title 38 U.S.C. 1741, 1742, 1743 and 1745—is used to assess and provide per diem to State homes retroactively. This collection instrument is used by the State home employees and VA Staff.

c. *VA Form 10–10SH:* State Home Program Application for Veterans Care Medical Certification—38 CFR 51, 52 and title 38 U.S.C. 1741, 1742, 1743 and 1745—provides for the collection of information to apply for the benefits of this program.

The State Home Per Diem (SHPD) Program recently automated the 10–10SH form. The form was converted into a web-based, fillable form that can be electronically submitted from the SVH to the appropriate VAMC. It includes data field validation, assuring that all required fields have been filled before the user can electronically submit the 10–10SH form. The VA portion of the application also includes business rules to assist the VA representatives in making uniform determinations, allow the VA representative to return incomplete applications to the SVH along with a notification to them, and record receipt of the completed application.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 88 FR 118 on June 21, 2023, pages 40402 and 40403.

Total Annual Burden: 4,816 hours.

Total Annual Responses: 13,614.

VA Form 10–5588

Affected Public: State, local, and Tribal governments.

Estimated Annual Burden: 834 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Monthly.

Estimated Number of Respondents: 139.

VA Form 10–5588A

Affected Public: State, local, and Tribal governments.

Estimated Annual Burden: 180 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: Monthly.

Estimated Number of Respondents: 45.

VA Form 10–10SH

Affected Public: State, local, and Tribal governments.

Estimated Annual Burden: 3,802 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 11,406.

By direction of the Secretary:

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–18533 Filed 8–28–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Veterans Rural Health Advisory Committee, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act that the Veterans Rural Health Advisory Committee will hold its face-to-face meeting at the American Legion, 1608 K Street NW, 7th Floor Conference Room, Washington, DC 20006 on Tuesday, September 19, 2023, through Wednesday, September 20, 2023. The meeting will convene at 9:00 a.m., Eastern Standard Time (EST) each day and adjourn at 5:00 p.m. (EST). The meeting sessions are open to the public. Additionally, a meeting link *https://us06web.zoom.us/j/82147382793* will be provided for the individuals who cannot attend in person.

The purpose of the Committee is to advise the Secretary of VA on rural health care issues affecting Veterans. The Committee examines programs and policies that impact the delivery of VA rural health care to Veterans and discusses ways to improve and enhance VA access to rural health care services for Veterans.

The agenda will include updates from Department leadership; the Acting Executive Director, VA Office of Rural Health; and the Committee Chair; as well as presentations by subject-matter experts on general rural health care access.

Public comments will be received at 4:30 p.m. on September 20, 2023. Interested parties should contact Ms. Judy Bowie, by email at *VRHAC@va.gov,* or by mail at 810 Vermont Avenue NW (12POP7), Washington, DC 20420. Individuals wishing to speak are invited to submit a 1–2-page summary of their comment for inclusion in the official meeting record. Any member of the public seeking additional information should contact Ms. Bowie at the phone number or email address noted above.

Dated: August 24, 2023.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–18647 Filed 8–28–23; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 88 Tuesday,

No. 166 August 29, 2023

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1, 31, and 301

Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 31, and 301

[REG–122793–19]

RIN 1545–BP71

Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations regarding information reporting, the determination of amount realized and basis, and backup withholding, for certain digital asset sales and exchanges. Based on existing authority as well as changes to the applicable tax law made by the Infrastructure Investment and Jobs Act, these proposed regulations would require brokers, including digital asset trading platforms, digital asset payment processors, and certain digital asset hosted wallets, to file information returns, and furnish payee statements, on dispositions of digital assets effected for customers in certain sale or exchange transactions. These proposed regulations would also require real estate reporting persons, who are treated as brokers with respect to reportable real estate transactions, to include on filed information returns and furnished payee statements the fair market value of digital asset consideration received by real estate sellers in reportable real estate transactions. Additionally, these real estate reporting persons would also be required to file information returns and furnish payee statements with respect to real estate purchasers who use digital assets to acquire real estate in these transactions.

DATES: Written or electronic comments must be received by October 30, 2023. A public hearing on this proposed regulation has been scheduled for November 7, 2023, at 10 a.m. ET. If the number of requests to speak at the hearing exceed the number that can be accommodated in one day, a second public hearing date for this proposed regulation will be held on November 8, 2023. Requests to speak and outlines of topics to be discussed at the public hearing must be received by October 30, 2023. If no outlines are received by October 30, 2023, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on November 3, 2023. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the public hearing must be received by 5 p.m. ET on November 2, 2023.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–122793–19) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish any comments submitted electronically or on paper to the public docket. Send paper submissions to: CC:PA:LPD:PR (REG–122793–19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–122793–19), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations under sections 1001 and 1012, Kyle Walker, (202) 317–4718, or Harith Razaa, (202) 317–7006, of the Office of the Associate Chief Counsel (Income Tax and Accounting); concerning the international sections of the proposed regulations under sections 3406 and 6045, John Sweeney or Alan Williams of the Office of the Associate Chief Counsel (International) at (202) 317–6933, and concerning the remainder of the proposed regulations under sections 3406, 6045, 6045A, 6045B, 6050W, 6721, and 6722, Roseann Cutrone of the Office of the Associate Chief Counsel (Procedure and Administration) at (202) 317–5436 (not toll-free numbers). Concerning submissions of comments and requests to participate in the public hearing, Vivian Hayes at *publichearings@irs.gov* (preferred) or at (202) 317–5306 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

These proposed regulations extend the information reporting rules in § 1.6045–1 to brokers who, in the ordinary course of a trade or business, act as agents, principals, or digital asset middlemen for others to effect sales or exchanges of digital assets for cash, broker services, or property of a type that is subject to reporting by the brokers (including different digital assets, securities, and real estate) under section 6045 of the Internal Revenue Code (Code) or effect on behalf of customers payments of digital assets associated with payment card and third party network transactions subject to reporting under section 6050W of the Code. These proposed regulations also clarify that the definition of *broker* for purposes of section 6045 includes digital asset trading platforms, digital asset payment processors, certain digital asset hosted wallet providers, and persons who regularly offer to redeem digital assets that were created or issued by that person. In addition, these proposed regulations would require real estate reporting persons to report on real estate purchasers who use digital assets to acquire real estate in a reportable real estate transaction and extend the information that must be reported under § 1.6045–4 with respect to sellers of real estate to include the fair market value of digital assets received by sellers in exchange for real estate. Additionally, in the case of a transaction involving the exchange of digital assets for goods (other than digital assets) or services, these proposed regulations treat the provision of the goods or services as reportable under section 6050W and the disposition of the digital assets as reportable under proposed § 1.6045–1 and not under section 6050W. These proposed regulations also provide that exchanges of digital assets for property or services are generally not reportable as barter exchange transactions under the existing rules under § 1.6045–1(e). Finally, these proposed regulations provide specific rules under section 1001 for determining the amount realized in a sale, exchange, or other disposition of digital assets and under section 1012 for calculating the basis of digital assets.

These proposed regulations concern Federal tax laws under the Internal Revenue Code only. No inference is intended with respect to any other legal regime, including the Federal securities laws and the Commodity Exchange Act, which are outside the scope of these regulations.

I. Background on Digital Assets and Virtual Currency

Digital assets are digital representations of value that use cryptography to secure transactions that are digitally recorded using distributed ledger technology on a distributed ledger, such as a blockchain or similar technology. Digital assets do not exist in physical form. Depending on the particular digital asset, individual units of a digital asset may be referred to as

coins or tokens. Some digital assets are referred to as virtual currency or as cryptocurrency.

Virtual currency is defined in Notice 2014–21, 2014–16 I.R.B. 938 (April 14, 2014) (Notice 2014–21 or Notice), for Federal income tax purposes as a digital representation of value that functions as a medium of exchange, a unit of account, or a store of value other than the U.S. dollar or a foreign currency (fiat currency). The Notice provides that convertible virtual currency (that is, virtual currency that has an equivalent value in real currency or that acts as a substitute for real currency) is treated as property for Federal income tax purposes.

A digital asset account or wallet generally provides its owner or custodian with the ability to store the public and private keys to digital asset holdings. These keys are required to conduct transactions with the digital assets associated with those keys and thus to control the ability to transfer those digital assets. References in this preamble and these proposed regulations to an owner holding digital assets generally or holding digital assets in a wallet or account are meant to refer to holding or controlling, whether directly or indirectly through a custodian, the keys to the digital assets and, thus, the ability to transfer those digital assets.

Some wallets may provide additional or different capabilities beyond storing keys. Wallets can be digital (software) or physical (hardware) and can be connected to the internet (hot) or disconnected from the internet (cold). Wallets can be custodial (hosted) or non-custodial (unhosted). Unhosted wallets are sometimes referred to as self-hosted or self-custodial wallets. Some owners use the services of a hosted wallet provider that stores their public and private keys. A hosted wallet provider may also maintain balance information, provide cybersecurity services, and facilitate the owners' ability to own, and conduct transactions using, digital assets. These services may also include providing owners with online platforms that directly link owners to third party services that allow owners to buy and sell digital assets held in their hosted wallets. Other owners do not use the services of a hosted wallet provider and instead store private keys in a software program or written record, often referred to as an unhosted wallet. In general, only the user of an unhosted wallet has access to both the public and private keys necessary to effect transactions in the digital assets associated with those keys. Additionally, some providers of unhosted wallets also provide their unhosted wallet users with online platform services, which may include links or other mechanisms for direct access to third party services that allow users to buy and sell digital assets held in their unhosted wallets.

A person that operates a trading platform or website that allows users to exchange digital assets in return for different digital assets or cash (meaning the U.S. dollar or foreign currency) is referred to in this preamble as a digital asset trading platform. Some digital asset trading platforms also offer hosted wallet services. In some circumstances, the custodial digital asset trading platform will match up buy and sell orders from separate users, whereas in other circumstances, the digital asset trading platform will settle users' orders using the digital asset trading platform's own account. In either circumstance, the digital asset trading platform could elect to require users to deposit with the trading platform the digital assets traded on the platform. Users typically pay these digital asset trading platforms a transaction fee (sometimes in digital assets). A custodial digital asset trading platform might often record its users' digital asset sale and exchange transactions on a centralized, omnibus ledger without also recording the transactions on the relevant distributed ledgers of the digital asset sold or exchanged. In other instances, however, the custodial digital asset trading platform might record user transactions directly on the distributed ledgers of the applicable digital assets involved in the transaction. These custodial digital asset trading platforms may provide users with valuations (in fiat currency) of the digital asset involved in these exchanges and keep records of each user's exchange activity.

Some digital asset trading platforms do not have access to the private keys and, therefore, do not take custody of their users' digital assets.[1] Owners of digital assets using these non-custodial trading platforms can buy, sell, and trade digital assets directly with others using automatically executing contracts (so-called smart contracts) to ensure that transactions are executed as agreed. For example, some peer-to-peer trading platforms facilitate transactions between owners of digital assets by matching buyers and sellers without holding the funds or digital assets of buyers or sellers. Some peer-to-peer trading platforms use software that connects buyers and sellers, who then effect the desired transactions off the platform. Other non-custodial trading platforms use automated market maker (AMM) systems that rely on liquidity pools or liquidity providers to automatically facilitate buy and sell orders on a platform. Some non-custodial trading platforms involve persons (operators) who provide services beyond that provided by software that merely facilitates digital asset trading. For example, to enhance secure transactions, non-custodial trading platform operators might process a transaction by communicating (or providing software that will communicate) with the wallets of buyers and sellers. Operators of non-custodial trading platforms may charge fees for some or all of these services, which may also include advertising or other services closely related to the facilitation of sales of digital assets.

In addition to buying, selling, and exchanging digital assets, taxpayers can participate in an increasing number and type of transactions that involve digital assets. For example, taxpayers can purchase or enter into derivative transactions involving digital assets, such as options, regulated futures contracts, and forward contracts. Some digital asset owners also use digital assets to make payments, including to purchase goods or services from merchants or to pay taxes or other fees to government entities. Digital assets may also be used as payment in consideration for the purchase of real estate. These payment transactions can be made directly to the seller through the use of smart contracts that can execute a transaction without an intermediary party, or through an intermediary that can process payments in digital assets (digital asset payment processor). To effect payment transactions using digital assets, some digital asset payment processors will, for a fee, accept digital assets directly from payors in exchange for the payment of cash at predetermined exchange rates to payment recipients or will facilitate the transfer of the payor's digital assets as part of a payment transaction. In some instances, digital asset payment processors will instead direct payors to transfer the digital asset payment directly to payment recipients, who may have the right to exchange the received digital asset for cash with the digital asset payment processors at predetermined fixed exchange rates.

[1] Some digital asset trading platforms that do not claim to offer custodial services may be able to exercise effective control over a user's digital assets. *See* Treasury Department, *Illicit Finance Risk Assessment of Decentralized Finance* (April 2023), *https://home.treasury.gov/system/files/136/DeFi-Risk-Full-Review.pdf*. No inference is intended as to the meaning or significance of custody under any other legal regime, which are outside the scope of these regulations.

II. Application of Existing Information Reporting Rules to Virtual Currency or Other Digital Assets

Notice 2014–21 provides guidance on the application of the current information reporting requirements when virtual currency is used to pay wages (requiring the filing of Forms W–2, *Wage and Tax Statement*), to make miscellaneous payments (requiring the filing of Forms 1099–MISC, *Miscellaneous Income*), and to settle third party network transactions (requiring the filing of Forms 1099–K, *Payment Card and Third Party Network Transactions*). The guidance provided by the Notice, however, focuses only on information reporting for virtual currency payments received by payees. The guidance does not address the information reporting requirements for income realized by persons who dispose of virtual currency or other digital assets. Although there are several existing information reporting provisions in the Code that do, or may, apply to dispositions of virtual currency and other digital assets, those provisions do not provide clear and comprehensive rules for consistent reporting of these dispositions.

A. Sections 1001 and 1012

Section 1001 of the Code provides rules for determining the amount of gain or loss recognized in a sale or exchange transaction. Under section 1001(a), gain from the sale or other disposition of property equals the excess of the amount realized from the transaction over the adjusted basis of the property, and loss from the sale or other disposition of property equals the excess of the adjusted basis of the property over the amount realized. Section 1.1001–1(a) provides that ''[e]xcept as otherwise provided in subtitle A of the Code, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent, is treated as income or as loss sustained.'' These regulations do not specifically address the determination of gain or loss with respect to digital assets.

Section 1012 of the Code provides that the basis of property is the cost of the property. The existing regulations under section 1012 provide special rules regarding the calculation of basis for certain types of property. These regulations do not expressly address the calculation of basis for digital assets.

B. Section 6041

Section 6041 of the Code requires any person who, in the course of a trade or business, makes payments of $600 or more that are deemed to be fixed or determinable income to file information returns, and furnish statements to the payee (payee statements), setting forth the amount of gains, profits, and income resulting from that payment and the name and address of the recipient of that payment. Published guidance states that the amount of gains, profits, or income resulting from a payment made in consideration for a capital asset is not fixed or determinable under section 6041 if the payor has no way of ascertaining the payee's basis in that asset. *See,* for example, Rev. Rul. 80–22, 1980–1 C.B. 286 (January 21, 1980). Thus, a payor otherwise required to report on a payment made in exchange for digital assets is required to report the payee's gain from that transaction under section 6041 if the payor has a way to ascertain the payee's basis and if the gain (in addition to any other payments made by that payor to the payee during the calendar year) is equal to $600 or more. Reporting under section 6041, however, does not apply to brokers with respect to payments made to customers. *See* § 1.6041–3(b). If a payment that is reportable under section 6041 is also subject to the information reporting rules under section 6050W, § 1.6041–1(a)(1)(iv) provides that the transaction must instead be reported under section 6050W.

C. Sections 6045, 6045A, and 6045B

Section 6045 and the regulations thereunder require a person doing business as a broker to file information returns, and furnish payee statements, in accordance with regulations, for each customer for whom the broker has sold stocks, certain commodities, options, regulated futures contracts, securities futures contracts, forward contracts or debt instruments, in exchange for cash, showing each customer's name and address, details regarding gross proceeds, the adjusted basis of certain categories of assets sold, and other information as the Secretary of the Treasury or her delegate (Secretary) may require by forms or regulations. Section 80603 of the Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429, 1339 (2021) (Infrastructure Act) made several changes to the broker reporting provisions under section 6045 to clarify the rules regarding how certain digital asset transactions should be reported by brokers, and to expand the categories of assets for which basis reporting is required to include all digital assets. These changes are discussed below in Part III of this *Background.* This Part II.C. of this *Background* discusses the rules in place prior to the changes made by the Infrastructure Act.

The term broker is defined by section 6045(c)(1) to include a dealer, a barter exchange, and any other person who (for a consideration) regularly acts as a middleman with respect to property or services. The existing regulations under section 6045 (existing regulations), further refine the meaning of a broker. Under existing § 1.6045–1(a)(1), a broker is defined to mean ''any person . . . , U.S. or foreign, that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales to be made by others.'' The term effect, as defined under existing § 1.6045–1(a)(10), means either to act as a principal with respect to a sale (for example, a dealer in securities who buys a security from one customer and then sells that security to another customer) or to act as an agent with respect to a sale if the nature of the agency is such that the agent ordinarily would know the gross proceeds of the sale. Accordingly, the term broker for purposes of gross proceeds reporting includes persons that may not otherwise be considered to act as a broker, including certain securities custodians, escrow agents, and stock transfer agents. The term broker for this purpose also includes persons that are not custodians. For example, a non-custodial executing broker that acts as an agent for customers to effect sales of securities is included in this definition. Finally, an obligor that regularly issues and retires its own debt obligations and a corporation (such as a mutual fund described in existing § 1.6045–1(b) Example 1 (i)) that regularly redeems its own stock also are treated as brokers under existing § 1.6045–1(a)(1).

The term commodity is defined in existing § 1.6045–1(a)(5) to mean any type of personal property (or interest therein), the trading of regulated futures contracts in which has been approved by the Commodities Futures Trading Commission (CFTC). At the time existing § 1.6045–1(a)(5) was promulgated, affirmative CFTC approval was required to list new regulated futures contracts on a commodities exchange. Since that time, however, the CFTC has revised its approval procedures pursuant to the Commodity Futures Modernization Act (''CFMA''), Public Law 106–554, 114 Stat. 2763 (2000). The CFTC now also allows new contracts to be listed if the listing market self-certifies that the new contracts comply with the Commodity Exchange Act, 7 U.S.C. 1 *et seq.,* and the CFTC's regulations. *See* CFTC, *Listing of New Contracts by Self-Certification, https://cftc.gov/IndustryOversight/*

ContractsProducts/index.htm and 17 CFR 40.2. Section 1.6045–1(a)(5) does not explicitly address whether digital assets, the trading of regulated futures contracts in which is permitted pursuant to the CFTC's self-certification procedures, are commodities subject to reporting.

For brokers required to file an information return with respect to the sale of a covered security, section 6045(g) requires that the return include the adjusted basis of the security and whether any gain or loss with respect to the security is long-term or short-term (adjusted basis reporting). With the exception of stock, covered securities are defined under section 6045(g)(3) as specified securities that are acquired on or after January 1, 2013, or such later date as determined by the Secretary. For stock to be included in the definition of *covered securities,* it must be acquired on or after either January 1, 2011, or January 1, 2012, depending on whether the average basis method is permissible with respect to the stock under section 1012. Under section 6045(g)(3)(B), specified securities generally include: (i) shares of corporate stock, (ii) notes, bonds, debentures, and other evidence of indebtedness, (iii) commodities, contracts, or derivatives with respect to commodities, if the Secretary determines that adjusted basis reporting is appropriate, and (iv) any other financial instrument with respect to which the Secretary determines that adjusted basis reporting is appropriate. The existing regulations under section 6045 do not specifically include digital assets as a specified security.

Section 6045A of the Code generally requires applicable persons who transfer securities that are covered securities in the hands of those applicable persons to a broker (the receiving broker) to furnish to the receiving broker a written statement setting forth such information as the Secretary may by regulations require. Existing § 1.6045A–1(b) requires transfer statements to include the name of the person effecting the transfer, the receiving broker, the name and account number of the customer for whom the security is transferred, as well as information about the security itself, including the transfer date, the adjusted basis, and the original acquisition date of the security. Prior to amendments made by the Infrastructure Act, section 6045A did not address the extent to which these requirements applied to transfers of digital assets. These amendments are discussed below in Part III of this *Background*.

Section 6045B of the Code requires certain securities issuers to report to the IRS as well as to shareholders or their nominees the effect on basis of certain organizational actions (such as a stock split, merger, or acquisition) that impact the basis of issued securities. These rules also do not explicitly address the reporting requirements with respect to digital assets.

Any organization with members or clients that contract with each other or with the organization to trade or barter property or services is a barter exchange under existing § 1.6045–1(a)(4). A barter exchange must file information returns, and furnish payee statements, with respect to the exchange of property or services by its members or clients. Property or services are considered exchanged through a barter exchange if payment is made by means of a credit on the books of the barter exchange or a scrip issued by the barter exchange, or if the barter exchange arranges a direct exchange of property or services between members. *See* existing § 1.6045–1(e)(2).

Section 6045(e) requires real estate reporting persons to file information returns, and furnish payee statements, including the seller's name and address, the gross proceeds paid to the seller, and other information as the Secretary may require by forms or regulations with respect to certain real estate transactions. A real estate reporting person is defined in section 6045(e)(2) to mean the person responsible for closing the transaction or, if no such person exists, the mortgage lender, the transferor's broker, the transferee's broker, or the person designated by the Secretary pursuant to regulations. Real estate reporting persons are treated as brokers under section 6045(e)(2) for purposes of the reporting obligations under section 6045. An exception to this real estate reporting rule is made for real estate reporting persons who rely on seller certifications setting forth written assurances in compliance with Rev. Proc. 2007–12, 2007–1 C.B. 357 (January 22, 2007), that the real estate being sold is the seller's principal residence and the full amount of the gain on the sale or exchange of the principal residence is excludable from gross income under section 121 of the Code, which generally permits individuals to exclude from gross income gain up to $250,000 (and married individuals filing joint returns gain up to $500,000) on the sale or exchange of a principal residence if certain conditions are met. Section 1.6045–4(i) also limits gross proceeds reporting required under section 6045(e) to cash received and cash to be received (also referred to in the existing regulations as consideration treated as cash) by or on behalf of the real estate seller in connection with the real estate transaction. As a result, these rules do not require the reporting of payments using digital assets made to real estate sellers in partial or full consideration for the sale of real estate, except to the extent that a digital asset falls within the definition of *consideration treated as cash* under existing § 1.6045–4(i)(1).

The definition of *broker* in existing regulations generally excludes a person described as a non-U.S. payor or non-U.S. middleman under § 1.6049–5(c)(5) with respect to a sale that is effected by the broker on behalf of a customer at an office outside the United States. Additionally, under existing regulations, regardless of a broker's status as U.S. or non-U.S. broker, a broker is not required to file an information return under section 6045 with respect to a sale for a customer whom the broker may treat as an exempt foreign person based primarily on documentation requirements that depend on whether the sale is effected at an office of the broker inside or outside the United States.[2] Generally, the effect of these rules is that non-U.S. securities brokers (other than controlled foreign corporations (CFCs) and a limited class of other brokers with U.S. activities, such as U.S. branches of foreign brokers) are not required to report information to the IRS on their customers, and that both U.S. and non-U.S. securities brokers are not required to report information to the IRS on non-U.S. customers under section 6045.

D. Section 6050W

Section 6050W requires payment settlement entities to file information returns, and furnish payee statements, with respect to each participating payee to whom they have made one or more payments in settlement of reportable payment transactions. Payment settlement entities are merchant acquiring entities, which are banks or other organizations that are contractually obligated to make payments to participating payees in settlement of payment card transactions, and third party settlement organizations (TPSOs). TPSOs are central organizations that are contractually obligated to make payments to participating payees with respect to third party network transactions for the purchase of goods or services sold through a third party payment network.

Payments by TPSOs to settle third party network transactions are required to be reported only if they exceed a *de*

[2] See Part I.I.4 of the Explanation of Provisions footnote 5 regarding the Bank Secrecy Act (31 U.S.C. 5311 *et seq.*) and the Financial Crimes Enforcement Network's (FinCEN) implementing regulations thereunder.

minimis threshold. Section 9674(a) of the American Rescue Plan Act of 2021, Public Law 117–2, 135 Stat. 4, 185 (ARP), lowered and modified this threshold for calendar years beginning after December 31, 2021. Under the prior threshold, payments by TPSOs to settle third party network transactions were required to be reported only if the aggregate number of transactions with a payee exceeded 200 and the aggregate amount to be reported with respect to those transactions exceeded $20,000 for a calendar year. Under the ARP provision, TPSOs must report third party network transactions with any participating payee that exceed a minimum threshold of $600 in aggregate payments, regardless of the aggregate number of these transactions. The rules under section 6050W, however, do not expressly address whether exchanges of digital assets for cash, services, or property effected through TPSOs are subject to reporting under section 6050W or whether the information reporting provisions under section 6045 would apply to such exchanges.

III. Infrastructure Investment and Jobs Act

Section 80603 of the Infrastructure Act clarifies and expands the rules regarding how digital assets should be reported by brokers under sections 6045 and 6045A to improve IRS and taxpayer access to gross proceeds and adjusted basis information when taxpayers dispose of digital assets in transactions involving brokers. First, section 80603(a) of the Infrastructure Act clarifies the definition of *broker* to include any person who, for consideration, is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person. Second, section 80603(b)(1) of the Infrastructure Act modifies the definition of *specified securities* under section 6045(g) to explicitly include digital assets and to provide that these specified securities are treated as covered securities for purposes of basis reporting if they are acquired on or after January 1, 2023. Third, section 80603(b)(1)(B) of the Infrastructure Act defines a digital asset broadly to mean any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary, except as otherwise provided by the Secretary. Fourth, section 80603(b)(2) of the Infrastructure Act clarifies that transfer statement reporting under section 6045A(a) applies to covered securities that are digital assets, and also adds a new information reporting provision under section 6045A(d) to provide for broker reporting on transfers of digital assets that are covered securities, provided the transfer is not a sale and is not to an account maintained by a person that the broker knows or has reason to know is also a broker. Section 80603(c) of the Infrastructure Act provides that these amendments apply to returns required to be filed, and statements required to be furnished, after December 31, 2023. Finally, section 80603(d) of the Infrastructure Act provides a rule of construction which states that these statutory amendments shall not be construed to create any inference for any period prior to the effective date of the amendments with respect to whether any person is a broker under section 6045(c)(1) or whether any digital asset is property which is a specified security under section 6045(g)(3)(B).

IV. Reasons for New Information Reporting Rules for Digital Assets

Digital assets have grown in popularity as both a payment method and an investment or trading asset. Proponents believe that digital assets may offer potential benefits over traditional fiat currencies, such as lower transaction costs and faster transaction speeds. Digital assets may also be popular, however, because the distributed ledger record of transactions does not include the identity of the parties involved in the transactions. This pseudonymity creates a significant risk to tax administration.

Digital assets are increasingly common in ordinary course transactions of a type that may be subject to information reporting if carried out using fiat currency or traditional financial assets. For example, several payment processors and credit card issuers that handle large volumes of payments now facilitate payments made using digital assets. Taxpayers can buy and sell digital assets directly or invest in digital assets through investment funds. Taxpayers can also trade derivatives, including futures and option contracts, on digital assets. A number of traditional financial institutions are offering, or have announced plans to offer, custody and trading services with respect to digital assets for institutional investors. In addition, some institutions are converting, or tokenizing, stock and security ownership interests into digital tokens. These tokenized stock and security interests trade on some digital asset trading platforms, and other trading platforms offer unique digital assets referred to as non-fungible tokens (NFTs) for sale in exchange for cash or other digital assets. Transactions of these kinds by U.S. taxpayers may take place either on U.S. custodial or non-custodial trading platforms or with U.S. financial intermediaries, or on foreign custodial or non-custodial trading platforms or with foreign financial intermediaries.

According to the Government Accountability Office (GAO), limits on third party information reporting to the IRS is an important factor contributing to the tax gap, which is the difference between taxes legally owed and taxes actually paid. GAO, *Tax Gap: Multiple Strategies Are Needed to Reduce Noncompliance,* GAO–19–558T at 6 (Washington, DC: May 9, 2019). Third party information reporting generally leads to higher levels of taxpayer compliance because the income earned by taxpayers is made transparent to both the IRS and taxpayers (who will use the furnished information to avoid both inadvertent errors and intentional misstatements). With third party information reporting that specifically identifies digital asset transactions, the IRS could more easily identify taxpayers with digital asset transactions that are otherwise difficult to discover. An information reporting regime requiring reporting to the IRS on digital asset transactions would benefit tax compliance by helping to close the information gap with respect to digital assets. *See* TIGTA, Ref. No. 2020–30–066, *The Internal Revenue Service Can Improve Taxpayer Compliance for Virtual Currency Transactions,* 10 (Sept. 2020); GAO, *Virtual Currencies: Additional Information Reporting and Clarified Guidance Could Improve Tax Compliance,* 28, GAO–20–188 (Washington, DC: Feb. 2020). In addition to the loss of information with respect to the recipients of digital asset payments that the IRS otherwise might receive if these transactions were carried out using fiat currency or traditional investment assets, these transactions give rise to a separate tax compliance concern because the disposition of digital assets is itself a taxable event that may give rise to gain or loss to the transferor that is reportable on a tax return. Existing information reporting rules do not specifically address how certain transactions involving digital assets must be reported to the party who disposes of the digital assets in exchange for cash, services, stored-value cards, or other property (including different digital assets).

Expanding information reporting for digital assets also benefits taxpayers. First, taxpayers use information provided to them by brokers to prepare their tax returns. The lack of such

information reporting for digital assets may make it difficult for taxpayers to properly track and report their gain or loss from dispositions of digital assets. Publicly available information indicates that this gap is being filled in part by voluntary tax reporting to customers by some digital asset platforms, and by digital asset tax service providers, including providers of tax software, who charge for the preparation of tax information. The existence of these services illustrates the benefits of information reporting to taxpayers because the same information that is reported by brokers to the IRS on dispositions of digital assets must also be furnished by brokers to their customers. A second benefit to taxpayers from information reporting is that it enables the IRS to focus its audit efforts on taxpayers who are more likely to have underreported their income from digital asset transactions.

Consequently, tax compliance would be increased if brokers, including digital asset trading platforms, digital asset payment processors, certain digital asset hosted wallet providers, and persons who regularly offer to redeem digital assets that were created or issued by that person, were required to file information returns, and furnish payee statements, under section 6045 with respect to digital asset dispositions in exchange for cash, broker services, or other property the sale of which is separately subject to reporting under section 6045 or with respect to transactions that are subject to reporting (with respect to the digital asset recipient) under section 6050W. Thus, for example, a digital asset trading platform, including an operator of a peer-to-peer or AMM trading platform, that facilitates a digital asset sale on behalf of a customer should be required to file an information return, and furnish a payee statement with respect to that sale, reporting the gross proceeds realized by the customer as a result of that sale. In addition, reporting should be required by digital asset payment processors who facilitate the use of digital assets to make payments of cash to others by either effecting the sale of digital assets on behalf of the person making payment (and paying the cash to the payment recipient) or by agreeing with the recipient of a digital asset payment in advance of the payment to exchange the digital assets received by that recipient for cash at a predetermined exchange rate. Further, digital asset payment processors who facilitate payments that are potentially subject to reporting under the existing section 6050W regulations should be required to report on the payor's exchange of digital assets in those transactions as well. Additionally, a stockbroker who accepts digital assets from a customer as payment for the customer's purchase of stock should be required to file an information return, and furnish a payee statement, reporting the gross proceeds realized by the customer as a result of that customer's exchange of digital assets for stock. Reporting should also be required in this example if the broker accepts digital assets in exchange for the broker's services (for example, transaction fees or commissions). Finally, to facilitate the filing by taxpayers of accurate information returns with respect to digital asset dispositions, substantive rules are needed for determining gain or loss in a digital asset sale or exchange transaction and for calculating the basis of digital assets.

Explanation of Provisions

The Treasury Department and the IRS expect to make the changes to broker reporting for digital assets in multiple phases. These proposed regulations generally focus on changes to existing § 1.6045–1 to require brokers to report on digital asset sales. Later phases will generally focus on implementing transfer statement reporting under section 6045A(a) and broker information reporting under section 6045A(d) for covered security transfers that are not transfers to accounts maintained by persons known to be brokers or subject to reporting as sales.

I. Proposed § 1.6045–1

These proposed regulations generally follow the framework and concepts of the existing rules for broker information reporting but differ from those rules as necessary to reflect both the unique nature of digital assets and the clarifications and changes made to section 6045 by the Infrastructure Act. These proposed regulations do not address every transaction involving digital assets that may give rise to income, such as the receipt of digital assets in hard forks, because it is more appropriate to address those transactions under other provisions of the Code.

A. Expansion of the Types of Property Subject to Reporting

Under existing § 1.6045–1(a)(9), brokers are generally required to file an information return for each sale effected on behalf of a customer. A disposition is treated as a sale subject to reporting only if the property disposed of is a security, commodity, option, regulated futures contract, securities futures contract, or forward contract and the disposition is for cash. These proposed regulations provide that reporting under section 6045 is also required for certain dispositions of digital assets that are made in exchange for cash, different digital assets, stored-value cards, broker services, or property subject to reporting under existing section 6045 regulations.

1. Definition of Digital Assets

The definition of *digital assets* in these proposed regulations follows the definition in section 80603(b)(1)(B) of the Infrastructure Act. Specifically, proposed § 1.6045–1(a)(19)(i) defines a *digital asset* as a digital representation of value that is recorded on a cryptographically secured distributed ledger (or similar technology). These proposed regulations also provide that a digital asset does not include cash, for example, a fiat currency in digital form such as funds in a bank or payment processor account accessed through the internet. In addition, under these proposed regulations, the determination of whether an asset is a digital asset is made without regard to whether each individual transaction involving that digital asset is actually recorded on the cryptographically secured distributed ledger. The use of cryptography, through the use of public and private keys to transfer assets, distinguishes digital assets as defined by the Infrastructure Act from other virtual assets and is therefore an essential part of the definition.

By not limiting the definition of *digital assets* to only those digital representations of value for which each transaction is actually recorded or secured on a cryptographically secured distributed ledger, the definition of *digital assets* covers transactions involving digital representations of value that are recorded by a broker only on its own centralized internal ledger. For example, a broker may hold a number of units of a digital asset in its own name, similar to holding shares of stock in street name, and carry out transactions between customers that wish to buy or sell units of that digital asset by first matching transactions internally and executing only net purchases or sales on the distributed ledger. Additionally, the definition covers transactions involving digital representations of value that are recorded on ledgers that may or may not be widely or publicly distributed.

The definition of *digital assets* includes digital representations of value that are capable of being recorded using technology that is similar to technology that uses cryptography to secure transactions. These proposed

regulations include this similar technology standard to ensure that the definition of *digital assets* captures digital representations of value that reflect advancements to the techniques, methods, and technology, upon which digital assets are based.

Section 80603(b)(1)(B) of the Infrastructure Act provides authority to the Secretary to modify the definition of *digital assets* for purposes of reporting under section 6045. The Treasury Department and the IRS considered applying these regulations to only virtual currency or a variant thereof rather than to all digital assets. The Treasury Department and the IRS also considered whether newer forms of digital assets, such as those referred to as stablecoins or NFTs, should be subject to the section 6045 broker reporting rules. The proposed regulations would require broker reporting for all types of digital assets, for multiple reasons. First, the definition of *digital assets* in the Infrastructure Act is expansive. Second, because the disposition of digital assets may give rise to gain or loss, reporting of gross proceeds and basis information is useful to taxpayers as well as the IRS. For example, some NFTs are readily being bought and sold, often as speculative investments on digital asset trading platforms, giving rise to gain or loss that is subject to reporting by taxpayers. The Treasury Department and the IRS are aware of concerns that applying these proposed regulations to such NFTs would create disparate reporting of transactions involving the subject of the NFT (such as ownership or license interests in artwork or sports memorabilia) depending on whether those interests are transferred using an NFT or as a traditional sale or license contract. But given that NFTs are popular investments, the buying and selling of NFTs raise tax administration concerns similar to the concerns associated with other types of digital assets that the physical analogues of NFTs do not. For example, like other digital assets, NFTs can readily be transferred to a private wallet or an offshore account, while the transfer of a physical artwork or trading card may be more difficult or costly. Third, there is a continuing evolution in the types of digital assets that can be used for payment transactions, investment, or for other purposes and this inclusive approach is designed to provide clarity as these types of digital assets continue to evolve. For example, a taxpayer may acquire an NFT to enjoy its artistic merit or for investment, or both. The treatment of any particular type of digital asset as reportable under these proposed regulations is not intended to imply any characterization of that type of digital asset as a matter of substantive law. *See* Part I.K of this *Explanation of Provisions* for further discussion of the reasons why privately issued stablecoins are treated as digital assets for purposes of these regulations.

Finally, it is intended that the definition of *digital assets* used in these proposed regulations would not apply to other types of virtual assets, such as assets that exist only in a closed system (such as video game tokens that can be purchased with U.S. dollars or other fiat currency but can be used only in-game and that cannot be sold or exchanged outside the game or sold for fiat currency). It is also intended that the regulations would not apply to uses of distributed ledger technology or similar technology for ordinary commercial purposes that do not create new transferable assets, such as tracking inventory or processing orders for purchase and sale transactions, which are unlikely to give rise to sales as defined for purposes of the regulations. Comments are requested on whether the proposed definition of *digital assets* accurately and appropriately defines the type of assets to which these regulations should apply.

2. Coordination With Reporting Rules for Securities, Commodities, and Real Estate

The Treasury Department and the IRS are aware that many provisions of the Code incorporate references to the terms security or commodity, and that questions exist as to whether, and if so, when, a digital asset may be treated as a security or a commodity for purposes of those Code sections. Apart from the rules proposed under sections 1001 and 1012 discussed in Part II of this *Explanation of Provisions,* these proposed regulations are information reporting regulations, and are therefore not the appropriate vehicle for answering those questions. Because the existing regulations under section 6045 require reporting with respect to sales for cash of securities and certain commodities, and with respect to real estate transactions in which gross proceeds are paid in cash (or consideration treated as cash), coordination rules have been included to provide certainty to brokers with respect to whether a particular transaction, or portion thereof, is reportable under those existing rules or under the proposed rules for digital assets and to avoid duplicate reporting obligations. Accordingly, the treatment of an asset as reportable as a security, commodity, digital asset or otherwise in these proposed rules applies only for purposes of sections 1001, 1012, 3406, 6045, 6045A, 6045B, 6050W, 6721, and 6722 and should not be construed to apply for any other purpose of the Code to determine whether a digital asset should or should not be properly classified as a security, commodity, option, securities futures contract, regulated futures contract, or forward contract. *See* proposed § 1.6045–1(a)(19)(ii). Similarly, the potential characterization of digital assets as securities, commodities, or derivatives for purposes of any other legal regime, such as the Federal securities laws and the Commodity Exchange Act, is outside the scope of these proposed regulations.

The Treasury Department and the IRS are aware that some digital asset tokens may be classified as securities for U.S. Federal income tax purposes, and that it is possible that tokens constituting securities issued by certain U.S. issuers or companies could be traded on certain digital asset trading platforms that are subject to these rules. If those tokens are securities for Federal income tax purposes, and also qualify as digital assets (as defined in proposed § 1.6045–1(a)(19)), the sale of those tokens for cash could be subject to the existing regulations requiring brokers to provide information reporting with respect to the sale of securities for cash (that is, gross proceeds and basis information) as well as to these proposed regulations relating to the sale of digital assets. The Treasury Department and the IRS considered several different alternatives for addressing this potential overlap.

The Treasury Department and the IRS considered providing a rule that would treat the sale for cash of any digital asset treated as a security under current law as a sale of securities and not a sale of digital assets for purposes of these proposed regulations. The Treasury Department and the IRS, however, have not issued guidance addressing when a digital asset should be treated as a security for substantive U.S. Federal income tax purposes. Because digital asset trading platforms may not be certain whether a particular asset should be reported as a security or as a digital asset without that guidance, and for the additional reasons described in the next paragraph, the Treasury Department and the IRS determined that this alternative would not provide the clarity and certainty necessary for information reporting purposes.

The Treasury Department and the IRS also considered providing a more limited exception to the definition of *digital assets* for digital representations of value that represent interests in one

or more units of a security to provide the same information reporting rules for a sale of stock for cash as for a sale of tokenized stock for cash. This alternative would have several undesirable results. First, digital asset trading platforms that trade both tokenized stock and other digital assets would be subject to two different sets of reporting rules when such assets were sold for cash. Second, tokenized stock would be subject to one set of reporting rules if sold for cash—that is, the existing regulations relating to the reporting of sales of securities for cash—and to a different set of reporting rules if sold for another digital asset or other consideration—that is, these proposed regulations for sales of digital assets. Moreover, the tax compliance concerns associated with transactions in digital assets are different from the tax compliance concerns associated with trading in conventional or non-digital asset securities, including as a result of the common market practice of transferring digital assets from a centralized platform to a private wallet and back again. Accordingly, different reporting rules are warranted for digital assets regardless of whether they would also qualify as a security.

As a result of these considerations, these proposed regulations make no changes to the definition of the term *security* (as defined in existing § 1.6045–1(a)(3)) but instead provide a coordination rule in proposed § 1.6045–1(c)(8)(i) applicable to transactions involving the sale of a digital asset that also constitutes a sale of a security as so defined (other than options that constitute contracts covered by section 1256(b)). Under this proposed coordination rule, the broker must report the sale of an asset that qualifies both as such a security and as a digital asset only as a sale of a digital asset and not as a sale of a security. See Part I.B of this *Explanation of Provisions,* however, for a discussion of the additional information that the broker may be required to provide for transactions involving the sale of a digital asset that also constitutes a sale of such a security. See Part I.B.3 of this *Explanation of Provisions* for a discussion of the applicable rules for digital assets that are also financial contracts, including contracts that are section 1256 contracts within the meaning of section 1256(b).

The Treasury Department and the IRS are aware that the financial services industry is exploring the use of distributed ledger technology or similar technology, such as a blockchain or a shared ledger, to process orders associated with conventional or non-digital asset securities transactions. Using distributed ledger technology or similar technology to process orders associated with securities transactions may require the temporary creation of digital representations of securities that may fit within the definition of *digital assets* in these proposed regulations. It may be appropriate for these regulations not to apply to these transactions because these transactions would typically involve securities being transferred from one traditional brokerage or custodial account to another. Nonetheless, these proposed regulations do not provide a specific exception for these transactions because the Treasury Department and the IRS would like to understand whether an exception is necessary. Comments are requested on whether the definition of *digital asset* or the reporting requirements with respect to digital assets inadvertently capture transactions involving conventional or non-digital asset securities that may use distributed ledger technology, shared ledgers, or similar technology merely to facilitate the processing, clearing, or settlement of orders. Comments also are requested on whether and, if so, how the definitions or reporting rules should be modified to address other transactions involving tokenized or digitized financial instruments that are used to facilitate back-office processing of the transaction. If an exception for these types of transactions is necessary, the Treasury Department and the IRS would also like to understand how it should be drafted so that it does not sweep in other transactions (such as tokenized securities, or other digital assets treated as securities) that should not be exempted from reporting.

The Treasury Department and the IRS also considered how to apply section 6045A and section 6045B to assets that qualify both as specified securities under existing § 1.6045–1(a)(14)(i) through (iv) for basis reporting purposes and as digital assets under proposed § 1.6045–1(a)(19) (dual classification assets) for the period of time until rules are promulgated dealing with the application of sections 6045A and 6045B to digital assets. Although the existing regulations under section 6045A operate to provide important information to brokers required to report adjusted basis information to the IRS (and taxpayers), it is unclear whether digital asset brokers currently have the mechanisms in place to provide transfer statements to receiving brokers that receive these dual classification assets in transfers that are recorded on a blockchain. With regard to section 6045B, issuers of dual classification assets may not have procedures in place to report information affecting basis. Accordingly, the Treasury Department and the IRS have decided to delay transfer statement reporting under section 6045A(a) and issuer reporting under section 6045B for these dual classification assets and will consider rules for dual classification assets as part of the implementation of more general transfer statement reporting and issuer reporting rules for digital asset brokers as part of a later phase of information reporting guidance for broker effected digital asset transfers. Proposed §§ 1.6045A–1(a)(1)(vi) and 1.6045B–1(a)(6) have been added to specifically exempt from transfer and issuer reporting any specified security that is also a digital asset. *See* Proposed §§ 1.6045A–1 and 1.6045B–1 in Part IV of this *Explanation of Provisions.*

The definition of *commodity* under existing § 1.6045–1(a)(5) was first promulgated in 1983 as part of TD 7873, 48 FR 10302, 10304 (Mar 11, 1983). Under that definition, the term includes any type of personal property or interest therein, the trading of futures contracts in which have been approved by the CFTC. Sometime after the promulgation of this definition, the CFTC added a new self-certification mechanism under which new exchange-traded contracts become subject to the jurisdiction of the CFTC. Some digital asset trading platforms have taken the position that assets underlying futures contracts that are subject to the jurisdiction of the CFTC pursuant to the CFTC's self-certification procedures are not commodities under existing § 1.6045–1(a)(5) because the CFTC did not affirmatively approve the listing of these contracts on an exchange. The Treasury Department and the IRS believe that the reporting regulations should reflect the current practice of the CFTC and therefore have modified this rule in proposed § 1.6045–1(a)(5)(i) to ensure that assets that are subject to the jurisdiction of the CFTC pursuant to the CFTC's self-certification procedures are included in the definition of *commodity* for purposes of information reporting under section 6045.

This modification applies broadly to all types of commodities subject to the jurisdiction of the CFTC for purposes of section 6045. However, because there has been some uncertainty about the scope of the term commodity for purposes of section 6045, reporting under section 6045 for sales of commodities as to which contracts have been self-certified to the CFTC is proposed to apply to any sale that occurs on or after January 1, 2025,

without regard to the date the self-certification procedures were undertaken. Thus, if an asset became subject to the jurisdiction of the CFTC pursuant to the CFTC's self-certification procedures prior to January 1, 2025, sales of that asset for cash on or after January 1, 2025, will be subject to reporting as a result of the revised definition of commodity under proposed § 1.6045–1(a)(5). This change to the definition of commodity does not affect the broker's obligation under existing § 1.6045–1(a)(9) and (c) to report on regulated futures contracts. For a detailed discussion of the broker reporting rules for financial contracts, *see* Part I.A.3 of this *Explanation of Provisions.*

Consequently, a digital asset, the trading of regulated futures contracts in which has been approved by or, pursuant to proposed § 1.6045–1(a)(5)(i), self-certified to the CFTC, would be treated as a commodity for purposes of reporting under section 6045 absent other changes to the existing regulations. Those assets would also be digital assets for purposes of these regulations. This dual classification could result in confusion as to whether sales of these digital assets should be reported as sales of commodities on Form 1099–B, sales of digital assets on a form prescribed by the Secretary for digital asset sales, or both—potentially resulting in duplicative reporting. To avoid confusion and potential duplicative reporting of sales made on or after January 1, 2025, these proposed regulations provide a coordination rule in proposed § 1.6045–1(c)(8)(i) applicable to transactions involving the sale of a digital asset that also constitutes a sale of a commodity. Under this proposed coordination rule, the broker must report the sale of an asset that qualifies both as a commodity and as a digital asset only as a sale of a digital asset (along with the additional information that this characterization requires) and not as a sale of a commodity.

Finally, the Treasury Department and the IRS are aware that distributed ledger technology or similar technology may be used in connection with transactions involving real estate. Using distributed ledger technology or similar technology to settle real estate transactions requires the creation of digital representations of real estate that may fit within the definition of *digital assets* in these proposed regulations. To avoid duplicative reporting for digital assets that also constitute reportable real estate and to avoid having real estate reporting persons report seller proceeds under an entirely new reporting regime, proposed § 1.6045–1(c)(8)(ii) provides a coordination rule applicable to transactions involving the sale of a digital asset that also constitutes reportable real estate (as defined under existing § 1.6045–4(b)(2)) that is subject to reporting under existing § 1.6045–4(a). Under this coordination rule, the broker must report the sale of reportable real estate only as a sale of reportable real estate (and not as a sale of a digital asset).

3. Rules Applicable to Financial Contracts on Digital Assets

To ensure reporting of sales of financial contracts involving or referencing digital assets, these proposed regulations expand the existing rules for certain financial products, such as options, futures, and forward contracts. Proposed § 1.6045–1(m)(1) expands the type of option transactions subject to reporting to generally include options on digital assets and options on derivatives with a digital asset as an underlying property. Generally, under these proposed regulations, how an option transaction is reported will depend on: (i) whether the option is a section 1256 contract within the meaning of section 1256(b) (section 1256 contract); (ii) whether the transaction is a disposition of the option itself or whether the transaction involves the delivery of the underlying property; and (iii) whether the option is itself a digital asset (digital asset option) or is not a digital asset (non-digital asset option).

For a disposition of an option that is not a section 1256 contract, the nature of the option itself determines the appropriate reporting treatment; that is, reporting would be required under proposed § 1.6045–1(a)(9)(i) if the option itself is a non-digital asset option and under proposed § 1.6045–1(a)(9)(ii) if the option itself is a digital asset option. Because the asset that is disposed of is the option itself, this proposed reporting treatment applies without regard to whether the digital asset option or non-digital asset option was issued with respect to digital asset or non-digital asset underlying property. In contrast, when an option that is not a section 1256 contract is settled by the delivery of the underlying property, reporting under these proposed regulations is based on the nature of the underlying property, with the delivery of non-digital asset underlying property reportable as a sale under proposed § 1.6045–1(a)(9)(i) and the delivery of digital asset underlying property reportable as a sale under proposed § 1.6045–1(a)(9)(ii). Because the asset that is disposed of is the asset underlying the option, this proposed reporting treatment for the sale of underlying property that is physically delivered applies without regard to whether the option is itself a digital asset option or a non-digital asset option.

Because the Treasury Department and the IRS are currently unaware of any digital asset options that are also section 1256 contracts, these proposed regulations do not provide new rules for such options. Rather, proposed § 1.6045–1(c)(8)(iii) provides that reporting of these dual classification options should be under the existing rules for options that are section 1256 contracts and not under the proposed rules for digital assets. Accordingly, for a disposition of an option that is a section 1256 contract, reporting is required under existing § 1.6045–1(c)(5) regardless of whether the option disposed of is a non-digital asset option or a digital asset option or whether the option was issued with respect to digital asset or non-digital asset underlying property. Further, as required by existing § 1.6045–1(m)(3) and proposed § 1.6045–1(a)(9)(i) and (c)(8)(iii), when an option that is a section 1256 contract is settled by the delivery of the underlying property, the profit or loss on the contract itself is reportable under existing § 1.6045–1(c)(5), but the underlying sale will be subject to reporting under these proposed regulations based on the nature of the underlying property, with the delivery of non-digital asset underlying property reportable under proposed § 1.6045–1(a)(9)(i) and the delivery of digital asset underlying property reportable under proposed § 1.6045–1(a)(9)(ii). The Treasury Department and the IRS invite comments regarding the above-described option transactions, including comments about how common are digital asset options that are also section 1256 contracts. Comments are also requested regarding whether there are other less burdensome alternatives for reporting the above-described option transactions. For example, whether it would be less burdensome to allow brokers to report transactions involving section 1256 contracts that are also digital assets or the delivery of non-digital assets that underlie a digital asset option as a sale under proposed § 1.6045–1(a)(9)(ii).

No changes have been made to the rules relating to regulated futures contracts in the existing regulations because the definition of a *regulated futures contract* in existing § 1.6045–1(a)(6) can apply to a regulated futures contract on digital assets and to regulated futures contracts that are

themselves digital assets. Accordingly, pursuant to proposed § 1.6045–1(c)(8)(iii), regulated futures contracts will continue to be reported under the rules in existing § 1.6045–1(c)(5) and not under the proposed rules for digital assets.

Proposed § 1.6045–1(a)(7)(iii) expands the definition of a *forward contract* subject to reporting to include executory contracts requiring delivery of digital assets in exchange for cash, different digital assets, or any other property or services that would result in a sale of digital assets under proposed § 1.6045–1(a)(9)(ii) if the exchange occurred at the time the contract was executed. When a forward contract is disposed of without delivery of its underlying property, the nature of the forward contract itself determines the appropriate reporting treatment. Specifically, reporting is required under proposed § 1.6045–1(a)(9)(i) if the forward contract itself is a non-digital asset forward contract and under proposed § 1.6045–1(a)(9)(ii) if the forward contract is a digital asset forward contract. Because the asset that is disposed of is the forward contract itself, this proposed reporting treatment applies without regard to whether the forward contract was issued with respect to digital asset or non-digital asset underlying property. The reporting on the delivery of the underlying property with respect to a forward contract, in contrast, does turn on the nature of that underlying property. That is, when the underlying asset is non-digital asset property, the delivery is reportable under proposed § 1.6045–1(a)(9)(i); whereas when the underlying asset is digital asset property, the delivery is reportable under proposed § 1.6045–1(a)(9)(ii). Because the asset that is disposed of when there is delivery is the asset underlying the forward contract, this proposed reporting treatment for the sale of underlying property that is physically delivered applies without regard to whether or not the forward contract is itself a digital asset.

The Treasury Department and the IRS request comments with respect to whether there is anything factually unique in the way short sales of digital assets, options on digital assets, and other financial product transactions involving digital assets are undertaken compared to similar transactions involving non-digital assets, and whether these transactions with respect to digital assets raise any additional reporting issues that have not been addressed in these proposed regulations.

B. Definition of Brokers Required To Report

As described in Part II.C. of the *Background,* prior to the Infrastructure Act, section 6045(c)(1) defined the term *broker* to include a dealer, a barter exchange, and any other person who (for a consideration) regularly acts as a middleman with respect to property or services. Existing regulations under section 6045 apply the ''middleman'' portion of this definition to treat as a broker effecting a sale a person that as part of the ordinary course of a trade or business acts as an agent with respect to a sale if the nature of the agency is such that the agent ordinarily would know the gross proceeds of the sale. *See* existing § 1.6045–1(a)(1) and (a)(10)(i)(A).

Section 80603(a) of the Infrastructure Act clarifies that the definition of *broker* under section 6045 includes any person who, for consideration, is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person. According to a report by the Joint Committee on Taxation published in the *Congressional Record* prior to the enactment of the Infrastructure Act, the change clarified prior law to resolve uncertainty over whether certain market participants are brokers. The change was not intended to limit the Secretary's authority to interpret the definition of *broker.* 167 Cong. Rec. S5702, 5703 (daily ed. Aug. 3, 2021) (Joint Committee on Taxation, Technical Explanation of Section 80603 of the Infrastructure Act).

To reflect this clarification made by the Infrastructure Act, proposed § 1.6045–1(a)(1) retains the existing definition of *broker* as any person that in the ordinary course of a trade or business stands ready to effect sales to be made by others. However, the definition of *effect* under existing § 1.6045–1(a)(10)(i) and (ii), which sets forth the various roles under which a broker may take actions on behalf of customers, has been revised to provide that any person that provides facilitative services that effectuate sales of digital assets by customers will be considered a broker, provided the nature of the person's service arrangement with customers is such that the person ordinarily would know or be in a position to know the identity of the party that makes the sale and the nature of the transaction potentially giving rise to gross proceeds. This definition is similar to the definition in the existing regulations with respect to agents and is similarly intended to limit the definition of *broker* to persons who have the ability to obtain information that is relevant for tax compliance purposes. The modified definition of *effect* takes into account whether a person is in a position to know information about the identity of a customer, rather than whether a person ordinarily would know such information, in recognition of the fact that some digital asset trading platforms that have a policy of not requesting customer information or requesting only limited information have the ability to obtain information about their customers by updating their protocols as they do with other upgrades to their platforms. The ability to modify the operation of a platform to obtain customer information is treated as being in a position to know that information. The Treasury Department and the IRS expect that this clarified proposed definition will ultimately require operators of some platforms generally referred to as decentralized exchanges to collect customer information and report sales information about their customers, if those operators otherwise qualify as brokers. This decision was made because the reasons for requiring information reporting on dispositions of digital assets do not depend on the manner by which a business operating a platform effects customers' transactions. Customers need information about gross proceeds and basis to prepare their tax returns; the IRS needs that information in order to collect the taxes that are imposed under laws enacted by Congress and in order to focus its compliance efforts on taxpayers who fail to comply with their obligations to report their tax liability; and policy makers need that information in order to understand what taxpayers are doing so that they can make informed judgments about further laws or other guidance relating to digital assets. Moreover, if the manner in which a digital asset trading platform operates reduces or eliminates its obligation to report information on customer transactions, digital asset trading platforms might modify their operations to avoid reporting or customers who wish to evade taxes might elect to use a non-reporting platform in order to reduce the IRS's ability to identify them as non-compliant.

The Treasury Department and the IRS recognize that some stakeholders may have concerns that providing personal identity information may raise privacy concerns, and request comments on whether there are alternative approaches that would satisfy tax compliance objectives while reducing privacy concerns. The Treasury

Department and the IRS also request comments on any technological or other technical issues that might affect the ability of a non-custodial digital asset trading platform that is a person who qualifies as a broker to obtain and transmit the information required under these proposed regulations and how these issues might be overcome. The Treasury Department and the IRS understand that digital asset trading platforms operate with varying degrees of centralization and effective control by founders or others, and request comments on whether the application of reporting rules only to ''persons'' (as described in the next paragraph) adequately limits the scope of reporting obligations to platforms that have one or more individuals or entities that can update, amend, or otherwise cause the platform to carry out the diligence and reporting rules of these proposed regulations.

As used in these proposed regulations, the term *person* generally has the meaning provided by section 7701(a)(1), which provides that the term generally includes an individual, a legal entity, and an unincorporated group or organization through which any business, financial operation or venture is carried on, such as a partnership. The term person includes a business entity that is treated as an association or a partnership for Federal tax purposes under § 301.7701–3(b). Accordingly, a group of persons providing facilitative services that are in a position to know the customer's identity and the nature of the transaction effectuated by customers may be treated as a broker whether or not the group operates through a legal entity if the group is treated as a partnership or other person for U.S. Federal income tax purposes.

These clarifying changes are intended to apply the reporting rules to digital asset trading platforms that provide facilitative services and that are in a position to know the customer's identity and the nature of the transaction effectuated by customers regardless of the manner in which they are organized or operate if the platform or its operator (or operators) is a person subject to reporting. Thus, for example, the reporting rules apply to custodial digital asset trading platforms that act as their customers' legal agents in trading their customers' digital assets as well as to operators of non-custodial trading platforms that provide digital asset middleman services that bring buyers and sellers together and rely on smart contracts to execute the transactions without further intervention from the operators, despite the fact that such digital asset middlemen may not necessarily be acting as legal agents of the customers in those transactions. Accordingly, under this definition, in addition to acting as either a principal with respect to sales of digital assets in the ordinary course of a trade or business, or as an agent (including as a custodial agent) if the nature of the agency is such that the agent ordinarily would know the gross proceeds of the sale, a broker also includes a person who acts as a digital asset middleman for a party in a sale of digital assets. Proposed § 1.6045–1(a)(21)(i) defines a digital asset middleman as any person who provides a facilitative service with respect to a sale wherein the nature of the arrangement is such that the person ordinarily would know or be in a position to know the identity of the party that makes the sale and the nature of the transaction potentially giving rise to gross proceeds from the sale.

A facilitative service is defined in proposed § 1.6045–1(a)(21)(iii)(A) as any service that directly or indirectly effectuates a sale of digital assets, such as providing: a party in the sale with access to an automatically executing contract or protocol; access to digital asset trading platforms; order matching services; market making functions to offer buy and sell prices; or escrow or escrow-like services to ensure both parties to an exchange act in accordance with their obligations. Because some persons providing these services or products may not be in a position to know the identity of the parties making a sale and the nature of the transaction, proposed § 1.6045–1(a)(21)(iii)(A) specifically excludes from the definition of *facilitative service* persons solely engaged in the business of providing distributed ledger validation services—whether through proof-of-work, proof-of-stake, or any other similar consensus mechanism—without providing other functions or services. For the same reason, proposed § 1.6045–1(a)(21)(iii)(A) also excludes from the definition of *facilitative service* persons solely engaged in the business of selling hardware or licensing software for which the sole function is to permit persons to control private keys which are used for accessing digital assets on a distributed ledger. This latter exclusion does not, therefore, exclude wallet software providers from the definition of *facilitative service* if the software also provides users with direct access to trading platforms from the wallet platform. The Treasury Department and the IRS invite comments regarding whether the provision of connection software by wallet providers to trading platforms (that customers of the trading platforms can then use to access their wallets from the trading platform) should be considered a facilitative service resulting in the wallet provider being treated as a broker. In addition, the Treasury Department and the IRS invite comments regarding what additional functions wallet providers might provide that would be considered facilitative services. Finally, the definition of *customer* under proposed § 1.6045–1(a)(2) has also been revised to include persons that make sales of digital assets using brokers who act as digital asset middlemen.

Under proposed § 1.6045–1(a)(21)(ii)(A), a person is in a position to know the identity of the party that makes the sale if that person maintains sufficient control or influence over the facilitative services provided so as to have the ability to set or change the terms under which its services are provided to request that the party making the sale provide that party's name, address, and taxpayer identification number, in advance of the sale. This rule is similar to the standard, recommended by the Financial Action Task Force (FATF), to be used to determine whether a creator, owner, operator, or other person involved in a decentralized application providing financial services should be considered to be a virtual asset service provider and should, thus, be subject to anti-money laundering (AML) and counter-terrorist financing (CFT) requirements. FATF (2021), *Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers,* p. 26–28, FATF, Paris. *https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets-2021.html.* Similarly, under proposed § 1.6045–1(a)(21)(ii)(B), a person is in a position to know the nature of the transaction potentially giving rise to gross proceeds from a sale if that person maintains sufficient control or influence over the facilitative services provided so as to have the ability to determine whether and the extent to which the transfer of digital assets involved in a transaction gives rise to gross proceeds. Thus, a person will be considered to be in a position to know the nature of the transaction potentially giving rise to gross proceeds from a sale if the person can determine that the transaction is a sale (and the gross proceeds from that sale) based on the consideration received when a sale transaction is completed. As a result, a person will be considered to be in a position to know the nature of the transaction potentially

giving rise to gross proceeds from a sale if the person has the ability to modify an automatically executing contract or protocol to which that person provides access to ensure that this information is provided upon the execution of a sale. For both of these standards, a person will be considered as maintaining sufficient control or influence over the provided facilitative services so as to have the ability to determine customer identities or the nature of transactions if that person has the ability to change the fees charged for the facilitative services, whether by modifying the existing service arrangement or by substituting a new service arrangement. The fact that a digital asset trading platform operator has modified an automatically executing contract or protocol in the past, or has replaced such a contract with another contract in its protocol, strongly suggests that the operator has sufficient control or influence over the facilitative services provided to obtain the information about either the identity of the party that makes the sale or whether and the extent to which the transfer of digital assets involved in a transaction gives rise to gross proceeds. The Treasury Department and the IRS invite comments regarding what other factors should be considered relevant to determining whether a person maintains sufficient control or influence over provided facilitative services.

The Treasury Department and the IRS understand that in some cases tokens that enable those who hold them to control the ability to change the underlying protocol of a platform described as a decentralized exchange (referred to as governance tokens) may be held in significant part by founders, development teams, or one or more investors and that in other cases those governance tokens may be more widely distributed. There may also be fact patterns in which a holder of a significant amount of governance tokens routinely takes actions that benefit the platform, for example reimbursing users whose tokens have been stolen, which actions are then ratified by or compensated by the broader group of holders of governance tokens. Consequently, there can be a range of effective control that ownership of governance tokens can provide, based on how widely the tokens are disbursed and whether or not a group of persons (normally the founders/development teams/investors) retain enough tokens as a group to make decisions. Some decentralized autonomous organizations (DAOs) are an example of this organizational structure. Even in structures where governance tokens may be widely distributed, individuals or groups of token holders can have the ability to maintain practical control. In addition, in some cases, so-called ''administration keys'' exist to allow developers or founders to modify or replace the automatically executing contracts or protocols underpinning digital asset trading platforms without requiring the vote of governance token holders. The Treasury Department and the IRS invite comments regarding the circumstances under which an operator does or does not maintain sufficient control or influence over the facilitative services offered by a digital asset trading platform. Additionally, comments are requested regarding whether, and if so, how should the ability of users of the platform, shareholders or holders of governance tokens to vote on aspects of the platform's operations be considered. Finally, comments are requested regarding whether this conclusion should be impacted by the existence of full or even partial-access administration keys or the ability of the operator to replace the existing protocol with a new or modified protocol if that replacement does not require holding a vote of governance tokens or complying with these voting restrictions.

As noted, the statutory definition of *broker* under section 6045(c)(1)(C) refers to a person who ''for a consideration'' regularly acts as a middleman. The revised definition of *broker* under the Infrastructure Act also refers to a person who, ''for consideration,'' is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person. The definition of *broker* under existing and proposed § 1.6045–1(a)(1) implements this ''for consideration'' qualification by limiting the definition of *broker* to a person who effects sales made by others ''in the ordinary course of a trade or business.'' Persons engaged in a trade or business necessarily are ''those so engaged for gain or profit.'' *See e.g.,* Treas. Reg. § 1.6041–1(b)(1); *Groetzinger* v. *Commissioner,* 480 U.S. 23 (1987). A business may receive different forms of consideration for its goods and services. The receipt of fees may be a relevant factor in determining whether a person is engaged in the ordinary course of a trade or business. However, there may be persons who facilitate transfers of digital assets for a fee or other consideration, such as individuals who occasionally facilitate transfers but do not do so on a regular basis, who are not engaged in a business activity. It is intended that this ''trade or business'' requirement will result in a more limited definition of *broker* than that which would apply under a less restrictive ''for consideration'' standard. Accordingly, as long as a broker effects the sales made by others in the ordinary course of its trade or business, it will have a reporting obligation under section 6045.

Proposed § 1.6045–1(a)(10)(i)(B) also revises the definition of *effect* to clarify that a person who acts as a principal with respect to a sale is to be treated as effecting a sale only to the extent such person is acting in the sale as a broker. Thus, for example, because an obligor that regularly issues and retires its own debt obligations is a broker, that obligor will be treated as effecting a sale when it retires its own debt as part of those regular activities. Similarly, a corporation that regularly issues and redeems its own stock will be treated as effecting a sale when it redeems its own shares as part of these regular activities. Additionally, an issuer of digital assets that regularly offers to redeem those digital assets will be treated as effecting a sale when it redeems those digital assets as part of these regular activities. Finally, proposed § 1.6045–1(a)(10)(i)(C) has been revised to clarify that a person who acts as a principal in a sale will be treated as effecting sales only if that principal is acting as a dealer with respect to the sale that is subject to reporting under section 6045. Thus, for example, a retailer who accepts digital assets from a customer as payment for the sale of goods is not effecting the sale of digital assets on behalf of that customer if that retailer is not otherwise a dealer of digital assets. Similarly, an artist in the business of creating and selling NFTs that represent interests in the artist's work is not effecting the sale of digital assets on behalf of purchasers, provided that artist is not otherwise a dealer in digital assets. This result is appropriate regardless of whether the artist regularly sells NFTs to the purchasers directly or through digital asset brokers.

Proposed § 1.6045–1(b)(1)(vi) through (xi) adds examples of persons who are generally considered to be brokers under the above definition. Specifically, digital asset trading platforms that also provide custodial (hosted wallet) services, operators of non-custodial trading platforms (including platforms that effect transactions through automatically executing contracts or protocols), digital asset payment processors, and operators and owners of digital asset kiosks are included as examples of persons who in the ordinary course of their trade or business stand ready to effect sales of digital assets on behalf of customers. These examples also clarify that even if

a person's principal business does not meet the definition of *broker,* the person will be considered a broker under the definition if that person also regularly stands ready to effect sales of digital assets on behalf of customers. Thus, digital asset hosted wallet providers and persons who sell or license software to unhosted wallet users will be considered brokers if they also facilitate or offer services to facilitate the purchase or sale of digital assets.

Conversely, proposed § 1.6045–1(b)(2)(viii) through (x) illustrate that the term broker does not extend to merchants who sell goods or services in return for digital assets, persons who are solely engaged in the business of validating distributed ledger transactions through proof-of-work, proof-of-stake, or any other consensus mechanism, without providing other functions or services, and persons who are solely engaged in the business of selling hardware or licensing software, the sole function of which is to permit a person to control private keys which are used for accessing digital assets on a distributed ledger, without providing other functions or services.

1. Digital Asset Broker

Proposed § 1.6045–1(a)(1) provides that a broker means any person that in the ordinary course of a trade or business during the calendar year stands ready to effect sales to be made by others. As applied to brokers standing ready to effect sales for others of digital assets (referred to in the preamble as a digital asset broker) the term includes not only businesses with physical locations, such as digital asset kiosks and other brick and mortar facilities, but also online businesses, such as operators of trading platforms that hold custody of their customers' digital assets and operators with sufficient control or influence over non-custodial trading platforms that effect sales of digital assets made for others by providing access to automatically executing contracts, protocols, or other software programs that automatically effect sales. As noted in the definition of *effect* discussed in Part I.B of this *Explanation of Provisions,* operators of non-custodial trading platforms would know or be in a position to know the identity of their customers and the gross proceeds of their sales, for example, because these operators have the ability to request that new potential customers provide this information and can require that their customers use automatically executing exchange contracts that provide these operators with the gross proceeds information.

As noted, the term *person* generally includes an individual, a legal entity, and an unincorporated group or organization through which any business, financial operation or venture is carried on. Accordingly, an operator of a digital asset trading platform that is an individual or legal entity may be treated as a broker, and an operator of a digital asset trading platform that is comprised of a group that shares fees from the operation of the trading platform, or is otherwise treated as an association or a partnership under § 301.7701–3(b), may also be treated as a broker even though there is no centralized legal entity through which trades are carried out. For example, a DAO may be a person that could be treated as a broker under these proposed regulations. For a discussion of digital asset trading platforms that issue governance tokens providing holders with the power to vote on major platform decisions—such as new features to be offered or revised governance rights, see Part I.B of this *Explanation of Provisions.* The Treasury Department and the IRS request comments regarding the extent to which holders of governance tokens should be treated as operating a digital asset trading platform business as an unincorporated group or organization.

A merchant that accepts digital assets directly from a customer as payment for its provision of goods or services generally is not a broker under these rules. A person is treated as a broker with respect to digital assets only if it effects sales of digital assets for customers. As described in Part I.C of this *Explanation of Provisions,* a sale by a broker generally includes a disposition of digital assets for cash, one or more stored-value cards, broker services, or certain other property (including different digital assets) that are subject to reporting under section 6045. While a merchant who provides goods, services, or other property (rather than digital assets or cash) in exchange for a customer's digital assets may be facilitating the disposition of the customer's digital assets, that merchant generally would not be treated as effecting sales of digital assets for customers as a broker because the customer's digital assets are not being exchanged for cash or the types of assets that cause the transaction to be treated as a sale under the proposed regulations. If the merchant's exchange of goods or services for digital assets is effected through a digital asset payment processor, however, the digital assets payment processor may be treated as a broker.

2. Digital Asset Hosted Wallet Providers

Under existing regulations, a broker includes an agent with respect to a sale in the ordinary course of a trade or business if the nature of the agency is such that the agent ordinarily would know the gross proceeds of the sale. Consequently, under current law, certain securities custodians and other agents are treated as brokers. Under the multiple broker rule of existing § 1.6045–1(c)(3)(iii), which exempts brokers who conduct sales on behalf of other brokers, only the broker that has the closest relationship to the customer is required to report information under section 6045.

In the digital asset industry, some persons stand ready in the ordinary course of a trade or business to take custody of and electronically store the public and private keys to digital assets held on behalf of others. These digital asset hosted wallet providers in some cases also effect sales or possess information regarding the digital asset sales of their customers in much the way a bank custodian or other custodian does for securities. The proposed definition of *broker* includes such a digital asset hosted wallet provider to the extent that the digital asset hosted wallet provider also functions as a principal in the sale of digital assets, acts as an agent for a party in the sale if it would ordinarily know the gross proceeds from the sale, or acts as a digital asset middleman and would ordinarily know or be in a position to know the identity of the party that makes the sale and the gross proceeds from the sale. If a hosted wallet provider solely holds and transfers digital assets on behalf of its customers, without possessing, or having the ability to possess, any knowledge of gross proceeds from sales, the hosted wallet provider would not qualify as a broker.

3. Digital Asset Payment Processors

A number of payment processors permit customers to make payment in digital assets. These transactions may take various forms. In many cases the customer pays in digital assets, and the payment processor exchanges those digital assets for a U.S. dollar amount that is then paid to a merchant, for example, in exchange for goods or services, or to another intermediary recipient as with a payment card purchase. In other cases, the payment processor transfers the digital assets to the merchant or other recipient. In both cases, the customer has disposed of its digital assets in a transaction that ordinarily is a gain (or loss) recognition transaction. These proposed regulations

would require digital asset payment processors to provide information on those dispositions. Payment processors (and in certain circumstances merchant acquiring entities within the same network as payment card issuers) may separately be required to provide information on the merchant transaction under section 6050W, which requires reporting by TPSOs and merchant acquiring entities. Therefore, for example, where a TPSO effects a transaction involving the exchange of merchandise for digital assets, the TPSO will need to report on the disposition of the merchandise under section 6050W and on the digital asset disposition under section 6045, assuming no exceptions apply.

A digital asset payment processor is defined in proposed § 1.6045–1(a)(22)(i)(A) as a person who in the ordinary course of its business regularly stands ready to effect digital sales by facilitating payments from one party to a second party by receiving digital assets from the first party and exchanging them into different digital assets or cash paid to the second party, such as a merchant. In some cases, payment recipients are willing to receive payments in digital assets rather than cash and those payments are facilitated by an intermediary. To facilitate a payment transaction in these circumstances, a digital asset payment processor might provide the payment recipient with a temporarily fixed exchange rate on a digital assets payment that is transferred directly from a customer to that payment recipient. This temporarily fixed exchange rate may also be available to the merchant if it wishes to immediately exchange the digital assets for cash. In a transaction of this kind, similar to other merchant transactions involving intermediaries that provide cash to the merchants in exchange for the merchant's provision of goods or services to the customer, the customer disposes of its digital assets in a transaction that gives rise to gain (or loss) and receives goods or services, while the merchant receives or can choose to receive cash. This customer consequently has the same obligation to determine and report its gain or loss as in the other type of merchant transaction, and similar reporting rules therefore should apply to the digital asset payment processor. To address these transactions, for purposes of the definition of a *digital asset payment processor,* these proposed regulations treat the transfer of digital assets by a customer directly to a second person (such as a vendor of goods or services) pursuant to a processor agreement that provides for the temporary fixing of the exchange rate to be applied to the digital assets received by the second person as if the digital assets were transferred by the customer to the digital asset payment processor in exchange for different digital assets or cash paid to the second person.

This characterization of the transaction as a transfer of digital assets by the customer to the digital asset payment processor in exchange for the payment of different digital assets or cash to the second person applies solely for purposes of certain definitions in these regulations, to ensure that customer dispositions of digital assets for consideration are subject to reporting regardless of the details of the arrangements made by the merchant for receiving payment. No inference is intended with respect to whether these transactions should or may be treated as dispositions for cash for any other purpose of the Code. The characterization of the transaction as involving a payment of cash to the merchant for purposes of these proposed regulations will apply regardless of whether the merchant subsequently exchanges the digital assets received pursuant to the temporarily fixed exchange rate, because the fixed exchange rate provided by the digital asset payment processor both facilitates the transaction and serves as a foundation to determine the fair market value received by the customer in the exchange. Accordingly, to meet their information reporting obligations in these alternatively structured payment transactions, digital asset payment processors will need to ensure that they obtain the required personal identifying information (that is, name, address, and tax identification number) from the customer (that is, the party making the payment in digital assets) in advance of these transactions. It is anticipated that digital asset payment processors will report gross proceeds from the disposition of digital assets by customers but may not have the information necessary or available to report the basis of the disposed-of digital assets unless they also hold digital assets for those customers.

In addition, because a payment processor knows the gross proceeds with respect to an exchange transaction when it is participating in a transaction that is potentially reportable under existing § 1.6050W–1(a)(1), the definition of a *digital asset payment processor* also includes certain payment settlement entities and certain entities that make payments to payment settlement entities that are potentially subject to reporting under section 6050W. First, proposed § 1.6045–1(a)(22)(i)(B) provides that a digital asset payment processor includes a TPSO (as defined in § 1.6050W–1(c)(2)) that makes (or submits instructions to make) payments using one or more digital assets in settlement of reportable payment transactions as described in § 1.6050W–1(a)(2). This treatment of a TPSO as a digital asset payment processor applies whether or not the TPSO actually makes (or provides the instructions to make) the payment or contracts with a third-party electronic payment facilitator, pursuant to § 1.6050W–1(d)(2), to make (or provide the instructions to make) the payment. In addition, this treatment of a TPSO as a digital asset payment processor applies without regard to whether the payment to the merchant is below the *de minimis* threshold described in section 6050W(e) and, thus, not reportable under section 6050W.

Second, the definition of a *digital asset payment processor* in proposed § 1.6045–1(a)(22)(i)(C) includes a payment card issuer that makes (or submits the instruction to make) payments in one or more digital assets to a merchant acquiring entity, as defined under § 1.6050W–1(b)(2), in a transaction that is associated with a reportable payment transaction under § 1.6050W–1(a)(2) that is effected by the merchant acquiring bank. Whether a transaction is associated with a reportable payment transaction is determined without regard to whether the merchant acquiring bank contracts with an agent to make (or submit the instructions to make) its payments to the merchant.

Proposed § 1.6045–1(a)(2)(ii)(A) clarifies that the customer in a digital assets payment processor transaction includes the person who transfers the digital assets or directs the transfer of the digital assets to the digital asset payment processor to make payment to the second person. Thus, for example, a digital asset payment processor's customer is the person who transfers the digital assets to that processor even if the processor has a contractual arrangement with only the second person, that is, the person who will ultimately receive the cash in the payment transaction.

The Treasury Department and the IRS recognize that some stakeholders may have concerns that providing personal identity information in transactions where the payment processor is an agent of a merchant may raise privacy concerns and request comments on whether there are alternative approaches that would satisfy tax

compliance objectives while reducing privacy concerns.

The Treasury Department and the IRS considered whether a *de minimis* threshold should apply to the reporting of merchant transactions of the kind described above, taking into account that the cost and effort to build a reporting system may increase if numerous small transactions must be reported. Whether there would in fact be an increase in cost and effort is uncertain, as in some other information reporting contexts reporting entities have elected not to take advantage of *de minimis* thresholds in order to avoid the need to monitor the size or amount of the reportable item. Moreover, taxpayers are required to report gain from dispositions of digital assets on their tax returns regardless of the amount disposed of, and a taxpayer that engages in many small dispositions of digital assets may have an aggregate amount of gain for the taxable year that is significant. Because information reporting assists customers in determining the proper amount of gain or loss attributable to such dispositions, these proposed regulations do not include a *de minimis* rule for reporting these merchant transactions.

4. Other Brokers

The definition of *broker* in existing § 1.6045–1(a)(1) is proposed to be modified to include persons that regularly offer to redeem digital assets that were created or issued by that person, such as in an initial coin offering or redemptions by an issuer of a so-called stablecoin. A stablecoin is a form of digital asset that is intended to have a stable value relative to another asset or assets, typically a fiat currency. Some stablecoin issuers effect redemptions on behalf of all, or some, of their customers and know the gross proceeds paid to their customers. Stablecoin issuers that redeem their stablecoins are included in the definition of *broker* because, notwithstanding the nomenclature ''stablecoin,'' the value of a stablecoin may not always be stable and therefore may give rise to gain or loss. *See* Additional Definitional Changes in Part I.K of this *Explanation of Provisions.* These proposed regulations apply to persons that regularly offer to redeem digital assets rather than persons who regularly carry out redemptions to ensure reporting on the occasional redemptions by digital asset issuers that may not regularly redeem their issued digital assets. The Treasury Department and the IRS request comments on the frequency with which creators or issuers of digital assets redeem digital assets. In addition, the Treasury Department and the IRS request comments regarding whether the broker reporting regulations should apply to include initial coin offerings, simple agreements for future tokens, and similar contracts.

5. Real Estate Reporting Persons

Proposed § 1.6045–1(a)(1) was also modified to provide that a real estate reporting person is a broker with respect to digital assets used as consideration in a real estate transaction if the reporting person would be required to make an information return with respect to that real estate transaction under proposed § 1.6045–4(a), without regard to any reporting exceptions provided under section 6045(e)(5) or proposed or existing § 1.6045–4(c) or (d), such as the exception for certain sales of principal residences or the exception for exempt real estate sellers. Thus, for example, a real estate reporting person would be required to report on a real estate buyer's exchange of digital assets for real estate as a sale of those digital assets even though the real estate reporting person is not required to report on the real estate seller's exchange of the real estate for digital assets due to the fact that the seller of that real estate is an exempt seller, such as a corporation, under existing § 1.6045–4(d).

C. Expansion of the Types of Sales Subject To Reporting

Digital assets are unique among the types of assets that are subject to reporting under section 6045 because it is common for digital assets to be exchanged for different digital assets. In addition, some digital assets can readily function as a payment method as well as an investment asset. Digital assets can be exchanged for cash, stored-value cards, services, or other property (including different digital assets). To avoid gaps in information reporting with respect to this broad range of taxable exchanges, proposed § 1.6045–1(a)(9)(ii) expands the definition of a *sale* subject to reporting. Proposed § 1.6045–1(a)(9)(ii)(A)(*1*) and (*2*) provide that a sale includes the disposition of a digital asset in exchange for cash, one or more stored-value cards, or a different digital asset. An exchange for cash for these purposes includes a payment received through the use of a check, credit card, or debit card. Proposed § 1.6045–1(a)(25) defines a stored-value card as a card—whether in physical or digital form—with a prepaid value in U.S. dollars, any convertible foreign currency, or any digital asset. A stored-value card includes a gift card. The Treasury Department and the IRS request comments on whether the types of consideration for which digital assets may be exchanged in a sale transaction is sufficiently broad to capture current and anticipated transactions in which taxpayers regularly dispose of digital assets for consideration.

In addition, proposed § 1.6045–1(a)(9)(ii)(B) provides that a sale of a digital asset includes the disposition of a digital asset by a customer in exchange for property (including securities and real property) of a type that is subject to reporting under section 6045. Thus, for example, if a stockbroker accepts a digital asset from a customer as payment for the customer's purchase of stock, that disposition of the digital asset in exchange for stock will be treated as a sale of the digital asset by that customer for purposes of section 6045. Similarly, if a real estate reporting person, as defined in existing § 1.6045–4(e), is involved in a real estate transaction in which the real estate buyer uses digital assets as consideration in the exchange for real property, that disposition of digital assets in exchange for real property will be treated as a sale of the digital assets by that real estate buyer for purposes of section 6045.

Proposed § 1.6045–1(a)(9)(ii)(C) provides that a sale of digital assets also includes a disposition of digital assets by a customer in consideration for the services of a broker as defined in proposed § 1.6045–1(a)(1). Whether a person is a broker for purposes of this rule, however, is determined without regard to whether that person regularly as part of its trade or business accepts digital assets in consideration for its services. Thus, if a stockbroker accepts a digital asset as payment for the commission charged for a stock purchase, the customer's disposition of the digital asset in exchange for the broker's services will be treated as a sale of the digital asset for purposes of section 6045 because the stockbroker is a broker due to the fact that it regularly effects sales of stock (not because it regularly accepts digital assets for services). In contrast, if a landscaper accepts a digital asset as payment for landscaping services, the customer's disposition of the digital asset in exchange for the landscaper's services will not be treated as a sale of digital assets for purposes of section 6045 because the determination of whether the landscaper is a broker is made without regard to whether that landscaper regularly accepts digital assets in consideration for landscaping services as part of a trade or business. Proposed § 1.6045–1(a)(2)(ii)(B) provides that the customer in these sales is the person who transfers the digital

assets or directs the transfer of the digital assets to the broker regardless of whether the broker is a digital asset broker. Proposed § 1.6045–1(a)(2)(ii)(C) provides that in the case of a broker that is a real estate reporting person with respect to a real estate transaction, the customer is the person who transfers the digital assets or directs the transfer of the digital assets to the seller of the real estate (or the seller's nominee or agent) to acquire the real estate. Finally, to ensure that these sales of digital assets are treated as effected by a broker, proposed § 1.6045–1(a)(21)(iii)(B) provides that the acceptance of digital assets in consideration for the above-described property or services provided by a broker is a facilitative service. As a result, the broker will be treated as effecting these sales of digital assets as a digital asset middleman under proposed § 1.6045–1(a)(10)(i)(D).

In certain circumstances, a digital asset broker (other than a digital asset payment processor discussed earlier in Part I.B.3 of this *Explanation of Provisions*) such as a digital asset broker providing hosted wallet services might transfer digital assets without knowing that the transfer was part of a sale transaction. For example, a customer might direct such a custodial broker to transfer digital assets to the wallet of a merchant in connection with the purchase of goods or services from that merchant. The definition of *effect* in proposed § 1.6045–1(a)(10) limits the sales for which such brokers must make a report to those transactions in which the broker (as agent) would ordinarily know the gross proceeds from the sale or (as digital asset middleman) would ordinarily know or be in a position to know the identity of the party that makes the sale and the gross proceeds from the sale. Although the custodial broker in this example would ordinarily know or be in a position to know the identity of its customer, it is not in a position to know that the transfer was associated with a sale or exchange transaction or the amount that the customer received as gross proceeds from the exchange (that is, the amount the customer received in consideration for the digital assets surrendered). Accordingly, the transfer of digital assets by that custodial broker to the wallet of the merchant does not constitute effecting a sale of digital assets by that broker. In contrast, a digital asset payment processor would typically know whether the transfer was part of a sale transaction because that broker would have a contractual relationship with the payment recipient as well as with the transferor of the payment. Accordingly, in these cases the transfer of digital assets by the digital asset payment processor (or the direction to the customer by the digital asset payment processor to transfer digital assets) to the wallet of the merchant would constitute effecting a sale.

In view of the increasing use of digital assets to make payments for goods and services or to satisfy other payment obligations through the intermediation of digital asset payment processors, digital asset payment processors (which may also function in other contexts as digital asset trading platforms) are subject to these rules. To achieve this result, proposed § 1.6045–1(a)(9)(ii)(D) provides that a sale includes payments of a digital asset by the customer to a digital asset payment processor in exchange for that processor's payment of a different digital asset or cash to a second person. A sale also includes the transfer of a digital asset by a customer directly to a second person (such as a vendor of goods or services) pursuant to a processor agreement that provides for the temporary fixing of the exchange rate to be applied to the digital asset received by the second person, which is treated (under the rules setting forth the definition of a *digital asset payment processor*) as if the digital asset was paid by the customer to the digital asset payment processor in exchange for a different digital asset or cash paid to that second person.

In the case of a digital asset payment processor that is a TPSO, a sale also includes a customer's payment in digital assets to the digital asset payment processor (or pursuant to instructions provided by that digital asset payment processor or its agent) as part of a transaction in which the digital asset payment processor pays (or is treated as paying) the digital assets to a merchant in settlement of a reportable payment transaction under § 1.6050W–1(a)(2). This payment is a sale of digital assets by the customer under these proposed regulations without regard to whether the amount paid to the merchant during the calendar year exceeds the *de minimis* threshold described in section 6050W(e) or whether the digital asset payment processor contracts with a third party to make (or provide instructions to make) the payment to the merchant pursuant to § 1.6050W–1(d)(2). Finally, to account for payments that are reportable under section 6050W with respect to payment card transactions where a digital asset payment processor is also a payment card issuer, a sale of digital assets also includes a payment made in digital assets by a customer to the payment card issuer (or pursuant to instructions provided by that card issuer or its agent) in a transaction associated with a reportable payment transaction under § 1.6050W–1(a)(2). This treatment of the customer's payment as a sale in this case is determined without regard to whether the merchant acquiring bank contracts with an agent to make (or submit the instructions to make) payment to the ultimate payee. Thus, under this rule, in the case of a payment card purchase at a merchant, the buyer's payment in a digital asset to the payment card issuer will be a sale even if that payment card issuer pays the merchant acquiring entity in the same type of digital asset because the subsequent payment (whether in cash or in digital assets) by the merchant acquiring entity (or its agent) to the merchant is a reportable payment transaction under § 1.6050W–1(a)(2).

A broker's customer may enter into executory contracts, or other derivative contracts involving the future delivery of a digital asset, where delivery under the contract also should be subject to reporting as a digital asset sale under these proposed regulations. To ensure that these executory or other derivative contracts do not circumvent the proposed information reporting rules for digital assets, proposed § 1.6045–1(a)(9)(ii)(A)(*3*) defines a sale to include the delivery of a digital asset pursuant to the settlement of a forward contract, option, regulated futures contract, any similar instrument, or any other executory contract that would be treated as a sale of the digital asset under the regulation if the contract had not been executory.[3] The rules in existing § 1.6045–1(a)(9), redesignated in these proposed regulations as proposed § 1.6045–1(a)(9)(i), applicable to making or taking delivery (for example, treating a closing transaction as one or two sales depending on the nature of the contract) are cross-referenced to apply to the delivery of digital assets pursuant to transactions described in proposed § 1.6045–1(a)(9)(ii)(A)(*3*). Additionally, the rules in existing § 1.6045–1(a)(9) applicable to the circumstances under which a transaction is treated as a sale with respect to certain contracts and options are cross-referenced to apply to determine if similar transactions related to digital assets constitute sales described in proposed § 1.6045–1(a)(9)(ii)(A). Accordingly, the entering into of a digital asset contract that

[3] No inference is intended as to when a sale of a digital asset occurs under any other legal regime, including the Federal securities laws and the Commodity Exchange Act, or to otherwise impact the interpretation or applicability of those laws, which are outside the scope of these regulations.

requires delivery of personal property, the initial grant or purchase of a digital asset option, or the exercise of a purchased digital asset call option for physical delivery (except for a contract described in section 988(c)(5)) is not included in the definition of *sale* under proposed § 1.6045–1(a)(9)(ii)(A).

Thus, for example, the closing of a regulated futures contract that involves making a delivery of digital assets will be treated as two sales, one under redesignated proposed § 1.6045–1(a)(9)(i) with respect to the profit or loss on the contract, and the other under proposed § 1.6045–1(a)(9)(ii)(A)(*3*) on the delivery of the digital assets. The Treasury Department and the IRS invite comments addressing the extent to which these rules create logistical concerns for the reporting on contracts involving the delivery of digital assets. Additionally, the delivery of a digital asset under an executory contract will be treated as a sale of the digital asset under these rules if the underlying terms of the contract (for example, an exchange of one digital asset for a different digital asset) would have given rise to a sale under these rules if the contract had been executed when made. In contrast, if the underlying terms of the contract would not have been treated as a sale under these rules (for example, the direct payment of a digital asset by a consumer to a merchant in exchange for merchandise without the involvement of a digital asset payment processor), then the delivery of the digital asset pursuant to this type of executory contract will not be treated as a sale. The Treasury Department and the IRS invite comments regarding how frequently forward contracts involving digital assets are traded in practice, and whether there are any additional issues that should be considered to enable brokers to report on these transactions.

Finally, there are several types of transactions that the definition of *sale* under proposed § 1.6045–1(a)(9)(ii) does not include. For example, the definition does not include a transaction in which a customer receives new digital assets without disposing of something else in exchange. Thus, for example, a sale does not include a hard fork transaction, in which a customer receives new digital assets as part of a protocol change in previously held digital assets without disposing of different digital assets in exchange. Similarly, the receipt by a customer of digital assets from an airdrop (or simultaneous distribution of units of digital assets to the distributed ledger addresses of multiple taxpayers) does not constitute the sale of digital assets under proposed § 1.6045–1(a)(9)(ii) even if the customer's holdings in existing digital assets are the basis on which the new digital assets were received. Additionally, the definition of *sale* under proposed § 1.6045–1(a)(9)(ii) does not include a transaction in which a broker's customer receives digital assets in return for the performance of services. Thus, for example, a sale does not include the receipt by a broker's customer of new digital assets as a reward in return for certain marketing-related services such as taking a survey.

The Treasury Department and the IRS are aware that the transactions described in this Part I.C of this *Explanation of Provisions* do not address every type of transaction involving digital assets that taxpayers engage in through entities defined in these proposed regulations as brokers. For example, these proposed regulations do not specify whether a loan of digital assets is required to be reported. These proposed regulations also do not specifically address whether reporting is required for transactions involving the transfer of digital assets to and from a liquidity pool by a liquidity pool provider, or the wrapping and unwrapping of a digital asset, in light of the absence of guidance on those transactions. Comments are requested on whether the definition of *sale* or other parts of the regulations should be revised to address transactions not described in these proposed regulations.

D. Information To Be Reported for Digital Asset Sales

Several new subparagraphs have been added to the rules contained in existing § 1.6045–1(d)(2)(i) to address the information required to be reported with respect to digital asset sales. Much of the information required to be reported is similar to the information that is currently required to be reported on the Form 1099–B with respect to securities. For example, proposed § 1.6045–1(d)(2)(i)(B) requires that for each digital asset sale for which a broker is required to file an information return, the broker must report on the form prescribed by the Secretary the following information:

- The customer's name, address, and taxpayer identification number;
- The name or type of the digital asset sold and the number of units of the digital asset sold;
- The sale date and time;
- The gross proceeds of the sale; and
- Any other information required by the form or instructions in the manner required by the form or instructions.

Additionally, to aid the IRS in verifying valuations provided for reported gross proceeds and in determining whether the basis claimed by taxpayers in connection with transactions for which adjusted basis information is not reported by the broker, proposed § 1.6045–1(d)(2)(i)(B) also requires that the broker report:

- The transaction identification (transaction ID or transaction hash) associated with the digital asset sale, if any;
- The digital asset address (or digital asset addresses if multiple) from which the digital asset was transferred in connection with the sale, if any; and
- Whether the consideration received was cash, different digital assets, other property, or services.

In addition to these listed items, if the transaction involves the sale of a digital asset that also constitutes a sale of a security, the broker must also provide certain information that is relevant to the sale of securities as required by the form or instructions. It is anticipated that this additional information will be required only for digital assets that are digital representations of other assets that constitute securities.

To the extent the sale is of a digital asset that was held by the broker in a hosted wallet on behalf of the customer and that digital asset was previously transferred into that account (transferred-in digital asset), the broker must also report the date and time of such transfer-in transaction, the transaction ID of such transfer-in transaction, the digital asset address (or digital asset addresses if multiple) from which the transferred-in digital asset was transferred, and the number of units transferred in by the customer as part of that transfer-in transaction. The Treasury Department and the IRS intend to except brokers from reporting this additional information with respect to the sale of transferred-in digital assets once rules have been promulgated under section 6045A with respect to brokers who receive transfer statements under section 6045A for digital assets. Until that time, this information would be used by the IRS to verify the basis claimed by the taxpayer in connection with the sale of the transferred-in digital asset.

For purposes of the above reporting requirements, proposed § 1.6045–1(a)(20) defines a *digital asset address* as the unique set of alphanumeric characters that is generated by the wallet into which the digital asset will be transferred. Some digital asset addresses may be referred to as wallet addresses. Additionally, proposed § 1.6045–1(a)(26) defines a *transaction identification,* or *transaction ID,* as the unique set of alphanumeric identification characters that a digital asset distributed ledger associates with

a transaction involving the transfer of a digital asset from one digital asset address to another. A transaction ID is alternatively referred to as a ''Txid'' or ''transaction hash.''

The Treasury Department and the IRS recognize that the requirement to report transaction ID information and digital asset addresses with respect to digital asset sales and certain digital asset transfer-in transactions may be burdensome under certain circumstances. Accordingly, the Treasury Department and the IRS request comments regarding whether there are other less burdensome alternatives that would allow the IRS the ability to investigate or verify basis information provided by taxpayers. For example, should the Treasury Department and the IRS consider an annual aggregate digital asset sale threshold, above which the broker would report transaction ID information and digital asset addresses? If so, what should that threshold be and why?

When available, drafts of the form prescribed by the Secretary will be posted for comment at *www.irs.gov/draftforms.* Brokers will only be required to file the form following approval of the information collection under the Paperwork Reduction Act. The Paperwork Reduction Act approval process requires the IRS to publish a 60-day notice and request for comments in the **Federal Register** and subsequently publish a 30-day notice and request for comments in the **Federal Register** for the Office of Management and Budget's (OMB) review and clearance. Proposed § 301.6721–1(g)(3)(iii) (failure to file correct information returns) and proposed § 301.6722–1(d)(2)(viii) (failure to furnish correct payee statements) have been modified to include the form prescribed by the Secretary pursuant to proposed § 1.6045–1(d)(2)(i)(B) in the list of forms subject to those penalties.

For sales of digital assets that are effected when recorded on a broker's internal accounting ledger, proposed § 1.6045–1(d)(4)(ii) provides that the broker must report the sale as of the date and time the sale was recorded on that internal ledger regardless of whether that sale is later recorded on a distributed ledger. Reporting the time of the transaction under a uniform time standard would eliminate any confusion that would be caused by reporting transactions by the same taxpayer in different local time zones. The Treasury Department and the IRS understand that transaction timestamps undertaken on blockchains are generally recorded using Coordinated Universal Time (UTC). Accordingly, proposed § 1.6045–1(d)(4)(ii) provides that the reported date and time should generally be set forth in hours, minutes, and seconds using UTC unless otherwise directed in the form prescribed by the Secretary pursuant to proposed § 1.6045–1(d)(2)(i)(B) or instructions. It is anticipated that the time standard required by this form prescribed by the Secretary or instructions will correspond to any successor convention for time generally used by the industry. Proposed § 1.6045–1(d)(4)(iii) provides examples of a broker reporting time using the UTC time convention based on a 12-hour clock (designating a.m. and p.m. as appropriate). The Treasury Department and the IRS request comments regarding whether it would be less burdensome to report the time using a 24-hour clock and the extent to which all brokers should be required to use the same 12-hour or 24-hour clock for these purposes. The Treasury Department and the IRS also request comments regarding whether a uniform time standard is overly burdensome and the extent to which there are circumstances under which more flexibility should be provided. For example, if a particular customer's transactions are carried out only in one time zone, the customer might prefer reporting that is based on that time zone, particularly for transactions for which the exact date and time of acquisition or disposition affect the determination of the customer's tax liability, such as transactions that take place just before the end of the customer's taxable year or that relate to the customer's holding period for the disposed-of digital asset. The Treasury Department and the IRS request comments regarding whether there are alternatives to basing the transaction date on the UTC for customers who are present in a different time zone known to the broker at the time of the transaction.

These information reporting rules will require digital asset brokers to expend resources to develop and implement information reporting systems to comply with the required reporting. Balancing on the other side of that consideration is the concern that limited information reporting by brokers has made it difficult, time-consuming, and expensive for taxpayers to calculate their gains or losses on these transactions and has contributed to significant underreporting by taxpayers of gain generated by digital asset sale and exchange transactions. Accordingly, these changes are proposed to apply to sales and exchanges of digital assets effected on or after January 1, 2025. No inference should be drawn from these proposed rules concerning the reporting requirements for digital asset sale transactions entered into before the regulations become applicable.

E. Gross Proceeds in Digital Asset Transactions

1. Determining the Gross Proceeds in a Sale Transaction

The information reporting rules for determining the gross proceeds in a sale transaction generally follow the substantive rules for computing the amount realized from transactions involving the sale or other disposition of digital assets. These substantive rules are provided under proposed § 1.1001–7(b) and discussed in Part II of this *Explanation of Provisions.* Accordingly, proposed § 1.6045–1(d)(5)(ii)(A) defines *gross proceeds* to be reported by a broker with respect to a customer's sale of digital assets as the sum of: (i) the total amount in U.S. dollars paid to the customer or credited to the customer's account as a result of the sale; (ii) the fair market value of any property received or, in the case of a debt instrument issued in exchange for the digital asset and subject to § 1.1001–1(g), the amount realized attributable to the debt instrument as determined under proposed § 1.1001–7(b)(1)(iv) (in general, the issue price of the debt instrument); and (iii) the fair market value of any services received, including services giving rise to digital asset transaction costs; reduced by the amount of the allocable digital asset transaction costs as discussed in Part I.E.3 of this *Explanation of Provisions.* Part I.E.2 of this *Explanation of Provisions* provides the rules applicable to determining the fair market value of property or services received in an exchange transaction.

In the case of a sale effected by a digital asset payment processor on behalf of one party, proposed § 1.6045–1(d)(5)(iii) provides that the amount of gross proceeds to be reported by the digital asset payment processor is equal to the sum of the amount paid in cash, or the fair market value of the amount paid in digital assets by the digital asset payment processor to a second party, plus any digital asset transaction costs withheld (whether withheld from the digital assets transferred by the first party or withheld from the amount due to the second party), reduced by the amount of the allocable digital asset transaction costs as discussed in Part I.E.3 of this *Explanation of Provisions.* For purposes of this calculation, the amount paid by a digital asset payment processor to a second person includes

the amount treated as paid to the second person pursuant to a processor agreement that temporarily fixes the exchange rate between that second person and a digital asset payment processor, which amount is determined by reference to the fixed exchange rate.

2. Determining the Fair Market Value of Property or Services Received in an Exchange Transaction

In determining the fair market value of property or services received by the customer in an exchange transaction involving digital assets, the information reporting rules generally follow the substantive rules provided under proposed § 1.1001–7(b) discussed in Part II of this *Explanation of Provisions.* Accordingly, proposed § 1.6045–1(d)(5)(ii)(A) provides that in determining gross proceeds under these rules, the fair market value should be measured as of the date and time the transaction was effected. Additionally, except in the case of services giving rise to digital asset transaction costs, to determine the fair market value of services or property (including different digital assets or real property) paid to the customer in exchange for digital assets, proposed § 1.6045–1(d)(5)(ii)(A) provides that the broker must use a reasonable valuation method that looks to the contemporaneous evidence of value of the services, stored-value cards, or other property. In contrast, because the value of digital assets used to pay for digital asset transaction costs is likely to be significantly easier to determine than any other measure of the value of services giving rise to those costs, the Treasury Department and the IRS have determined for administrability purposes that brokers must look to the fair market value of the digital assets used to pay for digital asset transaction costs in determining the fair market value of services (including the services of any broker or validator involved in executing or validating the transfer) giving rise to those costs. The Treasury Department and the IRS, however, request comments regarding whether there are circumstances under which an alternative valuation rule would be more appropriate.

In the case of one digital asset exchanged for a different digital asset, proposed § 1.6045–1(d)(5)(ii)(A) provides that the broker may rely on valuations performed by a digital asset data aggregator using a reasonable valuation method. For this purpose, a reasonable valuation method looks to the exchange rate and the U.S. dollar valuations generally applied by the broker effecting the exchange as well as other brokers, taking into account the pricing, trading volumes, market capitalization, and other relevant factors in conducting the valuation. Because taking into account these described factors from small volume exchangers could provide skewed valuations of a digital asset, proposed § 1.6045–1(d)(5)(ii)(C) provides that a valuation method is not a reasonable method if the method over-weighs prices from exchangers that have low trading volumes or if the method under-weighs exchange prices that lie near the median price value. A valuation method also is not a reasonable method if it inappropriately weighs factors associated with a price that would make that price an unreliable indicator of value. For example, if trading prices on a digital asset trading platform are affected by structured trading that tends to increase the price of assets beyond the price that an unrelated purchaser with knowledge of the facts would pay, using the prices from that digital asset trading platform may not be part of a reasonable valuation method.

Consistent with the substantive rules discussed in Part II of this *Explanation of Provisions,* if in a digital asset exchange transaction there is a disparity between the value of the services or property received and the value of the digital asset transferred, proposed § 1.6045–1(d)(5)(ii)(B) provides that the broker must look to the fair market value of the services or property received. If the broker reasonably determines that the value of services or property received cannot be valued with reasonable accuracy, proposed § 1.6045–1(d)(5)(ii)(B) provides that the fair market value of the received services or property must be determined by reference to the fair market value of the transferred digital asset. If the broker reasonably determines that neither the digital asset nor the services or other property exchanged for the digital asset can be valued with reasonable accuracy, proposed § 1.6045–1(d)(5)(ii)(B) provides that the broker must report an undeterminable value for gross proceeds from the transferred digital asset.

3. Determining Digital Asset Transaction Costs Allocable to the Sale in an Exchange Transaction

Many digital asset brokers will charge a single transaction fee in the case of an exchange of one digital asset for a different digital asset. In some cases, these fees may be adjusted depending on the type of digital asset acquired or disposed of in the exchange, with transactions involving less commonly traded digital assets carrying higher transaction fees than transactions involving more commonly traded digital assets. The Treasury Department and the IRS considered various approaches to allocating transaction fees and other digital asset transaction costs that are charged in an exchange of one digital asset for a different digital asset. Ultimately, to avoid the administrative complexities associated with distinguishing between special broker fee allocations that appropriately reflect the economics of the transaction and broker fee allocations that reflect tax-motivated requests, proposed § 1.6045–1(d)(5)(iv) provides that in the case of a sale or disposition of digital assets, the total digital asset transaction costs paid by the customer are generally allocable to the disposition of the digital assets. An exception applies, however, in an exchange of one digital asset for another digital asset differing materially in kind or in extent. In that case, one-half of any digital asset transaction cost paid by the customer in cash or property to effect the exchange should be allocable to the disposition of the transferred digital asset and the other half should be allocable to the acquisition of the received digital asset. These rules are consistent with the substantive rules provided under proposed § 1.1001–7(b) and proposed § 1.1012–1(h) discussed in Part II of this *Explanation of Provisions.* Finally, proposed § 1.6045–1(d)(5)(iv) defines the term *digital asset transaction costs* to mean the amount paid to effect the disposition or acquisition of a digital asset and includes transaction fees paid to a digital asset broker, any transfer taxes that apply, and any other commissions or other costs paid to effect the disposition or acquisition of a digital asset.

F. Adjusted Basis Reporting for Digital Assets and Certain Financial Contracts on Digital Assets

1. Mandatory Broker Reporting

Section 6045(g) requires a broker that is otherwise required to make a return under section 6045(a) with respect to covered securities to report the adjusted basis with respect to those securities. Under section 6045(g)(3)(A), a covered security is any specified security acquired on or after the acquisition applicable date if the security was either acquired through a transaction in the account in which the security is held or was transferred to that account from an account in which the security was a covered security, but only if the broker received a transfer statement under section 6045A with respect to that security. Prior to the amendments made by the Infrastructure Act, the term *specified security* was defined by

section 6045(g)(3)(B) to mean any share of stock in a corporation; any note, bond, debenture, or other evidence of indebtedness; any commodity or commodity derivative if the Secretary determines that adjusted basis reporting is appropriate; and any other financial instrument with respect to which the Secretary determines that adjusted basis reporting is appropriate. For stock in a corporation, sections 6045(g)(3)(C)(i) and (ii) provide that the acquisition applicable date is either January 1, 2011, or January 1, 2012, depending on whether the average basis method is permissible under section 1012. Prior to the amendments made by the Infrastructure Act, section 6045(g)(3)(C)(iii) provided the acquisition applicable date for specified securities other than stock, including for any other financial instrument with respect to which the Secretary determines that adjusted basis reporting is appropriate, was January 1, 2013, or such later date as determined by the Secretary. Under the existing regulations, reporting of adjusted basis is required only for stock, debt instruments, options on stock and debt and related financial attributes such as interest rates or dividend yields, and securities futures contracts.

The Treasury Department and the IRS intend to issue a separate notice of proposed rulemaking to implement the legislative changes to section 6045A which would require applicable persons, including brokers, to provide transfer statements under section 6045A when digital assets are transferred. These transfer statements are needed for digital assets that are acquired by taxpayers in one account and transferred to another account to provide the brokers who effect sales of digital assets with the information necessary to report the adjusted basis of the sold digital assets. Section 6045A addresses this information shortfall with respect to transferred securities by requiring that the acquiring broker or other applicable person provide the purchase date and basis information for a transferred security to the receiving broker. The legislative changes to section 6045A made in section 80603(b)(2)(A) of the Infrastructure Act not only clarify that transfer statement reporting under section 6045A(a) applies to covered securities that are digital assets, but also add a new reporting provision under section 6045A(d) to provide for broker information reporting to the IRS on transfers of digital assets that are covered securities, provided the transfer is not a sale and is not to an account maintained by a person that the broker knows or has reason to know is also a broker.

a. Digital Assets Acquired by Custodial Brokers and Certain Financial Contracts on Digital Assets

Brokers who acquire digital assets for customers, provide custodial services for these digital assets, and continue to hold those digital assets until sale have the necessary information to determine the customers' adjusted basis in these digital assets. By contrast, brokers who receive a transfer of a customer's digital assets that were acquired for that customer by another broker may not have that information. As a result, the Treasury Department and the IRS have determined that mandatory basis reporting under these proposed regulations should apply only to sales of digital assets that were previously acquired, held until sale, and then sold by a custodial broker for the benefit of a customer. Accordingly, until rulemaking under section 6045A is complete, the definition of a *covered security* for purposes of digital asset basis reporting is limited under proposed § 1.6045–1(a)(15)(i)(J) to digital assets that are acquired in a customer's account by a broker providing hosted wallet services. Therefore, sale transactions effected by custodial brokers of digital assets that were *not* previously acquired in the customer's account and sale transactions effected by non-custodial brokers, such as those that taxpayers may refer to as decentralized exchanges, are not subject to these mandatory basis reporting rules.

In contrast to digital assets, financial contracts (such as options and forward contracts) on digital assets that are not themselves digital assets are not held by brokers on behalf of customers in hosted wallets. Accordingly, the definition of a *covered security* subject to mandatory basis reporting for these non-digital asset options and forward contracts on digital assets is not limited to contracts held by brokers providing hosted wallet services. Instead, basis reporting for these financial contracts is required under these proposed regulations pursuant to the expanded definition of a *covered security* under proposed § 1.6045–1(a)(15)(i)(H) (non-digital asset options) and proposed § 1.6045–1(a)(15)(i)(K) (non-digital asset forward contracts) as long as they are granted, entered into, or acquired in a customer's account at a broker or custodian pursuant to the rules in existing § 1.6045–1(a)(15)(ii).

b. Acquisition Applicable Date

The recordkeeping burden for taxpayers transacting in digital assets can be significant. To determine whether a sale or exchange of a digital asset gives rise to gain or loss and the holding period for the asset, the taxpayer must know both the gross proceeds from the transaction as well as the adjusted basis and acquisition date of the digital asset. Determining a taxpayer's adjusted basis in a digital asset or portion of a digital asset sold or exchanged can be a complex endeavor, particularly for taxpayers that carry out frequent acquisitions and sales or exchanges of digital assets, as the taxpayer may need to track every transaction the taxpayer has carried out with respect to that digital asset both in the current taxable year and in prior taxable years. This is particularly true for interchangeable digital asset units for which minute fractions of previously purchased units can be sold on different dates. Complexity is further increased when transaction fees paid in digital assets give rise to separate digital asset sale transactions of the digital assets used to pay the transaction fees. Given these recordkeeping complexities, the Treasury Department and the IRS have determined that adjusted basis reporting by brokers for digital assets would both improve tax administration and assist taxpayers who sell or exchange digital assets to comply with their own basis tracking and reporting requirements, as well as assisting the IRS to determine whether a taxpayer has properly reported its gain or loss. Accordingly, these proposed regulations provide that for each sale of a digital asset that is a covered security for which a broker is required to make a return of information, the broker must also report the adjusted basis of the digital asset sold, the date and time the digital asset was purchased, and whether any gain or loss with respect to the digital asset sold is long-term or short-term (within the meaning of section 1222 of the Code). The remainder of the discussion in this Part I.F.1.b of this *Explanation of Provisions* describes when a digital asset is treated as a covered security under these proposed regulations.

Section 80603(b)(1) of the Infrastructure Act adds digital assets to the list of specified securities for which basis reporting is specifically required, provided that the digital asset is acquired on or after January 1, 2023 (the acquisition applicable date for digital assets). January 1, 2023, is prior to the date on which these proposed regulations may be finalized. Accordingly, the Treasury Department

and the IRS considered whether the acquisition date on or after which brokers should be required to track and report basis for digital assets acquired in a customer's account should be January 1, 2023 or should instead be a date after the finalization of these proposed regulations. In considering that question, the Treasury Department and the IRS have taken into account that while few digital assets have been in existence for more than a few years, the value of some of those digital assets has fluctuated significantly over relatively short periods of time. In addition, unlike the securities industry, in which the oldest records were first created on paper many decades ago and were then often stored physically on paper or microfilm, the oldest records created and stored by digital asset brokers were created and continue to be stored electronically as a matter of business practice. Thus, a digital asset broker has the ability to provide information regarding acquisition date, time, and cost (adjusted basis information) to customers with respect to digital assets previously acquired by that broker on behalf of its customers. The Treasury Department and the IRS understand that some digital asset brokers currently voluntarily provide this information to customers in response to customer requests for that information. Moreover, digital asset platforms have been aware since the enactment of the Infrastructure Act that digital assets would be treated as covered securities if acquired on or after January 1, 2023, and providing basis information for digital assets acquired on or after that date will assist taxpayers to properly prepare their tax returns for future sales of those assets. *See* section 6045(g)(3)(C)(iii). Accordingly, proposed § 1.6045–1(a)(15)(i)(J) expands the definition of a *covered security* for which adjusted basis reporting will be required under proposed § 1.6045–1(d)(2)(i)(C) to include digital assets acquired in a customer's account on or after January 1, 2023, by a broker providing hosted wallet services.

As discussed in Part I.F.1.a of this *Explanation of Provisions,* these proposed regulations also expand the definition of a *covered security* for which adjusted basis reporting will be required under proposed § 1.6045–1(d)(2)(i)(C) to include certain non-digital asset options on digital assets and non-digital asset forward contracts on digital assets. Proposed § 1.6045–1(a)(15)(i)(H) expands the definition of a *covered security* to include non-digital asset options on digital assets to the extent they are granted or acquired in an account on or after January 1, 2023, and proposed § 1.6045–1(a)(15)(i)(K) expands the definition of a *covered security* to include non-digital asset forward contracts on digital assets to the extent they are granted or acquired in an account on or after January 1, 2023.

Notwithstanding the proposed use of January 1, 2023 as the acquisition date on or after which brokers should be required to track and report basis for digital assets acquired in a customer's account, proposed § 1.6045–1(d)(2)(i)(C) would require adjusted basis reporting for sales of digital assets treated as covered securities and for non-digital asset options and forward contracts on digital assets only to the extent the sales are effected on or after January 1, 2026, in order to allow brokers additional time to build appropriate reporting and basis retrieval systems. That is, under these proposed regulations a broker providing custodial services for digital asset would be required to provide adjusted basis reporting for sales of digital assets effected on or after January 1, 2026, if the digital asset is acquired and continuously held by that broker in the customer's account on or after January 1, 2023. Additionally, any type of broker effecting sales of non-digital asset options on digital assets and non-digital asset forward contracts on digital assets would be required to provide adjusted basis reporting for sales of these assets if they were granted, entered into, or acquired on or after January 1, 2023.

2. Voluntary Broker Reporting

Some brokers may be capable of providing the information required in these regulations with respect to digital asset sales prior to the applicability dates, and some brokers may be capable of providing the information required in these regulations for digital assets that are not covered securities. To encourage reporting by digital asset brokers that are not subject to mandatory basis reporting, these proposed regulations apply the same penalty waiver rule to digital asset brokers that voluntarily report adjusted basis information on noncovered securities as currently applies to securities brokers. Accordingly, under proposed § 1.6045–1(d)(2)(iii)(A), brokers that voluntarily report adjusted basis information with respect to sales of digital asset-related noncovered securities (that is, digital assets acquired prior to January 1, 2023, options on digital assets granted or acquired in an account prior to January 1, 2023, and forward contracts on digital assets entered into or acquired in an account on or prior to January 1, 2023, which assets are not covered securities under proposed § 1.6045–1(a)(15)(i)(H), (J) or, (K)), are not subject to penalties under section 6721 or 6722 for failure to report or furnish the adjusted basis information correctly. Additionally, proposed § 1.6045–1(d)(2)(iii)(B) provides that brokers that choose to report sales of digital assets before the applicability date of these regulations (that is, gross proceeds from the sale of digital assets effected prior to January 1, 2025, or adjusted basis information with respect to sales effected prior to January 1, 2026), will not be subject to penalties under section 6721 or 6722 for failure to report or furnish that information correctly. Brokers that choose to report on sales of digital assets before the applicability date of these regulations can make that report on either the Form 1099–B, *Proceeds From Broker and Barter Exchange Transactions,* or, if available in time for this reporting, the form prescribed by the Secretary pursuant to proposed § 1.6045–1(d)(2)(i)(B).

3. Determining the Adjusted Basis

To ensure that the rules governing the calculation of adjusted basis apply to digital asset transactions, these proposed regulations modify existing § 1.6045–1(d)(6)(i) and (d)(6)(ii)(A), which provide the general rules for determining the adjusted basis of a security and detail how to calculate the initial basis of a security. First, proposed § 1.6045–1(d)(6)(i) and (d)(6)(ii)(A) clarify that the rules therein apply for determining the adjusted basis of a specified security that is subject to the broker basis reporting rules, whether or not the asset is within the definition of *security* under existing § 1.6045–1(a)(3). Additionally, proposed § 1.6045–1(d)(6)(ii)(A) is modified to add, in the case of a digital asset sale, digital asset transaction costs to the list of costs that are included in calculating the initial basis of a specified security. Accordingly, under proposed § 1.6045–1(d)(6)(ii)(A), the initial basis of a specified security that is a digital asset and that is acquired for cash is the total amount paid by the customer (or credited against the customer's account) for the specified security, increased by any commissions, transfer taxes, and digital asset transaction costs related to its acquisition.

The existing regulations do not permit brokers to adjust the basis of securities acquired to reflect income recognized upon the exercise of a compensatory option or the vesting or exercise of other equity-based compensation arrangements, to the extent the securities were granted or acquired on or after January 1, 2014. This decision was made because compensation

information is not generally accessible to most brokers, and, in many situations, a broker would have to accept customer-provided information to track the compensation-related status of these arrangements. Additionally, requiring basis reporting for securities acquired as part of equity-based compensation arrangements would have required extensive reprogramming of brokers' underlying databases and reporting systems. TD 9616, 78 FR 23116, 23122 (Apr. 18, 2013). For the same reasons, proposed § 1.6045–1(d)(6)(ii)(A) adds digital asset-based compensation arrangements to the types of services arrangements for which brokers are prohibited from adjusting to reflect income recognized.

These proposed regulations provide special rules for determining the initial basis of digital assets acquired in exchange for property, including different digital assets or real property. These rules are provided to avoid discrepancies associated with transactions in which the fair market value of property, including different digital assets, transferred is not equal to the fair market value of the digital assets received. *See* Proposed §§ 1.1001–7, 1.1012–1(h), and 1.1012–1(j) in Part II of this *Explanation of Provisions* in connection with exchanges of digital assets for different digital assets. In accordance with the principles described there, proposed § 1.6045–1(d)(6)(ii)(C)(*1*) provides that the initial basis of a digital asset received in an exchange for property that is not a debt instrument described in proposed § 1.1012–1(h)(1)(v) is the fair market value of the digital asset received at the time of the exchange, increased by any digital asset transaction costs allocable to the acquisition of that digital asset. Proposed § 1.6045–1(d)(6)(ii)(C)(*2*) provides that the total digital asset transaction costs paid by the customer in an acquisition of digital assets are allocable to the digital assets received. An exception is provided, however, in the case of an exchange of one digital asset for a different digital asset differing materially in kind or in extent. Rather, in the case of an exchange of one digital asset for a different digital asset differing materially in kind or in extent, one-half of any digital asset transaction costs paid in cash or property to effect the exchange is allocable to the disposition of the transferred digital asset and one-half is allocable to the acquisition of the received digital asset for the purpose of determining basis under proposed § 1.6045–1(d)(6)(ii)(C)(*1*). These allocation rules are consistent with the rules provided in proposed § 1.1012–1(h) discussed in Part II of this *Explanation of Provisions.* Finally, proposed § 1.6045–1(d)(6)(ii)(C)(*1*) provides that for digital assets acquired in exchange for a debt instrument described in proposed § 1.1012–1(h)(1)(v), the initial basis of the digital asset attributable to the debt instrument is equal to the amount determined under the rules provided in § 1.1012–1(g) (generally equal to the issue price of the debt instrument) plus any allocable digital asset transaction costs.

In determining the initial basis of a digital asset acquired in an exchange, if the broker or digital asset data aggregator reasonably determines that the value of the digital asset received cannot be determined with reasonable accuracy, proposed § 1.6045–1(d)(6)(ii)(C)(*1*) provides that the fair market value of the digital asset received must be determined by reference to the property transferred at the time of the exchange. If the broker or digital asset data aggregator reasonably determines that neither the value of the digital asset received, nor the value of the property transferred can be determined with reasonable accuracy, proposed § 1.6045–1(d)(6)(ii)(C)(*1*) provides that the broker must report zero for the initial basis of the received digital asset.

Finally, these proposed regulations reserve two paragraphs at proposed § 1.6045–1(d)(6)(vii) and (ix) to accommodate final regulations implementing safe harbor exceptions for *de minimis* errors on information returns and payee statements, which are expected to be finalized before these proposed regulations are finalized.

G. Ordering Rules

Proposed § 1.6045–1(d)(2)(ii)(B) provides ordering rules that are consistent with the ordering rules under proposed § 1.1012–1(j)(3) for a broker to determine which units of the same digital asset should be treated as sold when the customer previously acquired, or had transferred in, multiple units of that same digital asset on different dates or at different prices. Under these rules, a broker must report a sale of less than the customer's entire position in an account in accordance with a customer's identification of the digital assets to be sold. These proposed regulations provide, similar to the rules for identifying lots of stock that are sold when a taxpayer sells less than all of its shares in a particular company, that an adequate identification is made if a customer notifies the broker no later than the date and time of sale which units of a type of digital asset it is selling. *See* Proposed §§ 1.1001–7, 1.1012–1(h), and 1.1012–1(j) in Part II of this *Explanation of Provisions.*

In cases where a customer does not provide an adequate identification by the date and time of sale, proposed § 1.6045–1(d)(2)(ii)(B) provides that the units of the digital asset sold are the earliest units of that type of digital asset either purchased within or transferred into the customer's account with the broker. For purposes of this ordering rule, units of a digital asset are treated as transferred into the customer's account as of the date and time of the transfer. Once rules have been promulgated under section 6045A, it is anticipated that brokers who receive transfer statements under section 6045A with respect to transferred-in digital assets would be permitted to use the actual purchase date of these digital assets for purposes of determining which units are the earliest units of that type of digital asset held in the customer's account with the broker.

H. Exceptions To Reporting

These proposed regulations leave unchanged for digital asset brokers the exceptions to reporting provided under existing § 1.6045–1(c) for exempt recipients and excepted sales. Thus, for example, no reporting is required for sales of digital assets effected on behalf of certain customers, such as certain corporations, financial institutions, tax exempt organizations, or governments or political subdivisions thereof. The Treasury Department and the IRS considered adding registered money services businesses (MSBs), as defined in 31 CFR 1010.100(ff), to the list of recipients a broker may treat as exempt from reporting under existing § 1.6045–1(c)(3)(i)(B) but did not do so because the Treasury Department and the IRS are not aware of any public method for determining whether a registered MSB is compliant with its obligations under the Bank Secrecy Act. *See* Part I.I.4 of this *Explanation of Provisions* for a discussion of some of the obligations of registered MSBs under the Bank Secrecy Act. A registered MSB that is not compliant with its obligations under the Bank Secrecy Act may also fail to comply with its obligations to report information to the IRS.

The special multiple broker rule under existing § 1.6045–1(c)(3)(iii) provides that a broker is not required to file a return of information if it is instructed to initiate a sale on behalf of a customer by a person that is an exempt recipient under existing § 1.6045–1(c)(3)(i)(B)(*6*) (registered dealer in securities or commodities), existing § 1.6045–1(c)(3)(i)(B)(*7*)

(registered futures commission merchant), or existing § 1.6045–1(c)(3)(i)(B)(*11*) (financial institution). This rule is intended to avoid duplicative reporting. Although the avoidance of duplicative reporting is also a desirable goal for digital asset reporting, there are some practical considerations that impede the extension of the multiple broker rule to digital asset brokers that are not exempt recipients under the existing regulations. First, in some cases it may be difficult for a broker to determine whether a particular digital asset platform also qualifies as a broker for purposes of these proposed regulations. Second, even if a digital asset broker can determine that the person that instructed the broker to initiate a sale on behalf of a customer is also a digital asset broker, there is a higher level of risk that the multiple broker rule would result in no reporting of the sale than is the case with traditional financial institutions. Unlike the three types of listed exempt recipients, digital asset brokers are not necessarily subject to the type of prudential or supervisory regulation that would tend to provide assurance to the IRS that the broker will comply with its tax reporting obligations. Accordingly, while the Treasury Department and the IRS considered whether to add digital asset brokers to the list of exempt recipients for which the multiple broker rule would apply, it was decided that it was not appropriate at this time to expand the rule in this way. The Treasury Department and the IRS, however, welcome suggestions that could work to avoid duplicative broker reporting without sacrificing the certainty that at least one of the multiple brokers will report. Specifically, to what extent will a broker know with certainty that another party involved in a transaction is also a broker with a reporting obligation under these rules.

I. Sales Effected at an Office Outside the United States or on Behalf of Exempt Foreign Persons

This Part I.I describes the provisions in these proposed regulations relating to when U.S. brokers and, in some cases, non-U.S. brokers may treat a customer as an exempt foreign person and therefore not be required to report on digital asset sales effected for the customer. These rules are based on the rules in the existing regulations that provide that reporting is not required with respect to customers that may be treated as exempt foreign persons.

The Organisation for Economic Development and Co-operation has developed and approved the Crypto-Asset Reporting Framework (CARF), which is a framework for the reporting and automatic exchange of information on crypto-assets. The Treasury Department and the IRS are currently considering how the United States could implement the CARF, so that the IRS could receive information on sales effected for U.S. taxpayers by non-U.S. brokers through an automatic exchange of information with other countries that have implemented the CARF. It is anticipated that implementation of CARF by the United States would require the modification of the proposed regulations described in this Part I.I to ensure that U.S. brokers collect the information required to be exchanged under the framework, to the extent that the collection of that information is permitted under U.S. law, and to exempt some non-U.S. brokers from collecting certain information required under the proposed regulations. For example, the modifications may require reporting by U.S. brokers of certain information on transactions effected for customers that are treated under these proposed regulations as exempt foreign persons and relieve certain non-U.S. brokers of reporting under section 6045 on sales effected for U.S. customers if the IRS is entitled to receive information on such transactions from a foreign tax administration pursuant to an automatic exchange of information mechanism. Any modified rules would be reissued for notice and comment.

Under existing § 1.6045–1(a)(1), a U.S. payor or middleman is considered a broker (and therefore subject to the reporting rules under section 6045) with respect to sales effected at an office inside the United States and sales effected at an office outside the United States, while a non-U.S. payor or middleman is considered a broker (and therefore subject to the reporting rules under section 6045) only with respect to sales it effects at an office inside the United States. A U.S. payor or middleman includes a U.S. person (including a foreign branch of a U.S. person), a controlled foreign corporation (as defined in § 1.6049–5(c)(5)(i)(C)), certain U.S. branches, a foreign partnership with controlling U.S. partners and a U.S. trade or business, and a foreign person for which 50 percent or more of its gross income is effectively connected with a U.S. trade or business. A non-U.S. payor or middleman is a payor or middleman other than a U.S. payor or middleman.

A sale is treated as effected at an office located outside the United States under existing § 1.6045–1(g)(3)(iii)(A) if the broker completes the acts necessary to effect the sale outside the United States pursuant to instructions directly transmitted to that office from outside the United States by the broker's customer. If, however, specified indicia of U.S.-based activity are associated with a customer's sale (such as if the customer has transmitted instructions to the foreign office of the broker from within the United States, or gross proceeds are transferred into an account maintained by the customer in the United States), the sale (which would otherwise be treated as effected at an office outside the United States) will be treated as effected at an office inside the United States. *See* existing § 1.6045–1(g)(3)(iii)(B). Even when a sale is treated as effected at an office inside the United States by a broker that is a non-U.S. payor or middleman, existing § 1.6045–1(c)(3)(ii)(B) excepts the sale from reporting if the broker is a foreign financial institution that reports with respect to the account of the customer for which the sale was effected under the broker's requirements under chapter 4 of the Code or an applicable intergovernmental agreement to implement the provisions commonly known as the Foreign Account Tax Compliance Act (FATCA) of the Hiring Incentives to Restore Employment Act of 2010, Public Law 111–147, 124 Stat. 71 (March 18, 2010).

Regardless of the location of the sale and whether a broker is a U.S. or non-U.S. payor, reporting under section 6045 also does not apply to sales effected for a customer that a broker may treat as an exempt recipient or as an exempt foreign person. *See* existing § 1.6045–1(c)(3) and (g)(1). Under existing § 1.6045–1(c)(3)(i)(C), a broker may treat a customer as an exempt recipient based on a Form W–9, *Request for Taxpayer Identification Number and Certification,* the broker's actual knowledge that the customer is an exempt recipient, or applicable indicators, depending on the type of exempt recipient status. Except in circumstances under which a broker is permitted to presume a customer is a foreign person, to treat the customer as an exempt foreign person a broker must obtain for a customer a beneficial owner withholding certificate, such as a Form W–8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals).* Alternatively, for a sale effected at an office outside the United States, brokers may use documentary evidence to establish that a customer is an exempt foreign person. Documentary evidence can include a driver's license, other government issued identification, or certain other information supporting the customer's foreign status. *See*

existing §§ 1.6045–1(g)(1)(i) (referencing the documentation requirements of § 1.6049–5(c)) and 1.6049–5(d)(2) and (3) (presumption rules applicable in absence of reliable documentation). Finally, payments that are reportable under section 6045 may also be subject to backup withholding under section 3406, generally when a broker has failed to obtain a valid Form W–9 for a customer, subject to certain exceptions.

The existing regulations under section 6045 rules were written based on a business model for securities that assumed that brokers would have offices at physical locations where customer transactions may be booked, and that brokers would generally have direct, in-person contact with their customers. In comparison to the business model of securities brokers that existed at the time the existing regulations were promulgated, digital asset brokers typically interact with, and effect sales on behalf of, customers entirely online, without any in-person interactions with the customer. This business model means that brokers can transact with customers across jurisdictional borders, without necessarily having a branch or place of business in the jurisdiction where the customers are located. These proposed regulations therefore provide rules to adapt the concept of effecting a sale at an office outside the United States and the rules relating to exempt foreign persons to the digital asset broker business model.

Under these proposed regulations, the determination of whether a sale is effected at an office inside or outside the United States is generally not based on the physical location where the acts necessary to effect a sale of digital assets are undertaken. Instead, proposed § 1.6045–1(g)(4) classifies a broker as a U.S. digital asset broker, a CFC digital asset broker, or a non-U.S. digital asset broker, and provides rules for determining the location of a digital asset sale for each type of broker. That is, the determination of whether a sale is treated as effected at an office outside the United States begins with reference to the classification of the broker under these proposed regulations, rather than being an independent determination based on the location of the brokers' activities. In general, sales by U.S. digital asset brokers are treated as effected at an office inside the United States, and sales by CFC digital asset brokers and non-U.S. digital asset brokers are treated as effected at an office outside the United States, although there are circumstances under which sales effected by such brokers are treated as effected at an office inside the United States. These proposed regulations also incorporate certain modifications to the requirements for how each of these three types of brokers determine the foreign status of a customer for purposes of determining when the customer may be treated as an exempt foreign person. For CFC digital asset brokers and non-U.S. digital asset brokers, sales generally are not subject to backup withholding tax under proposed regulations under section 3406, although notable exceptions apply when the broker is considered to be conducting substantial business within the United States or when the broker has actual knowledge that the customer is a U.S. person.

1. Rules for U.S. Digital Asset Brokers

Under proposed § 1.6045–1(g)(4)(i)(A), a U.S. digital asset broker is a U.S. payor or middleman (as defined in § 1.6049–5(c)(5)), other than a controlled foreign corporation within the meaning of § 1.6049–5(c)(5)(i)(C), that effects sales of digital assets for customers. A U.S. payor or middleman that is considered a U.S. digital asset broker for this purpose includes a U.S. person (including a foreign branch of a U.S. person), a U.S. branch of a foreign entity described in § 1.1441–1(b)(2)(iv) that is treated as a U.S. person for purposes of withholding and reporting on specified payments under chapters 3, 4, and 61 of the Code, a foreign partnership with controlling U.S. partners and a U.S. trade or business, and a foreign person for which 50 percent or more of its gross income is effectively connected with a U.S. trade or business. As U.S. payors, U.S. digital asset brokers are treated as brokers under proposed § 1.6045–1(a)(1) with respect to all sales of digital assets they effect for their customers.

Proposed § 1.6045–1(g)(4)(ii) provides rules for a U.S. digital asset broker to determine the location of digital asset sales and the foreign status of its customers. Under these rules, all sales of digital assets effected by a U.S. digital asset broker are considered effected at an office inside the United States. Under these proposed regulations, a U.S. digital asset broker is required to report information with respect to sales effected for its customers unless the broker can treat the customer as an exempt recipient under existing § 1.6045–1(c)(3) or as an exempt foreign person. Finally, a payment by a U.S. digital asset broker that is reportable under section 6045 may also be subject to backup withholding under section 3406 when the broker has failed to obtain a valid Form W–9 for a customer, subject to certain exceptions.

To treat a customer as an exempt foreign person, unless there is an applicable presumption rule that allows that treatment under proposed § 1.6045–1(g)(4)(vi)(A)(*2*), a U.S. digital asset broker must obtain from the customer a valid beneficial owner withholding certificate described in § 1.1441–1(e)(2)(i) and (ii), such as a Form W–8BEN for a customer who is an individual, and must apply the reliance rules under proposed § 1.6045–1(g)(4)(vi) with respect to the beneficial owner withholding certificate. Similar to the existing rules for securities brokers, proposed § 1.6045–1(g)(4)(ii)(B) provides that a broker that obtains a beneficial owner withholding certificate from an individual may rely on the beneficial owner withholding certificate only if it includes a certification that the beneficial owner has not been, and at the time the beneficial owner withholding certificate is furnished reasonably expects not to be, present in the United States for a period aggregating 183 days or more during each calendar year to which the beneficial owner withholding certificate pertains. This certification is incorporated onto Form W–8BEN through the representation on that form that the person signing the form is an exempt foreign person in accordance with the instructions to the form, which instructions reference this requirement. U.S. digital asset brokers may not rely on documentary evidence such as a foreign driver's license or a government identification card to determine whether a customer may be treated as an exempt foreign person.

The rules described in the preceding paragraph are generally similar to those that apply under existing law for securities brokers that are U.S. payors or middlemen, except with respect to sales effected at an office outside the United States. The proposed rules for U.S. digital asset brokers differ from the rules for securities brokers in this case because securities brokers that are U.S. payors may rely on documentary evidence for sales effected at an office outside the United States. This approach was not adopted in these proposed regulations because of the difficulty of determining whether a sale of a digital asset is effected at an office inside or outside the United States. The Treasury Department and the IRS request comments on the approach adopted by these proposed regulations. If a commenter offers suggestions for an alternative approach that could be used to differentiate between a U.S. digital asset broker's U.S. business and non-U.S. business for purposes of allowing

different documentation to be used for the broker's non-U.S. business, the Treasury Department and the IRS request that the commenter explain how the alternative approach could be objectively applied and why the alternative would not be readily subject to manipulation.

See Part I.I.5 of this *Explanation of Provisions* for further discussion of the documentation, reliance, and presumption rules that U.S. digital asset brokers must apply to treat their customers as exempt foreign persons.

2. Rules for CFC Digital Asset Brokers Not Conducting Activities as Money Services Businesses

Under proposed § 1.6045–1(g)(4)(i)(B), a CFC digital asset broker is a controlled foreign corporation (as defined in § 1.6049–5(c)(5)(i)(C)) that effects sales of digital assets for customers. Under these proposed regulations, a CFC digital asset broker must use different rules to determine the place of a digital asset sale and the foreign status of its customers based on whether the CFC digital asset broker is considered under these proposed regulations to be conducting activities as an MSB (conducting activities as an MSB), with respect to sales of digital assets. *See* Part I.I.4 of this *Explanation of Provisions* for discussion of the rules for CFC digital asset brokers conducting activities as MSBs with respect to sales of digital assets as well as the rationale behind those rules.

Under these proposed regulations, a sale effected by a CFC digital asset broker not conducting activities as an MSB is considered a sale effected at an office outside the United States. These CFC digital asset brokers, like U.S. digital asset brokers, report on all sales other than sales effected for an exempt recipient (as defined in existing § 1.6045–1(c)(3)(i)(B)) or an exempt foreign person. *See* proposed § 1.6045–1(a)(1) (providing that for a sale effected at an office outside the United States, a broker includes only a U.S. payor or U.S. middleman). Requiring CFC digital asset brokers generally to report all sales, like U.S. digital asset brokers, is consistent with the existing regulations for securities brokers, which treat controlled foreign corporations as U.S. payors or middlemen, and which require U.S. payors or middlemen to report both on sales effected at an office inside the United States and on sales effected an office outside the United States (unless an exception applies).

Under these proposed regulations, a CFC digital asset broker not conducting activities as an MSB is permitted to rely on documentary evidence, rather than a withholding certificate, to determine whether a customer is an exempt foreign person. This rule is also consistent with the existing regulations for securities brokers, under which a broker may rely on documentary evidence to determine that a customer is an exempt foreign person if the broker effects the sale at an office outside the United States. The existing regulations for traditional brokers determine where a sale is effected by looking to, among other things, the location of the office that completes the acts necessary to effect the sale. A securities broker that is a controlled foreign corporation is likely to effect sales at an office outside the United States and thus may rely on documentary evidence to treat a customer as an exempt foreign person. Therefore, although these proposed regulations have a different framework than the existing regulations, unless the CFC digital asset broker is conducting activities as an MSB (as discussed in Part I.I.4 of this *Explanation of Provisions*), the same basic principles generally apply to controlled foreign corporations under both the proposed and existing regulations. Finally, also unlike a U.S. digital asset broker, a CFC digital asset broker not conducting activities as an MSB is not subject to backup withholding with respect to reportable sales unless it has actual knowledge that the customer is a U.S. person. Thus, if a CFC digital asset broker not conducting activities as an MSB has actual knowledge that a customer is a U.S. person, and the customer does not provide a valid Form W–9 to the broker, the broker must both report a sale or exchange of a digital asset by that customer to the IRS and backup withhold on the gross proceeds of the transaction.

3. Rules for Non-U.S. Digital Asset Brokers That Are Not Conducting Activities as Money Services Businesses

A non-U.S. payor or non-U.S. middleman under § 1.6049–5(c)(5) that effects sales of digital assets on behalf of customers is a non-U.S. digital asset broker under proposed § 1.6045–1(g)(4)(i)(C). A non-U.S. digital asset broker must use different rules to determine the location of its digital asset sales and, for sales that are effected within the United States, the foreign status of its customers is based on whether the broker is considered conducting activities as an MSB. *See* Part I.I.4 of this *Explanation of Provisions* for discussion of the rules for non-U.S. digital asset brokers conducting activities as MSBs as well as the rationale behind those rules.

Under these proposed regulations, a sale effected by a non-U.S. digital asset broker not conducting activities as an MSB is generally treated as effected at an office outside the United States unless the broker collects documentation or information that indicates that the customer has connections to the United States or may be a U.S. person. For a sale effected at an office outside the United States, a non-U.S. digital asset broker not conducting activities as an MSB would not be considered a broker under proposed § 1.6045–1(a)(1) and would not be required to report the sale under proposed § 1.6045–1(c).

These proposed regulations do not require non-U.S. digital asset brokers that are not conducting activities as MSBs to obtain documentation from customers prior to making a payment to the customer. However, these non-U.S. digital asset brokers may be obligated to collect documentation or information from customers under applicable anti-money laundering laws or other applicable laws (referred to as an AML program), or may otherwise collect information on customers under the broker's policies and procedures, and that documentation or information may include information that indicates that a customer has connections to the United States or may be a U.S. person (as described in the following paragraph). In such a case, these proposed regulations treat the sale as effected at an office inside the United States and require the non-U.S. digital asset broker to report a sale effected on behalf of this customer after the broker obtains that documentation or information, unless the broker determines that the customer is an exempt foreign person or an exempt recipient (as defined in existing § 1.6045–1(c)(3)(i)(B)) or the broker closes the account before effecting the sale for the customer. However, these proposed regulations limit the indicators of a connection to the United States to those that are contained in the documentation or information that is part of the broker's account information for the customer. This is intended to limit the efforts that a broker must make to determine if there are U.S. indicia for the customer and to allow brokers to automate their searches for U.S. indicia. Additionally, a non-U.S. digital asset broker not conducting activities as an MSB is not subject to backup withholding with respect to reportable sales unless it has actual knowledge that the customer is a U.S. person. Thus, if a non-U.S. digital asset broker not conducting activities as an MSB has actual knowledge that a customer is a

U.S. person, and the customer does not provide a valid Form W–9 to the broker, the broker must both report a sale or exchange of a digital asset by that customer to the IRS and backup withhold on the gross proceeds of the transaction.

Under proposed § 1.6045–1(g)(4)(iv), a digital asset sale effected by a non-U.S. digital asset broker that is not conducting activities as an MSB will be considered effected at an office inside the United States (and thus potentially subject to reporting and backup withholding as described in the prior paragraph) if, before the payment is made, the broker collects documentation or other information that is part of the broker's account information for the customer and the documentation or information that shows any of the following U.S. indicia: (i) a customer's communication with the broker using a device (such as a computer, smart phone, router, server or similar device) that the broker has associated with an internet Protocol (IP) address or other electronic address indicating a location within the United States; (ii) a U.S. permanent residence or mailing address for the customer, current U.S. telephone number and no non-U.S. telephone number for the customer, or the broker's classification of the customer as a U.S. person in its records; (iii) cash paid to the customer by a transfer of funds into an account maintained by the customer at a bank or financial institution in the United States, cash deposited with the broker by a transfer of funds from such an account, or if the customer's account is linked to a bank or financial account maintained within the United States; (iv) one or more digital asset deposits into the customer's account at the broker were transferred from, or digital asset withdrawals from the customer's account were transferred to, a digital asset broker that the broker knows or has reason to know to be organized within the United States, or the customer's account is linked to a digital asset broker that the broker knows or has reason to know to be organized within the United States; or (v) an unambiguous indication of a U.S. place of birth for the customer.

The U.S. indicia listed in the preceding paragraph differ from the U.S. indicia that apply to traditional brokers under existing regulations under section 6045 because of the digital nature of digital asset brokers and the technological developments that have been made since the issuance of the existing regulations. Unlike traditional brokers, digital asset brokers typically interact with customers primarily through digital means, and do not usually communicate through the mail with customers. Digital asset brokers also typically do not have a physical office from which business is conducted with the customer. Instead, IP addresses are commonly reviewed by tax and other investigators as possible indicators of a person's physical presence and may be taken into account as part of an AML program. Transfers of cash or digital assets to or from a U.S. bank or digital asset broker also are considered potential indicators of U.S. presence or connections. The Treasury Department and the IRS welcome comments on the appropriateness and sufficiency of the U.S. indicia listed in proposed § 1.6045–1(g)(4)(iv)(B)(*1*) through (*5*). The Treasury Department and the IRS also welcome comments on whether the regulations should define when a broker has reason to know that a digital asset broker is organized within the United States, and suggestions for objective indicators that a broker can use to determine if a digital asset broker is organized in the United States.

For a sale considered effected at an office inside the United States (that is, a sale effected for a customer for which the broker has documentation or information prior to the payments indicating U.S. indicia), a non-U.S. digital asset broker not conducting activities as an MSB will nonetheless not be required to report the sale under existing § 1.6045–1(c) if the broker determines that it can treat the customer as an exempt recipient under existing § 1.6045–1(c)(3). Additionally, a non-U.S. digital asset broker not conducting activities as an MSB is not required to report the sale if it obtains certain documentation to treat the customer as an exempt foreign person or if it may presume that the customer is a foreign person, pursuant to the requirements described in Part I.I.5 of this *Explanation of Provisions* (discussing the presumption rules, documentation requirements, and reliance rules that brokers must apply to treat their customers as exempt foreign persons).

The types of documentation on which a broker may rely to treat a customer as an exempt foreign person despite U.S. indicia depends on the particular U.S. indicator contained in the customer's account information. If any of the U.S. indicia described in proposed § 1.6045–1(g)(4)(iv)(B)(*1*) through (*4*) (U.S. indicia other than an unambiguous indication of a U.S. place of birth) is present, the broker may treat the customer as an exempt foreign person if the broker, prior to the payment of any proceeds to the customer, obtains either: (i) a beneficial owner withholding certificate, or (ii) documentary evidence for the customer described in § 1.1471–3(c)(5)(i) (for example, an identification document issued by a foreign government), and also a signed statement from the customer stating that the customer is not a U.S. person, that the customer understands that a false statement or misrepresentation of tax status by a U.S. person could lead to penalties under U.S. law, and that the customer agrees to notify the broker within 30 days of a change in the customer's status. If the broker's account information for the customer includes a U.S. indicator described in proposed § 1.6045–1(g)(4)(iv)(B)(*5*) (an unambiguous indication of a U.S. place of birth), proposed § 1.6045–1(g)(4)(iv)(D)(*2*) provides that the broker may nevertheless treat the customer as an exempt foreign person if, prior to the payment of any proceeds to the customer, the broker obtains documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship in a country other than the United States (for example, a foreign passport) and either (i) a copy of the customer's Certificate of Loss of Nationality of the United States, or (ii) a valid beneficial ownership withholding certificate and either a reasonable written explanation of the customer's renunciation of U.S. citizenship or the reason the customer did not obtain U.S. citizenship at birth. The rules in proposed § 1.6045–1(g)(4)(vi) (described in Part I.I.5 of this *Explanation of Provisions*) also apply to documentation obtained by a non-U.S. digital asset broker not conducting activities as an MSB; however, such a broker is not required to treat documentation as incorrect or unreliable solely as a result of the U.S. indicator that required the broker to obtain this documentation with respect to a customer. Additionally, these brokers are not required to collect additional documentation or to report a sale if they obtain U.S. indicia after a sale has taken place, although the rules described earlier apply with respect to any future sales by that customer.

4. Rules for CFC Digital Asset Brokers and Non-U.S. Digital Asset Brokers Conducting Activities as Money Services Businesses

CFC digital asset brokers and non-U.S. digital asset brokers may be MSBs under the Bank Secrecy Act (31 U.S.C. 5311 *et seq.*). An MSB is defined in regulations issued by the Financial Crimes Enforcement Network (FinCEN) of the Treasury Department as a person, wherever located, that is doing business wholly or in substantial part within the

United States in the capacity of a dealer in foreign exchange; a check casher; an issuer or seller of traveler's checks or money orders; an issuer, seller, or redeemer of stored value; or a money transmitter. 31 CFR 1010.100(ff). This includes, but is not limited to, maintenance of any agent, agency, branch, or office within the United States. Accordingly, a foreign person with no physical operations in the United States may nevertheless be an MSB under FinCEN regulations. An MSB is required under FinCEN regulations to develop, implement, and maintain an effective AML program that is reasonably designed to prevent the MSB from being used to facilitate the financing of terrorist activities and money laundering. 31 CFR 1022.210(a). AML programs generally include, among other things, obtaining customer-related information necessary to determine the risk profile of a customer. MSBs are also required to make certain reports to FinCEN, register with the Treasury Department, and maintain certain records about transmittals of funds. See 31 CFR part 1022.

Because CFC digital asset brokers and non-U.S. digital asset brokers conducting activities as MSBs may conduct business with customers located in the United States, even when the brokers have no branch or other fixed place of business in the United States, proposed § 1.6045–1(g)(4)(v) generally subjects these brokers to the same rules as U.S. digital asset brokers with respect to their sales of digital assets. Accordingly, a CFC digital asset broker conducting activities as an MSB and a non-U.S. digital asset broker conducting activities as an MSB must apply the rules for U.S. digital asset brokers to determine the place of sale of digital assets and the foreign status of its customers. With the exception of sales effected at certain kiosks located outside the United States (described in the next paragraph), the sales of digital assets are treated as effected at an office inside the United States. Therefore, these brokers are treated as brokers under proposed § 1.6045–1(a)(1) with respect to all sales of digital assets and are required to report information with respect to sales effected for their customers unless the broker can treat the customer as an exempt recipient under existing § 1.6045–1(c)(3) or as an exempt foreign person under proposed § 1.6045–1(g)(4)(ii). Unless there is an applicable presumption rule, these brokers conducting activities as MSBs must obtain a beneficial owner withholding certificate to treat a customer as an exempt foreign person and are subject to the same backup withholding rules with respect to reportable sales as those applicable to U.S. digital asset brokers.

Under proposed § 1.6045–1(g)(4)(i)(D), a CFC digital asset broker or a non-U.S. digital asset broker is conducting activities as an MSB with respect to a sale of digital assets if it is registered with the Treasury Department under 31 CFR 1022.380 as an MSB.[4] An exception applies, however, in the case of a sale that is effected at a digital asset kiosk that is physically located outside the United States and owned or operated by the broker conducting activities as an MSB, unless that broker is required under the Bank Secrecy Act to implement an AML program, file reports, or otherwise comply with the requirements for MSBs under the Bank Secrecy Act with respect to sales effected at that kiosk. *See* proposed § 1.6045–1(g)(4)(i)(E). With respect to sales effected at a foreign kiosk as described in the preceding sentence, CFC digital asset brokers and non-U.S. digital asset brokers are not treated as conducting activities as MSBs with respect to those sales for purposes of proposed § 1.6045–1(g)(4). This foreign kiosk exception allows CFC digital asset brokers and non-U.S. digital asset brokers that effect sales at foreign kiosks to apply the diligence and documentation rules that are generally applicable to CFC digital asset brokers and non-U.S. digital asset brokers, respectively, to those sales because these sales are less likely to have a connection to the United States.

These proposed regulations adopt this approach for CFC digital asset brokers and non-U.S. digital asset brokers that conduct activities as MSBs because the Treasury Department and the IRS have determined that a broker that is doing business wholly or in substantial part within the United States and is consequently subject to regulation by FinCEN should be subject to the same rules as U.S.-based digital asset brokers with respect to the part of its business that is subject to FinCEN regulation. The Treasury Department and the IRS are not aware of a reliable method for distinguishing the U.S. and non-U.S. parts of such a broker's business for purposes of determining whether the broker should be subject to reporting under section 6045 in light of the fact that almost all or all of a digital asset broker's activities take place electronically. The special rule for sales at foreign kiosks recognizes that in those limited circumstances it is possible to determine that a sale is effected at an office outside the United States because the kiosk and the customer are physically present outside the United States. The overall approach in these proposed regulations is consistent with the principles underlying the existing regulations, which treat a broker as a U.S. payor when it has a substantial nexus with the United States. The Treasury Department and the IRS request comments on administrable rules that would allow CFC digital asset brokers and non-U.S. digital asset brokers that conduct activities as MSBs to apply different rules to their U.S. and non-U.S. business activities while still ensuring that they are reporting on transactions of their U.S. customers.

The Treasury Department and the IRS are considering applying similar rules to CFC digital asset brokers and non-U.S. digital asset brokers that are regulated by other U.S. regulators, such as the Securities and Exchange Commission, the Commodity Futures Trading Commission, and banking regulators such as the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation. As is the case with CFC digital asset brokers and non-U.S. digital asset brokers that are registered as MSBs, such digital asset brokers may have sufficient contacts with the United States and a U.S. customer base that warrants the application of the same diligence and reporting rules as for U.S. digital asset brokers with respect to the U.S. part of their business. The Treasury Department and the IRS request comments on what CFC digital asset brokers and non-U.S. digital asset brokers should be subject to these rules.

Separate from the decision to require that CFC digital asset brokers and non-U.S. digital asset brokers conducting activities as MSBs with respect to sales of digital assets apply the rules applicable to U.S. digital asset brokers, the Treasury Department and the IRS also considered whether to adopt different diligence and documentation rules for these brokers. On the one hand, CFC digital asset brokers and non-U.S. digital asset brokers are foreign persons and may conduct a substantial part of their business with non-U.S. customers. On the other hand, a different rule for these brokers, particularly those with substantial U.S. customer business, might incentivize U.S. customers to move their digital asset transactions to

[4] No inference is intended as to whether a CFC digital asset broker or a non-U.S. digital asset broker that is not registered with FinCEN as an MSB (and therefore is not conducting activities as an MSB within the meaning of the proposed regulations) may be required to register as an MSB under the Bank Secrecy Act and FinCEN's implementing regulations, which are outside the scope of these regulations.

non-U.S.-based brokers, which might make it more difficult for the IRS to verify that taxpayers are properly reporting those transactions. Accordingly, the Treasury Department and the IRS determined that the same rules should apply to these brokers as apply for U.S. digital asset brokers, to impose similar obligations on CFC digital asset brokers and non-U.S. digital asset brokers with active U.S. operations regardless of where they are organized and in light of the difficulty referred to earlier in distinguishing between U.S. and non-U.S. business operations. The Treasury Department and the IRS request comments on whether different diligence and documentation rules should apply to CFC digital asset brokers and non-U.S. digital asset brokers conducting activities as MSBs with respect to the non-U.S. part of their business, and if so, on what basis should a determination be made as to when these different diligence and documentation rules would apply.

5. Documentation, Reliance, and Presumption Rules Applicable to Digital Asset Brokers

As described in Parts I.I.1 through I.I.4 of this *Explanation of Provisions,* U.S. digital asset brokers and CFC digital asset brokers generally must report a sale of digital assets unless the broker can treat the customer as an exempt foreign person or another exception applies (for example, the exception for exempt recipients in existing § 1.6045–1(c)(3)). For sales treated as effected at an office inside the United States, a non-U.S. digital asset broker is required to report a sale of digital assets unless the broker can treat the customer as an exempt foreign person (or another exception applies). In all cases, the broker may generally treat a customer as an exempt foreign person based on documentation obtained from the customer or, in some cases, based on a presumption that the customer is a foreign person. For example, if a broker does not have documentation from a customer, the broker is required to presume that the customer is classified in a specified manner (such as an individual or an entity), and then is required to presume that the customer is a U.S. or foreign person under rules that depend on how the customer has been classified. If the customer is presumed to be a foreign person, a broker generally is not required to report information on sales by that customer. In contrast, if the customer is presumed to be a U.S. person that is not an exempt recipient under existing § 1.6045–1(c)(3), the broker must report information on sales by that customer under these proposed regulations, unless the broker obtains documentation on which it may rely to treat the customer as an exempt foreign person.

As described in Parts I.I.1 through I.I.4 of this *Explanation of Provisions,* the types of documentation on which a broker may rely depends on whether the broker is a U.S. digital asset broker, a CFC digital asset broker, or a non-U.S. digital asset broker, and for a CFC digital asset broker and a non-U.S. digital asset broker, whether the broker is conducting activities as an MSB with respect to sales of digital assets. In general, U.S. digital asset brokers, as well as CFC digital asset brokers and non-U.S. digital asset brokers conducting activities as MSBs, may rely on withholding certificates to treat a customer as an exempt foreign person, while CFC digital asset brokers and non-U.S. digital asset brokers not conducting activities as MSBs (for sales effected at offices inside the United States) may rely on either a withholding certificate or documentary evidence, such as identification document from a foreign government, to establish a customer's foreign status. While the type of documentation on which these brokers may rely differs, all these brokers are subject to similar requirements to ensure that the documentation is reliable.

The existing regulations for securities brokers generally cross-reference to general provisions of regulations under sections 1441 and 6049 for rules on what documentation a broker may obtain to treat a customer as an exempt foreign person and for rules relating to reliance and validity of documentation. As described in Parts I.I.1 through I.I.4 of this *Explanation of Provisions,* these proposed regulations provide explicit rules on the type of documentation on which a broker may rely, rather than referring to regulations under sections 1441 and 6049 as in the existing regulations for securities brokers. However, for rules on reliance, validity, and other matters, these proposed regulations cross-reference in some cases to certain existing regulations under sections 1441 and 6049, with some modifications to take into account the differences between the rules for digital asset brokers in proposed § 1.6045–1(g)(4) and the rules for securities brokers in existing § 1.6045–1(g)(1) through (3). The benefit of referring to rules under section 1441 is that these rules have well-established and understood standards for reliance, validity, and other matters that will already be familiar to many brokers and U.S. tax advisors.

a. Valid Documentation of Foreign Status

In general, a broker may rely on documentation if (i) the documentation is valid, (ii) the broker can reliably associate the documentation with a payment, and (iii) the broker does not know or have reason to know that the documentation is incorrect or unreliable. Proposed § 1.6045–1(g)(4)(vi)(A)(*1*) refers to §§ 1.1441–1(e)(4)(i) through (ix) and 1.6049–5(c)(1)(ii) for documentation requirements that generally apply to digital asset brokers, with certain modifications (as described in this Part I.I.5). Additionally, § 1.1441–1(e)(4)(ii) provides rules regarding the period of time during which a broker may rely on a withholding certificate or documentary evidence. Section 1.1441–1(e)(4) also contains other rules specific to withholding certificates, such as rules on who may sign a withholding certificate (and when the certificate may be electronically signed), when a substitute withholding certificate (rather than an IRS form) may be obtained, when a taxpayer identification number must be included on a withholding certificate, and when a prior version of a withholding certificate may be used.

Section 1.1441–1(e)(4) also contains permissive rules for documentation, such as when documentation may be obtained through electronic transmission or from a third party repository. Some of the rules in § 1.1441–1(e)(4) provide more favorable treatment to a financial institution than to other persons obtaining documentation for a payment because of the high volume of accounts held at withholding agents that are financial institutions. In light of the fact that digital asset brokers, like financial institutions, may have a high volume of customer accounts to document, these proposed regulations allow digital asset brokers to apply § 1.1441–1(e)(4)(viii) (reliance rules for documentation) and (ix) (certificates to be furnished to a withholding agent for each obligation unless exception applies) regardless of whether the digital asset broker is a financial institution. Sections 1.1441–1(e)(4)(iii) and 1.6049–5(c)(1)(ii) are incorporated by cross-reference for the rules regarding the length of time that a broker must retain a withholding certificate and for procedures to obtain, review, and maintain documentary evidence. Finally, § 1.1441–1(e)(4)(viii) provides that documentation may be relied upon without having to inquire into the veracity of the information contained on the documentation unless the person obtaining the documentation

knows or has reason to know that the information is incorrect. These proposed regulations incorporate this rule but provide specific rules for when a broker has reason to know that documentation is incorrect or unreliable.

Proposed § 1.6045–1(g)(4)(vi)(A)(*1*) cross-references to § 1.1441–1(b)(2)(vii)(A) for when a broker may reliably associate a payment of gross proceeds with documentation. In general, this rule provides that a broker can reliably associate a payment with valid documentation if, prior to the payment, it holds valid documentation (either directly or through an agent), it can reliably determine how much of the payment relates to the valid documentation, and it has no actual knowledge or reason to know that any of the information, certifications, or statements in, or associated with, the documentation are incorrect.

b. Presumption Rules

If a broker does not have documentation from a customer, or the documentation it has obtained is not valid or cannot be reliably associated with a payment of gross proceeds, these proposed regulations provide presumption rules. The presumption rules also apply when documentation that the broker possesses has expired or the broker may no longer rely on the documentation because the broker knows or has reason to know that the documentation is incorrect or unreliable.

Proposed § 1.6045–1(g)(4)(vi)(A)(*2*) provides that a broker may determine the classification of a customer (as an individual, entity, etc.) by applying the presumption rules of § 1.1441–1(b)(3)(ii), with certain modifications. Section 1.1441–1(b)(3)(ii)(B) provides that if there is no reliable indication that a person is an individual, trust, or an estate, the person may be presumed to be an exempt recipient if it can be so treated without the need to furnish documentation. However, § 1.1441–1(b)(3)(ii)(B) cross references to regulations under section 6049 for the definition of an *exempt recipient.* Because the categories of exempt recipients under section 6045 are different from the categories that apply for purposes of section 6049, these proposed regulations provide that § 1.1441–1(b)(3)(ii)(B) is applied by replacing the references to exempt recipients under section 6049 with the exempt recipient categories in existing § 1.6045–1(c)(3).

Proposed § 1.6045–1(g)(4)(vi)(A)(*2*) also provides presumption rules to determine whether a customer is presumed to be a U.S. or foreign person in the absence of documentation. Existing regulations under section 6045 for securities brokers cross-reference to § 1.6049–5(d)(2), which generally requires a broker to presume a person classified as an individual to be a U.S. person (by cross-referencing to § 1.1441–1(b)(3)(iii), which presumes a payee to be a U.S. person unless another rule applies). However, for certain amounts paid outside the United States with respect to an offshore obligation, § 1.6049–5(d)(2)(i) provides that an individual payee shall be presumed a U.S. person only when there are certain U.S. indicia for the individual. These proposed regulations do not incorporate the concept of a payment outside the United States or an offshore obligation because digital asset activities overwhelmingly are conducted online and therefore are not located in an identifiable location. Instead, these proposed regulations apply this presumption rule depending on the status of the broker (including whether a broker other than a U.S. digital asset broker is conducting activities as an MSB) rather than the location of the customer's obligation or where the broker makes the payment. Proposed § 1.6045–1(g)(4)(vi)(A)(*2*) provides that with respect to a customer that the broker has classified as an individual in the absence of documentation, a broker that is a U.S. digital asset broker, or a CFC digital asset broker or a non-U.S. digital asset broker conducting activities as an MSB, must treat the customer as a U.S. person; however, a broker that is a CFC digital asset broker or a non-U.S. digital asset broker not conducting activities as an MSB with respect to a sale of a digital asset is required to presume that a customer that it has classified as an individual is a U.S. person only when the broker has certain U.S. indicia for the customer.

With respect to a customer that may be presumed to be an entity, these proposed regulations provide that a broker may generally determine the status of the customer as U.S. or foreign by applying the presumption rules in §§ 1.1441–1(b)(3)(iii)(A) and 1.1441–5(d) and (e)(6), except that the presumption rule in § 1.1441–1(b)(3)(iii)(A)(*1*)(*iv*) (which presumes that a payee is a foreign person if the payment is made with respect to an offshore obligation) does not apply. Under existing regulations, presumption rules for offshore obligations are generally not applicable to payments of gross proceeds by securities brokers. *See* § 1.6049–5(d)(2)(i) (providing that the presumption rules in § 1.1441–1(b)(3)(iii)(D) and (b)(3)(vii)(B) for payments with respect to offshore obligations do not apply to a payment of an amount not subject to withholding under chapter 3 of the Code, unless it is a withholdable payment made to an entity payee). These proposed regulations thereby apply a generally similar presumption rule for digital asset brokers as the rule that applies to securities brokers without applying the concept of a payment made with respect to an offshore obligation because digital asset activities overwhelmingly are conducted online and therefore are not located in an identifiable location.

c. Grace Period for Obtaining Documentation

These proposed regulations include a grace period to allow a broker time to obtain documentation (or additional documentation when the original documentation relied upon is incorrect or unreliable). Proposed § 1.6045–1(g)(4)(vi)(A)(*3*) provides that a broker may apply the grace period described in § 1.6049–5(d)(2)(ii), which allows a payor to treat an account as owned by a foreign person until the earlier of (i) 90 days from the date the payor first credits an account (for a new account) or the date the payor first credits the account after the existing documentation can no longer be relied upon (for an existing account), or (ii) the date when the remaining balance in the account is equal to or less than the applicable statutory backup withholding rate (currently 24 percent) of the total amounts credited during the grace period. Also under § 1.6049–5(d)(2)(ii), a payor may use the grace period only if at the beginning of the grace period: (i) the address that the payor has in its records for the account holder is in a foreign country, (ii) the payor has been furnished the information contained in a withholding certificate described in § 1.1441–1(e)(2), or (iii) the payor holds a withholding certificate that is no longer reliable other than because the validity period has expired. By cross-referencing § 1.6049–5(d)(2)(ii), these proposed regulations apply the same grace period to digital asset brokers as the grace period that applies to payors under section 6049 that hold securities in customers' accounts and securities brokers effecting sales of securities under section 6045.

d. Standards of Knowledge for Reliance on Withholding Certificates

These proposed regulations provide that a broker may rely on documentation only if it does not know or have reason to know that the documentation is incorrect or

unreliable. Proposed § 1.6045–1(g)(4)(vi)(A)(*1*)(*iii*) provides that in applying the reliance rules in § 1.1441–1(e)(4)(viii) for documentation, references to § 1.1441–7(b)(4) through (6) are replaced by the provisions of proposed § 1.6045–1(g)(4)(vi)(B) (relating to beneficial owner withholding certificates) and (C) (relating to documentary evidence), as applicable.

Proposed § 1.6045–1(g)(4)(vi)(B) specifies that a digital asset broker may rely on a beneficial owner withholding certificate to treat a customer as an exempt foreign person, unless the broker has actual knowledge or has reason to know that the beneficial owner withholding certificate is unreliable or incorrect. For this purpose, these proposed regulations limit when a digital asset broker has reason to know that information on a withholding certificate is unreliable or incorrect to when there are specific indicia of U.S. status in the broker's account files. The existing regulations limit when a securities broker has reason to know that information on a withholding certificate is unreliable or incorrect based on specific indicia set forth in § 1.1441–7(b)(3), which contain limitations on reason to know for financial institutions. However, a digital asset broker's reason to know standard is based on the same U.S. indicia set forth in proposed § 1.6045–1(g)(4)(iv)(B)(*1*) through (*5*) for determining when a non-U.S. digital asset broker is required to treat a sale as effected at an office inside the United States, rather than the U.S. indicia applicable to traditional brokers (which are in § 1.1441–7(b)(5) and (8)) to take into account the differences between traditional brokers and digital asset brokers.

These proposed regulations also prescribe the additional documentation that a broker may collect to continue to rely on the withholding certificate if there are U.S. indicia. That documentation is similar to the documentation specified for that purpose for securities brokers in § 1.1441–7(b)(5), but with certain modifications to eliminate distinctions in the additional documentation permitted to be collected that are based on whether a payment is made outside the United States with respect to an offshore obligation under § 1.1441–7(b)(5). Proposed § 1.6045–1(g)(4)(vi)(B) provides that if the broker collects documentation or information associated with the customer or the customer's account at the broker that shows U.S. indicia described in proposed § 1.6045–1(g)(4)(iv)(B)(*1*) through (*4*), then the broker may not rely on the beneficial owner withholding certificate unless the broker can obtain documentary evidence establishing foreign status (as described in § 1.1471–3(c)(5)(i) (for example, identification from a foreign government)) that does not contain a U.S. address and the individual customer provides the broker with a reasonable explanation, in writing, supporting the claim of foreign status. However, if the broker previously classified an individual customer as a U.S. person in its account information, the broker may treat the customer as an exempt foreign person only if it has in its possession documentation described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship in a country other than the United States. If the customer is an entity, the broker may treat the customer as an exempt foreign person if it has in its possession documentation that substantiates that the entity is organized or created under the laws of a foreign country. Additionally, and regardless of whether a customer is an individual or entity, a broker that is a non-U.S. person may treat a customer as an exempt foreign person if the broker reports the payment to the customer to the jurisdiction in which the customer is resident under that jurisdiction's tax reporting requirements, provided that the jurisdiction has a tax information exchange agreement or income tax treaty in effect with the United States. If the broker collects information with respect to the customer showing an unambiguous indication of a U.S. place of birth, proposed § 1.6045–1(g)(4)(vi)(B)(*2*) provides, however, that the broker may treat the customer as an exempt foreign person only if the broker has in its possession documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship (for example, a passport) in a foreign country and either a copy of the customer's Certificate of Loss of Nationality of the United States or a reasonable written explanation of the customer's renunciation of U.S. citizenship or the reason the customer did not obtain U.S. citizenship at birth.

e. Standards of Knowledge for Reliance on Documentary Evidence

Proposed § 1.6045–1(g)(4)(vi)(C) provides the rules for when a broker has reason to know that documentary evidence is unreliable or incorrect. As with the rules applicable to when a broker has reason to know that a beneficial owner withholding certificate is unreliable or incorrect, reason to know that documentary evidence is unreliable or incorrect is limited to when the U.S. indicia in proposed § 1.6045–1(g)(4)(iv)(B)(*1*) through (*5*) are present in the broker's account files for a customer. Proposed § 1.6045–1(g)(4)(vi)(C)(*1*) and (*2*) specify the additional documentation a broker is required to collect to continue to rely on the documentary evidence notwithstanding the presence of the U.S. indicia (similar to the documentation specified for that purpose in § 1.1441–7(b)(8), but with modifications similar to those that apply to reliance on a withholding certificate under these proposed regulations, except that a broker is permitted to obtain a withholding certificate in certain cases in lieu of obtaining additional documentary evidence).

f. Joint Owners

These proposed regulations provide that in the case of amounts paid to customers that are joint account holders for which a certificate or documentation is required as a condition for being exempt from reporting under proposed § 1.6045–1(g)(4)(ii)(B) or (g)(4)(iv)(D), the amounts are presumed paid to U.S. payees who are not exempt recipients when the conditions of existing § 1.6045–1(g)(3)(i) are met. The effect of this rule is to apply to digital asset brokers the same rule that applies to securities brokers for amounts paid to their customers that are joint account holders.

g. Foreign Intermediaries, Foreign Flow-Through Entities, and Certain U.S. Branches

Proposed § 1.6045–1(g)(4)(vi)(E) provides rules for a broker to determine whether a customer is a foreign intermediary, foreign flow-through entity, or U.S. branch (other than a U.S. branch that is the beneficial owner of a payment of gross proceeds), and, if so, whether the customer may be treated as an exempt foreign person. The rules in these proposed regulations reach a similar result as those that apply to securities brokers under existing regulations but provide more detail on the procedures for brokers to determine that a customer is a foreign intermediary, foreign flow-through entity, or U.S. branch.

Under proposed § 1.6045–1(g)(4)(vi)(E)(*1*), a broker may rely on a valid foreign intermediary withholding certificate described in § 1.1441–1(e)(3)(ii) or (iii), with one modification, to determine the classification of a customer as a foreign intermediary. Section 1.1441–1(e)(3)(iii) provides that a foreign intermediary withholding certificate from a nonqualified intermediary is not valid unless the

intermediary has attached the withholding certificates and other appropriate documentation for all persons to whom the certificate relates. Proposed § 1.6045–1(g)(4)(vi)(E)(*1*) provides that a broker does not need to obtain from the foreign intermediary the withholding certificates or other documentation for the intermediary's account holders. The Treasury Department and the IRS are considering requiring brokers to obtain documentation on account holders of customers that are foreign intermediaries in order to avoid circumvention of these proposed regulations by U.S. persons selling digital assets through a foreign intermediary. The Treasury Department and the IRS request comments on whether the transparency gained by adding this rule would justify the increased burden on brokers, and whether that trade-off would be different for digital asset-only brokers, securities-only brokers, or brokers that effect sales or exchanges in both categories. The Treasury Department and the IRS also request comments on how frequently and in what circumstances securities brokers rely on the existing section 6045 regulations to not document account holders of customers that are foreign intermediaries.

If a broker does not obtain a valid foreign intermediary withholding certificate or valid beneficial owner withholding certificate from the customer, it must determine under presumption rules whether the customer is treated as a beneficial owner or an intermediary, and whether the customer has the status of U.S. or foreign. The applicable presumption rules depend on whether the broker is a U.S. or foreign broker to provide rules similar to those applicable to securities brokers. Under proposed § 1.6045–1(g)(4)(vi)(E)(*1*), if a broker is a U.S. digital asset broker or a non-U.S. digital asset broker or CFC digital asset broker that in each case is conducting activities as an MSB, then the broker must apply the presumption rules in § 1.1441–1(b)(3)(ii)(B), which would result in a presumption that the entity is not an intermediary. If a broker is a non-U.S. digital asset broker or a CFC digital asset broker that in each case is not conducting activities as an MSB, then the broker may determine the status of a customer as an intermediary by presuming that the entity is an intermediary to the extent permitted by § 1.1441–1(b)(3)(ii)(C) (providing rules treating certain payees as not beneficial owners), with certain modifications. These modifications (i) allow a broker to apply § 1.1441–1(b)(3)(ii)(C) without regard to the requirement in that section that limits its application to payments on offshore obligations, and (ii) substitute the references in § 1.1441–1(b)(3)(ii)(C) to exempt recipient categories under section 6049 with the exempt recipient categories in existing § 1.6045–1(c)(3)(i). The first modification is made to conform the rule for digital asset brokers to the rule for securities brokers. *See* § 1.6049–5(d)(2)(i) for the rule applicable to securities brokers. The second modification is needed because § 1.1441–1(b)(3)(ii)(C) cites to regulations under section 6049 for exempt recipients, but the categories of exempt recipients under section 6045 are different from the categories that apply for purposes of section 6049.

If a customer is presumed to be an intermediary, these proposed regulations provide that a broker must determine the intermediary's status as U.S. or foreign by applying the presumption rules in § 1.1441–1(b)(3)(iii). If a broker is required to treat a customer as a foreign intermediary under proposed § 1.6045–1(g)(4)(vi)(E)(*1*), the broker must treat the foreign intermediary as an exempt foreign person except to the extent required by existing § 1.6045–1(g)(3)(iv) (providing that a broker may not treat a foreign intermediary as an exempt foreign person if the broker has actual knowledge that the person for whom the intermediary acts is a U.S. person who is not an exempt recipient, and providing for reporting that may be required by the foreign intermediary).

Proposed § 1.6045–1(g)(4)(vi)(E)(*2*) provides the documentation and presumption rules for brokers paying gross proceeds to foreign flow-through entities. Under these proposed regulations, a broker may rely on a valid foreign flow-through withholding certificate described in § 1.1441–5(c)(3)(iii) (relating to nonwithholding foreign partnerships) or (e)(5)(iii) (relating to foreign simple trusts and foreign grantor trusts that are nonwithholding foreign trusts) to determine the status of a customer as a foreign flow-through entity. Proposed § 1.6045–1(g)(4)(vi)(E)(*2*) provides that a broker does not need to obtain from the foreign flow-through entity the withholding certificates or other documentation for the entity's partners to treat the withholding certificate as valid. The Treasury Department and the IRS are considering requiring brokers to obtain documentation on partners, beneficiaries, or owners (as applicable) of customers that are foreign flow-through entities in order to avoid circumvention of these proposed regulations by U.S. persons holding interests in foreign flow-through entities selling digital assets. The Treasury Department and the IRS request comments on whether the transparency gained by adding this rule would justify the increased burden on brokers, and whether that trade-off would be different for digital asset-only brokers, securities-only brokers, or brokers that effect sales or exchanges in both categories. The Treasury Department and the IRS also request comments on how frequently and in what circumstances securities brokers rely on the existing section 6045 regulations to not document partners, beneficiaries, or owners (as applicable) of customers that are foreign flow-through entities.

If a broker does not obtain a valid foreign flow-through withholding certificate, the broker may determine the status of a customer as a foreign flow-through entity based on the presumption rules in § 1.1441–1(b)(3)(ii)(B) (relating to entity classification) and § 1.1441–5(d) (relating to partnership status as U.S. or foreign) and (e)(6) (relating to the status of trusts and estates as U.S. or foreign). If a broker is permitted to treat a customer as a foreign flow-through entity, the broker must treat the payment as made to an exempt foreign person except to the extent required by § 1.6049–5(d)(3)(ii) (providing that a broker may not treat a foreign flow-through entity as an exempt foreign person if the broker has actual knowledge that the partner to which the payment is allocated is a U.S. person who is not an exempt recipient and the broker has actual knowledge of the amount allocable to such person).

Proposed § 1.6045–1(g)(4)(vi) provides the documentation, presumptions, and reliance rules applicable to payments to a customer that is a U.S. branch (as described in § 1.1441–1(b)(2)(iv)). When a U.S. branch is the beneficial owner of the payment, the rules in proposed § 1.6045–1(g)(4)(vi) other than paragraph (g)(4)(vi)(E) apply. When a U.S. branch is not the beneficial owner of a payment, proposed § 1.6045–1(g)(4)(vi)(E)(*3*) provides that a broker may rely on a valid U.S. branch withholding certificate described in § 1.1441–1(e)(3)(v) to determine the status of a customer as a U.S. branch that is not a beneficial owner of a payment, without regard to whether the withholding certificate contains a withholding statement and withholding certificates or other documentation for each person for whom the branch receives the payment. If a U.S. branch

certifies on a valid U.S. branch withholding certificate that it agrees to be treated as a U.S. person under § 1.1441–1(b)(2)(iv)(A), the broker may treat the U.S. branch as an exempt foreign person. If a U.S. branch does not certify on a valid U.S. branch withholding certificate, the broker may treat the U.S. branch as an exempt foreign person except to the extent required by existing § 1.6045–1(g)(3)(iv) (providing that a broker may not treat a U.S. branch as an exempt foreign person if the broker has actual knowledge that the person for whom the U.S. branch receives the payment is a U.S. person who is not an exempt recipient, and providing for reporting that may be required by the U.S. branch).

6. Coordination With Rules Applicable to Sales of Securities

In determining whether a sale is effected at an office inside or outside the United States or whether a broker may treat a customer as an exempt foreign person, brokers that effect sales of both securities and digital assets for customers may find it difficult to apply both the rules in existing § 1.6045–1(g)(1) through (3) for sales of securities and those in proposed § 1.6045–1(g)(4) for sales of digital assets. This fact pattern could arise if a traditional securities broker also effected sales of digital assets for customers. The difficulty of complying both with the reporting and documentation rules for securities and with the reporting and documentation rules for digital assets might be particularly acute when a customer uses the same broker to effect both types of transactions.

The Treasury Department and the IRS considered including a coordination rule that would allow brokers that effect transactions involving both securities and digital assets, as those terms are defined under section 6045, to apply the rules of proposed § 1.6045–1(g)(4) to determine whether sales of both securities and digital assets are effected at an office inside or outside the United States and whether brokers may treat the customers as exempt foreign persons. These proposed regulations do not propose this coordination rule because it was determined that more extensive coordination between the rules for sales of securities and sales of digital assets would be required and because the rules proposed for sales of digital assets have been drafted based on the characteristics of digital asset transactions and may not apply seamlessly to a securities broker. For example, the U.S. indicia applicable to digital asset brokers differ from the U.S. indicia applicable to security brokers. The Treasury Department and the IRS request comments on whether a coordination provision would be helpful to brokers that effect sales of both securities and digital assets for customers, and if so, which proposed rules applicable to digital asset brokers should apply to securities brokers.

7. Transition Period

To provide digital asset brokers with sufficient time to obtain necessary documentation from existing customers to establish exempt foreign status under these proposed regulations, proposed § 1.6045–1(g)(4)(vi)(F) provides that for sales of digital assets effected before January 1, 2026, that were held in an account established at a broker before January 1, 2025, digital asset brokers may treat a customer as an exempt foreign person provided that the customer has not previously been classified as a U.S. person by the broker, and the information that the broker has for the customer in the account opening files or other files pertaining to the account, including documentation collected for purposes of an AML program, includes a residence address that is not a U.S. address.

J. Special Rules for Barter Exchanges That Effect Certain Digital Asset Exchanges

Any person with members or clients that contract with each other or with the organization to trade or barter property or services either directly (member to member) or through the organization is a barter exchange under existing § 1.6045–1(a)(4). A merchant that provides goods or services in exchange for a customer's digital asset is not acting as a barter exchange for purposes of this definition.

Property or services are considered exchanged through a barter exchange if payment is made by means of a credit on the books of the barter exchange or a scrip issued by the barter exchange, or if the barter exchange arranges a direct exchange of property or services between members. Existing regulations provide limited guidance on the application of these rules and do not explicitly address whether the barter exchange rules apply to digital asset exchange transactions under which digital assets are exchanged for property (including different digital assets) or services. Consequently, it is possible that a particular exchange transaction might qualify both as a sale under proposed § 1.6045–1(a)(9)(ii) effected by a broker under these regulations and also as an exchange transaction effected by a barter exchange. Alternatively, a particular exchange transaction could be considered both a reportable payment transaction facilitated by a TPSO under section 6050W as well as an exchange transaction effected by a barter exchange.

To avoid duplicative reporting, proposed § 1.6045–1(e)(2)(iii) provides coordination rules applicable to a barter exchange that is also a broker subject to reporting under proposed § 1.6045–1(c). Under these rules, exchange transactions involving the exchange of one digital asset held by one customer of a broker for a different digital asset held by a second customer of the same broker are treated as sales under proposed § 1.6045–1(a)(9)(ii) subject to reporting under proposed § 1.6045–1(c) and (d) (reporting by brokers) with respect to both customers and not as an exchange of personal property through a barter exchange subject to reporting under proposed § 1.6045–1(e) and (f) (reporting by barter exchanges).

Additionally, in circumstances involving exchanges of digital assets for personal property or services where the digital asset payment is also a reportable payment transaction subject to reporting by the barter exchange under § 1.6050W–1(a)(1), these proposed regulations provide rules for reporting each member's or client's disposition under rules other than under the barter exchange rules under proposed § 1.6045–1(e) and (f) depending on whether the member is disposing of digital assets on the one hand or personal property or services on the other. For the member or client disposing of personal property or services, proposed § 1.6045–1(e)(2)(iii) provides that the exchange must be treated as a reportable payment transaction that must be reported under proposed § 1.6050W–1(a)(1) and not as an exchange through a barter exchange subject to reporting under proposed § 1.6045–1(e). With respect to the member or client disposing of digital assets in this exchange, proposed § 1.6045–1(e)(2)(iii) provides that the exchange must be treated as a sale under proposed § 1.6045–1(a)(9)(ii)(D) subject to reporting under proposed § 1.6045–1(c) and not as an exchange through a barter exchange subject to reporting under proposed § 1.6045–1(e).

The purpose of these rules is to have brokers report all digital asset exchange transactions that are also subject to reporting under the barter exchange provisions reported under proposed § 1.6045–1(c) and (d). No inference is intended as to whether exchanges involving digital assets do or do not constitute exchanges subject to the reporting under the barter exchange rules under existing § 1.6045–1(e). The

Treasury Department and the IRS request comments on the extent to which there are additional broker-facilitated transactions involving digital assets that would still be subject to reporting under the barter exchange rules after the applicability date of these proposed regulations. For example, are there any broker-mediated transactions that are not reportable payment transactions under § 1.6050W–1(a)(1) with respect to the client that receives the digital assets as payment?

K. Additional Definitions and Definitional Changes

As noted in Part I of the *Background,* references in these proposed regulations to an owner holding digital assets generally or holding digital assets in a wallet or account are meant to refer to holding or controlling, whether directly or indirectly through a custodian, the keys to the digital assets. Proposed § 1.6045–1(a)(23) adds this clarification to the regulation by providing a definition for *held in a wallet or account.* Under this provision, a digital asset is considered held in a wallet or account if the wallet, whether hosted or unhosted, or account stores the private keys necessary to transfer access to, or control of, the digital asset. A digital asset associated with a digital asset address that is generated by a wallet, and a digital asset associated with a sub-ledger account of a wallet, are similarly considered held in a wallet. References to variations of held in a wallet or account, such as held at a broker, held with a broker, held by the user of a wallet, held on behalf of another, acquired in a wallet or account, acquired in a customer's wallet or account, or transferred into a wallet or account, each have a similar meaning. Proposed § 1.6045–1(a)(24) provides that a *hosted wallet* is a custodial service provided to a user that electronically stores the private keys to digital assets held on behalf of others. Hosted wallets are sometimes referred to as custodial wallets. Proposed § 1.6045–1(a)(27) provides that an *unhosted wallet* is a non-custodial means of storing, electronically or otherwise, a user's private keys to digital assets held by or for the user. Unhosted wallets can be provided through software that is connected to the internet (a hot wallet) or through hardware or physical media that is disconnected from the internet (a cold wallet).

Proposed § 1.6045–1(a)(12) revises the definition of *cash* to include U.S. dollars and any convertible foreign currency that is issued by a government or a central bank, whether in physical or digital form. Pursuant to that definition, a central bank digital currency may be treated as cash for purposes of these proposed regulations and not as digital assets. The revised definition is also intended to exclude privately-issued digital assets from the definition of *cash* for purposes of the reporting requirements under existing § 1.6045–1. No inference is intended, however, as to the treatment of a central bank digital currency or other digital asset for other purposes of the Code.

For purposes of these regulations, the definition of *cash* (including the U.S. dollar and foreign currency) does not include so-called stablecoins, which are a form of digital assets in which the underlying value of the coins generally are linked to another asset or assets. Stablecoins are treated as digital assets for purposes of these proposed regulations because stablecoins take multiple forms, may be backed by several different types of assets that are not limited to currencies, may not be fully collateralized or supported fully by reserves by the underlying asset, do not necessarily have a constant value, are frequently used in connection with transactions involving other types of digital assets, are held and transferred in the same manner as other digital assets and, therefore, raise similar tax compliance concerns.

The Treasury Department and the IRS considered whether to exclude transactions involving the disposition of stablecoins that are linked to the U.S. dollar or to other foreign currencies from the definition of a *sale* for which reporting is required, which would parallel the manner in which dispositions of U.S. dollars or other foreign currencies are treated for purposes of section 6045, that is, as dispositions that are generally not subject to reporting. These proposed regulations do not exclude stablecoin transactions from the definition of *sale* because a broker may not be able to identify which stablecoins will perfectly and consistently reflect the value of the currencies to which they are linked, if any. The Treasury Department and the IRS are aware that legislative or regulatory rules are being considered in a number of jurisdictions that might more closely tie the value of a stablecoin to a fiat currency, and request comments on whether stablecoins, or a subset of stablecoins, should not be treated as digital assets for purposes of these rules. Additionally, comments are requested on whether the regulations should exclude from reporting transactions involving the disposition of U.S. dollar related stablecoins that give rise to no gain or loss, and if so, how should those stablecoin transactions be identified. Finally, comments are requested regarding whether any other changes would need to be made to the regulations or other rules to ensure adequate reporting of transactions involving the receipt or disposition of stablecoins.

The Treasury Department and the IRS also request comments on the structure and use of tokenized deposits or other tokenized assets that are closely linked to cash held in an account.

Additionally, the list of governmental exempt recipients in existing § 1.6045–1(c)(3)(i)(B) is clarified by listing the specific territorial jurisdictions to which the existing exemption for ''a possession of the United States'' applies, and the definitions for *security, barter exchange, regulated futures contract, closing transaction, person, debt instrument,* and *securities futures contract,* are republished in proposed § 1.6045–1(a)(3), (4), (6), (8), (13), (17), and (18), respectively, to add headings and, where necessary, to reformat paragraph numbering and make other non-substantive changes.

Finally, where the existing regulations provide rules that do not apply to digital assets, such as existing § 1.6045–1(d)(2)(iv) governing the use by brokers of information furnished on a transfer statement described in § 1.6045A–1, these proposed regulations clarify that those existing rules do not apply to digital assets by limiting the existing rules to securities only or specifically excluding digital assets from the existing rules. These changes are not intended to change the way the proposed regulations apply to assets currently covered by the existing regulations.

II. Proposed §§ 1.1001–7, 1.1012–1(h), and 1.1012–1(j)

In general, existing regulations and other guidance under sections 1001 and 1012 provide the tax rules for determining a taxpayer's amount realized on the disposition of digital assets and basis in purchased digital assets. For example, a taxpayer's transfer of digital assets from one of the taxpayer's wallets into a different wallet owned by the same taxpayer is not a sale or other disposition pursuant to section 1001, whereas the payment of a transfer fee with digital assets to effectuate that transfer is a sale or other disposition of the digital assets used to pay the fee resulting in gain or loss pursuant to section 1001. In some fact patterns, however, taxpayers may benefit from additional clarifying guidance. Those fact patterns include exchanges of digital assets for services or other property, including different

digital assets, and dispositions of less than all of a taxpayer's holdings of a particular digital asset if the taxpayer purchased those holdings at different times or for different prices.

A. Amount Realized

Proposed § 1.1001–7(b)(1)(i) provides the general rule for determining the amount realized on a sale or disposition of digital assets for cash, other property differing materially either in kind or in extent, or services. Under these rules, the amount realized is the sum of: (i) the cash received; (ii) the fair market value of any property received (including digital assets) or, in the case of a debt instrument issued in exchange for the digital assets and subject to § 1.1001–1(g), the issue price of the debt instrument, as provided under the rules of § 1.1001–1(g); and (iii) the fair market value of any services received; reduced by the allocable digital asset transaction costs. Digital assets are defined in this proposed regulation by cross-reference to the *digital assets* definition contained in proposed § 1.6045–1(a)(19).

Proposed § 1.1001–7(b)(1)(ii) provides that the disposition of digital assets (including digital assets withheld) to pay digital asset transaction costs is a disposition of digital assets for services. Proposed § 1.1001–7(b)(1)(iii) applies the general rule included in proposed § 1.1001–7(b)(1)(i) to different fact patterns depending on whether cash, services, digital assets, or other property is received as consideration for the sale or disposition of the digital assets. Proposed § 1.1001–7(b)(1)(iv) provides the rule for calculating the amount attributable to a debt instrument issued in exchange for digital assets. Under this rule, the amount attributable to a debt instrument issued in exchange for digital assets is determined by cross-reference to the rules in § 1.1001–1(g) (in general the issue price of the debt instrument).

As provided in the general rule set forth in proposed § 1.1001–7(b)(1)(i), in computing the amount realized from the sale or exchange of digital assets, the amount determined to have been received in exchange for the digital assets must be reduced by any digital asset transaction costs allocable to the disposed-of digital asset. Proposed § 1.1001–7(b)(2)(i) defines *digital asset transaction costs* as the amount paid, in cash, or property (including digital assets), to effect the disposition or acquisition of a digital asset and includes transaction fees, transfer taxes, and any other commissions. Proposed § 1.1001–7(b)(2)(ii) provides rules for allocating digital asset transaction costs to the disposition or acquisition of a digital asset. These allocation rules apply to any digital asset transaction costs paid on the sale or disposition of a digital asset used or withheld to pay other digital asset transaction costs. Proposed § 1.1001–7(b)(2)(ii)(A) provides the general rule for allocating digital asset transaction costs on dispositions of digital assets in exchange for cash, services, debt instruments issued in exchange for the digital assets, or other property (other than digital assets). In these instances, the total digital asset transaction costs paid by the taxpayer are allocated to the disposition of the digital assets. The reference to total digital asset transaction costs in this rule is intended to avoid the further allocation of cascading digital asset transaction costs (that is, a digital asset transaction cost paid with respect to the use of a digital asset to pay for a digital asset transaction cost). The Treasury Department and the IRS request comments regarding whether it is appropriate to treat all such costs as digital asset transaction costs associated with the original transaction.

The Treasury Department and the IRS understand that brokers that effect exchanges of one digital asset for a different digital asset may charge a single digital asset transaction cost for the exchange. In this case, the digital asset transaction cost is associated both with the disposition of one digital asset and the acquisition of a different digital asset. The Treasury Department and the IRS considered whether these regulations should permit taxpayers or brokers to designate how to allocate digital asset transaction costs but determined that a single uniform rule would be easier to administer and less susceptible to manipulation. Consideration was also given to allocating the costs either entirely to reduce the amount realized or entirely to increase basis; however, this allocation would not reflect the economic reality that the costs are allocable to a particular transaction that includes both the purchase of one digital asset and the disposition of a different digital asset. Accordingly, proposed § 1.1001–7(b)(2)(ii)(B) provides that if digital asset transaction costs are paid to effect the exchange of one digital asset for a digital asset differing materially in kind or in extent, any allocation or assignment made by the parties or the entity effecting the exchange is disregarded. Instead, one-half of the total digital asset transaction costs paid by the taxpayer is allocable to the disposition of the transferred digital asset for purposes of determining the amount realized and one-half is allocable to the acquisition of the received digital asset for purposes of determining the basis of that received digital asset under § 1.1012–1(h). The Treasury Department and the IRS request comments on whether this allocation of digital asset transaction costs to exchanges of one digital asset for a different digital asset is administrable and whether alternative allocations, such as a 100 percent allocation of digital asset transaction costs to the disposed-of digital assets, would be less burdensome.

In some circumstances, taxpayers may incur a transfer fee associated with a transfer of digital assets that does not involve a sale or an exchange. For example, a transfer of digital assets from an unhosted wallet owned by a taxpayer to a hosted wallet in an account that is also owned by the taxpayer may incur a distributed ledger transaction fee that must be paid in digital assets, notwithstanding that the underlying transfer is not a taxable event under section 1001. To the extent that a digital asset is used to pay this fee in exchange for the recordation of the transfer on the distributed ledger, the exchange of the digital asset to pay this fee is a taxable event under section 1001 resulting in gain or loss.

Finally, proposed § 1.1001–7(b)(3) and (4) provide rules for determining the fair market value of digital assets and for determining the fair market value of services or property received in consideration for digital assets. Specifically, under proposed § 1.1001–7(b)(3), the fair market value of a digital asset is determined as of the date and time of the exchange or disposition of the digital asset. Under proposed § 1.1001–7(b)(4), when the fair market value of the property (including digital assets but excluding debt instruments subject to § 1.1001–1(g)) or services received in exchange for digital assets cannot be determined with reasonable accuracy, the fair market value of such property or services must be determined by reference to the fair market value of the digital assets transferred as of the date and time of the exchange.

B. Basis

The starting point for determining basis of property is its cost, that is, what is transferred in consideration for what is received, under section 1012. Proposed § 1.1012–1(h) provides the general rules for determining the cost basis of digital assets that are acquired in a purchase for cash, a transfer in connection with the performance of services, an exchange for digital assets or other property differing materially in

kind or extent, an exchange for a debt instrument, or in a part sale and part gift transfer.

Ordinarily, the value of property in exchange for other property received should be equal in value. Under Federal income tax law principles, in an exchange of property, both the amount realized on the property transferred and the basis of the property received in an exchange ordinarily are determined by reference to the fair market value of the property received. *See United States* v. *Davis,* 370 U.S. 65 (1962); *Philadelphia Park Amusement Co.* v. *United States,* 126 F. Supp. 184 (Ct. Cl. 1954); Rev. Rul. 55–757, 1955–2 C.B. 557. This rule ensures that the sum of any gain or loss realized by the taxpayer in an exchange transaction in which property is received plus the gain or loss realized by the taxpayer in a subsequent transaction in which the property received in the first transaction is later sold will be equivalent to the customer's economic gain on the combined transactions. Accordingly, proposed § 1.1012–1(h)(1) provides that the basis of digital assets acquired in an exchange is generally equal to the cost of the digital assets received at the date and time of the exchange. Basis also takes into account allocable digital asset transaction costs. Proposed § 1.1012–1(h)(3) provides that if a taxpayer receives digital assets in exchange for property differing materially in kind or in extent (including digital assets and non-digital asset property), the cost of the digital assets received is the same as the fair market value used in determining the amount realized on a sale or disposition of the transferred digital assets for the purposes of section 1001.

Proposed § 1.1012–1(h)(1)(i), (iii), and (iv) apply the general rule included in proposed § 1.1012–1(h)(1) to different fact patterns depending on whether cash or certain other property is used to acquire the digital assets. Specifically, under proposed § 1.1012–1(h)(1)(i), when digital assets are purchased for cash, the basis of the digital assets purchased is the amount of cash paid plus any allocable digital asset transaction costs. Under proposed § 1.1012–1(h)(1)(iii), the basis of digital assets acquired in exchange for property other than digital assets is the cost of the acquired digital assets plus any allocable digital asset transaction costs. Under proposed § 1.1012–1(h)(1)(iv), the basis of digital assets received in exchange for other digital assets differing materially in kind or in extent is the cost of the acquired digital assets, plus one-half of the total allocable digital asset transaction costs pursuant to the rules provided in proposed § 1.1012–1(h)(2)(ii)(B), discussed later in this section. Proposed § 1.1012–1(h)(3), discussed below, explains how to determine the cost of digital assets received in an exchange described in either proposed § 1.1012–1(h)(1)(iii) or (iv).

Proposed § 1.1012–1(h)(1)(ii), (v), and (vi) apply special rules for determining the basis of digital assets received in other select fact patterns. Proposed § 1.1012–1(h)(1)(ii) provides that when digital assets are received in exchange for the performance of services, taxpayers should follow the rules set forth in §§ 1.61–2(d)(2) and 1.83–4(b) for purposes of determining basis. Proposed § 1.1012–1(h)(1)(v) provides the rule for determining the basis of digital assets acquired in exchange for the issuance of a debt instrument. Under these rules, the cost of the digital asset attributable to the debt instrument is the amount determined under § 1.1012–1(g) (which generally looks to the issue price of the debt instrument as determined under the rules under either section 1273 or section 1274, whichever is applicable) plus any allocable digital asset transaction costs pursuant to the rules in proposed § 1.1012–1(h)(2) described in the next paragraph. Lastly, if digital assets are received in a transfer, which is in part a sale and in part a gift, proposed § 1.1012–1(h)(1)(vi) provides that taxpayers should look to the rules for transfers that are in part a sale and in part a gift under § 1.1012–2.

Proposed § 1.1012–1(h)(2)(ii) provides rules for allocating digital asset transaction costs to acquisitions of digital assets. Except in the case of an exchange of digital assets for other digital assets differing materially in kind or in extent, proposed § 1.1012–1(h)(2)(ii)(A) provides that digital asset transaction costs paid by the taxpayer are entirely allocable to the digital assets received. In contrast, as a corollary to the split digital asset transaction cost rule provided under proposed § 1.1001–7(b)(2)(ii)(B), when digital assets are received in exchange for other digital assets that differ materially in kind or extent, one-half of the total digital asset transaction costs paid by the taxpayer is allocable to the acquisition of the received digital assets for purposes of determining the basis of those received digital assets. Accordingly, if a taxpayer exchanges digital asset DE for digital asset ST and pays digital asset transaction costs, the basis of the digital asset ST is computed using the fair market value of the digital asset ST received, plus one-half of the total digital asset transaction costs.

Finally, proposed § 1.1012–1(h)(3) provides the rules for determining the cost of digital assets received in an exchange described in either proposed § 1.1012–1(h)(1)(iii) or (iv). Under these rules, the cost of the digital assets received equals the fair market value of those digital assets as of the date and time of the exchange. Additionally, when the fair market value of a digital asset received cannot be determined with reasonable accuracy, proposed § 1.1012–1(h)(3) provides that the fair market value of the digital asset received must be determined with reference to the property transferred. This rule is analogous to the rule provided in proposed § 1.1001–7(b)(4) with respect to the determination of the fair market value of property received.

C. Identification Rules

These proposed regulations provide rules for identifying which units of a particular digital asset held in a single wallet or account as defined in proposed § 1.6045–1(a)(23) are sold, disposed of, or transferred when less than all units of that digital asset are sold, disposed of, or transferred. Proposed § 1.1012–1(j)(1) and (2) provide rules for units of a digital asset that are left in an unhosted wallet and proposed § 1.1012–1(j)(3) provides rules for units of a digital asset left in the custody of a broker.

For units held in unhosted wallets and therefore not left in the custody of a broker, proposed § 1.1012–1(j)(1) provides that if a taxpayer sells, disposes of, or transfers less than all the units of the same digital asset held within a single wallet, the units disposed of for purposes of determining basis and holding period are determined by a specific identification of the units of the particular digital asset in the wallet or account that the taxpayer intends to sell, dispose of, or transfer. For a taxpayer that does not specifically identify the units to be sold, disposed of, or transferred, the units in the wallet or account disposed of are determined in order of time from the earliest purchase date of the units of that same digital asset. For purposes of making this determination, the dates the units were transferred into the taxpayer's wallet or account are disregarded.

Proposed § 1.1012–1(j)(2) provides that a specific identification of the units of a digital asset sold, disposed of, or transferred is made if, no later than the date and time of sale, disposition, or transfer, the taxpayer identifies on its books and records the particular units to be sold, disposed of, or transferred by reference to any identifier, such as purchase date and time or the purchase

price for the unit, that is sufficient to identify the basis and holding period of the units sold, disposed of, or transferred. A specific identification can be made only if adequate records are maintained for all units of a specific digital asset held in a single wallet or account to establish that a unit is removed from the wallet or account for purposes of subsequent transactions.

The Treasury Department and the IRS request comments on methods by which taxpayers using unhosted wallets can more easily track purchase dates, times, and/or basis of specific units of a digital asset upon the transfer of some or all of the units between custodial brokers and unhosted wallets. The Treasury Department and the IRS also request comments on whether the above ordering rules for unhosted wallets should be applied on a wallet-by-wallet basis as proposed, or whether these rules should instead be applied on a digital asset address-by-digital asset address basis or some other basis. Additionally, the Treasury Department and the IRS request comments on alternative proposals for these ordering rules if unhosted wallets have systems that can otherwise account for their customers' transactions.

For multiple units of a type of digital asset that are left in the custody of a broker, proposed § 1.1012–1(j)(3)(ii) provides that the taxpayer can make an adequate identification of the units sold, disposed of, or transferred by specifying to the broker, no later than the date and time of sale, disposition, or transfer, the particular units of the digital asset to be sold, disposed of, or transferred by reference to any identifier (such as purchase date and time or purchase price paid for the units) that the broker designates as sufficiently specific to allow it to determine the basis and holding period of those units. The units so identified are treated as the units of the digital asset sold, disposed of, or transferred to determine the basis and holding period of such units. This identification must also be taken into consideration in identifying the taxpayer's remaining units of the digital asset for purposes of subsequent sales, dispositions, or transfers. Identifying the units sold, disposed of, or transferred solely on the taxpayer's books or records is not an adequate identification of the digital assets if the assets are held in the custody of a broker. The Treasury Department and the IRS request comments on whether this ordering rule for digital assets left in the custody of a broker should apply on an account-by-account basis or whether brokers have systems that can otherwise account for their customers' transactions. Additionally, comments are also requested regarding whether exceptions should be made to the ordering rule for digital assets left in the custody of a broker to allow brokers to take into account reasonably reliable purchase date information received from outside sources, and if so, what types of purchase date information should be considered reasonably reliable.

For customers that do not provide the broker with an adequate identification of the units sold, disposed of, or transferred, proposed § 1.1012–1(j)(3)(i) provides that the units disposed of for purposes of determining the basis and holding period of such units is determined in order of time from the earliest units of that same digital asset purchased within or transferred into the taxpayer's account with the broker. For this purpose, units of a particular digital asset are treated as transferred into the taxpayer's account as of the date and time of the transfer. Once transfer statement reporting under section 6045A is required, however, the Treasury Department and the IRS anticipate that these rules would be revised to take into account the basis and holding period information provided to the broker on the transfer statement. A rule of that kind would conform the substantive rules applicable to taxpayers to the reporting required from brokers.

Lastly, proposed § 1.1012–1(j)(4) clarifies that the taxpayer's method of specifically identifying the units of a particular digital asset sold, disposed of, or transferred is not a method of accounting. This means that each time a taxpayer sells, disposes of, or transfers units of a particular digital asset, the taxpayer can decide how to specifically identify those units, for example, by the earliest acquired, the latest acquired, or the highest basis. Therefore, a change in the method of specifically identifying the digital asset sold, disposed of, or transferred is not a change in method of accounting to which sections 446 and 481 of the Code apply.

III. Proposed § 1.6045–4

In addition to reporting on dispositions by real estate buyers of digital assets in exchange for real estate under the proposed § 1.6045–1 rules described earlier, real estate reporting persons should also report on the fair market value of digital assets received by transferors (sellers) of real estate in real estate transactions. Accordingly, these proposed regulations expand the information real estate reporting persons are required to report on information returns filed, and payee statements furnished, with respect to real estate transactions. Proposed § 1.6045–4(h)(1)(vii) provides that for payments made to a transferor using digital assets, a real estate reporting person should report the name and number of units of the digital asset used to make the payment, the date and time the payment was made, the transaction identification of the digital asset transfer as defined in proposed § 1.6045–1(a)(26), and the digital asset address (or addresses) as defined in proposed § 1.6045–1(a)(20) into which the digital assets are transferred. Additionally, proposed § 1.6045–4(i) expands the definition of *gross proceeds* to be reported to include payments using digital assets received by the real estate transferor. For purposes of proposed § 1.6045–4, a digital asset has the same meaning set forth in proposed § 1.6045–1(a)(19).

Under existing § 1.6045–4(i)(1), the term *gross proceeds* means the total cash received and to be received by or on behalf of the transferor in connection with the real estate transaction. These proposed regulations make three main changes to this definition to ensure all payments using digital assets will be included in the amount reported. First, proposed § 1.6045–4(i)(1) clarifies that the total cash received by, or on behalf of, the transferor in connection with a real estate transaction includes cash received from a digital asset payment processor (as defined in proposed § 1.6045–1(a)(22)(i)) in exchange for the digital assets paid to that processor by the real estate buyer. Thus, if a buyer purchases real estate using a digital asset payment processor that accepts digital assets in return for the payment of cash to the real estate transferor, the cash received by that transferor includes the cash amount received from the digital asset payment processor.

Second, although existing § 1.6045–4(i)(1) uses the phrase ''cash . . . to be received,'' the remainder of the regulation uses the phrase ''consideration treated as cash'' to refer to what is meant by ''cash . . . to be received.'' To maintain consistency throughout the regulation, proposed § 1.6045–4(i)(1) replaces the ''cash . . . to be received'' phrase with ''consideration treated as cash'' in the two places where the former phrase appears in the regulation. The Treasury Department and the IRS intend this change as a clarification and not as a substantive change to any information that is currently required to be reported under the existing regulation.

Finally, proposed § 1.6045–4(i)(1) provides that gross proceeds also include the value of digital assets received by, or on behalf of, the transferor in connection with the real

estate transaction. Proposed § 1.6045–4(i)(1)(ii) provides that the value of digital assets received includes the fair market value of digital assets actually received. In addition, when a transferor receives an obligation to pay digital assets to, or for the benefit of, the transferor in the future, the value of digital assets received includes the fair market value, as of the date and time the obligation is entered into, of the digital assets to be paid as stated principal under the obligation. Digital assets actually received by, or on behalf of, the transferor from or at the direction of a digital asset payment processor are included in digital assets received for purposes of this rule. The fair market value of digital assets received by, or on behalf of, the transferor must be determined by the broker based on the valuation techniques provided in proposed § 1.6045–1(d)(5)(ii). *See* Parts I.E.2 and II of this *Explanation of Provisions.*

In a change unrelated to transactions involving digital assets, proposed § 1.6045–4 is also updated to reflect the section 6045(e)(5) exception from reporting for gross income up to $250,000 of gain on the sale or exchange of a principal residence if certain conditions are met. Section 6045(e)(5) was added to the Code by section 312 of the Taxpayer Relief Act of 1997, Public Law 105–34, 111 Stat. 788 (August 5, 1997), as amended by the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206, 112 Stat. 805 (July 22, 1998). Proposed § 1.6045–4(c)(2)(iv) provides that no information return is required with respect to a sale or exchange of an interest in a principal residence provided the real estate reporting person obtains from the seller a written certification consistent with guidance designated by the Secretary. This guidance is currently provided in Rev. Proc. 2007–12, 2007–1 C.B. 357. In addition, proposed § 1.6045–4(c)(2)(iv) also provides that if a residence has more than one owner, the real estate reporting person must either obtain a certification from each owner (whether married or not) or file an information return and furnish a payee statement for any owner that does not make the certification. The certification must be retained by the reporting person for four years after the year of the sale or exchange of the residence to which the certification applies. Finally, proposed § 1.6045–4(c)(2)(iv) provides that a reporting person who relies on a certification made in compliance with paragraph (c)(2)(iv) will not be liable for penalties under section 6721 for failure to file an information return, or under section 6722 for failure to furnish a payee statement to the seller, unless the reporting person has actual knowledge, or reason to know, that any assurance is incorrect.

Additionally, proposed § 1.6045–4 is updated to reflect the statutory changes made to section 6045(e)(3), which provides that it is unlawful for any real estate reporting person to separately charge any customer for complying with the reporting under section 6045. Section 6045(e)(3) was modified by section 1704(o)(1) of the Small Business Job Protection Act of 1996, Public Law 104–188, 110 Stat. 1755 (August 20, 1996), to provide that notwithstanding the prohibition against real estate reporting persons separately changing customers for complying with section 6045 reporting obligations, real estate reporting persons may take their costs of complying with the requirements of section 6045 into account in establishing their charge for performing services in connection with real estate transactions. Proposed § 1.6045–4(o) has been revised to reflect this statutory change.

Finally, in another change unrelated to transactions involving digital assets, the list of governmental exempt transferors in existing § 1.6045–4(d)(2)(ii)(A) is clarified by listing the specific territorial jurisdictions to which the existing exemption for ''a possession of the United States'' applies.

IV. Proposed §§ 1.6045A–1 and 1.6045B–1

As discussed in the introductory paragraph to this *Explanation of Provisions,* these proposed regulations do not provide guidance or otherwise implement the changes made by the Infrastructure Act that require transfer statement reporting in the case of digital asset transfers under section 6045A(a) or broker information reporting under section 6045A(d) for digital asset transfers that are not sales or are not transfers to accounts maintained by persons that the transferring broker knows or has reason to know are also brokers.

Additionally, as discussed in Part I.A.2. of this *Explanation of Provisions,* because it is unclear whether sections 6045A and 6045B are currently being applied to assets that qualify both as digital assets and specified securities under the existing rules, the Treasury Department and the IRS have decided to delay transfer statement reporting under section 6045A(a) and issuer reporting under section 6045B for these dual classification assets until regulations or other guidance is issued. Accordingly, proposed § 1.6045A–1(a)(1)(vi) has been added to specifically exempt from transfer statement reporting any specified security that is also a digital asset. Transferors that nonetheless choose to provide a transfer statement reporting some or all of the information described in section 6045A are not subject to penalties under section 6722 for failure to report this information correctly. In addition, proposed § 1.6045B–1(a)(6) similarly exempts issuers from reporting on any specified security that is also a digital asset. Accordingly, under these rules, the transfer of a specified security within the meaning of proposed § 1.6045–1(a)(14)(i) through (iv) or an issuer of a specified security within the meaning of proposed § 1.6045–1(a)(14)(i) through (iv) will not be subject to the section 6045A and section 6045B reporting rules if the specified security also falls within the definition of a *digital asset* under proposed § 1.6045–1(a)(19). Issuers that nonetheless choose to provide this reporting are not subject to penalties under either section 6721 or section 6722 for failure to report or furnish this information correctly.

The Treasury Department and the IRS will consider guidance for these dual classification assets as part of the implementation of more general transfer statement reporting under section 6045A(a), broker information reporting under section 6045A(d), and digital asset issuer reporting under section 6045B as part of a later phase of information reporting guidance. Comments are requested as to whether sections 6045A and 6045B should be made applicable for securities that are also digital assets prior to the implementation of this later phase of the information reporting guidance. Comments are requested regarding who would be the responsible party required to provide the reporting if section 6045B is made applicable to securities that are also digital assets prior to the implementation of this later phase of information reporting guidance.

V. Proposed § 1.6050W–1

Some digital asset brokers currently treat payments of cash for digital assets, or exchanges of one digital asset for a different digital asset, as reportable payments under section 6050W. These proposed regulations do not take a position regarding the appropriateness under existing regulations of treating payments of cash for digital assets, or payments of one digital asset in exchange for a different digital asset, as reportable payments under section 6050W. To the extent these transactions are reportable under proposed § 1.6045–

1 after the applicability date of these proposed regulations, however, these transactions must be reported under section 6045. Therefore, to avoid duplicative reporting, proposed § 1.6050W–1(c)(5)(i)(A) provides that in the case of a payor that makes a payment using digital assets as part of a third party network transaction involving the exchange of the payor's digital assets for goods or services, if that payment constitutes a sale of digital assets by the payor under the broker reporting rules under section 6045, the amount paid to that payor in settlement of that exchange will be subject to the broker reporting rules (including any exemptions from these rules) and not section 6050W. Additionally, for goods or services provided by a payee that are digital assets, proposed § 1.6050W–1(c)(5)(i)(B) provides that if the exchange is a sale of digital assets by the payee under the broker reporting rules under section 6045, the payment to the payee in settlement of that exchange will be reportable under the broker reporting rules (including any exemptions from these rules) and not section 6050W. Accordingly, the broker reporting rules (and not the section 6050W rules) will apply to both the payor and the payee in an exchange of digital assets for different digital assets.

Rules avoiding duplication are also provided for certain exchanges involving digital assets for goods or services that could potentially be treated as barter exchanges. As noted, if the purchaser of the goods or services in this type of exchange is subject to reporting under proposed § 1.6045–1 due to the use of digital assets to make payment, proposed § 1.6050W–1(c)(5)(i)(A) provides that reporting is not required under section 6050W. To avoid duplicative reporting under proposed §§ 1.6045–1(e) and 1.6050W–1(a) with respect to the payee who sells goods and services in this type of exchange (that is, in return for digital assets), proposed § 1.6050W–1(c)(5)(i)(B) also provides that any digital asset that is paid to a person (payee) in a third party network transaction that is reportable under proposed § 1.6045–1(e) (without regard to whether the payee is an exempt recipient under proposed § 1.6045–1(f)(2)(ii) or an exempt foreign person under proposed § 1.6045–1(g)) must be reported under section 6050W and not the barter exchange rules under proposed § 1.6045–1(e). As a result, reporting will be required under section 6050W with respect to a payee who sells goods or services (other than digital assets) in exchange for digital assets in third party network transactions to the extent the fair market value of the aggregate payments made to that payee exceed the *de minimis* exception as provided in section 6050W(e) for reportable payments made on or after January 1, 2023. *See* Notice 2023–10, 2023–3 I.R.B. 403 (January 17, 2023) (delaying the effective date of the modified *de minimis* exception under section 6050W(e) for payments made during calendar year 2022). The *de minimis* exception under section 6050W is not applicable to the reporting of information required with respect to digital asset sales or exchanges under section 6045.

In certain circumstances, such as when a TPSO functions as a digital asset payment processor as described in proposed § 1.6045–1(a)(22)(i)(B), a payment made with digital assets by a customer directly to a TPSO's participating payee may be a third party network transaction subject to reporting. For example, if a customer makes a payment pursuant to instructions provided by a TPSO that has an agreement with a participating payee to receive digital assets as payment, the payment to that payee should be treated as a payment made in settlement of a reportable payment transaction despite the fact that the payment was not first made to the TPSO. To clarify that reporting under section 6050W is required in this example with respect to the participating payee, proposed § 1.6050W–1(a)(2) provides that in the case of a TPSO that has the contractual obligation to make payments to participating payees, a payment in settlement of a reportable payment transaction includes the submission of an instruction to a purchaser to transfer funds directly to the account of the participating payee for purposes of settling the reportable payment transaction.

VI. Proposed §§ 31.3406(b)(3)–2, 31.3406(g)–2, and 31.3406(g)–1

Section 3406 of the Code requires certain payors of reportable payments, including payments required to be reported by a broker or a barter exchange under section 6045, to deduct and withhold a tax on the payment at the statutory backup withholding rate (currently 24 percent) if the payee fails to provide a TIN or provides an incorrect TIN. The existing rules under § 31.3406(b)(3)–2(a) provide generally that any payment made by a broker or barter exchange that is required to be reported under section 6045 is a reportable payment that is subject to backup withholding, and that the amount subject to backup withholding is the amount of gross proceeds as determined under existing § 1.6045–1(d)(5). Except for the addition of digital assets to the title to proposed § 31.3406(b)(3)–2, these proposed regulations do not make any substantive changes to these general rules under § 31.3406(b)(3)–2 because they are broad enough to cover digital asset transactions that are reportable under section 6045. The remainder of § 31.3406(b)(3)–2 provides the backup withholding rules for specific types of transactions reportable under section 6045. Specifically, § 31.3406(b)(3)–2(b)(2) provides backup withholding rules for brokers reporting on foreign currency contracts and regulated futures contracts subject to section 1256. The text of these existing rules is broad enough to also apply to forward contracts calling for the delivery of digital assets as well as forward contracts that are cryptographically recorded on a distributed ledger. Additionally, § 31.3406(b)(3)–2(b)(3) and (4) provide backup withholding rules for brokers reporting on securities sales made through a margin account and security short sales. Because these rules are limited to securities, they do not apply to most digital assets.[5] Comments are requested as to whether any changes should be made to these rules, either to address digital assets that may also be treated as securities for Federal income tax purposes or to address short sales of digital assets. The Treasury Department and the IRS also request comments regarding whether any additional rules are needed to address how backup withholding should apply to transactions involving digital assets.

Existing § 31.3406(g)–2(e) provides that real estate reporting persons are not required to backup withhold on a payment made with respect to a real estate transaction that is subject to reporting under section 6045(a) and (e) and existing § 1.6045–4. This rule was intended to apply to the reportable payment made to the transferors, or sellers, of real estate. Proposed § 31.3406(g)–2(e) has been revised to clarify that this rule does not apply to reportable payments made with respect to the disposition of digital assets by a real estate buyer to purchase real estate. Rather, sales of digital assets in return for real estate that are effected by brokers should be subject to backup

[5] No inference is intended as to whether a digital asset is treated as a security for any other legal regime, including the Federal securities laws and the Commodity Exchange Act, or to otherwise impact the interpretation or applicability of those laws, which are outside the scope of these regulations.

withholding under proposed § 31.3406(b)(3)–2 to ensure that all customers who exchange digital assets for services or property in transactions effected by a broker are treated consistently without regard to the type of property acquired. Accordingly, proposed § 31.3406(g)–2(e) provides that real estate reporting persons must backup withhold under section 3406 and in accordance with the rules in proposed § 31.3406(b)(3)–2 on reportable payments made with respect to real estate buyers who exchange digital assets for real estate.

Under existing § 31.3406(g)–1(e), an exception provides that a payor is not required to backup withhold on gross proceeds if the sale is effected at an office outside the United States (as defined in existing § 1.6045–1(g)(3)(iii)) unless the payor has actual knowledge that the payee is a U.S. person. These proposed regulations amend § 31.3406(g)–1(e) to apply this exception to a sale of digital assets effected at an office outside the United States by a CFC digital asset broker that is not conducting activities as an MSB with respect to that sale and to a sale of digital assets effected by a non-U.S. digital asset broker that is not conducting activities as an MSB with respect to that sale. These proposed regulations also clarify that, with respect to sales other than sales of digital assets, the reference to existing § 1.6045–1(g)(3)(iii) is intended to encompass sales described in that section without regard to whether the sale is considered effected at an office inside the United States under existing § 1.6045–1(g)(3)(iii)(B).

VII. Request for Comments

Comments are requested on all aspects of these proposed regulations, including the following:

A. Questions From the Explanation of Provisions

The comments specially requested throughout the discussion in the *Explanation of Provisions* are consolidated here in this Part VII *Request for Comments.* Comments are requested on the following questions:

1. Does the proposed definition of *digital asset* accurately and appropriately define the type of assets to which these regulations should apply? *See* Part I.A.1 of this *Explanation of Provisions.*

2. Does the definition of *digital asset* or the reporting requirements with respect to digital assets inadvertently capture transactions involving non-digital asset securities that may use distributed ledger technology, shared ledger, or similar technology to process orders without effecting sales? Should any definitions or reporting rules be modified to address other transactions involving tokenized or digitized financial instruments that are used to facilitate back-office processing of the transaction? *See* Part I.A.2. of this *Explanation of Provisions.*

3. If an exception is necessary for transactions involving non-digital asset securities that may use distributed ledger technology or similar technology to process orders without effecting sales, how should it be drafted so that it does not sweep in other transactions (such as tokenized securities, or other digital assets that are securities) that should not be exempted from the reporting requirements? For example, should, and if so how should, reporting requirements distinguish between, and thus avoid double-counting of, sales of digital assets from use of distributed ledger technology or similar technology for mere recordkeeping, clearing, or settlement of tokenized securities or other assets? *See* Part I.A.2. of this *Explanation of Provisions.*

4. How common are digital asset options that are also section 1256 contracts? Are there less burdensome alternatives for reporting these digital asset option transactions? For example, would it be less burdensome to allow brokers to report transactions involving section 1256 contracts that are also digital assets or the delivery of non-digital assets that underlie a digital asset option as a sale under proposed § 1.6045–1(a)(9)(ii)? *See* Part I.A.3 of this *Explanation of Provisions.*

5. Is there is anything factually unique in the way short sales of digital assets, options on digital assets, and other financial product transactions involving digital assets are undertaken compared to similar transactions involving non-digital assets, and do these transactions raise any additional reporting issues that have not been addressed in these proposed regulations? *See* Part I.A.3 of this *Explanation of Provisions.*

6. Are there alternative information reporting approaches that could be used by digital asset trading platforms that collect and retain no information or collect and retain limited information about the identity of their customers that would satisfy tax compliance objectives while reducing privacy concerns? *See* Part I.B of this *Explanation of Provisions.*

7. Are there any technological or other technical issues that might affect the ability of a non-custodial digital asset trading platform that is a person who qualifies as a broker to obtain and transmit the information required under these proposed regulations, and how might these issues be overcome? *See* Part I.B of this *Explanation of Provisions.*

8. In light of the fact that digital asset trading platforms operate with varying degrees of centralization and effective control by founders or others, does the application of reporting rules only to ''persons'' (as described in Part I.B of this *Explanation of Provisions*) adequately limit the scope of reporting obligations to platforms that have one or more individuals or entities that can update, amend, or otherwise cause the platform to carry out the diligence and reporting rules of these proposed regulations? *See* Part I.B of this *Explanation of Provisions.*

9. Should the provision of connection software by a wallet provider to a trading platform (that customers of the trading platform can then use to access their wallets from the trading platform) be considered a facilitative service resulting in the wallet provider being treated as a broker? *See* Part I.B of this *Explanation of Provisions.*

10. What additional functions potentially provided by wallet software should be considered sufficient to treat the wallet provider as providing facilitative services? *See* Part I.B of this *Explanation of Provisions.*

11. What other factors should be considered relevant to determining whether a person maintains sufficient control or influence over provided facilitative services to be considered being in a position to know either the identity of the party that makes a sale or the nature of the transaction potentially giving rise to gross proceeds from a sale? *See* Part I.B of this *Explanation of Provisions.*

12. Under what circumstances should an operator of a digital asset trading platform be considered to maintain or not to maintain sufficient control or influence over the facilitative services offered by that platform? Should, and if so how should, the ability of users of the platform, shareholders or holders of governance tokens to vote on aspects of the platform's operation be considered? How are these decentralized organizational and governance structures similar to or different from other existing organizational or governance structures (*e.g.,* shareholder votes, mutual organizations)? Should this conclusion be impacted by the existence of full or even partial-access administration keys or the ability of the operator to replace the existing protocol with a new or modified protocol if that replacement does not require holding a vote of governance token holders or complying with these voting

restrictions? *See* Part I.B of this *Explanation of Provisions.*

13. To what extent should holders of governance tokens be treated as operating a digital asset trading platform business as an unincorporated group or organization? Please provide examples of fact patterns involving governance tokens and explain any differences in those fact patterns relevant to assessing the degree of control or influence exercisable by holders of those tokens. *See* Part I.B.1 of this *Explanation of Provisions.*

14. Are there alternative information reporting approaches that could be used by digital asset payment processors effecting payments to merchants on behalf of customers in transactions where the payment processor is an agent of a merchant that would satisfy tax compliance objectives while reducing privacy concerns? *See* Part I.B.3 of this *Explanation of Provisions.*

15. What is the frequency with which creators or issuers of digital assets redeem digital assets? *See* Part I.B.4 of this *Explanation of Provisions.*

16. Should the broker reporting regulations apply to initial coin offerings, simple agreements for future tokens, and similar contracts? *See* Part I.B.4 of this *Explanation of Provisions.*

17. Are the types of consideration for which digital assets may be exchanged in a sale transaction sufficiently broad to capture current and anticipated transactions in which taxpayers regularly dispose of digital assets for consideration? *See* Part I.C of this *Explanation of Provisions.*

18. Are there any logistical concerns about the reporting on contracts involving the delivery of digital assets created by these proposed regulations? *See* Part I.C of this *Explanation of Provisions.*

19. What is the frequency with which forward contracts involving digital assets are traded in practice? Are there any additional issues that should be considered to enable brokers to report on these transactions? *See* Part I.C of this *Explanation of Provisions.*

20. Should the definition of *sale* or other parts of these proposed regulations be revised to address transactions not addressed in these proposed regulations, such as the transfer of digital assets to and from a liquidity pool by a liquidity pool provider, or the wrapping and unwrapping of digital assets? *See* Part I.C of this *Explanation of Provisions.*

21. Are there other less burdensome alternatives to reporting transaction ID information and digital asset addresses with respect to digital asset sales and certain digital asset transfer-in transactions that would still ensure the IRS receives the information necessary to determine taxpayers' gains and losses? *See* Part I.D of this *Explanation of Provisions.*

22. Should an annual digital asset sale threshold, above which the broker would report transaction ID information and digital asset addresses, be used? If so, what should that threshold be? *See* Part I.D of this *Explanation of Provisions.*

23. Should the time reported using UTC time be reported using a 12-hour clock (designating a.m. or p.m. as appropriate) or a 24-hour clock? To what extent should all brokers be required to use the same 12-hour or 24-hour clock for these purposes? *See* Part I.D of this *Explanation of Provisions.*

24. Is a uniform time standard overly burdensome, and are there circumstances under which more flexibility should be provided? *See* Part I.D of this *Explanation of Provisions.*

25. Are there alternatives to basing the transaction date on the UTC for customers who are present in different time zones known to the broker at the time of the transaction? *See* Part I.D of this *Explanation of Provisions.*

26. Should the fair market value of services giving rise to digital asset transaction costs (including the services of any broker or validator involved in executing or validating the transfer) be determined by looking to the fair market value of the digital assets used to pay for the transaction costs? Are there circumstances under which an alternative valuation rule would be more appropriate? *See* Part I.E.2 of this *Explanation of Provisions.*

27. Are there any suggestions that could work to avoid duplicative multiple broker reporting for sale transactions involving digital asset brokers without sacrificing the certainty that at least one of the multiple brokers will report? *See* Part I.H of this *Explanation of Provisions.*

28. Is there an alternative approach that could be objectively applied to differentiate between a U.S. digital asset broker's U.S. business and non-U.S. business for purposes of allowing different documentation to be used for the broker's non-U.S. business, and how could this alternative approach avoid being readily subject to manipulation? *See* Part I.I.1 of this *Explanation of Provisions.*

29. Are the U.S. indicia listed in proposed § 1.6045–1(g)(4)(iv)(B)(*1*) through (*5*) appropriate and sufficient? *See* Part I.I.3 of this *Explanation of Provisions.*

30. Should the regulations define when a broker has reason to know that a digital asset broker is organized within the United States, and are there suggestions for objective indicators that a digital asset broker is organized in the United States? *See* Part I.I.3 of this *Explanation of Provisions.*

31. Are there administrable rules that would allow CFC and non-U.S. digital asset brokers conducting activities as MSBs to apply different rules to their U.S. and non-U.S. business activities while still ensuring that they are reporting on transactions of their U.S. customers? *See* Part I.I.4 of this *Explanation of Provisions.*

32. Should different diligence and documentation rules apply to CFC and non-U.S. digital asset brokers conducting activities as MSBs with respect to the non-U.S. part of their business, and if so, on what basis should a determination be made as to when these different diligence and documentation rules would apply? *See* Part I.I.4 of this *Explanation of Provisions.*

33. What U.S. regulatory schemes applicable to a CFC digital asset broker or a non-U.S. digital asset broker other than registration with FinCEN should be sufficient to cause such a digital asset broker to be subject to the same diligence, documentation and reporting rules as a digital asset broker conducting activities as an MSB? How can such digital asset brokers be identified by the IRS? Please also address questions 31 and 32 relating to digital asset brokers conducting activities as an MSB.

34. Would a rule requiring brokers to obtain documentation on account holders or partners, beneficiaries, or owners (as applicable) of customers that are foreign intermediaries or foreign flow-through entities increase transparency sufficiently to justify the increased burden on brokers? Is that trade-off different for digital asset-only brokers, securities-only brokers, or brokers that effect sales or exchanges in both categories? How frequently and in what circumstances do securities brokers rely on the existing section 6045 regulations to not document account holders or partners, beneficiaries, or owners (as applicable) of customers that are foreign intermediaries or foreign flow-through entities? *See* Part I.I.5.g of this *Explanation of Provisions.*

35. Would a coordination provision for brokers that effect transactions involving both non-digital asset securities and digital assets be helpful to brokers, and if so, which proposed rules applicable to digital asset brokers should apply to non-digital asset securities brokers? *See* Part I.I.6 of this *Explanation of Provisions.*

36. Are there additional broker-facilitated transactions involving digital assets that would still be subject to reporting under the barter exchange rules after the applicability date of these proposed regulations? For example, are there broker-mediated transactions that are not reportable payment transactions under § 1.6050W–1(a)(1) with respect to the client that receives the digital assets as payment? *See* Part I.J of this *Explanation of Provisions.*

37. Is it appropriate to treat stablecoins, or a subset of stablecoins, as digital assets for purposes of these regulations? What characteristics should be considered when assessing whether stablecoins, or a subset of stablecoins, should be treated as digital assets under these regulations? *See* Part I.K of this *Explanation of Provisions.*

38. Should the regulations exclude reporting on transactions involving the disposition of U.S. dollar related stablecoins that give rise to no gain or loss, and if so, how should those stablecoin transactions be identified? *See* Part I.K of this *Explanation of Provisions.*

39. Should any other changes be made to the regulations or other rules to ensure adequate reporting of transactions involving the receipt or disposition of stablecoins? *See* Part I.K of this *Explanation of Provisions.*

40. In the case of cascading digital asset transaction costs (that is, a digital asset transaction cost paid with respect to the use of a digital asset to pay for a digital asset transaction cost), should all such costs be treated as digital asset transaction costs associated with the original transaction? *See* Part II.A of this *Explanation of Provisions.*

41. Is the allocation of one-half of total digital asset transaction costs paid to the disposition of digital assets for purposes of determining the amount realized and the allocation of the other half to the acquisition of the received digital assets for purposes of determining basis administrable? *See* Part II.A of this *Explanation of Provisions.*

42. Would a 100 percent allocation of digital asset transaction costs to the disposed-of digital asset in an exchange of one digital asset for a different digital asset be less burdensome? *See* Part II.A of this *Explanation of Provisions.*

43. Are there methods or functionalities that unhosted wallets can provide to assist taxpayers with the tracking of purchase dates, times, and/or basis of specific units of a digital asset upon the transfer of some or all of those units between custodial brokers and unhosted wallets? *See* Part II.C of this *Explanation of Provisions.*

44. Should the ordering rules for unhosted wallets be applied on a wallet-by-wallet basis as proposed, or should these rules be applied on a digital asset address-by-digital asset address basis or some other basis? *See* Part II.C of this *Explanation of Provisions.*

45. Are there any alternatives to requiring that the ordering rules for digital assets left in the custody of a broker be followed on an account-by-account basis; for example, if brokers have systems that can otherwise account for their customers' transactions? *See* Part II.C of this *Explanation of Provisions.*

46. Should exceptions be made to the ordering rule for digital assets left in the custody of a broker to allow brokers to take into account reasonably reliable purchase date information received from outside sources? If so, what types of purchase date information should be considered reasonably reliable? *See* Part II.C of this *Explanation of Provisions.*

47. Should the current rules under section 6045A applicable to transfers of securities from one broker to another remain applicable for securities that are also digital assets prior to the implementation of a later phase of the information reporting guidance? *See* Part IV of this *Explanation of Provisions.*

48. Who would be the responsible party required to provide the reporting if section 6045B is made applicable to securities that are also digital assets prior to the implementation of this later phase of information reporting guidance? *See* Part IV of this *Explanation of Provisions.*

49. Should any changes be made to the backup withholding rules under existing § 31.3406(b)(3)–2(b)(3) or (4) to address digital assets that may also be treated as securities for Federal income tax purposes or to address short sales of digital assets? Are any additional rules needed to address how backup withholding should apply to transactions involving digital assets? *See* Part VI of this *Explanation of Provisions.*

B. Additional Questions

Comments are also requested on any other aspect of these proposed regulations not specifically discussed in these proposed regulations, including on the following questions:

1. Are there any suggestions for what the IRS should consider in planning for the receipt, storage, retrieval, and usage of the information required to be reported under these proposed regulations?

2. These proposed regulations anticipate that reporting brokers may voluntarily engage with acquiring brokers to obtain basis information with respect to transactions in which the reporting broker does not already have adjusted basis information. What would encourage reporting brokers to voluntarily obtain and provide this information?

Applicability Dates

The regulations regarding computation of gain or loss and the basis of digital assets under sections 1001 and 1012 are proposed to apply to taxable years for all sales and acquisitions of digital assets on or after January 1 of the calendar year immediately following the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**. Taxpayers, however, may rely on these proposed regulations under sections 1001 and 1012 for dispositions in taxable years ending on or after August 29, 2023, provided the taxpayer consistently follows the proposed regulations under sections 1001 and 1012 in their entirety and in a consistent manner for all taxable years through the applicability date of the final regulations. The proposed § 1.6045–1 regulations require brokers to report the gross proceeds from the sale of digital assets if the sale is effected on or after January 1, 2025. According to the terms of proposed § 1.6045–1(d)(2)(i)(C), brokers are required to report the adjusted basis and the character of any gain or loss with respect to a sale if the sale or exchange is effected on or after January 1, 2026. For assets that are commodities pursuant to the Commodity Futures Trading Commission's certification procedures described in 17 CFR 40.2, these regulations are proposed to apply to sales of such commodities on or after January 1, 2025, without regard to the date such certification procedures were undertaken. The changes made by the proposed § 1.6045–4 regulations, applicable to reporting on real estate transactions, are proposed to apply to real estate transactions with dates of closing occurring on or after January 1, 2025. The changes made by these proposed regulations applicable to transfer statements (proposed § 1.6045A–1) and organizational actions (proposed § 1.6045B–1), applicable to specified securities described in proposed § 1.6045–1(a)(14)(i) through (iv) that are also digital assets as defined in proposed § 1.6045–1(a)(19), are proposed to apply on or following the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**. The regulations applicable to payments

made in settlement of payment card and third party network transactions (proposed § 1.6050W–1) are proposed to apply to payments made using digital assets on or after January 1, 2025. The regulations applicable to the penalties for failing to file or furnish an information return (proposed §§ 1.6721–1 and 1.6722–2) are proposed to apply to information returns required to be filed with respect to sales effected on or after January 1, 2025. Finally, the regulations applicable to backup withholding (proposed §§ 31.3406(b)(3)–2, 31.3406(g)–1(e), and 31.3406(g)–2(e)) are proposed to apply to sales of digital assets on or after January 1, 2025.

Special Analyses

These proposed regulations were subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

I. Regulatory Planning and Review—Economic Analysis

Executive Orders 13563 and 12866 direct agencies to assess 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, of reducing costs, of harmonizing rules, and of promoting flexibility.

These proposed regulations were designated by the Office of Information and Regulatory Affairs (OIRA) as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) (MOA) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. OIRA designated these regulations as significant under section 1(c) of the MOA. Accordingly, OMB reviewed these regulations.

A. Background

A digital asset is a representation of value that uses cryptography to verify transactions and maintain records using a distributed ledger as opposed to a centralized authority. Digital assets have gained popularity in recent years as both a method of payment and as an investment vehicle. Their popularity has grown due to the potential for low transaction fees, decentralization (that is, a lack of association with a central government and lack of intermediation by financial institutions), and because the distributed ledger record of transactions does not include the identities of the parties involved in the transaction. A ''distributed ledger technology'' is a decentralized infrastructure used to store and maintain data as opposed to using one centralized server.

One example of distributed ledger technology is a blockchain. A blockchain refers to a cryptographically secured digital ledger that maintains a record of transactions that occur on the network. Transactions are recorded in ''blocks'' and added to a ''chain'' that represents the entire history of transactions. This history is then shared and synchronized across many nodes, which then each keep a copy of the blockchain. When transactions are added to the blockchain, they include unique codes called ''public keys'' that identify the digital asset addresses involved. While a public key is unique to a digital asset owner, it does not reveal personal information such as a name or physical address. In this way, the blockchain preserves a layer of confidentiality that allows digital asset owners to feel their privacy is better protected on the distributed ledger.

The confidentiality which helped digital assets gain popularity presents challenges for tax compliance. Because the distributed ledger does not identify digital asset owners past a public key, compliance currently relies primarily on self-reported information.

B. Need for These Proposed Regulations

Information reporting is essential to the integrity of the tax system. The Internal Revenue Service (IRS) estimated in its 2019 tax gap analysis that net misreporting as a percent of income for income with little to no third-party information reporting is 55 percent. In comparison, misreporting for income with some information reporting, such as capital gains, is 17 percent, and for income with substantial information reporting, such as dividend and interest income, is just five percent.

Prior to these proposed regulations, many transactions involving digital assets were outside the scope of information reporting rules. Digital assets are treated as property for Federal income tax purposes. The regulations under section 6045 of the Internal Revenue Code (Code) require brokers to file information returns for customers that sell certain types of property noting gross proceeds and, in some cases, adjusted basis. However, the existing regulations do not specify digital assets as a type of property for which information reporting is required. Section 6045 also requires information returns for real estate transactions, but the existing regulations do not require reporting of amounts received in digital assets. Section 6050W of the Code requires information reporting by payment settlement entities on certain payments made with respect to payment card and third-party network transactions. However, the existing regulations are silent as to whether certain exchanges involving digital assets are reportable payments under section 6050W.

C. Overview

These proposed regulations add digital assets to the list of property for which brokers must file information returns under section 6045. In effect, these proposed regulations would require brokers to report sales of digital assets if, in return, customers receive cash, stored-value cards, different digital assets, services, or other property that is subject to reporting under section 6045. Real estate persons would also be required to file information returns reporting digital assets received in real estate transactions. Finally, to avoid duplicative reporting, a broker who is also a payment settlement entity would be required to report the sale of digital assets used to make a payment associated with a payment card or third party network transaction under section 6050W, to the extent the payment is not subject to reporting under section 6045.

Furthermore, these proposed regulations provide the tax rules for determining a taxpayer's amount realized on the disposition of digital assets and basis in purchased digital assets. Specifically, the proposed regulations address exchanges of digital assets for services or other property, including different digital assets, and dispositions of less than all of a taxpayer's holdings of a particular digital asset if the taxpayer purchased those holdings at different times or for different prices. The proposed regulations also provide rules for allocating transaction costs when one digital asset is exchanged for another digital asset.

These provisions are analyzed in Part D of these *Special Analyses.*

D. Economic Analysis

1. Baseline

In this analysis, the Treasury Department and the IRS assess the benefits and costs of these proposed regulations compared to a no-action

baseline that reflects anticipated Federal income tax-related behavior in the absence of these regulations.

a. Economic Effects of These Proposed Regulations

The worldwide digital asset market is estimated to be valued at around $1 trillion as of January 2023.[6] It is currently unknown how much of the global market cap or what share of monthly transactions is held by U.S. taxpayers.

b. Alternatives Considered for the Definition of Digital Assets

A digital asset is defined in the Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429 (2021) (IIJA) to be any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary of the Treasury. The definition of *digital assets* in these proposed regulations does not include other types of virtual assets, such as those that exist only in a closed system (such as a video game). The proposed definition is not intended to include uses of distributed ledger technology for ordinary commercial purposes that do not create new transferable assets, such as tracking inventory, which may be unlikely to give rise to sales as defined for purposes of the regulations.

These proposed regulations extend the information reporting rules under section 6045 to brokers who, in the ordinary course of a trade or business, act as agents, principals, or digital asset middlemen for others to effect sales or exchanges of digital assets for cash, broker services, or property of a type that is subject to reporting by the brokers (including different digital assets, securities, and real estate) under section 6045 or to effect on behalf of customers payments of digital assets associated with payment card and third party network transactions subject to reporting under section 6050W. These proposed regulations also clarify that the definition of *broker* for purposes of section 6045 includes certain digital asset trading platforms, digital asset payment processors, certain digital asset hosted wallet providers, and persons who regularly offer to redeem digital assets that were created or issued by that person. In addition, these proposed regulations would require real estate reporting persons to report on real estate purchasers who use digital assets to acquire real estate in a reportable real estate transaction and extend the information that must be reported with respect to sellers of real estate to include the fair market value of digital assets received by sellers in exchange for real estate. Finally, in the case of a transaction involving the exchange of digital assets for goods (other than digital assets) or services, these proposed regulations treat the provision of the goods or services as reportable under section 6050W and the disposition of the digital assets as reportable under section 6045.

The Treasury Department and the IRS considered whether newer forms of digital assets, such as those referred to as stablecoins, should be subject to the section 6045 broker reporting rules. A stablecoin is a form of digital asset that is generally designed to track the value of another asset and is intended to have a stable value. It was determined that broker reporting should be required for stablecoins. However, the principal reporting on stablecoins is likely to come from platforms that facilitate the purchase and sale of other digital assets along with stablecoins. Stablecoin issuers that redeem stablecoins are included in the definition of *broker* because, notwithstanding their nomenclature, the value of a stablecoin is not always stable and therefore may give rise to gain or loss. Stablecoin issuers effect these redemptions on behalf of their customers and know the gross proceeds paid to their customers. The Treasury Department and the IRS considered whether to carve out transactions involving stablecoins that are linked to the U.S. dollar or to other foreign currencies from the definition of a *sale* for which reporting is required. These proposed regulations do not carve out stablecoin transactions from the definition of *sale* because a broker may not be able to identify which stablecoins will perfectly and consistently reflect the value of the currencies to which they are linked.

The Treasury Department and the IRS also considered whether transactions featuring non-fungible tokens (NFTs) should be subject to the proposed regulations. NFTs differ from some other digital assets, including cryptocurrency, due to their non-fungible nature—that is, they are unique and, thus, not directly interchangeable with other NFTs. For purposes of these proposed regulations, NFTs also are digital assets that may represent artwork; antiques; written compositions, articles, or commentaries; music; videos; films; fashion designs; or sports or other entertainment memorabilia, the sale of which is not currently subject to reporting under section 6045. However, there is no indication in the IIJA or its legislative history that Congress intended to exclude certain digital assets from section 6045 reporting. NFTs are digital assets that are bought, sold, and traded on digital asset trading platforms similar to other digital assets. The disposition of NFTs may give rise to gain or loss, and the reporting of gross proceeds and basis information is equally useful to taxpayers and the IRS as reporting on other digital assets. Ultimately, the Treasury Department and the IRS decided that transactions involving NFTs should be included under the proposed regulations.

b. Alternatives Considered for Allocating Transaction Costs

While the majority of the proposed regulations deal with information reporting rules for brokers, the proposed regulations also deal with operative rules of substantive tax law for customers conducting the underlying transactions being reported, including rules with respect to the allocation of digital asset transaction costs. The term digital asset transaction costs (including transaction fees, transfer taxes, and commissions) means the amount paid in cash or property (including digital assets) to effect the disposition or acquisition of a digital asset. Some digital asset brokers will charge a single transaction fee in the case of an exchange of one digital asset for a different digital asset. In some cases, these transaction fees may be adjusted depending on the type of digital asset acquired or disposed of in the exchange, with transactions involving less commonly traded digital assets carrying higher transaction fees than transactions involving more commonly traded digital assets. The Treasury Department and the IRS considered various approaches to allocating digital asset transaction costs that are charged in an exchange of one digital asset for another. Consideration was given to whether these proposed regulations should permit taxpayers or brokers to designate how to allocate digital asset transaction costs by, for example, entirely reducing the amount realized or entirely increasing basis; however, this allocation would not reflect the economic reality that the costs are allocable to a particular transaction that includes both the purchase of one digital asset and the disposition of a different digital asset. Furthermore, a single uniform rule is easier to administer and less susceptible to manipulation.

Ultimately, to avoid the administrative complexities associated with distinguishing between special broker fee allocations that appropriately

[6] See *CryptoSlate.com* and *CoinMarketCap.com.*

reflect the economics of the transaction and broker fee allocations that reflect tax-motivated requests, these proposed regulations provide that in an exchange of one digital asset for a different digital asset, one-half of any digital asset transaction cost paid in cash or property to effect the exchange is allocable to the disposition of the transferred digital asset for purposes of determining the amount realized and one-half is allocable to the acquisition of the received digital asset for purposes of determining the basis of that received digital asset. To clarify, these proposed regulations provide that in an exchange of two different digital assets where transaction costs are paid or withheld, the amount realized from the exchange is the cash received plus the fair market value of other property (including digital assets), or services received, reduced by one half of the total digital asset transaction costs. Economically, this decision likely has little effect on the market since prices will adjust to reflect the relative elasticities of supply and demand.

c. Economic Effects on Brokers

The Treasury Department and the IRS estimate that approximately 600 to 9,500 brokers will be impacted by these proposed regulations. The lower bound of this estimate is derived using Form 1099 issuer data through 2021 and statistics from CoinMarketCap.com. The upper bound of this estimate is based on IRS data for brokers with nonzero revenue who may deal in digital assets. These proposed regulations increase costs for brokers who do not already maintain records of customers' digital asset transactions. These proposed regulations will require brokers to collect and store customers' information, including names, addresses, and tax identification numbers. Brokers will also be required to collect and store information about customers' digital asset transactions. While the ongoing costs of reporting information to the IRS may be small, there will be larger costs associated with the initial setup for brokers. To the extent that they do not have such a system in place, brokers will need to build a system of collecting and storing this information, as well as reporting this information to the IRS and taxpayers, or will need to find a service provider to do so. They will also need to develop and maintain the ability to backup withhold and deposit withheld tax with the IRS for applicable taxpayers. Some of these costs may be curtailed by working with existing third parties that currently assist some brokers with voluntary reporting. These regulations may also increase costs for those brokers who do voluntarily report under the current rules, since these brokers will need to ensure that their current reporting systems are compliant with the proposed reporting rules.

A reasonable burden estimate for the average time to complete these forms for each customer is between 7.5 minutes and 10.5 minutes, with a mid-point of 9 minutes (or 0.15 hours). The Treasury Department and the IRS estimate that 13 to 16 million customers will be impacted by these proposed regulations. Taking the mid-points of the ranges for the number of taxpayers that are expected to report gain (or loss) from digital asset transactions (*i.e.,* form recipients) and number of brokers expected to be impacted by these regulations (14.5 million recipients and 5,050 brokers, respectively), we expect the average broker to incur 425 hours of time burden and $27,000 of monetized burden for the ongoing costs per year based on calculations using wage and compensation data from the Bureau of Labor Statistics that capture the wage, benefit, and overhead costs of a typical tax preparer.[7] The total estimated aggregate annual burden is 2,146,250 hours. The total estimated monetized annual burden is $136,350,000. These estimates are based on survey data collected from filers of similar information returns, such as Form 1099–B, *Proceeds From Broker and Barter Exchange Transactions,* and Form 1099–K, *Payment Card and Third Party Network Transactions.* Although these estimates are likely to change once these proposed regulations are effective, the Treasury Department and the IRS do not have data that would allow for an accurate estimate of these changes.

Additionally, start-up costs are estimated to be between three and eight times annual costs. Given that we expect per firm annual estimated burden hours to be 425 hours and $27,000 of estimated monetized burden, we estimate per firm start-up aggregate burden hours to range from 1,275 to 3,400 hours and $81,000 to $216,000 of aggregate monetized burden. Using the mid-points, start-up total estimated aggregate burden hours is 11,804,375 and total estimated monetized burden is $749,925,000.

However, these proposed regulations also work to mitigate some potential compliance costs for brokers. First, the clarity provided by these proposed regulations on which types of transactions (namely those involving digital assets) are subject to reporting will allow brokers to create a consistent reporting plan and not collect additional information for other types of transactions that do not otherwise require information reporting. Second, the application of one fixed rule for allocating transaction costs gives brokers a clear rule to follow and resolves any uncertainty with how to treat those transaction costs for reporting purposes.

Prior to these proposed regulations, brokers who chose to report on digital asset transactions took different approaches to collecting information and reporting due to a lack of clear policy guidelines. Any economic inefficiencies created by this uncertainty (such as competition between brokers regarding collecting personal information) would now be resolved.

d. Economic Effects on Digital Asset Owners

The Treasury Department and the IRS estimate that 13 to 16 million digital asset owners will be impacted by these proposed regulations. This estimated range may be low, since it relies on information reported on Forms 8949, Sales and Other Dispositions of Capital Assets, by individuals, Forms 1099–B, Forms 1099–K, Forms 1099–MISC, Miscellaneous Income, and Forms 1099–NEC, Nonemployee Compensation, provided by brokers and/or payment settlement entities prior to the passage of IIJA and individuals that checked yes on the Form 1040, *U.S. Individual Income Tax Return,* question regarding virtual currency transactions. Because the existing regulations were previously silent as to the information reporting obligations of brokers for many digital asset transactions prior to IIJA, these data are likely not complete even for those who did file. Payment settlement entities were also only required to file a Form 1099–K if the payee had more than 200 transactions and $20,000 in gross proceeds, further limiting the information available. The Treasury Department and the IRS do not have adequate data to estimate the level of noncompliance regarding digital asset reporting by digital asset owners.

These proposed regulations will have different effects on different types of digital asset owners. The majority of digital asset owners will see greatly reduced costs of monitoring and tracking their own digital asset portfolios. These reduced costs and the increased confidence potential digital asset owners will gain as a result of brokers being compliant with Federal tax laws will likely increase the number

[7] See *https://www.bls.gov/oes/tables.htm* and *https://www.bls.gov/news.release/ecec.toc.htm.*

of digital asset owners and may increase existing owners' trade volume.

Due to the volatile nature of digital asset values, and due to the precision allowed for digital asset holdings, digital asset owners currently must closely monitor and maintain records of all their transactions to correctly report their tax liability at the end of the year. This is a complicated and time-consuming task that is prone to error. Those potential digital asset owners who have little experience with accounting for digital assets may have been unwilling to enter the market due to the high learning and record maintenance costs. Eliminating these high entry costs will allow more potential digital asset owners to enter the market.

These proposed regulations also make clear which types of digital assets are subject to reporting requirements and which are not. Without this clarification, digital asset owners may have failed to properly maintain records for some of their transactions, believing them to not be subject to reporting per the existing regulations. Similarly, these digital asset owners may have also overallocated resources to monitoring taxable transactions that are now required to be reported, adding unnecessary costs to using digital assets.

On the other hand, those digital asset owners who prefer to use digital assets due to the pseudonymity of the blockchain will see an additional privacy cost of making transactions with digital assets, since brokers will be required to collect information from them for tax reporting purposes. These digital asset owners may decrease their volume of digital asset trading through brokers.

II. Paperwork Reduction Act

The collections of information in these proposed regulations are required under section 6045 of the Internal Revenue Code (the Code). The collection of information with respect to dispositions of digital assets in these proposed regulations is set forth in proposed § 1.6045–1 and the collection of information with respect to dispositions of real estate in consideration for digital assets in these proposed regulations is set forth in proposed § 1.6045–4. Responses to these collections of information are mandatory.

Section 1.6045–1(d) of these proposed regulations would generally require brokers to report to the customer and the IRS the gross proceeds paid to the customer or credited to the customer's account upon the broker's sale of digital assets on behalf of the customer, as well as, in certain circumstances, the customer's adjusted basis in, and date of purchase of, the digital assets sold. This information is necessary to allow the customer and the IRS to determine the amount and character of the customer's gain (or loss) from the sale of digital assets. Section 1.6045–4(i) of these proposed regulations would generally require real estate reporting persons (treated as brokers for purposes of proposed § 1.6045–1) to report to the real estate transferor and to the IRS the fair market value of digital assets paid to the transferor as consideration in a real estate transaction. This information is necessary to allow the transferor and the IRS to determine the total gross proceeds from digital assets paid in the real estate transaction.

The IRS intends that the collection of information pursuant to proposed § 1.6045–1 will be conducted through a form prescribed by the Secretary for digital asset sales, and that the collection of information pursuant to proposed § 1.6045–4 will be conducted through a revised Form 1099–S, *Proceeds From Real Estate Transactions.* For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the reporting burden associated with the collection of information with respect to proposed §§ 1.6045–1 and 1.6045–4 will be reflected in the Paperwork Reduction Act Submissions associated with those Forms. The OMB Control Number for the Form 1099–S is 1545–0997. Currently, there is no OMB Control Number for the form that will be prescribed by the Secretary for the collection of information pursuant to proposed § 1.6045–1.

The form prescribed by the Secretary for digital asset sales will be used by all digital asset brokers, digital asset payment processors, and certain other brokers with a reporting requirement. The revised Form 1099–S will be used by all real estate reporting persons with a reporting requirement. The Treasury Department and the IRS request comments on all aspects of information collection burdens related to these proposed regulations. In addition, when available, drafts of IRS forms will be posted for comment at *www.irs.gov/draftforms.*

Regarding the form that will be prescribed by the Secretary for sales of digital assets, the burden estimate must reflect the continuing costs of collecting and reporting the information required by these regulations as well as the upfront or start-up costs associated with creating the systems to collect and report the information. A reasonable burden estimate for the average time to complete these Forms for each customer is between 7.5 minutes and 10.5 minutes, with a mid-point of 9 minutes (or 0.15 hours). The Treasury Department and the IRS estimate that 13 to 16 million customers will be impacted by these proposed regulations. Taking the mid-points of the ranges for the number of taxpayers that are expected to report gain (or loss) from digital asset transactions (*i.e.,* form recipients) and number of brokers expected to be impacted by these regulations (14.5 million recipients and 5,050 brokers, respectively), we expect the average broker to incur 425 hours of time burden and $27,000 of monetized burden for the ongoing costs per year. The total estimated aggregate annual burden hours is 2,146,250. The total estimated monetized annual burden is $136,350,000. These estimates are based on survey data collected from filers of similar information returns, such as Form 1099–B, *Proceeds From Broker and Barter Exchange Transactions,* and Form 1099–K, *Payment Card and Third Party Network Transactions.* Although these estimates are likely to increase once these proposed regulations are effective, the Treasury Department and the IRS do not have data that would allow for an accurate estimate of these increases.

Additionally, start-up costs are estimated to be between three to eight times annual costs. Given that we expect per firm annual estimated burden hours to be 425 hours and $27,000 of estimated monetized burden, we estimate per firm start-up aggregate burden hours to range from 1,275 to 3,400 hours and $81,000 to $216,000 of aggregate monetized burden. Using the mid-points, start-up total estimated aggregate burden hours is 11,804,375 and total estimated monetized burden is $749,925,000.

Based on the most recent OMB burden estimate for the average time to complete Form 1099–S, it was estimated that the IRS received a total number of 2,573,400 Form 1099–S responses with a total estimated time burden for those responses of 411,744 hours (or 9.6 minutes per Form). *See https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201806-1545-024.* Neither a material change in the average time to complete the revised Form, nor a material increase in the number of Forms that will be filed is expected once these proposed regulations are effective. No material increase is expected in the start-up costs and it is anticipated that less than 1 percent of Form 1099–S issuers will be impacted by this change. There is no available data to predict the increase in the number of Forms to be

filed. The Treasury Department and the IRS request comments on all aspects of these estimates.

Written comments and recommendations for the proposed information collection may be submitted via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–122793–19) by following the online instructions for submitting comments and may also be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by October 30, 2023.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the duties of the IRS, including whether the information will have practical utility (including underlying assumptions and methodology);

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

III. Regulatory Flexibility Act

When the IRS issues a proposed rulemaking imposing a collection of information requirement on small entities, the Regulatory Flexibility Act (RFA) requires the agency to ''prepare and make available for public comment an initial regulatory flexibility analysis,'' which will ''describe the impact of the proposed rule on small entities.'' 5 U.S.C. 603(a). Unless an agency determines that a proposal will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule.

As discussed in Part I.D.2.c. of this *Special Analyses,* the expected number of impacted issuers of information returns under these proposed regulations is between 600 and 9,500 (mid-point 5,050). Small Business Administration regulations provide small business size standards by North American Industry Classification System (NAICS) Industry. *See* 13 CFR 121.201. The NAICS includes virtual currency exchange services in the NAICS code for Commodity Contracts Dealing (523130). According to Small Business Administration regulations, the maximum annual receipts for a concern and its affiliates to be considered small in this NAICS code is $41.5 million. Based on tax return data, only 150 of the 9,500 firms identified as impacted issuers in the upper bound estimate exceed the $41.5 million threshold. This implies there could be 450 to 9,350 impacted small business issuers under the Small Business Administration small business size standards. Notwithstanding these estimates and analysis, the Treasury Department and the IRS have not yet determined whether the proposed rule, when finalized, will likely have a significant economic impact on a substantial number of small entities. The determination of whether reporting by small brokers and real estate reporting persons on certain digital asset transactions will have a significant economic impact on a substantial number of these entities requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an Initial Regulatory Flexibility Analysis is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities.

A. Need for and Objectives of the Rule

As discussed earlier in this preamble, the existing information reporting rules do not address how certain transactions involving digital assets must be reported to the party who disposes of the digital assets in exchange for cash, services, stored-value cards, or other property (including different digital assets). Information reporting by brokers and real estate reporting persons under section 6045 of the Code with respect to certain digital asset dispositions and digital asset payments received by real estate transferors would lead to higher levels of taxpayer compliance because the income earned by taxpayers engaging in transactions involving digital assets would be made transparent to both the IRS and taxpayers. Clear information reporting rules that report gross proceeds and, in some cases, adjusted basis for taxpayers who engage in digital asset transactions will help the IRS to identify taxpayers who have engaged in these transactions, and thereby help to reduce the overall tax gap. The proposed rule is also expected to facilitate the preparation of tax returns (and reduce the number of inadvertent errors or intentional misstatements shown on those returns) by taxpayers who engage in digital asset transactions.

B. Affected Small Entities

As discussed above, we anticipate 9,350 of the 9,500 (or 98 percent) impacted issuers in the upper bound estimate could be small businesses.

C. Impact of the Rule and Alternatives Considered

1. Proposed Reporting and Compliance Requirements

Section 1.6045–1(d) of these proposed regulations would generally require brokers to report to the IRS and the customer the gross proceeds paid to the customer or credited to the customer's account upon the broker's sale of digital assets on behalf of the customer, as well as, in certain circumstances, the customer's adjusted basis in, and date of purchase of, the digital assets sold. This information is necessary to allow the IRS and the customer to determine the amount and character of the customer's gain (or loss) from the sale of digital assets. Section 1.6045–4(i) of these proposed regulations would also generally require real estate reporting persons (treated as brokers for purposes of proposed § 1.6045–1) to report to the IRS and the real estate transferor the fair market value of digital assets paid to the real estate transferor as consideration in a real estate transaction. This information is necessary to allow the IRS and the real estate transferor to determine the total gross proceeds from digital assets paid in the real estate transaction and assist the IRS and the real estate transferor to determine whether, and to what extent, the gross proceeds are taxable income to the real estate transferor.

As previously stated in the Paperwork Reduction Act section of this preamble, the form prescribed by the Secretary for reporting sales of digital assets pursuant to § 1.6045–1(d) of these proposed

regulations is expected to create an average estimated per customer burden on brokers of between 7.5 minutes and 10.5 minutes, with a mid-point of 9 minutes (or 0.15 hours). In addition, the form is expected to create an average estimated per broker burden of between 1,275 and 3,400 hours in start-up costs to build processes to comply with the information reporting requirements. The revised Form 1099–S prescribed by the Secretary for reporting gross proceeds from the payment of digital assets paid to real estate transferors as consideration in a real estate transaction pursuant to § 1.6045–4(i) of these proposed regulations is not expected to materially change overall costs to complete the revised Form. Because we expect that filers of revised Form 1099–S will already be filers of the form, we do not expect them to incur a material increase in start-up costs associated with the revised form.

Although small businesses may engage tax reporting services to complete, file, and furnish information returns to avoid the start-up costs associated with building an internal information return reporting system for sales of digital assets, it remains difficult to predict whether the economies of scale efficiencies of using these services will offset the somewhat more burdensome ongoing costs associated with using third party contractors.

2. Reporting Alternatives Considered for Small Businesses

The Treasury Department and the IRS considered alternatives to these proposed regulations that would have created an exception to reporting, or a delayed applicability date, for small businesses but decided against such alternatives for several reasons. As discussed above, we anticipate 9,350 of the 9,500 (or 98 percent) impacted issuers in the upper bound estimate could be small businesses. First, one purpose of these proposed regulations is to eliminate the overall tax gap. Any exception or delay to the information reporting rules for small business brokers, which may comprise the vast majority of impacted issuers, would reduce the effectiveness of these proposed regulations. In addition, such an exception or delay could have the unintended effect of incentivizing taxpayers to move their business to excepted small businesses, thus thwarting IRS efforts to identify taxpayers engaged in digital asset transactions. Additionally, because the information reported on statements furnished to customers will likely be an aid to tax return preparation by those customers, small business brokers will be able to offer their customers the same amount of useful information as their larger competitors. Finally, to the extent investors in digital asset transactions are themselves small businesses, these proposed regulations will help these businesses with their own tax return preparation efforts.

D. Duplicate, Overlapping, or Relevant Federal Rules

The proposed rule would not conflict or overlap with any relevant Federal rules. As discussed above, in certain instances, the proposed rule ensures duplicative reporting is not required.

The Treasury Department and the IRS invite comments on any impact this rule would have on small entities. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small entities.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This proposed rule does not have federalism implications, does not impose substantial direct compliance costs on State and local governments, and does not preempt State law within the meaning of the Executive order.

Comments and Requests To Participate in the Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments that are submitted by the public will be made available at *https://www.regulations.gov.* Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing has been scheduled for November 7, 2023, beginning at 10 a.m. ET, in the Auditorium at the Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC. If the number of requests to speak at the hearing exceed the number that can be accommodated in one day, a second public hearing date for this proposed regulation will be held on November 8, 2023. In this event and to the extent possible, persons requesting to testify in person will be assigned to speak on the first day of the public hearing. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the public hearing starts. Participants may alternatively attend the public hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the public hearing. Persons who wish to present oral comments at the public hearing must submit written or electronic comments and an outline of the topics to be discussed as well as the time to be devoted to each topic by October 30, 2023, as prescribed in the preamble under the **ADDRESSES** section. For those requesting to speak during the public hearing, send an outline of topic submissions electronically via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–122793–19). If no outlines are received by October 30, 2023, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

Individuals who want to testify in person at the public hearing must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–122793–19 and the language ''TESTIFY In Person''. For example, the subject line may say: ''Request to TESTIFY In Person at Hearing for REG–122793–19''. Individuals who want to testify by telephone at the public hearing must send an email to

publichearings@irs.gov to receive the telephone number and access code for the public hearing. The subject line of the email must contain the regulation number ''REG–122793–19'' and the language ''TESTIFY Telephonically''. For example, the subject line may say: ''Request to TESTIFY Telephonically at Hearing for REG–122793–19''.

The email by persons requesting to testify either in person or telephonically should include a copy of the speaker's public comments and outline of topics. A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda with the order of the speakers will be made available free of charge at the public hearing and will also be uploaded to *https://www.regulations.gov.*

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have their names added to the building access list. The subject line of the email must contain the regulation number ''REG–122793–19'' and the words ''ATTEND in Person''. For example, the subject line may say: ''Request to ATTEND Hearing in Person for REG–122793–19''. Requests to attend the public hearing must be received by 5 p.m. ET on November 3, 2023.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the public hearing. The subject line of the email must contain the regulation number ''REG–122793–19'' and the words ''ATTEND Hearing Telephonically''. For example, the subject line may say: ''Request to ATTEND Hearing Telephonically for REG–122793–19''. Requests to attend the public hearing must be received by 5 p.m. ET on November 3, 2023.

Hearings will be made accessible to people with disabilities. To request special assistance during the telephonic hearing, contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317–5306 (not a toll-free number) by November 2, 2023.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices and other guidance cited in this document are published in the Internal Revenue Bulletin and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

Drafting Information

The principal authors of these regulations are Roseann Cutrone, Office of the Associate Chief Counsel (Procedure and Administration) and Kyle Walker and Harith Razaa, Office of the Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the Treasury Department and the IRS, including John Sweeney and Alan Williams, Office of Associate Chief Counsel (International), and Pamela Lew, Office of Associate Chief Counsel (Financial Institutions and Products), participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR parts 1, 31, and 301 as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.1001–1 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 1.1001–1 Computation of gain or loss.

(a) * * * For rules determining the amount realized for purposes of computing the gain or loss upon the sale, exchange, or other disposition of digital assets, as defined in § 1.6045–1(a)(19), *see* § 1.1001–7.

* * * * *

■ **Par. 3.** Section 1.1001–7 is added to read as follows:

§ 1.1001–7 Computation of gain or loss for digital assets.

(a) *In general.* This section provides rules to determine the amount realized for purposes of computing the gain or loss upon the sale, exchange, or other disposition of digital assets, as defined in § 1.6045–1(a)(19).

(b) *Amount realized in a sale, exchange, or other disposition of digital assets for cash, other property, or services*—(1) *Computation of amount realized*—(i) *In general.* If digital assets are sold or otherwise disposed of for cash, other property differing materially in kind or in extent, or services, the amount realized is the excess of:

(A) The sum of:

(*1*) Any cash received;

(*2*) The fair market value of any property received or, in the case of a debt instrument described in paragraph (b)(1)(iv) of this section, the amount determined under paragraph (b)(1)(iv) of this section; and

(*3*) The fair market value of any services received; over

(B) The amount of digital asset transaction costs, as defined in paragraph (b)(2)(i) of this section, allocable to the sale or disposition of the transferred digital asset, as determined under paragraph (b)(2)(ii) of this section.

(ii) *Digital assets used to pay digital asset transaction costs.* If digital assets are used (including withheld) to pay digital asset transaction costs, as defined in paragraph (b)(2)(i) of this section, such use is a disposition of the digital assets for services.

(iii) *Application of general rule to certain sales, exchanges, or other dispositions of digital assets.* The following paragraphs apply the rules of this section to certain sales, exchanges, or other dispositions of digital assets.

(A) *Sales or other dispositions of digital assets for cash.* The amount realized from the sale of digital assets for cash is the sum of the amount of cash received plus the fair market value of services received described in paragraph (b)(1)(ii) of this section, reduced by the amount of digital asset transaction costs allocable to the disposition of the transferred digital assets, as determined under paragraph (b)(2)(ii) of this section.

(B) *Exchanges or other dispositions of digital assets for services, or certain property.* The amount realized on the exchange or other disposition of digital assets for services or property differing materially in kind or in extent, other than digital assets or debt instruments described in paragraph (b)(1)(iv) of this section, is the sum of the fair market value of such property and services received (including services received

described in paragraph (b)(1)(ii) of this section), reduced by the amount of digital asset transaction costs allocable to the disposition of the transferred digital assets, as determined under paragraph (b)(2)(ii) of this section.

(C) *Exchanges of digital assets.* The amount realized on the exchange of one digital asset for another digital asset differing materially in kind or in extent is the sum of the fair market value of the digital asset received plus the fair market value of services received described in paragraph (b)(1)(ii) of this section, reduced by the amount of digital asset transaction costs allocable to the disposition of the transferred digital asset, as determined under paragraph (b)(2)(ii) of this section.

(iv) *Debt instrument issued in exchange for digital assets.* For purposes of this section, if a debt instrument is issued in exchange for digital assets and the debt instrument is subject to § 1.1001–1(g), the amount attributable to the debt instrument is determined under § 1.1001–1(g) (in general, the issue price of the debt instrument).

(2) *Digital asset transaction costs*—(i) *Definition.* The term *digital asset transaction costs* means the amount paid in cash or property (including digital assets) to effect the disposition or acquisition of a digital asset. Digital asset transaction costs include transaction fees, transfer taxes, and commissions.

(ii) *Allocation of digital asset transaction costs.* This paragraph (b)(2)(ii) provides the rules for allocating digital asset transaction costs to the disposition or acquisition of a digital asset.

(A) *In general.* Except as provided in paragraph (b)(2)(ii)(B) of this section, in the case of a sale or disposition of digital assets, the total digital asset transaction costs paid by the taxpayer are allocable to the disposition of the digital assets. Such costs include any digital asset transaction costs paid by the taxpayer on the sale or disposition of a digital asset used or withheld to pay other digital asset transaction costs.

(B) *Special rule for certain exchanges.* In the case of an exchange of digital assets described in paragraph (b)(1)(iii)(C) of this section, one-half of the total digital asset transaction costs paid by the taxpayer to effect the exchange are allocable to the disposition of the transferred digital assets, and the other half of such costs are allocable to the acquisition of the received digital assets for purposes of determining basis under § 1.1012–1(a). *See* § 1.1012–1(h). Such costs include any digital asset transaction costs paid by the taxpayer on the sale or disposition of a digital asset used or withheld to pay other digital asset transaction costs. Accordingly, any other allocation or specific assignment of digital asset transaction costs is disregarded.

(3) *Time for determining fair market value of digital assets.* Generally, the fair market value of a digital asset is determined as of the date and time of the exchange or disposition of the digital asset.

(4) *Special rule when the fair market value of property or services cannot be determined.* If the fair market value of the property (including digital assets) or services received in exchange for digital assets cannot be determined with reasonable accuracy, the fair market value of such property or services must be determined by reference to the fair market value of the digital assets transferred as of the date and time of the exchange. This paragraph (b)(4), however, does not apply to a debt instrument described in paragraph (b)(1)(iv) of this section.

(5) *Examples.* The following examples illustrate the application of paragraphs (b)(1) through (3) of this section. Unless the facts specifically state otherwise, the transactions described in the following examples occur after the applicability date set forth in paragraph (c) of this section. For purposes of the examples under this paragraph (b)(5), assume that TP is a digital asset investor, and each unit of digital asset A, B, and C is materially different in kind or in extent from the other units. *See* § 1.1012–1(h)(4) for examples illustrating the determination of basis of digital assets.

(i) *Example 1: Exchange of digital assets for services*—(A) *Facts.* TP owns a total of 20 units of digital asset A, and each unit has an adjusted basis of $0.50. X, an unrelated person, agrees to perform cleaning services for TP in exchange for 10 units of digital asset A. The fair market value of the services performed by X equals $10. X then performs the services, and TP transfers 10 units of digital asset A to X. Additionally, TP pays, in cash, $1 of transaction fees to dispose of digital asset A.

(B) *Analysis.* Under paragraph (b)(1) of this section, TP has a disposition of 10 units of digital asset A for services received. Under paragraphs (b)(2)(i) and (b)(2)(ii)(A) of this section, TP has digital asset transaction costs of $1, which must be allocated to the disposition of digital asset A. Under paragraph (b)(1)(i) of this section, TP's amount realized on the disposition of the units of digital asset A is $9, which is the fair market value of the services received, $10, reduced by the digital asset transaction costs allocated to the disposition of digital asset A, $1. TP recognizes a gain of $4 on the exchange ($9 amount realized reduced by $5 adjusted basis in 10 units).

(ii) *Example 2: Digital asset transaction costs paid in cash in an exchange of digital assets*—(A) *Facts.* TP owns a total of 10 units of digital asset A, and each unit has an adjusted basis of $0.50. TP uses BEX, an unrelated third party, to effect the exchange of 10 units of digital asset A for 20 units of digital asset B. At the time of the exchange, each unit of digital asset A has a fair market value of $2 and each unit of digital asset B has a fair market value of $1. BEX charges $2 per transaction, which BEX requires its customers to pay in cash. At the time of the transaction, TP pays BEX $2 in cash.

(B) *Analysis.* Under paragraph (b)(2)(i) of this section, TP has digital asset transaction costs of $2. Under paragraph (b)(2)(ii)(B) of this section, TP must allocate one-half of such costs ($1) to the disposition of the 10 units of digital asset A and must allocate the remaining one-half ($1) to the acquisition of the 20 units of digital asset B. Under paragraphs (b)(1)(i) and (b)(3) of this section, TP's amount realized from the exchange is $19, which is the fair market value of the 20 units of digital asset B received ($20) as of the date and time of the transaction, reduced by the digital asset transaction costs allocated to the disposition of digital asset A ($1). TP recognizes a gain of $14 on the exchange ($19 amount realized reduced by $5 adjusted basis in the 10 units of digital asset A).

(iii) *Example 3: Digital asset transaction costs paid with digital assets in an exchange of digital assets*—(A) *Facts.* The facts are the same as in paragraph (b)(5)(ii)(A) of this section (the facts in *Example 2*), except that BEX requires its customers to pay transaction costs using units of digital asset C. TP has an adjusted basis in each unit of digital asset C of $0.50. TP transfers 2 units of digital asset C to BEX to effect the exchange of digital asset A for digital asset B. TP also pays to BEX an additional unit of digital asset C to effect the disposition of digital asset C for payment of the transaction costs. The fair market value of each unit of digital asset C is $1.

(B) *Analysis.* TP disposes of 3 units of digital asset C for services described in paragraph (b)(1)(ii) of this section. Therefore, under paragraph (b)(2)(i) of this section, TP has digital asset transaction costs of $3. Under paragraph (b)(2)(ii)(B) of this section, TP must allocate one-half of such costs ($1.50) to the disposition of the 10 units of digital

asset A and the remaining one-half ($1.50) to the acquisition of the 20 units of digital asset B. None of the digital asset transaction costs are allocable to the disposition of digital asset C. Under paragraphs (b)(1)(i) and (b)(3) of this section, TP's amount realized on the disposition of digital asset A is $18.50, which is the excess of the fair market value of the 20 units of digital asset B received ($20) as of the date and time of the transaction over the allocated digital asset transaction costs ($1.50). Under paragraph (b)(1)(i) of this section, TP's amount realized on the disposition of the 3 units of digital asset C is $3, which is the fair market value of the services received as of the date and time of the transaction. TP recognizes a gain of $13.50 on the disposition of 10 units of digital asset A ($18.50 amount realized over $5 adjusted basis) and a gain of $1.50 on the disposition of the 3 units of digital asset C ($3 amount realized over $1.50 adjusted basis).

(iv) *Example 4: Digital asset transaction costs withheld from the transferred digital assets in an exchange of digital assets*—(A) *Facts.* The facts are the same as in paragraph (b)(5)(ii)(A) of this section (the facts in *Example 2*), except that BEX requires its payment be withheld from the units of the digital asset transferred. At the time of the transaction, BEX withholds 1 unit of digital asset A. TP exchanges the remaining 9 units of digital asset A for 18 units of digital asset B.

(B) *Analysis.* The withholding of 1 unit of digital asset A is a disposition of a digital asset for services within the meaning of paragraph (b)(1)(ii) of this section. Under paragraph (b)(2)(i) of this section, TP has digital asset transaction costs of $2. Under paragraph (b)(2)(ii)(B) of this section, TP must allocate one-half of such costs to the disposition of the 10 units of digital asset A and must allocate the other half of such costs to the acquisition of the 18 units of digital asset B. Under paragraphs (b)(1)(i) and (b)(3) of this section, TP's amount realized on the 10 units of digital asset A is $19, which is the excess of the fair market value of the 18 units of digital asset B received ($18) and the fair market value of services received ($2) as of the date and time of the transaction over the allocated digital asset transaction costs ($1). TP recognizes a gain on the 10 units of digital asset A transferred of $14 ($19 amount realized reduced by $5.00 adjusted basis in the 10 units).

(c) *Applicability date.* This section applies to all sales, exchanges, and dispositions of digital assets on or after January 1 of the calendar year immediately following [date of publication of final regulations in the **Federal Register**].

■ **Par. 4.** Section 1.1012–1 is amended by:

■ 1. Adding paragraph (h);

■ 2. Adding reserved paragraph (i); and

■ 3. Adding paragraph (j).

The additions read as follows:

§ 1.1012–1 Basis of property.

* * * * *

(h) *Determination of basis of digital assets*—(1) *Overview and general rule.* This paragraph (h) provides rules to determine the basis of digital assets, as defined in § 1.6045–1(a)(19), received in a purchase for cash, a transfer in connection with the performance of services, an exchange for digital assets or other property differing materially in kind or in extent, an exchange for a debt instrument described in paragraph (h)(1)(v) of this section, or in a part sale and part gift transfer described in paragraph (h)(1)(vi) of this section. Except as provided in paragraph (h)(1)(ii), (v), or (vi) of this section, the basis of digital assets received in a purchase or exchange is generally equal to the cost thereof at the date and time of the purchase or exchange, plus any allocable digital asset transaction costs as determined under paragraph (h)(2)(ii) of this section.

(i) *Basis of digital assets purchased for cash.* The basis of digital assets purchased for cash is the amount of cash used to purchase the digital assets plus any allocable digital asset transaction costs as determined under paragraph (h)(2)(ii)(A) of this section.

(ii) *Basis of digital assets received in connection with the performance of services.* For rules regarding digital assets received in connection with the performance of services, *see* §§ 1.61–2(d)(2) and 1.83–4(b).

(iii) *Basis of digital assets received in exchange for property other than digital assets.* The basis of digital assets received in exchange for property differing materially in kind or in extent, other than digital assets, is the cost as described in paragraph (h)(3) of this section of the digital assets received plus any allocable digital asset transaction costs as determined under paragraph (h)(2)(ii)(A) of this section.

(iv) *Basis of digital assets received in exchange for other digital assets.* The basis of digital assets received in an exchange for other digital assets differing materially in kind or in extent is the cost as described in paragraph (h)(3) of this section of the digital assets received plus one-half of the total allocable digital asset transaction costs as determined under paragraph (h)(2)(ii)(B) of this section.

(v) *Basis of digital assets received in exchange for the issuance of a debt instrument.* If a debt instrument is issued in exchange for digital assets, the cost of the digital assets attributable to the debt instrument is the amount determined under paragraph (g) of this section, plus any allocable digital asset transaction costs as determined under paragraph (h)(2)(ii)(A) of this section.

(vi) *Basis of digital assets received in a part sale and part gift transfer.* To the extent digital assets are received in a transfer, which is in part a sale and in part a gift, *see* § 1.1012–2.

(2) *Digital asset transaction costs*—(i) *Definition.* The term *digital asset transaction costs* under paragraph (h) of this section has the same meaning as in § 1.1001–7(b)(2)(i).

(ii) *Allocation of digital asset transaction costs.* This paragraph (h)(2)(ii) provides the rules for allocating digital asset transaction costs to the acquisition of digital assets described in paragraph (h)(1) of this section.

(A) *Allocation of digital asset transaction costs on a purchase or exchange for digital assets.* Except for an exchange described in paragraph (h)(2)(ii)(B) of this section, the total digital asset transaction costs paid by the taxpayer are allocable to the digital assets received.

(B) *Special rule for the allocation of digital asset transaction costs on an exchange of digital assets for other digital assets.* In the case of an exchange of digital assets for other digital assets differing materially in kind or in extent, one-half of the total digital asset transaction costs paid by the taxpayer is allocable to the disposition of the transferred digital assets for purposes of determining the amount realized under § 1.1001–7(b)(1). The other half of such costs is allocable to the acquisition of the digital assets for purposes of determining the basis of such digital assets under paragraph (h)(1) of this section. Accordingly, any other allocation or specific assignment of digital asset transaction costs is disregarded.

(3) *Determining the cost of the digital assets received.* In the case of an exchange described in either paragraph (h)(1)(iii) or (iv) of this section, the cost of the digital assets received is the same as the fair market value used in determining the amount realized on the sale or disposition of the transferred property for purposes of section 1001 of the Code. Generally, the cost of a digital asset received is determined at the date and time of the exchange. The special rule in § 1.1001–7(b)(4) also applies in this section for purposes of determining

the fair market value of a received digital asset when it cannot be determined with reasonable accuracy.

(4) *Examples.* The following examples illustrate the application of this section. Unless the facts specifically state otherwise, the transactions described in the following examples occur after the applicability date set forth in paragraph (h)(5) of this section. For purposes of the examples under this paragraph (h)(4), assume that TP is a digital asset investor, and that digital assets A, B, and C are materially different in kind or in extent from each other. *See* § 1.1001–7(b)(5) for examples illustrating the determination of the amount realized and gain or loss in a sale or disposition of a digital asset for cash, other property differing materially in kind or in extent, or services.

(i) *Example 1: Transaction fee paid in cash*—(A) *Facts.* TP uses BEX, an unrelated third party, to exchange 10 units of digital asset A for 20 units of digital asset B. At the time of the exchange, a unit of digital asset A has a fair market value of $2, and a unit of digital asset B has a fair market value of $1. BEX charges TP a transaction fee of $2, which TP pays to BEX in cash at the time of the exchange.

(B) *Analysis.* Under paragraph (h)(2)(i) of this section, TP has digital asset transaction costs of $2. Under paragraph (h)(2)(ii)(B) of this section, TP allocates one-half of the digital asset transaction costs ($1) to the disposition of the 10 units of digital asset A and allocates the other half of such costs ($1) to the acquisition of 20 units of digital asset B. Under paragraphs (h)(1)(iv) and (h)(3) of this section, TP's basis in the 20 units of digital asset B received is $21, which is the sum of the fair market value of the 20 units of digital asset B received ($20), plus the allocated digital asset transaction costs ($1).

(ii) *Example 2: Transaction fee paid in other property*—(A) *Facts.* The facts are the same as in paragraph (h)(4)(i)(A) of this section (the facts in *Example 1*), except that BEX requires its customers to pay transaction fees using units of digital asset C. TP pays the transaction fees using 2 units of digital asset C that TP holds. At the time TP pays the transaction fees, each unit of digital asset C has a fair market value of $1. TP acquires 20 units of digital asset B with a fair market value of $20 in the exchange.

(B) *Analysis.* Under paragraph (h)(2)(i) of this section, TP has digital asset transaction costs of $2. Under paragraph (h)(2)(ii)(B) of this section, TP must allocate one-half of the digital asset transaction costs ($1) to the disposition of the 10 units of digital asset A and must allocate the remaining one-half of such costs ($1) to the acquisition of the 20 units of digital asset B. Under paragraphs (h)(1)(iv) and (h)(3) of this section, TP's basis in the 20 units of digital asset B is $21, which is the sum of the fair market value of the 20 units of digital asset B received ($20) plus the allocated digital asset transaction costs ($1).

(iii) *Example 3: Digital asset transaction costs withheld from the transferred digital assets*—(A) *Facts.* The facts are the same as in paragraph (h)(4)(i)(A) of this section (the facts in *Example 1*), except that BEX withholds 1 unit of digital asset A in payment of the transaction fees and TP receives 18 units of digital asset B.

(B) *Analysis.* Under paragraph (h)(2)(i) of this section, TP has digital asset transaction costs of $2. Under paragraph (h)(2)(ii)(B) of this section, TP must allocate one-half of the digital asset transaction costs ($1) to the disposition of the 10 units of digital asset A and must allocate the remaining one-half of such costs ($1) to the acquisition of the 18 units of digital asset B received. Under paragraphs (h)(1)(iv) and (h)(3) of this section, TP's total basis in the digital asset B units is $19, which is the sum of the fair market value of the 18 units of digital asset B received ($18) plus the allocated digital asset transaction costs ($1).

(5) *Applicability date.* This paragraph (h) is applicable to all acquisitions and dispositions of digital assets on or after January 1 of the calendar year immediately following [date of publication of final regulations in the **Federal Register**].

* * * * *

(j) *Sale, disposition, or transfer of digital assets*—(1) *In general.* Except as provided in paragraph (j)(3) of this section for digital assets in the custody of a broker, if a taxpayer sells, disposes of, or transfers less than all units of the same digital asset, as defined in § 1.6045–1(a)(19), held in a single wallet or account, as defined in § 1.6045–1(a)(23), the basis and holding period of the disposed units are determined by making a specific identification of the units in the wallet or account that are sold, disposed of, or transferred, as provided in paragraph (j)(2) of this section. If a specific identification is not made, units in the wallet or account are disposed of in order of time from the earliest acquired. For purposes of the preceding sentence, the date the units were transferred into the taxpayer's wallet or account is disregarded.

(2) *Specific identification of digital assets.* A specific identification of the units of a digital asset sold, disposed of, or transferred is made if, no later than the date and time of the sale, disposition, or transfer, the taxpayer identifies on its books and records the particular units to be sold, disposed of, or transferred by reference to any identifier, such as purchase date and time or the purchase price for the unit, that is sufficient to identify the units sold, disposed of, or transferred in order to determine the basis and holding period of such units. A specific identification can be made only if adequate records are maintained for all units of a specific digital asset held in a single wallet or account to establish that a disposed unit is removed from the wallet or account for purposes of subsequent transactions.

(3) *Digital assets in the custody of a broker*—(i) *Unit of a digital asset sold, disposed of, or transferred.* Notwithstanding the general rule set forth in paragraph (j)(1) of this section, where multiple units of the same digital asset are left in the custody of a broker, as defined in § 1.6045–1(a)(1), and, no later than the date and time of sale, disposition, or transfer, the taxpayer does not provide the broker with an adequate identification of which units are sold, disposed of, or transferred, as provided in paragraph (j)(3)(ii) of this section, the basis and holding period of the units disposed of, sold, or transferred must be determined in order of time from the earliest units acquired of that same digital asset in the taxpayer's account with the broker.

(ii) *Identification of units.* Where multiple units of the same digital asset are left in the custody of a broker, an adequate identification occurs if, no later than the date and time of the sale, disposition, or transfer, the taxpayer specifies to the broker having custody of the digital assets the particular units of the digital asset to be sold, disposed of, or transferred by reference to any identifier, such as purchase date and time or purchase price that the broker designates as sufficiently specific to determine the units transferred in order to determine the basis and holding period of such units. The taxpayer is responsible for maintaining records to substantiate the identification.

(4) *Method for specifically identifying units of a digital asset.* A method of specifically identifying the units of a digital asset sold, disposed of, or transferred under this paragraph (j), for example, by the earliest acquired, the latest acquired, or the highest basis, is not a method of accounting. Therefore, a change in the method of specifically identifying the digital asset sold, disposed of, or transferred, for example,

from the earliest acquired to the latest acquired, is not a change in method of accounting to which sections 446 and 481 apply.

(5) *Examples.* The following examples illustrate the application of this section. Unless the facts specifically state otherwise, the transactions described in the following examples occur after the applicability date set forth in paragraph (j)(6) of this section. For purposes of the examples under this paragraph (j)(5), assume that TP is a digital asset investor.

(i) *Example 1: Identification of the digital asset not in the custody of a broker*—(A) *Facts.* On September 1, Year 2, TP transfers two lots of digital asset DE to a newly opened digital asset wallet that is not in the custody of a broker, as defined in § 1.6045–1(a)(1). The first lot transferred into TP's wallet, with a transaction ID 1114ABC, comes from digital asset address AAA123 and consists of 10 units of digital asset DE, with a purchase date of January 1, Year 1, and a basis of $2 per unit. The second lot transferred into TP's wallet, with transaction ID 9996XYZ, comes from digital asset address BBB456 and consists of 20 units of digital asset DE, with a purchase date of January 1, Year 2, and a basis of $5 per unit. On September 2, Year 2, when the DE units have a fair market value of $10 per unit, TP purchases $100 worth of consumer goods from Merchant M. To make payment, TP transfers 10 units of digital asset DE from TP's wallet to CPP, a digital asset payment processor that then pays $100 to M. Prior to making the transfer to CPP, TP keeps a record that the 10 units of DE sold in this transaction were from the second lot of units transferred into TP's wallet, that is, from digital asset address BBB456 and purchased with transaction ID 9996XYZ.

(B) *Analysis.* Under the facts in paragraph (j)(5)(i)(A) of this section, TP's notation in its records on the date of sale, specifying that the 10 units sold were from the 20 units acquired in transaction ID 9996XYZ, is a specific identification within the meaning of paragraph (j)(2) of this section. TP's notation in its records that the 10 units sold were from the 20 units that had previously been at digital asset address BBB456 is also a specific identification within the meaning of paragraph (j)(2) of this section. Either of these notations is sufficient to identify the basis and holding period of the 10 units of digital asset DE sold. Accordingly, TP has identified the units disposed of for purposes of determining the basis ($5 per unit) and holding period (one year or less) of the units sold in order to purchase the merchandise.

(ii) *Example 2: Identification of digital assets not in the custody of a broker*—(A) *Facts.* The facts are the same as in paragraph (j)(5)(i)(A) of this section (the facts in *Example 1*), except in making the transfer to CPP, TP did not keep a record of the specific 10 units of digital asset DE that TP intended to sell.

(B) *Analysis.* TP did not make a specific identification within the meaning of paragraph (j)(2) of this section for the 10 units of digital asset DE that were sold. Pursuant to the ordering rule provided in paragraph (j)(1) of this section, the units disposed of are the earliest acquired. Accordingly, TP must treat the 10 units sold as the 10 units with a purchase date of January 1, Year 1, and a basis of $2 per unit, transferred into the wallet with transaction ID 1114ABC (that is, the units previously held in digital asset address AAA123).

(iii) *Example 3: Identification of the digital asset sold at broker*—(A) *Facts.* On August 1, Year 1, TP opens an account at CRX, a broker within the meaning of § 1.6045–1(a)(1) and purchases through CRX 10 units of digital asset DE for $9 per unit. On January 1, Year 2, TP opens an account at BEX, an unrelated broker and purchases through BEX 20 units of digital asset DE for $5 per unit. On August 1, Year 3, TP transfers the digital assets TP holds with CRX into TP's account with BEX. BEX does not account for its customers' digital asset holdings by transaction ID, but rather keeps a centralized account of its customers' holdings. BEX has a policy that purchase or transfer date and time, if necessary, is a sufficiently specific identifier for customers to determine the basis and holding period of units sold, disposed of, or transferred. On September 1, Year 3, TP directs BEX to sell 10 units of digital asset DE for $10 per unit and specifies that BEX sell the units that were transferred into TP's account with BEX on August 1, Year 3. BEX effects the sale.

(B) *Analysis.* No later than the date and time of the sale, TP specified to BEX the particular units of digital assets to be sold. Accordingly, under paragraph (j)(3)(ii) of this section, TP provided an adequate identification of the 10 units of digital asset DE sold.

(iv) *Example 4: Identification of the digital asset sold at a broker*—(A) *Facts.* The facts are the same as in paragraph (j)(5)(iii)(A) of this section (the facts in *Example 3*) except that TP directs BEX to sell 10 units of digital asset DE but does not make any identification of which units to sell.

(B) *Analysis.* Because TP did not specify to BEX no later than the date and time of the sale the particular units of digital assets to be sold, TP did not make an adequate identification within the meaning of paragraph (j)(3)(ii) of this section. Thus, TP must use the ordering rule provided in paragraph (j)(3)(i) of this section to determine the units of digital asset DE sold. Pursuant to this rule, the units sold must be attributed to the earliest units of digital asset DE purchased within or transferred into the TP's account with BEX. The 10 units of digital asset DE sold must be attributed to 10 of the 20 units of digital asset DE purchased by TP at BEX on January 1, Year 2, which are the earliest units of digital asset DE acquired in TP's account.

(6) *Applicability date.* This paragraph (j) is applicable to all acquisitions and dispositions of digital assets on or after January 1 of the calendar year immediately following [date of publication of final regulations in the **Federal Register**].

■ **Par. 5**. Section 1.6045–0 is added to read as follows:

§ 1.6045–0 Table of contents.

In order to facilitate the use of § 1.6045–1, this section lists the paragraphs contained in § 1.6045–1.

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■ **Par. 6.** Section 1.6045–1 is amended by:
■ 1. Revising paragraphs (a), (b), (c)(3)(i)(B)(*3*), and (c)(3)(i)(C)(*2*) introductory text;
■ 2. In paragraph (c)(3)(xi)(A), removing the language ''(d)(2)(i)'' and adding the language ''(d)(2)(i)(A)'' in its place, wherever it appears;
■ 3. Adding paragraph (c)(8);
■ 4. Revising paragraphs (d)(2)(i) through (iii);
■ 5. In paragraph (d)(2)(iv)(A), revising the heading and the first sentence;
■ 6. Revising the heading in paragraph (d)(2)(iv)(B);
■ 7. In paragraph (d)(2)(v), revising the heading and the first sentence;
■ 8. Revising the heading of paragraph (d)(2)(vi);
■ 9. In paragraph (d)(2)(vii), revising the introductory text and designating *Examples 1* and *2* as paragraphs (d)(2)(vii)(A) and (B), respectively;
■ 10. In newly designated paragraphs (d)(2)(vii)(A) and (B), redesignating the paragraphs in the first column as the paragraphs in the second column:

Old paragraphs	New paragraphs
(d)(2)(vii)(A)(i) and (ii)	(d)(2)(vii)(A)(*1*) and (*2*).
(d)(2)(vii)(B)(i) and (ii)	(d)(2)(vii)(B)(*1*) and (*2*).

■ 11. In newly redesignated paragraph (d)(2)(vii)(B)(*2*), removing the language ''(d)(2)(i)'' and ''(d)(2)(iii)'' and adding the language ''(d)(2)(i)(A)'' and ''(d)(2)(iii)(A)'' in their places, respectively;
■ 12. Adding paragraphs (d)(2)(vii)(C) through (F);
■ 13. Revising paragraphs (d)(4) and (5);
■ 14. In paragraph (d)(6)(i), revising the first and second sentences;
■ 15. In paragraph (d)(6)(ii)(A), revising the heading and the first sentence and removing the language ''on or after January 1, 2014,'' and adding the language ''on or after January 1, 2014, or upon the vesting or exercise of a digital asset-based compensation arrangement granted or acquired on or after January 1, 2025,'' in its place;
■ 16. Adding paragraph (d)(6)(ii)(C);
■ 17. In paragraph (d)(6)(iii)(A), revising the first sentence;
■ 18. Redesignating paragraph (d)(6)(vii) as paragraph (d)(6)(viii);
■ 19. Adding new reserved paragraph (d)(6)(vii);
■ 20. In newly redesignated paragraph (d)(6)(viii), designating *Examples 1* through *4* as paragraphs (d)(6)(viii)(A) through (D), respectively;
■ 21. In newly designated paragraphs (d)(6)(viii)(A) and (C), redesignating the paragraphs in the first column as the paragraphs in the second column:

Old paragraphs	New paragraphs
(d)(6)(viii)(A)(i), (ii), and (iii)	(d)(6)(viii)(A)(*1*), (*2*), and (*3*).
(d)(6)(viii)(C)(i) and (ii)	(d)(6)(viii)(C)(*1*) and (*2*).

■ 22. In newly redesignated paragraph (d)(6)(viii)(B), removing the language ''*Example 1*'' and ''(d)(2)(iii)'' and adding the language ''paragraph (d)(6)(viii)(A)(*1*) of this section (the facts in *Example 1*)'' and ''(d)(2)(iii)(A)'' in their places, respectively;
■ 23. Adding reserved paragraph (d)(6)(ix) and paragraph (d)(6)(x);
■ 24. In paragraph (d)(7)(ii)(A), removing the language ''covered securities'' and adding the language ''covered securities described in paragraphs (a)(15)(i)(A) through (G) of this section'' in its place;
■ 25. Adding paragraph (e)(2)(iii);
■ 26. Revising paragraph (g)(1) introductory text;
■ 27. In the first sentence of paragraphs (g)(1)(i) and (iii), removing the language ''With respect to a sale'' and adding the language ''With respect to a sale as defined in paragraph (a)(9)(i) of this section (relating to sales other than sales of digital assets) that is'' in its place;
■ 28. Revising paragraph (g)(2);
■ 29. In paragraph (g)(3)(ii), removing the language ''this paragraph (g)'' and adding the language ''paragraph (g)(1) of this section'' in its place;
■ 30. In paragraph (g)(3)(iii)(A), revising the first sentence;
■ 31. Redesignating paragraph (g)(4) as paragraph (g)(5) and adding a new paragraph (g)(4);
■ 32. In newly redesignated paragraph (g)(5):
■ i. Removing the language ''this paragraph (g)'' in the introductory text and adding the language ''paragraphs (g)(1) through (3) of this section'' in its place; and
■ ii. Designating *Examples 1* through *8* as paragraphs (g)(5)(i) through (viii), respectively;
■ 33. In newly designated paragraph (g)(5)(ii), removing ''*Example 1*'' and adding ''paragraph (g)(5)(i) of this section (the facts in *Example 1*)'' in its place;
■ 34. In newly designated paragraph (g)(5)(iii), removing ''*Example 2*'' and adding ''paragraph (g)(5)(ii) of this section (the facts in *Example 2*)'' in its place;
■ 35. In newly designated paragraph (g)(5)(iv), removing ''*Example 1*'' and adding ''paragraph (g)(5)(i) of this section (the facts in *Example 1*)'' in its place;
■ 36. In newly designated paragraphs (g)(5)(v) and (vi), removing ''*Example 4*'' and adding ''paragraph (g)(5)(iv) of this section (the facts in *Example 4*)'' in its place;
■ 37. In newly designated paragraphs (g)(5)(vii) and (viii), redesignating the paragraphs in the first column as the paragraphs in the second column:

Old paragraphs	New paragraphs
(g)(5)(vii)(i) and (ii)	(g)(5)(vii)(A) and (B).
(g)(5)(viii)(i) and (ii)	(g)(5)(viii)(A) and (B).

■ 38. In newly designated paragraph (g)(5)(viii) introductory text, removing ''*Example 7*'' and adding ''paragraph (g)(5)(vii) of this section (the facts in *Example 7*)'' in its place;

■ 39. Adding paragraph (g)(6);
■ 40. Revising paragraphs (j) and (m)(1);
■ 41. Adding paragraph (m)(2)(ii)(C);
■ 42. In paragraph (n)(6)(i), removing the language ''(a)(9)'' and adding the language ''(a)(9)(i)'' in its place;
■ 43. Revising paragraph (q); and
■ 44. Adding paragraph (r).

The revisions and additions read as follows:

§ 1.6045–1 Returns of information of brokers and barter exchanges.

(a) *Definitions.* The following definitions apply for purposes of this section and §§ 1.6045–2 and 1.6045–4.

(1) *Broker.* The term *broker* means any person (other than a person who is required to report a transaction under section 6043 of the Code), U.S. or foreign, that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales to be made by others. A broker includes an obligor that regularly issues and retires its own debt obligations, a corporation that regularly redeems its own stock, or a person that regularly offers to redeem digital assets that were created or issued by that person. A broker also includes a real estate reporting person under § 1.6045–4(e) who (without regard to any exceptions provided by § 1.6045–4(c) and (d)) would be required to make an information return with respect to a real estate transaction under § 1.6045–4(a). However, with respect to a sale (including a redemption or retirement) effected at an office outside the United States under paragraph (g)(3)(iii) of this section (relating to sales other than sales of digital assets) or under paragraph (g)(4) of this section (relating to sales of digital assets), a broker includes only a person described as a U.S. payor or U.S. middleman in § 1.6049–5(c)(5). In addition, a broker does not include an international organization described in § 1.6049–4(c)(1)(ii)(G) that redeems or retires an obligation of which it is the issuer.

(2) *Customer*—(i) *In general.* The term *customer* means, with respect to a sale effected by a broker, the person (other than such broker) that makes the sale, if the broker acts as—

(A) An agent for such person in the sale;

(B) A principal in the sale;

(C) The participant in the sale responsible for paying to such person or crediting to such person's account the gross proceeds on the sale; or

(D) A digital asset middleman, as defined in paragraph (a)(21) of this section, that effects the sale of a digital asset for such person.

(ii) *Special rules for payment transactions involving digital assets.* In addition to the persons defined as customers in paragraph (a)(2)(i) of this section, the term *customer* includes:

(A) The person who transfers, or is treated under paragraph (a)(22)(ii) of this section as transferring, digital assets to a digital asset payment processor in a sale described in paragraph (a)(9)(ii)(D) of this section;

(B) The person who transfers digital assets or directs the transfer of digital assets—

(*1*) In exchange for property of a type the later sale of which, if effected by such broker, would constitute a sale of that property under paragraph (a)(9) of this section; or

(*2*) In exchange for the acquisition of services performed by such broker; and

(C) In the case of a real estate reporting person under § 1.6045–4(e) with respect to a real estate transaction as defined in § 1.6045–4(b)(1), the person who transfers digital assets or directs the transfer of digital assets to the transferor of real estate (or the seller's nominee or agent) to acquire such real estate.

(3) *Security.* The term *security* means:

(i) A share of stock in a corporation (foreign or domestic);

(ii) An interest in a trust;

(iii) An interest in a partnership;

(iv) A debt obligation;

(v) An interest in or right to purchase any of the foregoing in connection with the issuance thereof from the issuer or an agent of the issuer or from an underwriter that purchases any of the foregoing from the issuer;

(vi) An interest in a security described in paragraph (a)(3)(i) or (iv) of this section (but not including executory contracts that require delivery of such type of security);

(vii) An option described in paragraph (m)(2) of this section; or

(viii) A securities futures contract.

(4) *Barter exchange.* The term *barter exchange* means any person with members or clients that contract either with each other or with such person to trade or barter property or services either directly or through such person. The term does not include arrangements that provide solely for the informal exchange of similar services on a noncommercial basis.

(5) *Commodity.* The term *commodity* means:

(i) Any type of personal property or an interest therein (other than securities as defined in paragraph (a)(3) of this section) the trading of regulated futures contracts in which has been approved by or has been certified to the Commodity Futures Trading Commission (*see* 17 CFR 40.3 or 40.2);

(ii) Lead, palm oil, rapeseed, tea, tin, or an interest in any of the foregoing; or

(iii) Any other personal property or an interest therein that is of a type the Secretary determines is to be treated as a *commodity* under this section, from and after the date specified in a notice of such determination published in the **Federal Register**.

(6) *Regulated futures contract.* The term *regulated futures contract* means a regulated futures contract within the meaning of section 1256(b) of the Code.

(7) *Forward contract.* The term *forward contract* means:

(i) An executory contract that requires delivery of a commodity in exchange for cash and which contract is not a regulated futures contract;

(ii) An executory contract that requires delivery of personal property or an interest therein in exchange for cash, or a cash settlement contract, if such executory contract or cash settlement contract is of a type the Secretary determines is to be treated as a ''forward contract'' under this section, from and after the date specified in a notice of such determination published in the **Federal Register**; or

(iii) An executory contract that—

(A) Requires delivery of a digital asset in exchange for cash, stored-value cards, a different digital asset, or any other property or services described in paragraph (a)(9)(ii)(B) or (C) of this section; and

(B) Is not a regulated futures contract.

(8) *Closing transaction.* The term *closing transaction* means a lapse, expiration, settlement, abandonment, or other termination of a position. For purposes of the preceding sentence, a position includes a right or an obligation under a forward contract, a regulated futures contract, a securities futures contract, or an option.

(9) *Sale*—(i) *In general.* The term *sale* means any disposition of securities, commodities, options, regulated futures contracts, securities futures contracts, or forward contracts and includes redemptions of stock, retirements of debt instruments (including a partial retirement attributable to a principal payment received on or after January 1, 2014), and enterings into short sales, but only to the extent any of these actions are conducted for cash. In the case of an option, a regulated futures contract, a securities futures contract, or a forward contract, a sale under this paragraph (a)(9)(i) includes any closing transaction. When a closing transaction for a contract described in section 1256(b)(1)(A) involves making or taking delivery, there are two sales, one resulting in profit or loss on the contract, and a separate sale on the delivery. When a closing transaction for a contract described in section 988(c)(5)

of the Code involves making delivery, there are two sales, one resulting in profit or loss on the contract, and a separate sale on the delivery. For purposes of the preceding sentence, a broker may assume that any customer's functional currency is the U.S. dollar. When a closing transaction in a forward contract involves making or taking delivery, the broker may treat the delivery as a sale without separating the profit or loss on the contract from the profit or loss on the delivery, except that taking delivery for U.S. dollars is not a sale. The term *sale* does not include entering into a contract that requires delivery of personal property or an interest therein, the initial grant or purchase of an option, or the exercise of a purchased call option for physical delivery (except for a contract described in section 988(c)(5)). For purposes of this section only, a constructive sale under section 1259 and a mark to fair market value under section 475 or 1296 are not sales.

(ii) *Sales with respect to digital assets*—(A) *In general.* In addition to the specific rules provided in paragraphs (a)(9)(ii)(B) through (D) of this section, the term *sale* also includes:

(*1*) Any disposition of a digital asset in exchange for cash or stored-value cards;

(*2*) Any disposition of a digital asset in exchange for a different digital asset; and

(*3*) The delivery of a digital asset pursuant to the settlement of a forward contract, option, regulated futures contract, any similar instrument, or any other executory contract which would be treated as a sale of a digital asset under this paragraph (a)(9)(ii) if the contract had not been executory. For transactions involving a contract described in the previous sentence, *see* paragraph (a)(9)(i) of this section for rules applicable to determining whether a sale has occurred or how to report the making or taking delivery of the underlying asset.

(B) *Dispositions of digital assets for certain property.* Solely in the case of a broker that is a real estate reporting person defined in § 1.6045–4(e) with respect to real property or is in the business of effecting sales of property for others, which sales when effected would constitute sales under paragraph (a)(9)(i) of this section, the term *sale* also includes any disposition of a digital asset in exchange for such property.

(C) *Dispositions of digital assets for certain services.* The term *sale* also includes any disposition of a digital asset in consideration for any services provided by a broker that is a real estate reporting person defined in § 1.6045–4(e) with respect to real property or is in the business of effecting sales of property described in paragraph (a)(9)(i), paragraphs (a)(9)(ii)(A) and (B), or paragraph (a)(9)(ii)(D) of this section.

(D) *Special rule for sales effected by digital asset payment processors.* In the case of a digital asset payment processor as defined in paragraph (a)(22) of this section, the term *sale* also includes the payment by a party of a digital asset to a digital asset payment processor in return for the payment of cash or a different digital asset to a second party, or the treatment under paragraph (a)(22)(ii) of this section of the digital asset as paid by a party to the digital asset payment processor in exchange for cash or a different digital asset paid to a second party. In the case of a digital asset payment processor defined in either paragraph (a)(22)(i)(B) or (C) of this section, a sale of a digital asset includes any payment by a party of a digital asset to that digital asset payment processor, or to a second party pursuant to instructions provided by that digital asset payment processor or its agent in exchange for goods or services provided to the first party.

(10) *Effect*—(i) *In general.* The term *effect* means, with respect to a sale, to act as—

(A) An agent for a party in the sale wherein the nature of the agency is such that the agent ordinarily would know the gross proceeds from the sale;

(B) In the case of a broker described in the second sentence of paragraph (a)(1) of this section, a person that is an obligor retiring its own debt obligations, a corporation redeeming its own stock, or an issuer of digital assets redeeming those digital assets;

(C) A principal that is a dealer in such sale; or

(D) A digital asset middleman as defined in paragraph (a)(21) of this section for a party in a sale of digital assets.

(ii) *Actions relating to certain options and forward contracts.* For purposes of paragraph (a)(10)(i) of this section, acting as an agent, principal or digital asset middleman with respect to grants or purchases of options, exercises of call options, or enterings into contracts that require delivery of personal property or an interest therein is not of itself effecting a sale. A broker that has on its books a forward contract under which delivery is made effects such delivery.

(11) *Foreign currency.* The term *foreign currency* means currency of a foreign country.

(12) *Cash.* The term *cash* means United States dollars or any convertible foreign currency that is issued by a government or a central bank, whether in physical or digital form.

(13) *Person.* The term *person* includes any governmental unit and any agency or instrumentality thereof.

(14) *Specified security.* The term *specified security* means:

(i) Any share of stock (or any interest treated as stock, including, for example, an American Depositary Receipt) in an entity organized as, or treated for Federal tax purposes as, a corporation, either foreign or domestic (provided that, solely for purposes of this paragraph (a)(14)(i), a security classified as stock by the issuer is treated as stock, and if the issuer has not classified the security, the security is not treated as stock unless the broker knows that the security is reasonably classified as stock under general Federal tax principles);

(ii) Any debt instrument described in paragraph (a)(17) of this section, other than a debt instrument subject to section 1272(a)(6) of the Code (certain interests in or mortgages held by a real estate mortgage investment conduit (REMIC), certain other debt instruments with payments subject to acceleration, and pools of debt instruments the yield on which may be affected by prepayments) or a short-term obligation described in section 1272(a)(2)(C);

(iii) Any option described in paragraph (m)(2) of this section;

(iv) Any securities futures contract;

(v) Any digital asset as defined in paragraph (a)(19) of this section; or

(vi) Any forward contract described in paragraph (a)(7)(iii) of this section requiring the delivery of a digital asset.

(15) *Covered security.* The term *covered security* means a specified security described in this paragraph (a)(15).

(i) *In general.* Except as provided in paragraph (a)(15)(iv) of this section, the following specified securities are covered securities:

(A) A specified security described in paragraph (a)(14)(i) of this section acquired for cash in an account on or after January 1, 2011, except stock for which the average basis method is available under § 1.1012–1(e).

(B) Stock for which the average basis method is available under § 1.1012–1(e) acquired for cash in an account on or after January 1, 2012.

(C) A specified security described in paragraphs (a)(14)(ii) and (n)(2)(i) of this section (not including the debt instruments described in paragraph (n)(2)(ii) of this section) acquired for cash in an account on or after January 1, 2014.

(D) A specified security described in paragraphs (a)(14)(ii) and (n)(3) of this

section acquired for cash in an account on or after January 1, 2016.

(E) Except for an option described in paragraph (m)(2)(ii)(C) of this section (relating to an option on a digital asset), an option described in paragraph (a)(14)(iii) of this section granted or acquired for cash in an account on or after January 1, 2014.

(F) A securities futures contract described in paragraph (a)(14)(iv) of this section entered into in an account on or after January 1, 2014.

(G) A specified security transferred to an account if the broker or other custodian of the account receives a transfer statement (as described in § 1.6045A–1) reporting the security as a covered security.

(H) An option on a digital asset described in paragraphs (a)(14)(iii) and (m)(2)(ii)(C) of this section (other than an option described in paragraph (a)(14)(v) of this section) granted or acquired in an account on or after January 1, 2023.

(I) [Reserved]

(J) A specified security described in paragraph (a)(14)(v) of this section that is acquired in a customer's account by a broker providing hosted wallet services on or after January 1, 2023, in exchange for cash, stored-value cards, different digital assets, or any other property or services described in paragraph (a)(9)(ii)(B) or (C) of this section, respectively.

(K) A specified security described in paragraph (a)(14)(vi) of this section, not described in paragraph (a)(14)(v) of this section, that is entered into or acquired in an account on or after January 1, 2023.

(ii) *Acquired in an account.* For purposes of this paragraph (a)(15), a security is considered acquired in a customer's account at a broker or custodian if the security is acquired by the customer's broker or custodian or acquired by another broker and delivered to the customer's broker or custodian. Acquiring a security in an account includes granting an option and entering into a forward contract or short sale.

(iii) *Corporate actions and other events.* For purposes of this paragraph (a)(15), a security acquired due to a stock dividend, stock split, reorganization, redemption, stock conversion, recapitalization, corporate division, or other similar action is considered acquired for cash in an account.

(iv) *Exceptions.* Notwithstanding paragraph (a)(15)(i) of this section, the following specified securities are not covered securities:

(A) Stock acquired in 2011 that is transferred to a dividend reinvestment plan (as described in § 1.1012–1(e)(6)) in 2011. However, a covered security acquired in 2011 that is transferred to a dividend reinvestment plan after 2011 remains a covered security.

(B) A specified security, other than a specified security described in paragraph (a)(14)(v) or (vi) of this section, acquired through an event described in paragraph (a)(15)(iii) of this section if the basis of the acquired security is determined from the basis of a noncovered security.

(C) A specified security that is excepted at the time of its acquisition from reporting under paragraph (c)(3) or (g) of this section. However, a broker cannot treat a specified security as acquired by an exempt foreign person under paragraph (g)(1)(i) or paragraphs (g)(4)(ii) through (v) of this section at the time of acquisition if, at that time, the broker knows or should have known (including by reason of information that the broker is required to collect under section 1471 or 1472 of the Code) that the customer is not a foreign person.

(D) A security for which reporting under this section is required by § 1.6049–5(d)(3)(ii) (certain securities owned by a foreign intermediary or flow-through entity).

(E) Digital assets in a sale required to be reported under paragraph (g)(4)(vi)(E) of this section by a broker making a payment of gross proceeds from the sale to a foreign intermediary, flow-through entity, or U.S. branch.

(16) *Noncovered security.* The term *noncovered security* means any specified security that is not a covered security.

(17) *Debt instrument, bond, debt obligation, and obligation.* For purposes of this section, the terms *debt instrument, bond, debt obligation,* and *obligation* mean a debt instrument as defined in § 1.1275–1(d) and any instrument or position that is treated as a debt instrument under a specific provision of the Internal Revenue Code (Code) (for example, a regular interest in a REMIC as defined in section 860G(a)(1) and § 1.860G–1). Solely for purposes of this section, a security classified as debt by the issuer is treated as debt. If the issuer has not classified the security, the security is not treated as debt unless the broker knows that the security is reasonably classified as debt under general Federal tax principles or that the instrument or position is treated as a debt instrument under a specific provision of the Code.

(18) *Securities futures contract.* For purposes of this section, the term *securities futures contract* means a contract described in section 1234B(c) whose underlying asset is described in paragraph (a)(14)(i) of this section and which is entered into on or after January 1, 2014.

(19) *Digital asset*—(i) *In general.* For purposes of this section, the term *digital asset* means any digital representation of value that is recorded on a cryptographically secured distributed ledger (or any similar technology), without regard to whether each individual transaction involving that digital asset is actually recorded on that ledger, and that is not cash.

(ii) *No inference.* Nothing in this paragraph (a)(19) or elsewhere in this section may be construed to mean that a digital asset is or is not properly classified as a security, commodity, option, securities futures contract, regulated futures contract, or forward contract for any other purpose of the Code.

(20) *Digital asset address.* For purposes of this section, the term *digital asset address* means the unique set of alphanumeric characters, in some cases referred to as a quick response or QR Code, that is generated by the wallet into which the digital asset will be transferred.

(21) *Digital asset middleman*—(i) *In general.* The term *digital asset middleman* means any person who provides a facilitative service as described in paragraph (a)(21)(iii) of this section with respect to a sale of digital assets wherein the nature of the service arrangement is such that the person ordinarily would know or be in a position to know the identity of the party that makes the sale and the nature of the transaction potentially giving rise to gross proceeds from the sale.

(ii) *Position to know*—(A) *Identity.* A person ordinarily would know or be in a position to know the identity of the party that makes the sale if that person maintains sufficient control or influence over the facilitative services provided to have the ability to set or change the terms under which its services are provided to request that the party making the sale provide that party's name, address, and taxpayer identification number upon request. For purposes of the previous sentence, a person with the ability to change the fees charged for facilitative services is an example of a person that maintains sufficient control or influence over provided facilitative services to have the ability to set or change the terms under which its services are provided to request that the party making the sale provide that party's name, address, and taxpayer identification number upon request.

(B) *Nature of the transaction.* A person ordinarily would know or be in a position to know the nature of the transaction potentially giving rise to gross proceeds from a sale if that person maintains sufficient control or influence over the facilitative services provided to have the ability to determine whether and the extent to which the transfer of digital assets involved in a transaction gives rise to gross proceeds, including by reference to the consideration that the person receives or pursuant to the operations of or modifications to an automatically executing contract or protocol to which the person provides access. For purposes of the previous sentence, a person with the ability to change the fees charged for facilitative services is an example of a person that maintains sufficient control or influence over provided facilitative services to have the ability to determine whether and the extent to which the transfer of digital assets involved in a transaction gives rise to gross proceeds.

(iii) *Facilitative service*—(A) *In general.* A facilitative service includes the provision of a service that directly or indirectly effectuates a sale of digital assets, such as providing a party in the sale with access to an automatically executing contract or protocol, providing access to digital asset trading platforms, providing an automated market maker system, providing order matching services, providing market making functions, providing services to discover the most competitive buy and sell prices, or providing escrow or escrow-like services to ensure both parties to an exchange act in accordance with their obligations. A facilitative service does not include validating distributed ledger transactions (whether through proof-of-work, proof-of-stake, or any other similar consensus mechanism) without providing other functions or services if provided by a person solely engaged in the business of providing such validating services. A facilitative service also does not include the selling of hardware or the licensing of software for which the sole function is to permit persons to control private keys which are used for accessing digital assets on a distributed ledger if such functions are conducted by a person solely engaged in the business of selling such hardware or licensing such software. Software that provides users with direct access to trading platforms from the wallet platform is not an example of software with the sole function of providing users with the ability to control private keys to send and receive digital assets.

(B) *Special rule involving sales of digital assets under paragraphs (a)(9)(ii)(B) and (C) of this section.* A facilitative service includes the acceptance or processing of digital assets as payment for property of a type which when sold would constitute a sale under paragraph (a)(9)(i) of this section by a broker that is in the business of effecting sales of such property. A facilitative service also includes any service performed by a real estate reporting person as defined in § 1.6045–4(e) with respect to a real estate transaction in which digital assets are paid by the real estate buyer in full or partial consideration for the real estate. Finally, a facilitative service includes the acceptance or processing of digital assets as payment for any service provided by a broker described in paragraph (a)(1) of this section determined without regard to any sales under paragraph (a)(9)(ii)(C) of this section that are effected by such broker.

(22) *Digital asset payment processor*—(i) *In general.* For purposes of this section, the term *digital asset payment processor* means a person who in the ordinary course of a trade or business stands ready to effect sales of digital assets as defined in paragraph (a)(9)(ii)(D) of this section by:

(A) Regularly facilitating payments from one party to a second party by receiving digital assets from the first party and exchanging those digital assets into cash or different digital assets paid to the second party;

(B) Acting as a third party settlement organization (as defined in § 1.6050W–1(c)(2)) that facilitates payments, either by making or submitting instructions to make payments, using one or more digital assets in settlement of a reportable payment transaction under § 1.6050W–1(a)(2), without regard to whether the third party settlement organization contracts with an agent to make, or to submit the instructions to make, such payments; or

(C) Acting as a payment card issuer that facilitates payments, either by making or submitting the instruction to make payments, in one or more digital assets to a merchant acquiring entity as defined under § 1.6050W–1(b)(2) in a transaction that is associated with a payment made by the merchant acquiring entity, or its agent, in settlement of a reportable payment transaction under § 1.6050W–1(a)(2).

(ii) *Special rule for digital asset transfers pursuant to paragraph (a)(22)(i)(A) of this section.* For purposes of paragraph (a)(22)(i)(A) of this section, the transfer of a digital asset from one party to a second party, such as a vendor of goods or services, pursuant to a processor agreement between that second person and a payment processor must be treated as if the digital asset was paid by the first party to the payment processor in exchange for cash or a different digital asset paid to the second party.

(iii) *Processor agreement.* For purposes of paragraph (a)(22)(ii) of this section, the term *processor agreement* means an agreement between a payment processor and a second party, such as a vendor of goods or services, that in order to facilitate one party's payment to that second party provides for the temporary fixing of the exchange rate to be applied to the digital asset received by that second party from the first party as payment in a transaction.

(23) *Held in a wallet or account.* For purposes of this section, a digital asset is considered *held in a wallet or account* if the wallet, whether hosted or unhosted, or account stores the private keys necessary to transfer control of the digital asset. A digital asset associated with a digital asset address that is generated by a wallet, and a digital asset associated with a sub-ledger account of a wallet, are similarly considered held in a wallet. References to variations of held in a wallet or account, such as held at a broker, held with a broker, held by the user of a wallet, held on behalf of another, acquired in a wallet or account, or transferred into a wallet or account, each have a similar meaning.

(24) *Hosted wallet.* A *hosted wallet* is a custodial service provided to a user that electronically stores the private keys to digital assets held on behalf of others.

(25) *Stored-value card.* For purposes of this section, the term *stored-value card* means a card, including any gift card, with a prepaid value in U.S. dollars, any convertible foreign currency, or any digital asset, without regard to whether the card is in physical or digital form.

(26) *Transaction identification.* For purposes of this section, the term *transaction identification,* or *transaction ID,* means the unique set of alphanumeric identification characters that a digital asset distributed ledger associates with a transaction involving the transfer of a digital asset from one digital asset address to another. A transaction ID includes terms such as a ''Txid'' or ''transaction hash.''

(27) *Unhosted wallet.* An *unhosted wallet* is a non-custodial means of storing, electronically or otherwise, a user's private keys to digital assets held by or for the user. Unhosted wallets, sometimes referred to as self-hosted or self-custodial wallets, can be provided through software that is connected to the internet (a hot wallet) or through hardware or physical media that is

disconnected from the internet (a cold wallet).

(b) *Examples.* The following examples illustrate the definitions in paragraph (a) of this section.

(1) *Example 1.* The following persons generally are brokers within the meaning of paragraph (a)(1) of this section—

(i) A mutual fund, an underwriter of the mutual fund, or an agent for the mutual fund, any of which stands ready to redeem or repurchase shares in such mutual fund.

(ii) A professional custodian (such as a bank) that regularly arranges sales for custodial accounts pursuant to instructions from the owner of the property.

(iii) A depositary trust or other person who regularly acts as an escrow agent in corporate acquisitions, if the nature of the activities of the agent is such that the agent ordinarily would know the gross proceeds from sales.

(iv) A stock transfer agent for a corporation, which agent records transfers of stock in such corporation, if the nature of the activities of the agent is such that the agent ordinarily would know the gross proceeds from sales.

(v) A dividend reinvestment agent for a corporation that stands ready to purchase or redeem shares.

(vi) A person who in the ordinary course of a trade or business provides users with hosted wallet services to the extent such person stands ready to effect the sale of digital assets on behalf of its customers, including by acting as an agent for a party in the sale wherein the nature of the agency is as described in paragraph (a)(10)(i)(A) of this section or as a digital asset middleman as defined in paragraph (a)(21) of this section.

(vii) A digital asset payment processor as described in paragraph (a)(22) of this section.

(viii) A person who in the ordinary course of a trade or business either owns or operates one or more physical electronic terminals or kiosks that stand ready to act on behalf of other persons to effect the sale of digital assets for cash stored-value cards, or different digital assets, regardless of whether the other person is the disposer or the acquirer of the digital assets in such an exchange.

(ix) A person who in the ordinary course of a trade or business operates a non-custodial trading platform or website that stands ready to effect sales of digital assets for others by allowing persons to exchange digital assets directly with other persons for cash stored-value cards, or different digital assets, including by providing access to automatically executing contracts, protocols, or other software programs that automatically effect such sales.

(x) A person who in the ordinary course of a trade or business stands ready at a physical location to effect sales of digital assets on behalf of others.

(xi) A person who sells or licenses software to unhosted wallet users if that person as part of its trade or business also offers services to such wallet users that effect sales of digital assets, provided the person would ordinarily know or be in a position to know the identity of the wallet users that effect the sales and the nature of the transactions potentially giving rise to gross proceeds from the sales as described in paragraphs (a)(21)(ii)(A) and (B) of this section.

(2) *Example 2.* The following persons are not brokers within the meaning of paragraph (a)(1) of this section in the absence of additional facts that indicate the person is a broker—

(i) A stock transfer agent for a corporation, which agent daily records transfers of stock in such corporation, if the nature of the activities of the agent is such that the agent ordinarily would not know the gross proceeds from sales.

(ii) A person (such as a stock exchange) that merely provides facilities in which others effect sales.

(iii) An escrow agent or nominee if such agency is not in the ordinary course of a trade or business.

(iv) An escrow agent, otherwise a broker, which agent effects no sales other than such transactions as are incidental to the purpose of the escrow (such as sales to collect on collateral).

(v) A floor broker on a commodities exchange, which broker maintains no records with respect to the terms of sales.

(vi) A corporation that issues and retires long-term debt on an irregular basis.

(vii) A clearing organization.

(viii) A merchant who is not otherwise required to make a return of information under section 6045 of the Code and who regularly sells goods or other property (other than digital assets) or services in return for digital assets.

(ix) A person solely engaged in the business of validating distributed ledger transactions, through proof-of-work, proof-of-stake, or any other similar consensus mechanism, without providing other functions or services.

(x) A person solely engaged in the business of selling hardware or licensing software, the sole function of which is to permit a person to control private keys which are used for accessing digital assets on a distributed ledger, without providing other functions or services.

(3) *Example 3: Barter exchange.* A, B, and C belong to a carpool in which they commute to and from work. Every third day, each member of the carpool provides transportation for the other two members. Because the carpool arrangement provides solely for the informal exchange of similar services on a noncommercial basis, the carpool is not a barter exchange within the meaning of paragraph (a)(4) of this section.

(4) *Example 4: Barter exchange.* X is an organization whose members include retail merchants, wholesale merchants, and persons in the trade or business of performing services. X's members exchange property and services among themselves using credits on the books of X as a medium of exchange. Each exchange through X is reflected on the books of X by crediting the account of the member providing property or services and debiting the account of the member receiving such property or services. X also provides information to its members concerning property and services available for exchange through X. X charges its members a commission on each transaction in which credits on its books are used as a medium of exchange. X is a barter exchange within the meaning of paragraph (a)(4) of this section.

(5) *Example 5: Commodity, forward contract.* A warehouse receipt is an interest in personal property for purposes of paragraph (a) of this section. Consequently, a warehouse receipt for a quantity of lead is a commodity under paragraph (a)(5)(ii) of this section. Similarly, an executory contract that requires delivery of a warehouse receipt for a quantity of lead is a forward contract under paragraph (a)(7)(ii) of this section.

(6) *Example 6: Customer.* The only customers of a depository trust acting as an escrow agent in corporate acquisitions, which trust is a broker, are shareholders to whom the trust makes payments or shareholders for whom the trust is acting as an agent.

(7) *Example 7: Customer.* The only customers of a stock transfer agent, which agent is a broker, are shareholders to whom the agent makes payments or shareholders for whom the agent is acting as an agent.

(8) *Example 8: Customer.* D, an individual not otherwise exempt from reporting, is the holder of an obligation issued by P, a corporation. R, a broker, acting as an agent for P, retires such obligation held by D. Such obligor payments from R represent obligor payments by P. D, the person to whom the gross proceeds are paid or credited by R, is the customer of R.

(9) *Example 9: Covered security.* E, an individual not otherwise exempt from reporting, maintains an account with S, a broker. On June 1, 2012, E instructs S to purchase stock that is a specified security for cash. S places an order to purchase the stock with T, another broker. E does not maintain an account with T. T executes the purchase. Custody of the purchased stock is transferred to E's account at S. Under paragraph (a)(15)(ii) of this section, the stock is considered acquired for cash in E's account at S. Because the stock is acquired on or after January 1, 2012, under paragraph (a)(15)(i) of this section, it is a covered security.

(10) *Example 10: Covered security.* F, an individual not otherwise exempt from reporting, is granted 100 shares of stock in F's employer by F's employer. Because F does not acquire the stock for cash or through a transfer to an account with a transfer statement (as described in § 1.6045A–1), under paragraph (a)(15) of this section, the stock is not a covered security.

(11) *Example 11: Covered security.* G, an individual not otherwise exempt from reporting, owns 400 shares of stock in Q, a corporation, in an account with U, a broker. Of the 400 shares, 100 are covered securities and 300 are noncovered securities. Q takes a corporate action to split its stock in a 2-for-1 split. After the stock split, G owns 800 shares of stock. Because the adjusted basis of 600 of the 800 shares that G owns is determined from the basis of noncovered securities, under paragraphs (a)(15)(iii) and (a)(15)(iv)(B) of this section, these 600 shares are not covered securities and the remaining 200 shares are covered securities.

(12) *Example 12: Digital asset payment processor, sale, and customer—(i) Facts.* Company Z is an online retailer of merchandise that accepts digital asset DE as a form of payment. To facilitate the use of digital asset DE as payment, Z contracts with CPP, an unrelated party that is in the business of facilitating payments using digital assets. Under Z's contractual agreement with CPP, when purchasers of merchandise initiate payment on Z's website using DE, they are directed to CPP's website to complete the payment part of the transaction. Customer R seeks to purchase merchandise from Z that is priced at $15 (or 15 units of DE). After R initiates purchase, R is directed to CPP's website where R is directed to transfer 15 units of DE to a digital asset address controlled by CPP. CPP then pays $15 in cash to Z, who in turn processes R's merchandise order.

(ii) *Analysis.* CPP is a digital asset payment processor within the meaning of paragraph (a)(22)(i)(A) of this section because CPP, in the ordinary course of its business, effects payments from customers to retailers by receiving digital assets from customers in exchange for cash paid to retailers. CPP is also a broker under paragraph (a)(1) of this section because CPP stands ready to effect sales of digital assets to be made by others. R's payment of 15 units of DE to CPP in return for the payment of $15 cash to Z is a sale of digital assets under paragraph (a)(9)(ii)(D) of this section. Additionally, because R transferred digital assets to CPP in a sale described in paragraph (a)(9)(ii)(D) of this section, R is CPP's customer under paragraph (a)(2)(ii)(A) of this section. Finally, CPP's payment to Z may also be a third party network transaction under § 1.6050W–1(c) subject to reporting under § 1.6050W–1(a) if CPP is a third party settlement organization under the definition in § 1.6050W–1(c)(2).

(13) *Example 13: Digital asset payment processor, sale, and customer*—(i) *Facts.* The facts are the same as in paragraph (b)(12)(i) of this section (the facts in *Example 12*), except that under Z's contractual arrangement with CPP, when Z's purchasers seek to make payments using DE and are directed to CPP's website, they are instructed to transfer their units of DE to a digital asset address owned by Z pursuant to a temporarily fixed exchange rate of DE for cash, which CPP communicates to Z and which Z passes along to its purchasers. Additionally, the purchasers are required to provide CPP with the information CPP will need, such as name, address, and taxpayer identification number, to report the purchaser's sale of DE. To effect the purchase of Z's merchandise, R transfers 15 units of DE equal directly to Z's wallet. CPP provides similar services to other retail purchasers and merchants.

(ii) *Analysis.* CPP is a digital asset payment processor within the meaning of paragraph (a)(22) of this section because CPP, in the ordinary course of its business, effects payments from customers (Z's purchasers) in exchange for digital assets paid to a second person (Z) pursuant to a processor agreement that provides for the temporary fixing of the exchange rate to be applied to the digital assets received by the retailer (Z). Such transactions are treated for purposes of paragraph (a)(22)(i) of this section as if R paid the digital assets to CPP in exchange for cash or different digital assets. R's payment of digital assets directly to Z pursuant to a temporarily fixed exchange rate of DE for cash is a sale of the digital assets within the meaning of paragraph (a)(9)(ii)(D) of this section because the transaction is treated for purposes of paragraph (a)(22)(i) of this section as if R paid the digital assets to CPP in exchange for cash or different digital assets. R's payment of digital assets directly to Z pursuant to the temporarily fixed exchange rate of DE for cash is a sale without regard to whether Z, after the payment is made, decides to exchange the digital assets pursuant to that fixed exchange rate. R is CPP's customer under paragraph (a)(2)(ii)(A) of this section because R is the person who is treated as transferring digital assets to a digital asset payment processor in a sale as defined in paragraph (a)(9)(ii)(D) of this section. Finally, the transfer of DE units by R to Z pursuant to CPP's instructions may also be a third party network transaction under § 1.6050W–1(c) subject to reporting under § 1.6050W–1(a) if CPP is a third party settlement organization under the definition in § 1.6050W–1(c)(2).

(14) *Example 14: Third party settlement organization as digital asset payment processor*—(i) *Facts.* The facts are the same as in paragraph (b)(12)(i) of this section (the facts in *Example 12*) except that CPP is also a third party settlement organization, as defined in § 1.6050W–1(c)(2), with respect to the payments it makes (or submits instructions for others to make) to Z. To process R's payment and settle the transaction, CPP submits instructions to R to transfer 15 units of digital asset DE to a digital asset address held in a wallet owned by Z. Z, in turn, processes R's merchandise order. Z does not have any arrangement with CPP to temporarily fix the exchange rate of DE for cash.

(ii) *Analysis.* CPP is a digital asset payment processor as defined in paragraph (a)(22)(i)(B) of this section because it is a third party settlement organization that submitted an instruction to R to make payment to Z in settlement of a reportable payment transaction under § 1.6050W–1(a)(2) using digital asset DE. Accordingly, CPP is a broker under paragraph (a)(1) of this section, and the transaction is a sale of R's 15 units of digital asset DE under paragraph (a)(9)(ii)(D) of this section.

(15) *Example 15: Broker.* The facts are the same as in paragraph (b)(12)(i) of this section (the facts in *Example 12*), except that Z accepts digital asset DE from its purchasers directly without the services of CPP or any other digital asset payment processor. To pay for the merchandise R purchases on Z's website, R is directed by Z to transfer 15 units of DE directly to Z's digital asset address. Z is not a broker under the definition of paragraph (a)(1) of this

section because Z does not stand ready as part of its trade or business to effect sales as defined in paragraph (a)(9) of this section made by others. That is, the sales that Z is in the business of conducting are of property that is not subject to reporting under section 6045.

(16) *Example 16: Payment card issuer as digital asset payment processor*—(i) *Facts.* Customer S purchases goods for 10 units of digital asset DE from merchant M using a digital asset DE credit card issued by Bank X. Merchant M is one of a network of unrelated persons that has agreed to accept credit cards issued by Bank X as payment under an agreement that provides standards and mechanisms for settling the transaction between a merchant acquiring bank and the persons who accept the cards. Under these standards, payments are made by customers, to the issuing bank, and by the issuing bank to the merchant acquiring bank in units of DE. Bank MAB is the merchant acquiring entity within the meaning of § 1.6050W–1(b)(2) with the contractual obligation to make payments to merchant M for goods provided to S in this transaction. The arrangement between merchant M and Bank MAB provides that M may direct Bank MAB to make payment to M in either digital asset DE or cash. To make payment for S's purchase of goods from merchant M, at Bank X's direction, S transfers 10 units of digital asset DE to Bank X. Bank X pays the 10 units of DE, less its processing fee, to Bank MAB, which amount Bank MAB pays, less its processing fee, to M.

(ii) *Analysis.* Bank MAB is a merchant acquiring entity under § 1.6050W–1(b)(2), and the payment made by Bank MAB to merchant M is in settlement of a reportable payment transaction under § 1.6050W–1(a)(2). Accordingly, Bank X is a digital asset payment processor as defined in paragraph (a)(22)(i)(C) of this section because Bank X is a payment card issuer that made payment to Bank MAB in DE in a transaction that is associated with Bank MAB's reportable payment transaction under § 1.6050W–1(a)(2). Additionally, S's payment of DE is a sale transaction under paragraph (a)(9)(ii)(D) of this section because that payment was made pursuant to the instructions provided by Bank X.

(17) *Example 17: Effect, and digital asset middleman*—(i) *Facts.* P2X, a business that is jointly operated by several individuals, created a website that regularly provides online services to customers in order to match would-be sellers of digital assets with would-be buyers. As part of this business, P2X directs matched buyers and sellers to use automatically executing contracts to settle the desired exchange without any additional services from P2X. The software underlying the automatically executing contracts was originally developed and then open-sourced by Z, a person unrelated to P2X. Z does not maintain the software and does not receive any fee when transactions are settled using the software. Customers undertaking transactions using the automatically executing contracts are charged a small percentage of the transaction value as a fee that is transferred to unrelated persons (miners) who validate transactions on the applicable blockchains. Additionally, P2X has modified the software so that buyers and sellers using P2X's platform are charged an additional 1% transaction fee, which is automatically taken from the accounts of buyers and sellers and transferred to P2X when transactions are executed.

(ii) *Analysis with respect to P2X.* The group of individuals that operate P2X are treated for U.S. Federal income tax purposes as a business entity that is a partnership, or as a sole proprietorship, depending on the facts, and therefore as a person within the meaning of paragraph (a)(13) of this section. P2X provides facilitative services as described in paragraph (a)(21)(iii)(A) of this section because it provides buyers and sellers a digital marketplace for digital asset as well as automatically executing contracts to effectuate sales of digital assets. P2X is in a position to know the identity of the parties that make sales on its platform within the meaning of paragraph (a)(21)(ii)(A) of this section because it can request the name, address, and taxpayer identification number of each digital asset buyer and seller in advance of the sale. P2X is also in a position to know the nature of the transactions potentially giving rise to gross proceeds from sales within the meaning of paragraph (a)(21)(ii)(B) of this section because it can determine that information from the transaction fees P2X collects from each transaction. Accordingly, P2X acts as a digital asset middleman within the meaning of paragraph (a)(21) of this section to effect sales of digital assets on behalf of others on its platform within the meaning of paragraph (a)(10)(i)(D) of this section.

(iii) *Analysis with respect to Z.* Although the software developed by Z that underlies the automatically executing contracts facilitates sales of digital assets on P2X's platform, Z is not in a position to know the identity of the parties that make sales using these contracts within the meaning of paragraph (a)(21)(ii)(A) of this section because Z open-sourced the software and has no connection to P2X. As a result, Z does not have the power to set or change the terms under which its software can be used. Accordingly, Z is not a digital asset middleman within the meaning of paragraph (a)(21) of this section.

(18) *Example 18: Digital asset middleman*—(i) *Facts.* The facts are the same as in paragraph (b)(17)(i) of this section (the facts in *Example 17*) except Individual K utilizes P2X's website to find a counterparty and to trade 10 units of digital asset DE, which are held in a personal unhosted wallet, for 50 units of digital asset ST. When the transfer of K's 10 units of DE to the counterparty is validated on the blockchain, a small percentage of the 10 units are withheld from the amount received by K's counterparty and are, instead, transferred to Miner M, who performed the validation of the transaction on the DE blockchain.

(ii) *Analysis.* The validation services provided by M are not facilitative services under paragraph (a)(21)(iii)(A) of this section. Accordingly, M is not a digital asset middleman within the meaning of paragraph (a)(21) of this section and is also not a broker under paragraph (a)(1) of this section.

(19) *Example 19: Digital asset middleman*—(i) *Facts.* The facts are the same as in paragraph (b)(17)(i) of this section (the facts in *Example 17*), except that P2X's automatically executing contract charges a flat transaction fee (instead of a fee that is contingent on the value of the transaction) that is paid to P2X upon the execution of a trade.

(ii) *Analysis with respect to P2X.* For the same reasons discussed in paragraph (b)(17)(ii) of this section (the analysis in *Example 17*), P2X provides facilitative services and is in a position to know the identity of the parties that make sales on its platform. Although P2X cannot determine the nature of the transactions potentially giving rise to gross proceeds from sales within the meaning of paragraph (a)(21)(ii)(B) of this section that are undertaken on its website from the flat transaction fees P2X collects from each transaction, P2X has the ability to alter the automatically executing contracts to provide that information to P2X. Additionally, because P2X provides facilitative services that matches would-be sellers of digital assets with would-be buyers, P2X is in a position to know the nature of the transactions potentially giving rise to gross proceeds from sales. Accordingly, P2X acts as a digital asset middleman under paragraph (a)(21) of this section to effect transactions on behalf of P2X platform users.

(20) *Example 20: Effect*—(i) *Facts.* Individual J is an artist in the business of creating non-fungible tokens (NFTs) representing ownership interests in J's artwork for sale. Transfers of J's NFTs are recorded on a cryptographically secured distributed ledger called the DE blockchain. J regularly sells these newly created NFTs to buyers in return for units of digital asset DE. To find buyers and to execute these transactions, J uses the services of P2X, an unrelated digital asset broker that provides a digital marketplace for NFT sellers to find buyers and automatically executing contracts in return for a transaction fee. J does not perform any other services with respect to these transactions. Using P2X's platform, buyer K purchases J's NFT–4 for 1,000 units of DE. At the direction of P2X, J and K execute their exchange using an automatically executing contract, which automatically transfers J's NFT–4 to K and K's 1,000 units of DE to J. The contract also automatically transfers P2X's transaction fee from K's wallet to P2X.

(ii) *Analysis.* NFT–4 is a digital representation of value that is recorded on a cryptographically secured distributed ledger and is not cash. Accordingly, NFT–4 is a digital asset under paragraph (a)(19) of this section. Although J is a principal in the exchange of the NFT–4 for 1,000 units of DE, J is not acting as an obligor retiring its own debt obligations, a corporation redeeming its own stock, or an issuer of digital assets that is redeeming those digital assets, as described in paragraph (a)(10)(i)(B) of this section. Because J creates the NFTs as part of J's business, J is also not acting as a dealer as described in paragraph (a)(10)(i)(C) of this section in these transactions. Accordingly, J is not effecting sales of digital assets on behalf of others under the definition of paragraph (a)(10)(i)(B) or (C) of this section.

(21) *Example 21: Digital asset middleman*—(i) *Facts.* Corporation H is solely engaged in the business of developing and selling H-brand unhosted hardware wallets. H-brand wallets permit users to store private keys used for accessing digital assets on hardware devices that can either be connected to or disconnected from the internet. Users who seek to transfer digital assets controlled by an H-brand hardware wallet must connect the H-brand wallet to the internet and use connecting software (not licensed by H) to execute the transfer. Once H sells a hardware wallet to a customer, H does not have access to any information about transactions the customer undertakes using the connecting software not licensed by H.

(ii) *Analysis.* The sale by H of the H-brand wallets is not a facilitative service under paragraph (a)(21)(iii)(A) of this section. Accordingly, H is not acting as a digital asset middleman under paragraph (a)(21) of this section with respect to digital asset sale transactions made by H-brand wallet users.

(22) *Example 22: Digital asset middleman*—(i) *Facts.* Corporation S is engaged in the business of operating and maintaining a website that licenses S-brand unhosted wallets (or S-Wallets) that are accessible online and allow users to control private keys to digital assets and transfer (and receive) digital assets directly from (into) their S-Wallets. S requests each user's name, address, and tax identification number when first licensing its S-Wallets. S also provides each S-Wallet user a digital asset trading service (S-Trades) that compares pricing at several unrelated non-custodial trading platforms to facilitate access to the most competitive buy and sell prices offered by these unrelated platforms. Sales of digital assets from S-Wallets using S-Trade are automatically executed from digital assets held in S-wallets using contracts that deduct and pay a 1% transaction fee to S from digital assets transferred out of the S-Wallets. This fee is in addition to any fees charged by the unrelated non-custodial trading platforms.

(ii) *Analysis.* The access provided by S to unrelated digital asset brokers and market-making services are facilitative services as described in paragraph (a)(21)(iii)(A) of this section. Because S has the ability to request each wallet user's name, address, and taxpayer identification number, S is in a position to know the identity of the S-Wallet users under paragraph (a)(21)(ii)(A) of this section. S is also in a position to know the nature of the transactions potentially giving rise to gross proceeds of S-Wallet users from digital asset sales using S-Trade under paragraph (a)(21)(ii)(B) of this section because S can determine the gross proceeds from the 1% transaction fee it collects on each transaction by operation of the automatically executing contract to which it provides access. Accordingly, S is acting as a digital asset middleman with respect to the sale transactions made by S-Wallet users using S-Trade.

(23) *Example 23: Digital asset middleman*—(i) *Facts.* The facts are the same as in paragraph (b)(22)(i) of this section (the facts in *Example 22*), except S does not provide the S-Trade digital asset trading service, with wallet connection services, or with direct platform access to any digital asset trading platform that facilitates the purchase or sale of digital assets. S-Wallet users seeking to make exchanges of digital assets from their S-Wallets at one of these unrelated non-custodial trading platforms must initiate the trade on the unrelated trading platform, which in turn will provide the functionality for users of S-Wallets to trade digital assets held in their S-Wallets using the services of that unrelated trading platform. Trades using these unrelated trading platforms are completed directly from the users' S-Wallets using automatically executing contracts that deduct and pay a 0.9% transaction fee to the non-custodial trading platforms. The unrelated trading platforms do not pay compensation to S for the wallet connection service these platforms provide to S-Wallet users in making trades on the unrelated trading platforms.

(ii) *Analysis.* Because the software licensed by S provides S-Wallet users solely with the ability to control digital assets directly from their S-Wallets, S does not provide S-Wallet users with a facilitative service as described in paragraph (a)(21)(iii)(A) of this section. Accordingly, S is a not acting as a digital asset middleman under paragraph (a)(21) of this section with respect to sale transactions made by S-Wallet users on unrelated trading platforms.

(24) *Example 24: Digital asset middleman and effect*—(i) *Facts.* SBK is in the business of effecting sales of stock and other securities on behalf of customers. To open an account with SBK, each customer must provide SBK with their name, address, and tax identification number. SBK accepts 20 units of digital asset DE from Customer P as payment for 10 shares of AB stock. Additionally, P pays SBK an additional 1 unit of digital asset DE as a commission for SBK's services.

(ii) *Analysis.* SBK's acceptance of 20 units of DE as payment for the AB stock is a facilitative service under paragraph (a)(21)(iii)(B) of this section because the payment is for property (the AB stock) that when sold would constitute a sale under paragraph (a)(9)(i) of this section by a broker that is in the business of effecting sales of stock and other securities. Because SBK is a broker under paragraph (a)(1) of this section with respect to any type of sale under paragraph (a)(9) of this section, SBK's acceptance of 1 unit of DE as payment for SBK's commission is also a facilitative service under paragraph (a)(21)(iii)(B) of this section. Additionally, SBK is in a position to know, under paragraphs (a)(21)(ii)(A)

and (B) of this section, P's identity and the nature of P's transaction involving the 20 units of DE and the commission payment. Accordingly, SBK is acting as a digital asset middleman to effect P's sale of 10 units of DE in return for the AB stock and P's sale of 1 unit of DE as payment for SBK's commission under paragraphs (a)(10)(i)(D) and (a)(21) of this section.

(25) *Example 25: Digital asset middleman and effect*—(i) *Facts.* B is an individual that purchases real estate from individual S in exchange for cash and 1,000 units of digital asset DE. The transaction is a real estate transaction under § 1.6045–4(b) and is closed by closing attorney CA, who is a real estate reporting person under § 1.6045–4(e). As part of performing its services as closing attorney, CA requests the name, address, and tax identification number from both B and S.

(ii) *Analysis.* The closing services provided by CA are facilitative services under paragraph (a)(21)(iii)(B) of this section because CA is performing services as a real estate reporting person as defined in § 1.6045–4(e) with respect to a real estate transaction in which the real estate buyer (B) pays digital assets in full or partial consideration for the real estate. As part of its services in closing the real estate transaction, CA is in a position to know B's identity and the nature of B's real estate transaction under paragraphs (a)(21)(ii)(A) and (B) of this section. Accordingly, CA is acting as a digital asset middleman under paragraph (a)(21) of this section to effect B's sale of 1,000 DE units under paragraph (a)(10)(i)(D) of this section. These conclusions are not impacted by whether or not CA is required to report the sale of the real estate by S under § 1.6045–4(a).

(26) *Example 26: Digital asset and cash*—(i) *Facts.* Y is a privately held corporation that issues DL, a digital representation of value designed to track the value of the U.S. dollar. DL is backed in part or in full by U.S. dollars held by Y, and Y offers to redeem units of DL for U.S. dollars at par at any time. Transactions involving DL utilize cryptography to secure transactions that are digitally recorded on a cryptographically secured distributed ledger called the DL blockchain. CRX is a digital asset broker that also provides hosted wallet services for its customers seeking to made trades of digital assets using CRX. R is a customer of CRX. R exchanges 100 units of DL for $100 in cash from CRX. CRX does not record this transaction on the DL blockchain, but instead records the transaction on CRX's own centralized private ledger.

(ii) *Analysis.* DL is not cash under paragraph (a)(12) of this section because it is not issued by a government or central bank. DL is a digital asset under paragraph (a)(19) of this section because it is a digital representation of value that is recorded on a cryptographically secured distributed ledger. The fact that CRX recorded R's transaction on its own private ledger and not on the DL blockchain does not change this conclusion.

(27) *Example 27: Digital asset and security.* M owns 10 units of a fund that was formed to invest in digital assets. M's units of the fund are held in a securities brokerage account and are not recorded using cryptographically secured distributed ledger technology. Although the fund's underlying investments are comprised of one or more digital assets, M's investment is in units of the fund, which are not digital assets under paragraph (a)(19) of this section because transactions involving these fund units are not secured using cryptography and are not digitally recorded on a ledger, such as a blockchain.

(28) *Example 28: Forward contract, closing transaction, and sale*—(i) *Facts.* On February 24, Year 1, J contracts with broker CRX to sell J's 10 units of digital asset DE to CRX at an agreed upon price, with delivery under the contract to occur at 4 p.m. on March 10, Year 1. Pursuant to this agreement, J delivers the 10 units of DE to CRX, and CRX pays J the agreed upon price in cash.

(ii) *Analysis.* Under paragraph (a)(7)(iii) of this section, the contract between J and CRX is a forward contract. J's delivery of digital asset DE pursuant to the forward contract is a closing transaction described in paragraph (a)(8) of this section that is treated as a sale of the underlying digital asset DE under paragraph (a)(9)(ii)(A)(*3*) of this section. Pursuant to the rules of paragraphs (a)(9)(ii)(A)(*3*) and (a)(9)(i) of this section, CRX may treat the delivery of DE as a sale without separating the profit or loss on the forward contract from the profit or loss on the delivery.

(29) *Example 29: Digital asset*—(i) *Facts.* On February 7, Year 1, J purchases a regulated futures contract on digital asset DE through futures commission merchant FCM. The contract is not recorded using cryptographically secured distributed ledger technology. The contract expires on the last Friday in June, Year 1. On May 1, Year 1, J enters into an offsetting closing transaction with respect to the regulated futures contract.

(ii) *Analysis.* Although the regulated futures contract's underlying assets are comprised of digital assets, J's investment is in the regulated futures contract, which is not a digital asset under paragraph (a)(19) of this section because transactions involving the contract are not secured using cryptography and are not digitally recorded using cryptographically secured distributed ledger technology, such as a blockchain. When J disposes of the contract, the transaction is a sale of a regulated futures contract covered by paragraph (a)(9)(i) of this section.

(30) *Example 30: Closing transaction and sale*—(i) *Facts.* On January 15, Year 1, J purchases digital asset DE through Broker. On March 1, Year 1, J sells a regulated futures contract on DE through Broker. The contract expires on the last Friday in June, Year 1, at an exercise price of $5,000 for the contract. On the last Friday in June, Year 1, the fair market value of the DE covered by the regulated futures contract is $5,050. J delivers the DE in settlement of the regulated futures contract.

(ii) *Analysis.* J's delivery of the DE pursuant to the regulated futures contract is a closing transaction described in paragraph (a)(8) of this section that is treated as a sale of the regulated futures contract under paragraph (a)(9)(i) of this section. In addition, under paragraph (a)(9)(ii)(A)(*3*) of this section, J's delivery of digital asset DE pursuant to the settlement of the regulated futures contract is a sale of the underlying digital asset DE.

(c) * * *

(3) * * *

(i) * * *

(B) * * *

(*3*) The United States or a State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Commonwealth of Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa, a political subdivision of any of the foregoing, a wholly owned agency or instrumentality of any one or more of the foregoing, or a pool or partnership composed exclusively of any of the foregoing;

* * * * *

(C) * * *

(*2*) *Limitation for corporate customers.* For sales of covered securities acquired on or after January 1, 2012, a broker may not treat a customer as an exempt recipient described in paragraph (c)(3)(i)(B)(*1*) of this section based on the indicators of corporate status described in § 1.6049–4(c)(1)(ii)(A). However, for sales of all securities and for sales of digital assets, a broker may treat a customer as an exempt recipient if one of the following applies—

* * * * *

(8) *Special coordination rules for certain information returns relating to digital assets*—(i) *Digital assets that constitute securities or commodities.* For any sale of a digital asset under paragraph (a)(9)(ii) of this section that also constitutes a sale under paragraph (a)(9)(i) of this section of a security not described in paragraph (c)(8)(iii) of this section or of a commodity, the broker must report the sale only as a sale of a digital asset under paragraph (a)(9)(ii) of this section. *See* paragraph (d)(2)(i)(B) of this section for the information required to be reported for such a sale.

(ii) *Digital assets that constitute real estate.* For any transaction involving a sale of a digital asset under paragraph (a)(9)(ii) of this section that also constitutes a sale of reportable real estate under § 1.6045–4(b)(2) that is subject to reporting under § 1.6045–4(a), the broker must report the transaction as a sale only of reportable real estate under § 1.6045–4(b)(2).

(iii) *Digital assets that constitute contracts covered by section 1256(b).* For a sale of a digital asset that is also a contract covered by section 1256(b), the broker must report the sale only under paragraph (c)(5) of this section including, as appropriate, the application of the rules in paragraph (m)(3) of this section.

(iv) *Examples.* The following examples illustrates the rules of this paragraph (c)(8):

(A) *Example 1: Digital asset securities*—(*1*) *Facts.* Digital asset broker CRX effects on behalf of its customers sales of DSK, which is a security within the meaning of paragraph (a)(3) of this section. Transactions involving DSK are recorded on a cryptographically secured distributed ledger called the DSK blockchain. L is an individual customer of CRX that is not otherwise exempt from reporting. Using CRX's services, L exchanges 100 units of DSK for $200 in cash. CRX does not record this transaction on the DSK blockchain, but instead records the transaction on CRX's private ledger.

(*2*) *Analysis.* DSK is both a security under paragraph (a)(3) of this section and a digital asset under paragraph (a)(19) of this section. L's sale of 100 units of DSK for $200 in cash constitutes a sale of securities for cash under paragraph (a)(9)(i) of this section and a sale of digital assets in exchange for cash under paragraph (a)(9)(ii)(A)(*1*) of this section. Accordingly, pursuant to the coordination rule set forth in paragraph (c)(8)(i) of this section, CRX is required to report this transaction as a sale of digital assets under paragraph (a)(9)(ii) of this section and not as a sale of securities.

(B) *Example 2: Digital asset representing real estate*—(*1*) *Facts.* Digital asset broker CRX effects on behalf of its customers sales of tokenized real estate interests, including RE, which is a digital representation of value representing a partial ownership interest in a physical building in City X. Transactions involving RE are recorded on a cryptographically secured distributed ledger called the Z blockchain. S is an individual customer of CRX that is not otherwise exempt from reporting. S sells 1 unit of RE for $20,000 in cash to another customer of CRX, Individual B. The transfer of the RE token from S's digital asset address to B's digital asset address is recorded on the Z blockchain.

(*2*) *Analysis.* RE is both an interest in reportable real estate under § 1.6045–4(b)(2) and a digital asset under paragraph (a)(19) of this section. Although the sale of the RE unit by L to B for $20,000 in cash constitutes a sale of a digital asset in exchange for cash under paragraph (a)(9)(ii)(A)(*1*) of this section, L's sale of the RE unit also constitutes a real estate transaction under § 1.6045–4(b)(1) that is subject to reporting under § 1.6045–4(a). Accordingly, pursuant to the coordination rule set forth in paragraph (c)(8)(ii) of this section, CRX is required to report this transaction as a sale of a reportable real estate interest under § 1.6045–4(a) and not as a sale of a digital asset.

(C) *Example 3: Digital asset representing real estate*—(*1*) *Facts.* The facts are the same as in paragraph (c)(8)(iv)(B) of this section (the facts in *Example 2*), except that S's sale of the RE token to B is for $500 instead of $20,000 in cash.

(*2*) *Analysis.* Although RE constitutes both an interest in reportable real estate under § 1.6045–4(b)(2) and a digital asset under paragraph (a)(19) of this section, S's sale of RE is for a total consideration of less than $600. Pursuant to the *de minimis* transaction rule under § 1.6045–4(c)(1)(iii), the sale of RE is not subject to reporting under § 1.6045–4(a). Accordingly, CRX is required to report this transaction as a sale of a digital asset under paragraph (c) of this section.

(d) * * *

(2) * * *

(i) *Required information*—(A) *General rule for sales described in paragraph (a)(9)(i) of this section.* Except as provided in paragraph (c)(5) of this section, for each sale described in paragraph (a)(9)(i) of this section for which a broker is required to make a return of information under this section, the broker must report on Form 1099–B, ''Proceeds From Broker and Barter Exchange Transactions,'' or any successor form, the name, address, and taxpayer identification number of the customer, the property sold, the Committee on Uniform Security Identification Procedures (CUSIP) number of the security sold (if applicable) or other security identifier number that the Secretary may designate by publication in the **Federal Register** or in the Internal Revenue Bulletin (*see* § 601.601(d)(2) of this chapter), the adjusted basis of the security sold, whether any gain or loss with respect to the security sold is long-term or short-term (within the meaning of section 1222 of the Code), the gross proceeds of the sale, the sale date, and other information required by the form in the manner and number of copies required by the form. In addition, for a sale of a covered security on or after January 1, 2014, a broker must report on Form 1099–B whether any gain or loss is ordinary. *See* paragraph (m) of this section for additional rules related to options and paragraph (n) of this section for additional rules related to debt instruments. *See* paragraph (c)(8) of this section for rules related to sales of securities or sales of commodities under paragraph (a)(9)(i) of this section that are also sales of digital assets under paragraph (a)(9)(ii) of this section.

(B) *Required information for digital asset transactions.* For each sale of a digital asset described in paragraph (a)(9)(ii) of this section for which a broker is required to make a return of information under this section, the broker must report on the form prescribed by the Secretary the name, address, and taxpayer identification number of the customer; the name and number of units of the digital asset sold; the sale date and time; the gross proceeds amount (after reduction for the allocable digital asset transaction costs as defined and allocated pursuant to paragraph (d)(5)(iv) of this section); the transaction ID as defined in paragraph (a)(26) of this section in connection with the sale, if any; the digital asset address as defined in paragraph (a)(20) of this section (or digital asset addresses if multiple) from which the digital asset was transferred in connection with the sale, if any; whether the sale was for cash stored-value cards, or in exchange for services, or other property; and any other information required by the form in the manner and number of copies required by the form or instructions. In the case of any sale described in the previous sentence that is also described in paragraph (c)(8)(i) of this section, the broker must also report any information

required under paragraph (d)(2)(i)(A) of this section to the extent required by the form or instructions. For each such sale of a digital asset that was held by the broker in a hosted wallet on behalf of a customer and was previously transferred into an account at the broker (transferred-in digital asset), the broker must also report the date and time of such transfer in; the transaction ID of such transfer in, if any; the digital asset address (or digital asset addresses if multiple) from which the digital asset was transferred, if any; and the number of units transferred in by the customer. If a sale of a digital asset gives rise to digital asset transaction costs that are paid using digital assets, the sale of the digital asset to pay for the digital asset transaction costs must also be reported as a sale.

(C) *Acquisition information for sales of certain digital assets.* For each sale described in paragraph (a)(9) of this section on or after January 1, 2026, of a covered security defined in paragraph (a)(15)(i)(H), (J), or (K) of this section, for which a broker is required to make a return of information under paragraph (d)(2)(i) of this section, the broker must also report the adjusted basis of the covered security sold calculated in accordance with paragraph (d)(6) of this section, the date and time such covered security was purchased, and whether any gain or loss with respect to the covered security sold is long-term or short-term (within the meaning of section 1222).

(ii) *Specific identification of specified securities*—(A) *In general.* Except as provided in § 1.1012–1(e)(7)(ii), for a specified security described in paragraph (a)(14)(i) of this section sold on or after January 1, 2011, or for a specified security described in paragraph (a)(14)(ii) of this section sold on or after January 1, 2014, a broker must report a sale of less than the entire position in an account of a specified security that was acquired on different dates or at different prices consistently with a customer's adequate and timely identification of the security to be sold. *See* § 1.1012–1(c). If the customer does not provide an adequate and timely identification for the sale, the broker must first report the sale of securities in the account for which the broker does not know the acquisition or purchase date followed by the earliest securities purchased or acquired, whether covered securities or noncovered securities.

(B) *Specific identification of digital assets.* For a specified security described in paragraph (a)(14)(v) of this section, a broker must report a sale of less than the entire position in an account of such specified security that was acquired on different dates or at different prices consistently with the adequate identification of the digital asset to be sold. *See* § 1.1012–1(j)(3)(ii) for rules relating to the identification of units sold, exchanged, or transferred. If the customer does not provide an adequate and timely identification for the sale, the broker must first report the sale of the earliest units of the digital asset purchased within or transferred into the customer's account at the broker. Units of a digital asset are transferred into the customer's account as of the date and time of the transfer.

(iii) *Penalty relief for reporting information not subject to reporting*—(A) *Noncovered securities.* A broker is not required to report adjusted basis and the character of any gain or loss for the sale of a noncovered security if the return identifies the sale as a sale of a noncovered security. A broker that chooses to report this information for a noncovered security is not subject to penalties under section 6721 or 6722 of the Code for failure to report this information correctly if the return identifies the sale as a sale of a noncovered security. For purposes of this paragraph (d)(2)(iii)(A), a broker must treat a security for which a broker makes the single-account election described in § 1.1012–1(e)(11)(i) as a covered security.

(B) *Digital assets sold before applicability date.* A broker is not required to report the gross proceeds from the sale of a digital asset as described in paragraph (a)(9)(ii) of this section if the sale is effected prior to January 1, 2025, or the adjusted basis and the character of any gain or loss with respect to a sale of a covered security described in paragraph (a)(15)(i)(H), (J), or (K) of this section if the sale is effected prior to January 1, 2026. A broker that chooses to report this information on either the Form 1099–B, ''Proceeds From Broker and Barter Exchange Transactions,'' or when available the form prescribed by the Secretary pursuant to paragraph (d)(2)(i)(B) of this section is not subject to penalties under section 6721 or 6722 for failure to report this information correctly.

(iv) * * *

(A) *Transfer and issuer statements for securities.* When reporting a sale of a covered security other than a digital asset described in paragraph (a)(19) of this section, a broker must take into account all information, other than the classification of the security (such as stock), furnished on a transfer statement (as described in § 1.6045A–1) and all information furnished or deemed furnished on an issuer statement (as described in § 1.6045B–1), unless the statement is incomplete or the broker has actual knowledge that it is incorrect. * * *

(B) *Other information with respect to securities.* * * *

(v) *Failure to receive a complete transfer statement for securities.* A broker that has not received a complete transfer statement as required under § 1.6045A–1(a)(3) for a transfer of a specified security described in paragraphs (a)(14)(i) through (iv) of this section must request a complete statement from the applicable person effecting the transfer unless, under § 1.6045A–1(a), the transferor has no duty to furnish a transfer statement for the transfer. * * *

(vi) *Reporting by other parties after a sale of securities*— * * *

(vii) *Examples.* The following examples illustrate the rules of this paragraph (d)(2). Unless otherwise indicated, all events and transactions described in paragraphs (d)(2)(vii)(C) through (F) of this section (*Examples 3* through *6*) occur after the applicability date set forth in paragraph (q) of this section.

* * * * *

(C) *Example 3: Reporting required by broker providing hosted wallet services*—(*1*) *Facts.* TRX is a digital asset broker that also provides hosted wallet services. As part of TRX's regular operations, TRX does not record customer purchases of DE on the DE blockchain, but instead holds all digital assets in a TRX omnibus account. TRX, in turn, keeps a centralized record on which it allocates digital assets held on behalf of each of its customers. K, an individual not otherwise exempt from reporting, purchases 100 units of digital asset DE in a hosted wallet account at TRX. On March 9, Year 1, K directs TRX to transfer the 100 units to CRX, another digital asset broker that owns and operates a digital asset trading platform and provides hosted wallet services. CRX does not record customer purchases of DE on the DE blockchain, but instead holds all digital assets in a CRX omnibus account and keeps a centralized record on which it allocates digital assets held on behalf of each of its customers. The transaction ID of this transfer to CRX is kbcsj123. The digital asset address from which the units were transferred is 2hh77100. K directs CRX to sell the 100 units of DE on April 1, Year 1. CRX does not record K's sale on the DE blockchain, but instead reallocates the 100 units of DE previously allocated to K back to CRX's omnibus account.

(*2*) *Analysis.* Under paragraph (d)(2)(i)(B) of this section, CRX is

required to make a return of information with respect to K's sale of 100 units of DE. CRX must report the gross proceeds from the sale, the date (April 1, Year 1) and time of the sale, the name of the digital asset (DE) sold, and the number of units (100) sold, and any other information required by the form prescribed by the Secretary pursuant to paragraph (d)(2)(i)(B) of this section. CRX is not required to report the transaction ID of the sale transaction or the digital asset address from which the units were transferred because CRX did not record K's sale on the DE blockchain (and therefore there is no transaction ID or digital asset address in connection with the sale). Because K previously transferred the DE units treated as sold into K's account at CRX, paragraph (d)(2)(i)(B) of this section requires that CRX also report the transaction ID (kbcsj123) associated with the transferred-in digital assets, the digital asset address (2hh77100) from which the digital assets were transferred, and the date (March 9, Year 1) and time the units were transferred to CRX.

(D) *Example 4: Reporting required by broker not providing hosted wallet services*—(*1*) *Facts.* J, an individual not otherwise exempt from reporting, purchases 500 units of digital asset DE in an unhosted wallet. Of these 500 units purchased, 350 are held at digital asset address 1ss9925 and 150 are held at digital asset address 2tt8875. On April 28, Year 1, J exchanges all 500 units of DE for 500 units of ST using the services of P2X, a digital asset broker that effects sales of digital assets directly between customers by providing customers with access to automatically executing contracts. The transaction ID of J's exchange is ghj789.

(*2*) *Analysis.* Under paragraph (d)(2)(i)(B) of this section, P2X is required to make a return of information with respect to J's sale of 500 units of DE. P2X must report the gross proceeds from the sale, the date (April 28, Year 1) and time of the sale, the name of the digital asset (DE) sold, the number of units (500) sold, and any other information required by the form prescribed by the Secretary pursuant to paragraph (d)(2)(i)(B) of this section. Additionally, P2X must also report the transaction ID (ghj789) of the sale transaction and the digital asset addresses (350 units from 1ss9925 and 150 units from 2tt8875) from which the digital assets were transferred.

(E) *Example 5: Reporting required by real estate reporting person*—(*1*) *Facts.* J, an unmarried individual not otherwise exempt from reporting, agrees to exchange with B, an individual not otherwise exempt from reporting, J's principal residence, Blackacre, which has a fair market value of $225,000 for digital assets with a value of $225,000. Prior to closing, J provides CA with the certifications required under § 1.6045–4(c)(2)(iv) (to exempt the transaction from reporting under § 1.6045–4(a) due to Blackacre being J's principal residence). At closing, B transfers the digital assets directly from B's wallet to J's wallet. CA is the closing attorney and real estate reporting person under § 1.6045–4 with respect to the transaction.

(*2*) *Analysis.* CA is required to report. Although CA is not required to file an information report with respect to the gross proceeds received by J as a result of the exception to reporting provided under § 1.6045–4(c)(2), CA is required to report on the form prescribed by the Secretary pursuant to paragraph (d)(2)(i)(B) of this section the gross proceeds received by B ($225,000) in exchange for B's sale of digital assets in this transaction because B's exchange of digital assets for Blackacre is a sale under paragraph (a)(9)(ii)(B) of this section and CA is a broker under paragraph (a)(1) of this section notwithstanding the exception from reporting to J.

(F) *Example 6: Ordering rule*—(*1*) *Facts.* On August 1, Year 1, TP opens a hosted wallet account at CRX, a digital asset broker that owns and operates a digital asset trading platform, and purchases within the account 10 units of digital asset DE for $1 per unit. On January 1, Year 2, TP opens a hosted wallet account at BEX, another digital asset broker that owns and operates a digital asset trading platform, and purchases within this account 20 units of digital asset DE for $5 per unit. On August 1, Year 3, TP transfers the digital asset units held in TP's hosted wallet account with CRX into TP's hosted wallet account with BEX. On August 3, Year 3, TP directs BEX to sell 10 units of DE but does not specify which units are to be sold. BEX effects the sale on TP's behalf for $10 per unit.

(*2*) *Analysis.* TP did not make an adequate identification of the units to be sold in a sale of DE units that was less than TP's entire position in digital asset DE. Therefore, BEX must treat the units of digital asset DE sold according to the ordering rule provided in paragraph (d)(2)(ii)(B) of this section. Pursuant to that rule, the units sold must be attributed to the earliest units of digital asset DE purchased within or transferred into TP's account. Accordingly, the 10 units sold must be attributed to 10 of the 20 DE units purchased by TP on January 1, Year 2, in the BEX account because based on the information known to BEX these units were purchased prior to the date (August 1, Year 3) when TP transferred the other units purchased at CRX into the account.

* * * * *

(4) *Sale date and time*—(i) *In general.* For sales of property that are reportable under this section other than digital assets, a broker must report a sale as occurring on the date the sale is entered on the books of the broker.

(ii) *Special rules for digital asset sales.* For sales of digital assets that are effected when digitally recorded using cryptographically secured distributed ledger technology, such as a blockchain or similar technology, the broker must report the date and time of sale as the date and time when the transactions are recorded on the ledger. For sales of digital assets that are effected on a system outside of a blockchain, the broker must report the date and time of sale as the date and time when the transactions are recorded on that outside system without regard to the date and time that the transactions may be later recorded on a blockchain. Unless otherwise specified on the form prescribed by the Secretary pursuant to paragraph (d)(2)(i)(B) of this section or its instructions, all dates and times reported with respect to a digital asset transaction should be set forth in hours, minutes, and seconds using Coordinated Universal Time (UTC).

(iii) *Examples.* The following examples illustrate the rules of this paragraph (d)(4). Unless otherwise indicated, all events and transactions in the following examples occur after the applicability date set forth in paragraph (q) of this section.

(A) *Example 1: Digital assets sale date and time*—(*1*) *Facts.* J, an individual not otherwise exempt from reporting, purchases 500 units of digital asset DE in an unhosted wallet. On April 28, Year 1, J initiates an exchange of these 500 units of DE for 500 units of ST using the services of P2X, a digital asset broker that effects sales of digital assets by providing customers with access to automatically executing contracts. The completed exchange is recorded on the DE blockchain at 10:00:00 a.m. UTC on April 28, Year 1.

(*2*) *Analysis.* Under paragraph (d)(4) of this section, the date and time P2X must report with respect to J's sale is April 28, Year 1, at 10:00:00 a.m. UTC because that is the time the sale transaction was recorded on the DE distributed ledger.

(B) *Example 2: Digital assets sale date and time*—(*1*) *Facts.* The facts are the same as in paragraph (d)(4)(iii)(A)(*1*) of

this section (the facts in *Example 1*), except J initiates the exchange on December 31, Year 1, at 10:00:00 p.m. Eastern Standard Time (EST), which is the time zone J was in at the time of the exchange. The completed exchange is recorded on the DE blockchain at 3:00:00 a.m. UTC on January 1, Year 2.

(*2*) *Analysis.* Under paragraph (d)(4) of this section, P2X must report the date and time of the transaction using UTC time. Because the transaction was recorded at 3:00:00 a.m. UTC on January 1, Year 2, P2X must report J's sale in calendar year of Year2 as of that UTC date and time and not in calendar year of Year 1.

(C) *Example 3: Digital assets sale date and time*—(*1*) *Facts.* TRX is a digital asset broker that also provides hosted wallet services. As part of TRX's regular operations, TRX does not record customer purchases of DE on the DE blockchain, but instead holds all digital assets in a TRX omnibus account. TRX, in turn, keeps a centralized record on which it allocates digital assets held on behalf of each of its customers. On January 1, Year 1, K, an individual not otherwise exempt from reporting, purchases 100 units of digital asset DE in a hosted wallet account at TRX. On March 9, Year 4, K directs TRX to sell, and TRX sells, the 100 units of DE. TRX does not record K's sale on the DE blockchain, but instead debits from K's account the 100 units of DE previously allocated to K's account. TRX's records reflect that this debit was recorded on March 9, Year 4, at 10:45:00 a.m. UTC.

(*2*) *Analysis.* Under paragraph (d)(4) of this section, the date and time TRX must report with respect to K's sale is March 9, Year 4, at 10:45:00 a.m. UTC because that is the time the sale transaction was recorded on TRX's internal records.

(D) *Example 4: Information reporting required*—(*1*) *Facts.* The facts are the same as in paragraph (d)(4)(iii)(C)(*1*) of this section (the facts in *Example 3*), except TRX keeps its records using Eastern Standard Time (EST), and those records reflect that the debited units associated with K's transaction was recorded on March 9, Year 4, at 9:45:00 a.m. EST.

(*2*) *Analysis.* Under paragraph (d)(4) of this section, TRX must convert the time recorded in its records using EST into UTC time. Because 9:45:00 a.m. EST on March 9, Year 4, is equivalent to 2:45:00 p.m. UTC, the date and time TRX must report with respect to K's sale is March 9, Year 4, at 2:45:00 p.m. UTC.

(5) *Gross proceeds*—(i) *In general.* Except as otherwise provided in paragraph (d)(5)(ii) of this section with respect to digital asset sales, for purposes of this section, *gross proceeds* on a sale are the total amount paid to the customer or credited to the customer's account as a result of the sale reduced by the amount of any qualified stated interest reported under paragraph (d)(3) of this section and increased by any amount not paid or credited by reason of repayment of margin loans. In the case of a closing transaction (other than a closing transaction related to an option) that results in a loss, gross proceeds are the amount debited from the customer's account. For sales before January 1, 2014, a broker may, but is not required to, reduce gross proceeds by the amount of commissions and transfer taxes, provided the treatment chosen is consistent with the books of the broker. For sales on or after January 1, 2014, a broker must reduce gross proceeds by the amount of commissions and transfer taxes related to the sale of the security. For securities sold pursuant to the exercise of an option granted or acquired before January 1, 2014, a broker may, but is not required to, take the option premiums into account in determining the gross proceeds of the securities sold, provided the treatment chosen is consistent with the books of the broker. For securities sold pursuant to the exercise of an option granted or acquired on or after January 1, 2014, or for the treatment of an option granted or acquired on or after January 1, 2014, *see* paragraph (m) of this section. A broker must report the gross proceeds of identical stock (within the meaning of § 1.1012–1(e)(4)) by averaging the proceeds of each share if the stock is sold at separate times on the same calendar day in executing a single trade order and the broker executing the trade provides a single confirmation to the customer that reports an aggregate total price or an average price per share. However, a broker may not average the proceeds if the customer notifies the broker in writing of an intent to determine the proceeds of the stock by the actual proceeds per share and the broker receives the notification by January 15 of the calendar year following the year of the sale. A broker may extend the January 15 deadline but not beyond the due date for filing the return required under this section.

(ii) *Sales of digital assets.* The rules contained in paragraphs (d)(5)(ii)(A) through (D) of this section apply solely for purposes of this section.

(A) *In general.* Except as otherwise provided in this section, gross proceeds from the sale of a digital asset are equal to the sum of the total amount in U.S. dollars paid to the customer or credited to the customer's account from the sale plus the fair market value of any property or services received (including services giving rise to digital asset transaction costs), reduced by the amount of digital asset transaction costs, as defined and allocated under paragraph (d)(5)(iv) of this section. In the case of a debt instrument issued in exchange for the digital asset and subject to § 1.1001–1(g), the amount realized attributable to the debt instrument is determined under § 1.1001–7(b)(1)(iv) rather than by reference to the fair market value of the debt instrument. *See* paragraph (d)(5)(iv) of this section for a special rule setting forth how digital asset transaction costs are to be allocated in an exchange of one digital asset for a different digital asset. Fair market value is measured at the date and time the transaction was effected. Except as provided in the next sentence, in determining the fair market value of services or property received or credited in exchange for a digital asset, the broker must use a reasonable valuation method that looks to contemporaneous evidence of value, such as the purchase price of the services, goods or other property, the exchange rate, and the U.S. dollar valuation applied by the broker to effect the exchange. In determining the fair market value of services giving rise to digital asset transaction costs, the broker must look to the fair market value of the digital assets used to pay for such transaction costs.

In determining the fair market value of a digital asset, the broker may perform its own valuations or rely on valuations performed by a digital asset data aggregator as defined in paragraph (d)(5)(ii)(D) of this section, provided such valuations apply a reasonable valuation method for digital assets as described in paragraph (d)(5)(ii)(C) of this section.

(B) *Consideration value not readily ascertainable.* When valuing services or property (including digital assets) received in exchange for a digital asset, the value of what is received should ordinarily be identical to the value of the digital asset exchanged. If there is a disparity between the value of services or property received and the value of the digital asset exchanged, the gross proceeds received by the customer is the fair market value at the date and time the transaction was effected of the services or property, including digital assets, received. If the broker or digital asset data aggregator, in the case of digital assets, reasonably determines that the fair market value of the services or property received cannot be determined with reasonable accuracy, the fair market value of the received

services or property must be determined by reference to the fair market value of the transferred digital asset at the time of the exchange. *See* § 1.1001–7(b)(4). If the broker or digital asset data aggregator, in the case of a digital asset, reasonably determines that neither the value of the received services or property nor the value of the transferred digital asset can be determined with reasonable accuracy, the broker must report that the received services or property has an undeterminable value.

(C) *Reasonable valuation method for digital assets.* A reasonable valuation method for digital assets is a method that considers and appropriately weighs the pricing, trading volumes, market capitalization and other factors relevant to the valuation of digital assets traded through digital asset trading platforms. A valuation method is not a reasonable valuation method for digital assets if it, for example, gives an underweight effect to exchange prices lying near the median price value, an overweight effect to digital asset trading platforms having low trading volume, or otherwise inappropriately weighs factors associated with a price that would make that price an unreliable indicator of value.

(D) *Digital asset data aggregator.* A digital asset data aggregator is an information service provider that provides valuations of digital assets based on any reasonable valuation method.

(iii) *Digital asset transactions effected by digital asset payment processors.* The amount of gross proceeds under paragraph (d)(5)(ii) of this section received by a party who sells a digital asset through a digital asset payment processor is equal to: the sum of the amount paid in cash, or the fair market value of the amount paid in digital assets by that digital asset payment processor to a second party, plus any digital asset transaction costs withheld (whether withheld from the digital assets transferred by first party or withheld from the amount due to the second party); and reduced by the amount of digital asset transaction costs paid by or withheld from the first party, as defined and allocated under the rules of paragraph (d)(5)(iv) of this section. For purposes of this paragraph (d)(5)(iii), if a digital asset payment processor transfers digital assets to a second person pursuant to a processor agreement that temporarily fixes the exchange rate in a transaction described in paragraph (a)(22)(ii) of this section, the fair market value of the amount paid in digital assets is the amount determined by reference to the fixed exchange rate.

(iv) *Allocation of digital asset transaction costs.* The term digital asset transaction costs means the amount paid in cash or property (including digital assets) to effect the disposition or acquisition of a digital asset. Digital asset transaction costs include transaction fees, transfer taxes, and commissions. Except as provided in the following sentence, in the case of a sale or disposition of digital assets, the total digital asset transaction costs paid by the customer are allocable to the disposition of the digital assets. In an exchange of one digital asset for another digital asset differing materially in kind or in extent, one-half of any digital asset transaction costs paid by the customer in cash or property to effect the exchange is allocable to the disposition of the transferred digital asset and the other half of such costs is allocable to the acquisition of the received digital asset.

(v) *Examples.* The following examples illustrate the rules of this paragraph (d)(5). Unless otherwise indicated, all events and transactions in the following examples occur after the applicability date set forth in paragraph (q) of this section.

(A) *Example 1: Determination of gross proceeds*—(*1*) *Facts.* CRX, a digital asset broker, buys, sells, and exchanges various digital assets for cash or different digital assets on behalf of its customers. For this service, CRX charges a transaction fee equal to 1 unit of CRX's proprietary digital asset CM per transaction. Using the services of CRX, customer K, an individual not otherwise exempt from reporting, purchases 15 units of CM and 10 units of digital asset DE. On April 28, Year 1, when the CM units have a value of $2 per unit, the DE units have a value of $8 per unit, and digital asset ST units have a value of $0.80 per unit, K instructs CRX to exchange K's 10 units of DE for 100 units of digital asset ST. CRX charges K one unit of CM as a transaction fee for the exchange.

(*2*) *Analysis.* Under paragraph (d)(5)(iv) of this section, K has digital asset transaction costs of $2, which is the value of 1 CM unit. Under paragraph (d)(5)(ii)(A) of this section, the gross proceeds amount that CRX must report from K's sale of the 10 units of DE is equal to the fair market value of the 100 units of ST that K received (less one-half of the value of the CM unit sold to pay the digital asset transaction cost to CRX). The fair market value of the 100 units of ST at the date and time the transaction was effected is equal to $80 (the product of $0.80 and 100 units). One-half of such costs ($1) is allocable to the sale of the DE units. Accordingly, CRX must report gross proceeds of $79 from K's sale of the 10 units of DE. CRX must also report the gross proceeds from K's sale of one CM unit to pay for CRX's services. Under paragraph (d)(5)(ii)(A) of this section, the gross proceeds from K's sale of one unit of CM is equal to the fair market value of the digital assets used to pay for such transaction costs. Accordingly, CRX must report $2 as gross proceeds from K's sale of one unit of CM.

(B) *Example 2: Determination of gross proceeds*—(*1*) *Facts.* CPP, a digital asset payment processor, offers debit cards to its customers who hold digital asset FE in their accounts with CPP. The debit cards allow CPP's customers to use digital assets held in accounts with CPP to make payments to merchants who do not accept digital assets. CPP charges its card holders a 2% transaction fee for purchases made using the debit card and sets forth in its terms and conditions the process CPP will use to determine the exchange rate provided at the date and time of its customers' transactions. CPP has issued a debit card to B, an individual not otherwise exempt from reporting, who wants to make purchases using digital assets. B transfers 1,000 units of FE into B's account with CPP. B then uses the debit card to purchase merchandise from a U.S. retail merchant STR for $1,000. An exchange rate of 1 FE = $2 USD is applied to effect the transaction, based on the exchange rate at that date and time and pursuant to B's account agreement. To settle the transaction, CPP removes 510 units of FE from B's account equal to $1,020 ($1,000 plus a 2% transaction fee equal to $20). CPP then pays STR $1,000 in cash.

(*2*) *Analysis.* Under paragraph (d)(5)(iv) of this section, B has digital asset transaction costs of $20. Under paragraph (d)(5)(iii) of this section, the gross proceeds amount that CPP must report with respect to B's sale of the 510 units of FE to purchase the merchandise is $1,000, which is the sum of the amount of cash paid by CPP to STR plus the $20 digital asset transaction costs paid by B, reduced by the $20 digital asset transaction costs paid by B. CPP's payment of cash to STR is also a payment card transaction under § 1.6050W–1(b) subject to reporting under § 1.6050W–1(a).

(C) *Example 3: Determination of gross proceeds*—(*1*) *Facts.* STR, a U.S. retail corporation, advertises that it accepts digital asset FE as payment for its merchandise. Customers making purchases at STR using digital asset FE are directed to create an account with digital asset payment processor CXX, which, pursuant to a preexisting

agreement with STR, accepts digital asset FE in return for payments in cash made to STR. CXX charges a 2% transaction fee, which is paid by STR and not STR's customers. S, an individual not otherwise exempt from reporting, seeks to purchase merchandise from STR for $1,000. To effect payment, S is directed by STR to CXX, with whom S has an account. An exchange rate of 1 FE = $2 USD is applied to effect the purchase transaction. Pursuant to this exchange rate, S then transfers 500 units of FE to CXX, which, in turn, pays STR $980 ($1,000 less a 2% transaction fee equal to $20).

(*2*) *Analysis.* Under paragraph (d)(5)(iii) of this section, the gross proceeds amount that CXX must report with respect to this sale is $1,000, which is the sum of the amount in U.S. dollars paid by CPP to STR ($980) plus the $20 digital asset transaction costs withheld from the payment due to STR. Under paragraph (d)(5)(iv) of this section, S has no allocable digital asset transaction costs. Therefore, the $980 amount is not reduced by any digital asset transaction costs charged to STR because that fee was not paid by S. In addition, CXX's payment of cash to STR (plus the withheld transaction fee) may be reportable under § 1.6050W–1(a) as a third party network transaction under § 1.6050W–1(c) if CXX is a third party settlement organization under the definition in § 1.6050W–1(c)(2).

(D) *Example 4: Determination of gross proceeds in a real estate transaction*—(*1*) *Facts.* J, an unmarried individual not otherwise exempt from reporting, agrees to exchange with B, an individual not otherwise exempt from reporting, J's principal residence, Blackacre, which has a fair market value of $300,000 for cash in the amount of $75,000 and digital assets with a value of $225,000. At closing, B transfers the digital assets directly from B's wallet to J's wallet. CA is the closing attorney, real estate reporting person under § 1.6045–4, and broker under paragraph (a)(1) of this section with respect to the transaction.

(*2*) *Analysis.* CA is required to report on the form prescribed by the Secretary pursuant to paragraph (d)(2)(i)(B) of this section the gross proceeds received by B in exchange for B's sale of digital assets in this transaction. The gross proceeds amount to be reported under paragraph (d)(5)(ii)(A) of this section is equal to $225,000, which is the $300,000 value of Blackacre less $75,000 that B paid in cash. In addition, under § 1.6045–4, CA is required to report on Form 1099–S the $300,000 of gross proceeds received by J ($75,000 cash and $225,000 in digital assets) as consideration for J's disposition of Blackacre.

(6) * * *

(i) * * * For purposes of this section, the adjusted basis of a specified security is determined from the initial basis under paragraph (d)(6)(ii) of this section as of the date the specified security is acquired in an account, increased by the commissions and transfer taxes related to its sale to the extent not accounted for in gross proceeds as described in paragraph (d)(5) of this section. A broker is not required to consider transactions or events occurring outside the account except for an organizational action taken by an issuer of a specified security other than a digital asset during the period the broker holds custody of the security (beginning with the date that the broker receives a transferred security) reported on an issuer statement (as described in § 1.6045B–1) furnished or deemed furnished to the broker. * * *

(ii) * * *

(A) *Cost basis for specified securities acquired for cash.* For a specified security acquired for cash, the initial basis generally is the total amount of cash paid by the customer or credited against the customer's account for the specified security, increased by the commissions, transfer taxes, and digital asset transaction costs related to its acquisition. * * *

* * * * *

(C) *Digital assets acquired in exchange for property*—(*1*) *In general.* This paragraph (d)(6)(ii)(C) applies solely for purposes of this section. For a digital asset acquired in exchange for property that is not a debt instrument described in § 1.1012–1(h)(1)(v), the initial basis of the digital asset is the fair market value of the digital asset received at the time of the exchange, increased by any digital asset transaction costs allocable to the acquisition of the digital asset pursuant to the rules under paragraph (d)(6)(ii)(C)(*2*) of this section. The fair market value of the digital asset received must be determined using a reasonable valuation method as of the date and time the exchange transaction was effected. In valuing the digital asset received, the broker may perform its own valuations or rely on valuations performed by a digital asset data aggregator as defined in paragraph (d)(5)(ii)(D) of this section, provided such valuations apply a reasonable valuation method for digital assets as described in paragraph (d)(5)(ii)(C) of this section. If the broker or digital asset data aggregator reasonably determines that the fair market value of the digital asset received cannot be determined with reasonable accuracy, the fair market value of the digital asset received must be determined by reference to the property transferred at the time of the exchange. If the broker or digital asset data aggregator reasonably determines that neither the value of the digital asset received nor the value of the property transferred can be determined with reasonable accuracy, the fair market value of the received digital asset must be treated as zero. For a digital asset acquired in exchange for a debt instrument described in § 1.1012–1(h)(1)(v), the initial basis of the digital asset attributable to the debt instrument is the amount determined under § 1.1012–1(h)(1)(v).

(*2*) *Allocation of digital asset transaction costs.* Except as provided in the following sentence, in the case of an acquisition of digital assets, the total digital asset transaction costs paid by the customer are allocable to the digital assets received. In an exchange of one digital asset for a different digital asset differing materially in kind or in extent, one-half of the total digital asset transaction costs paid by the customer in cash or property to effect the exchange is allocable to the disposition of the transferred digital asset and one-half of such costs is allocable to the acquisition of the received digital asset for the purpose of determining basis.

(iii) * * *

(A) * * * A broker must apply the wash sale rules under section 1091 of the Code if both the sale and purchase transactions are of covered securities described in paragraphs (a)(15)(i)(A) through (G) of this section with the same CUSIP number or other security identifier number that the Secretary may designate by publication in the **Federal Register** or in the Internal Revenue Bulletin (*see* § 601.601(d)(2) of this chapter). * * *

* * * * *

(x) *Examples.* The following examples illustrate the rules of paragraphs (d)(5) and (6) of this section as applied to digital assets. Unless otherwise indicated, all events and transactions in the following examples occur using the services of CRX, an entity that owns and operates a digital asset trading platform and provides digital asset broker and hosted wallet services. In performing these services, CRX holds and records all customer purchase and sale transactions using CRX's centralized omnibus account. CRX does not record any of its customer's purchase or sale transactions on the relevant cryptographically secured distributed ledgers. Additionally, unless otherwise

indicated, all events and transactions in the following examples occur after the applicability date for reporting acquisition information set forth in paragraph (d)(2)(i)(C) of this section.

(A) *Example 1: Determination of basis in digital assets*—(*1*) *Facts.* As a digital asset broker, CRX generally charges transaction fees equal to 1 unit of CRX's proprietary digital asset CM per transaction. CRX does not, however, charge transaction fees for the purchase of CM. On March 9, Year 1, K, an individual not otherwise exempt from reporting, purchases 20 units of CM for $20 in K's account at CRX. A week later, on March 16, Year 1, K uses CRX's services to purchase 10 units of digital asset DE for $80 in cash. To pay for CRX's transaction fee, K directs CRX to debit 1 unit of CM (worth $1 at the time of transfer) from K's account.

(*2*) *Analysis.* The units of CM purchased by K are covered securities under paragraph (a)(15)(i) of this section because they were purchased in K's account at CRX by a broker (CRX) providing hosted wallet services. Accordingly, under paragraphs (d)(2)(i)(B) and (C) of this section, CRX must report the disposition by K of 1 unit of CM as a sale by K. The gross proceeds from that sale is equal to the fair market value of the CM units on March 16, Year 1 ($1), and the adjusted basis of that unit is equal to the amount K paid in cash for the CM unit on March 9, Year 1 ($1). This reporting is required regardless of the fact that there is $0 of gain or loss associated with this sale. Additionally, K's adjusted basis in the 10 units of DE acquired is equal to the initial basis in DE, $80 plus the $1 value of 1 unit of CM paid as a digital asset transaction cost for the purchase of the DE units.

(B) *Example 2: Determination of basis in digital assets*—(*1*) *Facts.* The facts are the same as in paragraph (d)(6)(x)(A)(*1*) of this section (the facts in *Example 1*), except that on June 12, Year 2, K instructs CRX to exchange K's 10 units of DE for 50 units of digital asset ST. CRX effects this exchange using its own omnibus account holdings of ST at an exchange rate of 1 DE = 5 ST. The total value of the 50 units of ST received by K is $100. K directs CRX to debit 1 CM unit (worth $2 at the time of the transfer) from K's account to pay CRX for the transaction fee.

(*2*) *Analysis.* Under paragraph (d)(5)(iv) of this section, K has digital asset transaction costs of $2, which is the value of 1 unit of CM. Under paragraphs (d)(2)(i)(B) and (C) of this section, CRX must report the gross proceeds from K's exchange of DE for ST (as a sale of K's 10 units of DE) and the gross proceeds from K's disposition of 1 unit of CM for CRX's services. Additionally, because the units of DE and CM were purchased in K's account at CRX by a broker (CRX) providing hosted wallet services, the units of DE and CM are covered securities under paragraph (a)(15)(i) of this section, and CRX must report K's adjusted basis in the 10 units of DE and 1 unit of CM. Under paragraph (d)(5)(ii)(A) of this section, the gross proceeds from K's sale of the DE units is $99 (the fair market value of the 50 units of ST that K received less one-half of the $2 digital asset transaction costs paid by K, or $1, paid in CM), that is allocable to the sale of the DE units. The gross proceeds from K's sale of the single unit of CM is $2. Under paragraph (d)(6) of this section, K's adjusted basis in the 10 units of DE is $81, resulting in a long-term capital gain to K of $18 ($99 − $81). K's adjusted basis in the ST units under paragraph (d)(6)(ii)(C) of this section is equal to the initial basis in ST, which is $101.

(C) *Example 3: Basis reporting for digital assets*—(*1*) *Facts.* On August 26, 2023, Customer P purchases 10 units of DE for $2 per unit in cash in an account at CRX. CRX charges P a fixed transaction fee of $5 in cash for the exchange. DE is a digital representation of value, the transfer of which is recorded on Blockchain DE, a cryptographically secured distributed ledger. On October 26, 2027, P directs CRX to exchange P's 10 units of DE for units of digital asset FG. At the time of the exchange, CRX determines that each unit of DE has a fair market value of $100 and each unit of FG has a fair market value of $50. As a result of this determination, CRX effects an exchange of P's 10 units of DE for 20 units of FG. CRX charges P a fixed transaction fee of $20 in cash for the exchange.

(*2*) *Analysis.* DE is a digital asset under paragraph (a)(19) of this section because it is a digital representation of value that is recorded on a cryptographically secured distributed ledger and, therefore, a specified security under paragraph (a)(14)(v) of this section. Because the 10 units of DE that P exchanged for FG through CRX were acquired in an account at CRX on August 26, 2023, which is after January 1, 2023, these units are covered securities under paragraph (a)(15)(i)(J) of this section. Under paragraph (d)(5)(iv) of this section, P has digital asset transaction costs of $20. For the transaction that took place on October 26, 2027, under paragraph (d)(2)(i)(B) of this section, CRX must report the amount of gross proceeds from the sale of DE in the amount of $990 (the $1,000 fair market value of FG received on the date and time of transfer, less one-half of the digital asset transaction costs of $20, or $10 allocated to the sale). CRX must also report the $10 digital asset transaction costs allocated to the sale. Additionally, CRX must also report the adjusted basis of P's DE units under paragraph (d)(2)(i)(C) of this section because they are covered securities. Under paragraph (d)(6)(ii)(C) of this section, the adjusted basis of P's DE units is equal to $25, which the $20 paid in cash for the 10 units increased by the $5 digital asset transaction costs allocable to that purchase. Finally, P's adjusted basis in the 20 units of FG is equal to the fair market value of the FG received, $1,000, plus one-half of the $20 transaction fee, or $10, which is allocated under paragraph (d)(6)(ii)(C)(*2*) of this section to the acquisition of P's FG units.

* * * * *

(e) * * *

(2) * * *

(iii) *Coordination rules for exchanges of digital assets made through barter exchanges.* Exchange transactions involving the exchange of one digital asset held by one customer of a broker for a different digital asset held by a second customer of the same broker must be treated as a sale under paragraph (a)(9)(ii) of this section subject to reporting under paragraphs (c) and (d) of this section, and not as an exchange of personal property through a barter exchange subject to reporting under paragraphs (e) and (f) of this section, with respect to both customers involved in the exchange transaction. In the case of an exchange transaction that involves the transfer of a digital asset for personal property or services that are not also digital assets, if the digital asset payment also is a reportable payment transaction subject to reporting by the barter exchange under § 1.6050W–1(a)(1), the exchange transaction must be treated as a reportable payment transaction and not as an exchange of personal property through a barter exchange subject to reporting under paragraphs (e) and (f) of this section with respect to the member or client disposing of personal property or services. Additionally, an exchange transaction described in the previous sentence must be treated as a sale under paragraph (a)(9)(ii)(D) of this section subject to reporting under paragraphs (c) and (d) of this section and not as an exchange of personal property through a barter exchange subject to reporting under paragraphs (e) and (f) of this section with respect to the member or client disposing of the digital asset. Nothing in this paragraph (e)(2)(iii) may

be construed to mean that any broker is or is not properly classified as a barter exchange.

* * * * *

(g) * * *

(1) * * * No return of information is required to be made by a broker with respect to a customer who is considered to be an exempt foreign person under paragraphs (g)(1)(i) through (iii) or paragraph (g)(4) of this section. *See* paragraph (a)(1) of this section for when a person is not treated as a broker under this section for a sale effected at an office outside the United States. *See* paragraphs (g)(1)(i) through (g)(3) of this section for rules relating to sales as defined in paragraph (a)(9)(i) of this section and *see* paragraph (g)(4) of this section for rules relating to sales of digital assets.

* * * * *

(2) *Barter exchange.* No return of information is required by a barter exchange under the rules of paragraphs (e) and (f) of this section with respect to a client or a member that the barter exchange may treat as an exempt foreign person pursuant to the procedures described in paragraph (g)(1) of this section.

(3) * * *

(iii) * * *

(A) * * * For purposes of this paragraph (g), a sale as defined in paragraph (a)(9)(i) of this section (relating to sales other than sales of digital assets) is considered to be effected by a broker at an office outside the United States if, in accordance with instructions directly transmitted to such office from outside the United States by the broker's customer, the office completes the acts necessary to effect the sale outside the United States. * * *

* * * * *

(4) *Rules for sales of digital assets.* The rules of this paragraph (g)(4) apply to a sale of a digital asset as defined in paragraph (a)(9)(ii) of this section. *See* paragraph (a)(1) of this section for when a person is treated as a broker under this section with respect to a sale of a digital asset. *See* paragraph (c) of this section for rules requiring brokers to report sales. *See* paragraph (g)(1) of this section providing that no return of information is required to be made by a broker effecting a sale of a digital asset for a customer who is considered to be an exempt foreign person under this paragraph (g)(4).

(i) *Definitions.* The following definitions apply for purposes of this section.

(A) *U.S. digital asset broker.* A *U.S. digital asset broker* is a U.S. payor or U.S. middleman as defined in § 1.6049–5(c)(5), other than a controlled foreign corporation within the meaning of § 1.6049–5(c)(5)(i)(C), that effects sales of digital assets on behalf of others.

(B) *CFC digital asset broker.* A *CFC digital asset broker* is a controlled foreign corporation within the meaning of § 1.6049–5(c)(5)(i)(C) that effects sales of digital assets on behalf of others.

(C) *Non-U.S. digital asset broker.* A *non-U.S. digital asset broker* is a non-U.S. payor or non-U.S. middleman as defined in § 1.6049–5(c)(5) that effects sales of digital assets on behalf of others.

(D) *Conducting activities as a money services business.* A CFC digital asset broker or a non-U.S. digital asset broker is conducting activities as a money services business (conducting activities as a money services business (MSB)) under this paragraph (g)(4) with respect to its sales of digital assets, except as provided in the next sentence, if it is registered with the Department of the Treasury under 31 CFR 1022.380 or any successor guidance as an MSB, as defined in 31 CFR 1010.100(ff) or any successor guidance. Notwithstanding any registration as an MSB described in the preceding sentence, solely for purposes of this paragraph (g)(4), CFC digital asset brokers and non-U.S. digital asset brokers may not be treated as conducting activities as an MSB with respect to any sale of a digital asset that is effected by that broker on behalf of a customer at a foreign kiosk to the extent provided in paragraph (g)(4)(i)(E) of this section.

(E) *Foreign kiosk.* A *foreign kiosk* means a physical electronic terminal that is located outside the United States and is owned or operated by a CFC digital asset broker or a non-U.S. digital asset broker that is not required under the Bank Secrecy Act to implement an anti-money laundering program (AML program), file reports, or otherwise comply with requirements for MSBs under the Bank Secrecy Act with respect to sales effected on behalf of its customers at the foreign kiosk.

(ii) *Rules for U.S. digital asset brokers*—(A) *Place of effecting sale.* For purposes of this section, a sale of a digital asset that is effected by a U.S. digital asset broker is considered a sale effected at an office inside the United States.

(B) *Determination of foreign status.* A U.S. digital asset broker may treat a customer as an exempt foreign person with respect to a sale effected at an office inside the United States provided that, prior to the payment to such customer of the gross proceeds from the sale, the broker has a beneficial owner withholding certificate described in § 1.1441–1(e)(2)(i) that the broker may treat as valid under § 1.1441–1(e)(2)(ii) and that satisfies the requirements of paragraph (g)(4)(vi) of this section. Additionally, a U.S. digital asset broker may treat a customer as an exempt foreign person with respect to a sale effected at an office inside the United States under an applicable presumption rule as provided in paragraph (g)(4)(vi)(A)(*2*) of this section. A beneficial owner withholding certificate provided by an individual must include a certification that the beneficial owner has not been, and at the time the certificate is furnished reasonably expects not to be, present in the United States for a period aggregating 183 days or more during each calendar year to which the certificate pertains. *See* paragraphs (g)(4)(vi)(A) through (D) of this section for additional rules applicable to withholding certificates, when a broker may rely on a withholding certificate, presumption rules that apply in the absence of documentation, and rules for customers that are joint account holders. *See* paragraph (g)(4)(vi)(E) of this section for the extent to which a U.S. digital asset broker may treat a customer as an exempt foreign person with respect to a payment treated as made to a foreign intermediary, flow-through entity or certain U.S. branches. *See* paragraph (g)(4)(vi)(F) of this section for a transition rule for preexisting accounts.

(iii) *Rules for CFC digital asset brokers not conducting activities as MSBs.* This paragraph (g)(4)(iii) applies to CFC digital asset brokers that are not conducting activities as MSBs. *See* paragraph (g)(4)(v) of this section for rules applicable to CFC digital asset brokers that are conducting activities as MSBs.

(A) *Place of effecting sale.* For purposes of this section, a sale of a digital asset that is effected by a CFC digital asset broker subject to the rules of this paragraph (g)(4)(iii) is considered to be effected at an office outside the United States. *See* § 31.3406(g)–1(e) of this chapter for an exception to backup withholding on gross proceeds from a sale of a digital asset effected at an office outside the United States by a CFC digital asset broker unless the broker has actual knowledge that the payee is a U. S. person.

(B) *Determination of foreign status.* A CFC digital asset broker subject to the rules of this paragraph (g)(4)(iii) may treat a customer as an exempt foreign person with respect to a sale provided that, prior to the payment to such customer of the gross proceeds from the sale, the broker has either a beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section

or the documentary evidence described in § 1.1471–3(c)(5)(i) to support the customer's foreign status, pursuant to the requirements of paragraph (g)(4)(vi) of this section. Additionally, a CFC digital asset broker may treat the customer as an exempt foreign person with respect to a sale under an applicable presumption rule as provided in paragraph (g)(4)(vi)(A)(*2*) of this section. *See* paragraphs (g)(4)(vi)(A) through (D) of this section for additional rules applicable to withholding certificates and documentary evidence, when a broker may rely on documentation, presumption rules that apply in the absence of documentation, and rules for customers that are joint account holders. *See* paragraph (g)(4)(vi)(E) of this section for the extent to which a CFC digital asset broker subject to the rules of this paragraph (g)(4)(iii) may treat a customer as an exempt foreign person with respect to a payment treated as made to a foreign intermediary, flow-through entity or certain U.S. branches. *See* paragraph (g)(4)(vi)(F) of this section for a transition rule for preexisting accounts.

(iv) *Rules for non-U.S. digital asset brokers not conducting activities as MSBs.* This section applies to non-U.S. digital asset brokers that are not conducting activities as MSBs. *See* paragraph (g)(4)(v) of this section for rules applicable to non-U.S. digital asset brokers that are conducting activities as MSBs.

(A) *Sale outside the United States.* For purposes of this section and except as provided in paragraph (g)(4)(iv)(B) of this section, a digital asset sale that is effected by a non-U.S. digital asset broker subject to the rules of this paragraph (g)(4)(iv) is considered to be effected at an office outside the United States.

(B) *Sale treated as effected at an office inside the United States as a result of U.S. indicia.* For purposes of this section, a sale that is otherwise considered to be effected at an office outside the United States under paragraph (g)(4)(iv)(A) of this section by a non-U.S. digital asset broker must nevertheless be considered to be effected by that broker at an office inside the United States if, before the sale is effected, the broker collects documentation or has other information that is part of the broker's account information for the customer (including information collected with respect to the customer pursuant to the broker's compliance with applicable AML program requirements that show any of the following indicia (referred to in this paragraph (g)(4) as U.S. indicia)):

(*1*) A customer's communication with the broker using a device (such as a computer, smart phone, router, or server) that the broker has associated with an internet Protocol (IP) address or other electronic address indicating a location within the United States;

(*2*) A permanent residence address (as defined in § 1.1441–1(c)(38)) in the U.S. or a U.S. mailing address for the customer, a current U.S. telephone number and no non-U.S. telephone number for the customer, or the broker's classification of the customer as a U.S. person in its records;

(*3*) Cash paid to the customer by a transfer of funds into an account maintained by the customer in the United States, or cash deposited with the broker by a transfer of funds from such an account, or if the customer's account is linked to a bank or financial account maintained within the United States. For purposes of the preceding sentence, an account maintained by the customer in the United States includes an account at a bank or financial institution maintained within the United States but does not include an international account as defined in § 1.6049–5(e)(4);

(*4*) One or more digital asset deposits into the customer's account at the broker were transferred from, or one or more digital asset withdrawals from the customer's account were transferred to, a digital asset broker that the broker knows or has reason to know to be organized within the United States, or the customer's account is linked to a digital asset broker that the broker knows or has reason to know to be organized within the United States; or

(*5*) An unambiguous indication of a U.S. place of birth for the customer.

(C) *Consequences of treatment as sale effected at an office inside the United States.* If a non-U.S. digital asset broker subject to the rules of this paragraph (g)(4)(iv) is required to treat a sale as effected at an office inside the United States pursuant to paragraph (g)(4)(iv)(B) of this section, the broker is required to report the sale to the extent required by paragraph (c) of this section unless the broker determines the customer is an exempt foreign person. *See,* however, § 31.3406(g)–1(e) of this chapter for an exception to backup withholding on gross proceeds from a sale of a digital asset effected by a non-U.S. digital asset broker that is not conducting activities as an MSB unless the broker has actual knowledge that the payee is a U.S. person. The broker can treat the customer as an exempt foreign person if it obtains documentation permitted under paragraph (g)(4)(iv)(D) of this section and applies the rules of paragraphs (g)(4)(vi)(A) through (D) of this section with respect to the documentation, or when the broker may treat the customer as an exempt foreign person under an applicable presumption rule as provided in paragraph (g)(4)(vi)(A)(*2*) of this section. In applying paragraph (g)(4)(vi)(B) (relating to reliance on beneficial owner withholding certificates) or (C) of this section (relating to reliance on documentary evidence), however, the broker is not required to treat documentation as incorrect or unreliable solely as a result of the U.S. indicia that required the broker to obtain such documentation with respect to a customer. *See* paragraph (g)(4)(vi)(E) of this section for the extent to which a non-U.S. digital asset broker subject to the rules of this paragraph (g)(4)(iv) may treat a customer as an exempt foreign person with respect to a payment treated as made to a foreign intermediary, flow-through entity or certain U.S. branches. *See* paragraph (g)(4)(vi)(F) of this section for a transition rule for preexisting accounts.

(D) *Type of documentation that may be obtained where there are U.S. indicia*—(*1*) *Collection of U.S. indicia other than U.S. place of birth.* A non-U.S. digital asset broker subject to the rules of this paragraph (g)(4)(iv) that is considered to effect a sale at an office inside the United States under paragraph (g)(4)(iv)(B) of this section due to the collection of a document or possession of other information showing any of the U.S. indicia that is described in paragraphs (g)(4)(iv)(B)(*1*) through (*4*) of this section may treat the customer as an exempt foreign person provided that, prior to the payment to such customer, the broker has either a valid beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section for the customer, or both—

(*i*) The documentary evidence described in § 1.1471–3(c)(5)(i) to support the customer's foreign status; and

(*ii*) A written representation from the customer stating that: ''I, the account owner represent and warrant that I am not a U.S. person for purposes of U.S. Federal income tax and that I am not acting for, or on behalf of, a U.S. person. I understand that a false statement or misrepresentation of tax status by a U.S. person could lead to penalties under U.S. law. If my tax status changes and I become a U.S. citizen or a resident, I agree to notify [insert broker's name] within 30 days.''

(*2*) *Collection of information showing U.S. place of birth.* A non-U.S. digital asset broker subject to the rules of this paragraph (g)(4)(iv) that is considered to

effect a sale at an office inside the United States due to the collection of a document or possession of information showing the U.S. indicia that is described in paragraph (g)(4)(iv)(B)(*5*) of this section with respect to a customer may treat the customer as an exempt foreign person if it obtains documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing the customer's citizenship in a country other than the United States and either—

(*i*) A copy of the customer's Certificate of Loss of Nationality of the United States; or

(*ii*) A valid beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section for the customer and a reasonable written explanation of the customer's renunciation of U.S. citizenship or the reason the customer did not obtain U.S. citizenship at birth.

(v) *Rules for CFC digital asset brokers and non-U.S. digital asset brokers conducting activities as MSBs.* A CFC digital asset broker or a non-U.S. digital asset broker that is conducting activities as an MSB as described in paragraph (g)(4)(i)(D) of this section with respect to a sale of a digital asset must apply the rules in paragraph (g)(4)(ii) of this section to that sale as if that broker were a U.S. digital asset broker to determine the location where the sale is effected and the foreign status of the customer.

(vi) *Rules applicable to brokers that obtain or are required to obtain documentation for a customer and presumption rules*—(A) *In general.* Paragraph (g)(4)(vi)(A)(*1*) of this section describes rules applicable to documentation permitted to be used under this paragraph (g)(4) to determine whether a customer may be treated as an exempt foreign person. Paragraph (g)(4)(vi)(A)(*2*) of this section provides presumption rules that apply if the broker does not have documentation on which the broker may rely to determine a customer's status. Paragraph (g)(4)(vi)(A)(*3*) of this section provides a grace period for obtaining documentation in circumstances where there are indicia that a customer is a foreign person. Paragraph (g)(4)(vi)(A)(*4*) of this section provides rules relating to blocked income. Paragraph (g)(4)(vi)(B) of this section provides rules relating to reliance on beneficial ownership withholding certificates to determine whether a customer is an exempt foreign person. Paragraph (g)(4)(vi)(C) of this section provides rules relating to reliance on documentary evidence to determine whether a customer is an exempt foreign person. Paragraph (g)(4)(vi)(D) of this section provides rules relating to customers that are joint account holders. Paragraph (g)(4)(vi)(E) of this section provides special rules for a customer that is a foreign intermediary, a flow-through entity, or certain U.S. branches. Paragraph (g)(4)(vi)(F) of this section provides a transition rule for obtaining documentation to treat a customer as an exempt foreign person.

(*1*) *Documentation of foreign status.* A broker may treat a customer as an exempt foreign person when the broker obtains valid documentation permitted to support a customer's foreign status as described in paragraph (g)(4)(ii), (iii) or (iv) of this section that the broker can reliably associate (within the meaning of § 1.1441–1(b)(2)(vii)(A)) with a payment of gross proceeds, provided that the broker is not required to treat the documentation as unreliable or incorrect under paragraph (g)(4)(vi)(B) or (C) of this section. For rules regarding the validity period of a withholding certificate or documentary evidence, retention of documentation, electronic transmission of documentation, information required to be provided on a withholding certificate, who may sign a withholding certificate, when a substitute withholding certificate may be accepted, and general reliance rules on documentation (including when a prior version of a withholding certificate may be relied upon), the provisions of §§ 1.1441–1(e)(4)(i) through (ix) and 1.6049–5(c)(1)(ii) apply, with the following modifications—

(*i*) The provisions in § 1.1441–1(e)(4)(i) through (ix) apply by substituting the terms ''broker'' and ''customer'' for the terms ''withholding agent'' and ''payee,'' respectively, and disregarding the fact that the provisions under § 1.1441–1 apply only to amounts subject to withholding under chapter 3 of the Code;

(*ii*) The provisions of § 1.6049–5(c)(1)(ii) (relating to general requirements for when a payor may rely upon and must maintain documentary evidence with respect to a payee) apply by substituting the terms ''broker'' and ''customer'' for the terms ''payor'' and ''payee,'' respectively;

(*iii*) To apply § 1.1441–1(e)(4)(viii) (reliance rules for documentation), the reference to § 1.1441–7(b)(4) through (6) is replaced by the provisions of paragraph (g)(4)(vi)(B) or (C) of this section, as applicable, and the reference to § 1.1441–6(c)(2) is disregarded; and

(*iv*) To apply § 1.1441–1(e)(4)(viii) (reliance rules for documentation) and (ix) (certificates to be furnished to a withholding agent for each obligation unless an exception applies), the provisions applicable to a financial institution apply to a broker described in this paragraph (g)(4) whether or not it is a financial institution.

(*2*) *Presumption rules.* If a broker is not permitted to treat a customer as an exempt foreign person under paragraph (g)(4)(vi)(A)(*1*) of this section because the broker has not collected the documentation permitted to be collected under this paragraph (g)(4) or is not permitted to rely on the documentation it has collected, the broker may determine the classification of a customer (as an individual, entity, etc.) by applying the presumption rules of § 1.1441–1(b)(3)(ii), except that references in § 1.1441–1(b)(3)(ii)(B) to exempt recipient categories under section 6049 are replaced by the exempt recipient categories in paragraph (c)(3)(i) of this section. With respect to a customer that the broker has classified as an individual, a broker that is a U.S. digital asset broker or that is a CFC digital asset broker or a non-U.S. digital asset broker that in each case is conducting activities as an MSB must treat the customer as a U.S. person. A broker that is a CFC digital asset broker or a non-U.S. digital asset broker that in each case is not conducting activities as an MSB is required to treat a customer that it has classified as an individual as a U.S. person only when the broker has documentation or other information that is part of the broker's account information for the customer (including information collected with respect to the customer pursuant to the broker's compliance with applicable AML program requirements) or a withholding certificate that show any of the U.S. indicia described in paragraphs (g)(4)(iv)(B)(*1*) through (*5*) of this section. With respect to a customer that the broker has classified as an entity, the broker may determine the status of the customer as U.S. or foreign by applying §§ 1.1441–1(b)(3)(iii)(A) and 1.1441–5(d) and (e)(6), except that § 1.1441–1(b)(3)(iii)(A)(*1*)(*iv*) does not apply. Notwithstanding the preceding provisions of this paragraph (g)(4)(vi)(A)(*2*), a broker may not treat a customer as a foreign person under this paragraph (g)(4)(vi)(A)(*2*) if the broker has actual knowledge that the customer is a U.S. person. For presumption rules to treat a payment as made to an intermediary or flow-through entity and whether the payment is also treated as made to an exempt foreign person, *see* paragraph (g)(4)(vi)(E) of this section.

(*3*) *Grace period to collect valid documentation in the case of indicia of a foreign customer.* If a broker has not obtained valid documentation that it can reliably associate with a payment of gross proceeds to a customer to treat the customer as an exempt foreign person,

or if the broker is unable to rely upon documentation under the rules described in paragraph (g)(4)(vi)(A)(*1*) of this section or is required to treat documentation obtained for a customer as unreliable or incorrect (after applying paragraphs (g)(4)(vi)(B) and (C) of this section), the broker may apply the grace period described in § 1.6049–5(d)(2)(ii) (generally allowing in certain circumstances a payor to treat an account as owned by a foreign person for a 90 day period). In applying § 1.6049–5(d)(2)(ii), references to ''securities described in § 1.1441–6(c)(2)'' are replaced with ''digital assets.''

(*4*) *Blocked income.* A broker may apply the provisions in paragraph (g)(1)(iii) of this section to treat a customer as an exempt foreign person when the proceeds are blocked income as described in § 1.1441–2(e)(3).

(B) *Reliance on beneficial ownership withholding certificates to determine foreign status.* For purposes of determining whether a customer may be treated as an exempt foreign person under this section, except as otherwise provided in this paragraph (g)(4)(vi)(B), a broker may rely on a beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section unless the broker has actual knowledge or reason to know that the certificate is unreliable or incorrect. Reason to know is limited to when the broker has in its account opening files or other files pertaining to the account (account information), including documentation collected for purposes of an AML program or the beneficial owner withholding certificate, any of the U.S. indicia set forth in paragraphs (g)(4)(iv)(B)(*1*) through (*5*) of this section. A broker will not be considered to have reason to know that a certificate is unreliable or incorrect based on documentation collected for an AML program until the date that is 30 days after the account is opened. A broker may rely, however, on a beneficial owner withholding certificate notwithstanding the presence of any of the U.S. indicia set forth in paragraphs (g)(4)(iv)(B)(*1*) through (*5*) of this section on the withholding certificate or in the account information for a customer in the following circumstances:

(*1*) With respect to any of the U.S. indicia described in paragraphs (g)(4)(iv)(B)(*1*) through (*4*) of this section, the broker has in its possession for a customer who is an individual documentary evidence establishing foreign status (as described in § 1.1471–3(c)(5)(i)) that does not contain a U.S. address and the customer provides the broker with a reasonable explanation (as defined in § 1.1441–7(b)(12)) from the customer, in writing, supporting the claim of foreign status. Notwithstanding the preceding sentence, in a case in which the broker classified an individual customer as a U.S. person in its account information, the broker may treat the customer as an exempt foreign person only if it has in its possession documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship in a country other than the United States. In the case of a customer that is an entity, the broker may treat the customer as an exempt foreign person if it has in its possession documentation establishing foreign status that substantiates that the entity is actually organized or created under the laws of a foreign country. Additionally, regardless of whether the customer is an individual or an entity, a broker may rely on a beneficial owner withholding certificate for purposes of this paragraph (g)(4)(vi)(B)(*1*) when—

(*i*) The broker is a non-U.S. person;

(*ii*) The broker is required to report the payment made to the customer annually on a tax information statement that is filed with the tax authority of the country where the customer is resident as part of that country's resident reporting requirements; and

(*iii*) That country has a tax information exchange agreement or income tax treaty in effect with the United States.

(*2*) With respect to the U.S. indicia described in paragraph (g)(4)(iv)(B)(*5*) of this section, the broker has in its possession documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship in a country other than the United States and the broker has in its possession either a copy of the customer's Certificate of Loss of Nationality of the United States or a reasonable written explanation of the customer's renunciation of U.S. citizenship or the reason the customer did not obtain U.S. citizenship at birth.

(C) *Reliance on documentary evidence to determine foreign status.* For purposes of treating a customer as an exempt foreign person under this section, except as otherwise provided in this paragraph (g)(4)(vi)(C), a broker may rely on documentary evidence described in § 1.1471–3(c)(5)(i) (when the broker is otherwise permitted to do so under paragraph (g)(4)(iii)(B) or (g)(4)(iv)(B) of this section) unless the broker has actual knowledge or reason to know that the documentary evidence is unreliable or incorrect. Reason to know is limited to when the broker has in its account opening files or other files pertaining to the account, including documentation collected for purposes of an AML program, any of the U.S. indicia set forth in paragraphs (g)(4)(iv)(B)(*1*) through (*5*) of this section. A broker will not be considered to have reason to know that documentary evidence is unreliable or incorrect based on documentation collected for an AML program until the date that is 30 days after the account is opened. A broker may rely, however, on documentary evidence notwithstanding the presence of any of U.S. indicia set forth in paragraphs (g)(4)(iv)(B)(*1*) through (*5*) of this section on the documentary evidence or in the account information for a customer in the following circumstances:

(*1*) With respect to any of the U.S. indicia described in paragraphs (g)(4)(iv)(B)(*1*) through (*4*) of this section, the broker has in its possession for a customer who is an individual additional documentary evidence establishing foreign status (as described in § 1.1471–3(c)(5)(i)) that does not contain a U.S. address and the customer provides the broker with a reasonable explanation (as defined in § 1.1441–7(b)(12)), in writing, supporting the claim of foreign status. In the case of a customer that is an entity, the broker may treat the customer as an exempt foreign person if the broker has in its possession documentation establishing foreign status that substantiates that the entity is actually organized or created under the laws of a foreign country. In lieu of the documentary evidence or documentation described in this paragraph (g)(4)(vi)(C)(*1*), a broker may treat a customer (regardless of whether an individual or entity) as an exempt foreign person if—

(*i*) The broker has in its possession a beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section for the customer that contains a permanent residence address (as defined in § 1.1441–1(c)(38)) outside the United States and a mailing address outside the United States (or if a mailing address is inside the United States the customer provides a reasonable explanation in writing or additional documentary evidence sufficient to establish the customer's foreign status); or

(*ii*) The broker is a non-U.S. person and the conditions specified in paragraphs (g)(4)(vi)(B)(*1*)(*ii*) and (*iii*) of this section are satisfied.

(*2*) With respect to the U.S. indicia described in paragraph (g)(4)(iv)(B)(*5*) of this section, the broker has in its possession documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship in a country other than the United States and either—

(*i*) A copy of the customer's Certificate of Loss of Nationality of the United States; or

(*ii*) A valid beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section for the customer and a reasonable written explanation of the customer's renunciation of U.S. citizenship or the reason the customer did not obtain U.S. citizenship at birth.

(D) *Joint owners.* In the case of amounts paid to customers that are joint account holders for which a certificate or documentation is required as a condition for being exempt from reporting under this paragraph (g)(4), such amounts are presumed made to U.S. payees who are not exempt recipients (as defined in paragraph (c)(3)(i)(B) of this section) when the conditions of paragraph (g)(3)(i) of this section are met.

(E) *Special rules for customer that is a foreign intermediary, a flow-through entity, or certain U.S. branches*—(*1*) *Foreign intermediaries.* For purposes of this paragraph (g)(4), a broker may determine the status of a customer as a foreign intermediary (as defined in § 1.1441–1(c)(13)) by reliably associating (under § 1.1441–1(b)(2)(vii)) a payment of gross proceeds with a valid foreign intermediary withholding certificate described in § 1.1441–1(e)(3)(ii) or (iii), without regard to whether the withholding certificate contains a withholding statement and withholding certificates or other documentation for each account holder. A broker that is a U.S. digital asset broker and a non-U.S. digital asset broker or a CFC digital asset broker that in each case is conducting activities as an MSB, that does not have a valid foreign intermediary withholding certificate or a valid beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section for the customer applies the presumption rules in § 1.1441–1(b)(3)(ii)(B) (which would presume that the entity is not an intermediary). A broker that is a non-U.S. digital asset broker or a CFC digital asset broker that in each case is not conducting activities as an MSB may alternatively determine the status of a customer as an intermediary by presuming that the entity is an intermediary to the extent permitted by § 1.1441–1(b)(3)(ii)(C) (providing rules treating certain payees as not beneficial owners), without regard to the requirement in § 1.1441–1(b)(3)(ii)(C) that any documentation be furnished with respect to an offshore obligation, and applying § 1.1441–1(b)(3)(ii)(C) by substituting the references to exempt recipient categories under section 6049 with the exempt recipient categories in paragraph (c)(3)(i) of this section. *See* § 1.1441–1(b)(3)(iii) for presumption rules relating to the U.S. or foreign status of a customer that is presumed to be an intermediary. In the case of a payment of gross proceeds from a sale of a digital asset that a broker treats as made to a foreign intermediary under this paragraph (g)(4)(vi)(E)(*1*), the broker must treat the foreign intermediary as an exempt foreign person except to the extent required by paragraph (g)(3)(iv) of this section (rules for when a broker is required to treat a payment as made to a U.S. person that is not an exempt recipient under paragraph (c)(3) of this section and for reporting that may be required by the foreign intermediary).

(*2*) *Foreign flow-through entities.* For purposes of this paragraph (g)(4), a broker may determine the status of a customer as a foreign flow-through entity (as defined in § 1.1441–1(c)(23)) by reliably associating (under § 1.1441–1(b)(2)(vii)) a payment of gross proceeds with a valid foreign flow-through withholding certificate described in § 1.1441–5(c)(3)(iii) (relating to nonwithholding foreign partnerships) or (e)(5)(iii) (relating to foreign simple trusts and foreign grantor trusts that are nonwithholding foreign trusts), without regard to whether the withholding certificate contains a withholding statement and withholding certificates or other documentation for each partner. A broker may alternatively determine the status of a customer as a foreign flow-through entity based on the presumption rules in §§ 1.1441–1(b)(3)(ii)(B) (relating to entity classification) and 1.1441–5(d) (relating to partnership status as U.S. or foreign) and (e)(6) (relating to the status of trusts and estates as U.S. or foreign). In the case of a payment of gross proceeds from a sale of a digital asset that a broker treats as made to a foreign flow-through entity under this paragraph (g)(4)(vi)(E)(*2*), the broker must treat the foreign flow-through entity as an exempt foreign person except to the extent required by § 1.6049–5(d)(3)(ii) (rules for when a broker is required to treat a payment as made to a U.S. person other than an exempt recipient (substituting ''exempt recipient under § 1.6045–1(c)(3)'' for ''exempt recipient described in § 1.6049–4(c)'')).

(*3*) *U.S. branches that are not beneficial owners.* For purposes of this paragraph (g)(4), a broker may determine the status of a customer as a U.S. branch (as described in § 1.1441–1(b)(2)(iv)) that is not a beneficial owner (as defined in § 1.1441–1(c)(6)) of a payment of gross proceeds by reliably associating (under § 1.1441–1(b)(2)(vii)) the payment with a valid U.S. branch withholding certificate described in § 1.1441–1(e)(3)(v) without regard to whether the withholding certificate contains a withholding statement and withholding certificates or other documentation for each person for whom the branch receives the payment. If a U.S. branch certifies on a U.S. branch withholding certificate described in the preceding sentence that it agrees to be treated as a U.S. person under § 1.1441–1(b)(2)(iv)(A), the broker provided the certificate must treat the U.S. branch as an exempt foreign person. If a U.S. branch does not certify as described in the preceding sentence on its U.S. branch withholding certificate, the broker provided the certificate must treat the U.S. branch as an exempt foreign person except to the extent required by paragraph (g)(3)(iv) of this section (rules for when a broker is required to treat a payment as made to a U.S. person that is not an exempt recipient under paragraph (c)(3) of this section and for reporting that may be required by the U.S. branch). In a case in which a broker cannot reliably associate a payment of gross proceeds made to a U.S. branch with a U.S. branch withholding certificate described in § 1.1441–1(e)(3)(v) or a valid beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section, *see* paragraph (g)(4)(vi)(E)(*1*) of this section for determining the status of the U.S. branch as a beneficial owner or intermediary.

(F) *Transition rule for obtaining documentation to treat a customer as an exempt foreign person.* Notwithstanding the rules of this paragraph (g)(4) for determining the status of a customer as an exempt foreign person, for a sale of a digital asset effected before January 1, 2026, that was held in an account established for the customer by a broker before January 1, 2025, the broker may treat the customer as an exempt foreign person provided that the customer has not previously been classified as a U.S. person by the broker, and the information that the broker has in the account opening files or other files pertaining to the account, including documentation collected for purposes of an AML program, includes a residence address for the customer that is not a U.S. address.

(vii) *Barter exchange.* No return of information is required by a barter exchange under the rules of paragraphs (e) and (f) of this section with respect to a client or a member that the barter exchange may treat as an exempt foreign person pursuant to the procedures

described in paragraph (g)(4) of this section.

* * * * *

(6) *Examples.* The application of the provisions of paragraph (g)(4) of this section with respect to sales of digital assets may be illustrated by the following examples. All events and transactions in the following examples occur after the applicability date set forth in paragraph (q) of this section.

(i) *Example 1: Foreign digital asset broker conducting activities as an MSB*—(A) *Facts.* Foreign corporation (FKS) owns and operates several digital asset kiosks physically located within the United States. FKS is not a controlled foreign corporation within the meaning of § 1.6049–5(c)(5)(i)(C). In addition to the digital asset kiosks located in the United States, FKS owns and operates an online digital asset trading platform and provides digital asset hosted wallet services for online customers who want to purchase, hold, and exchange various digital assets for cash or other digital assets. FKS does not own or operate kiosks located outside of the United States. FKS is registered as a money service business (MSB) with the Department of the Treasury.

(*1*) *Customer L: No withholding certificate.* L, an individual who is a non-U.S. resident visiting the United States, utilizes one of FKS's digital asset kiosks located in the United States in order to effect a sale of digital asset DE for cash. L has not previously done business with FKS and does not hold digital assets in an online account with FKS. L represents to FKS that L is a foreign individual. FKS requests a beneficial owner withholding certificate from L as part of FKS's procedures for effecting transactions with customers that use FKS's digital asset kiosks located in the United States. L does not provide FKS with a valid beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section. FKS executes the sale of L's DE on behalf of L and pays the gross proceeds to L.

(*2*) *Customer L: Withholding certificate.* The facts are the same as in paragraph (g)(6)(i)(A)(*1*) of this section, except that prior to the payment of sale proceeds, L provides FKS with a beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section that FKS may treat as valid under § 1.1441–1(e)(2)(ii) and that satisfies the requirements of paragraph (g)(4)(vi) of this section.

(*3*) *Customer J.* J is an individual that opened an account with FKS to use FKS's online digital asset trading platform. As part of performing FKS's account opening procedures FKS collected from J a copy of a driver's license issued by country Y and a valid beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section. Shortly after opening J's account, FKS obtains information showing that J's communications to FKS come from an IP address located within the United States that becomes part of FKS's account file for J. After obtaining the information described in the preceding sentence, FKS effects a sale of digital asset DE for cash on behalf of J, and credits the gross proceeds to J's account with FKS.

(B) *Broker's status and requirements.* FKS is a non-U.S. digital asset broker under paragraph (g)(4)(i)(C) of this section because it is a non-U.S. payor under § 1.6049–5(c)(5) that effects sales of digital assets on behalf of customers. Because FKS is registered as an MSB with the Department of the Treasury, FKS is conducting activities as an MSB under paragraph (g)(4)(i)(D) of this section with respect to its sales of digital assets. As a result, FKS is subject to the requirements of a U.S. digital asset broker under paragraph (g)(4)(ii) of this section with respect to those sales rather than the requirements of a non-U.S. digital asset broker under paragraph (g)(4)(iv) of this section (which apply to a non-U.S. digital asset broker not conducting activities as an MSB). Moreover, FKS is subject to the requirements of paragraph (g)(4)(ii) of this section with respect to all sales of digital assets it effects for its customers because FKS does not own or operate any digital asset kiosks physically located outside of the United States. *See* paragraphs (g)(4)(i)(D) and (E) of this section.

(C) *Broker's obligation to report*—(*1*) *Customer L: No withholding certificate.* Because FKS must apply the requirements of paragraph (g)(4)(ii) of this section with respect to L's sale, FKS must make an information return for the sale under section 6045 unless FKS can treat L as an exempt recipient under paragraph (c)(3) of this section (which applies to only certain specified entities) or as an exempt foreign person. Because FKS has not collected documentation for L on which FKS may rely to treat L as an exempt foreign person, FKS must apply the presumption rules in paragraph (g)(4)(vi)(A)(*2*) of this section. FKS presumes that L is an individual because L appears to be an individual based on L's name in the customer file. As an individual, L cannot be treated as an exempt recipient under paragraph (c)(3) of this section. Because FKS has classified L as an individual and FKS is a non-U.S. digital asset broker conducting activities as an MSB that is subject to the rules in paragraph (g)(4)(ii) of this section with respect to L's sale, FKS must treat L as a U.S. person under the presumption rule applicable to individuals described in paragraph (g)(4)(vi)(A)(*2*) of this section. Thus, FKS may not treat L as an exempt foreign person with respect to L's sale of digital asset DE and must make an information return for the sale under section 6045. *See* paragraph (r) of this section for cross references to requirements for backup withholding under section 3406 that may apply to a sale required to be reported under section 6045. In connection with applying the requirements for backup withholding, because sales of DE effected by FKS for L are considered effected at an office inside the United States under paragraph (g)(4)(ii)(B) of this section, FKS may not apply the exception to backup withholding provided in § 31.3406(g)–1(e) of this chapter to the sale effected on behalf of L.

(*2*) *Customer L: Withholding certificate.* As provided in paragraph (g)(4)(ii)(B) of this section, FKS may treat L as an exempt foreign person because FKS has a valid withholding certificate for L described in paragraph (g)(4)(ii)(B) of this section that satisfies the requirements of paragraph (g)(4)(vi) of this section. Accordingly, FKS is not required to make an information return under section 6045 with respect to L's sale.

(*3*) *Customer J.* As described in paragraph (g)(6)(i)(B) of this section, FKS must apply the requirements of paragraph (g)(4)(ii) of this section with respect to J's sale. Although FKS collected a valid beneficial owner withholding certificate with respect to J in accordance with paragraph (g)(4)(ii)(B) of this section, FKS has reason to know that the withholding certificate is incorrect or unreliable because FKS has U.S. indicia described in paragraph (g)(4)(iv)(B)(*1*) of this section in J's account file. FKS may continue to rely on the withholding certificate if FKS obtains from J documentary evidence establishing foreign status (as described in § 1.1471–3(c)(5)(i)) that does not contain a U.S. address and a reasonable explanation (as defined in § 1.1441–7(b)(12)) from J, in writing, supporting the claim of foreign status. Alternatively, FKS may rely on the withholding certificate if FKS reports J to country Y and the conditions specified in paragraphs (g)(4)(vi)(B)(*1*)(*ii*) and (*iii*) of this section are satisfied. FKS has a driver's license

for J issued by country Y but does not have the reasonable explanation. FKS does not report J to country Y or satisfy the other conditions in paragraphs (g)(4)(vi)(B)(*1*)(*ii*) and (*iii*) of this section. Therefore, FKS may not rely on the beneficial owner withholding certificate to treat J as an exempt foreign person. However, FKS may rely on the grace period described in paragraph (g)(4)(vi)(A)(*3*) of this section (which in turn references the requirements of § 1.6049–5(d)(2)(ii)) to treat J as an exempt foreign person for a 90-day period because FKS has a withholding certificate for J that is no longer reliable (other than because the validity period has expired), provided that the remaining balance of J's account with FKS is equal to or greater than the statutory backup withholding rate applied to the amount of gross proceeds credited to the account. *See* § 1.6049–5(d)(2)(ii). The 90-day grace period begins on the date that the withholding certificate may no longer be relied upon because of the communications from a U.S. IP address. If the sale is effected after the end of the grace period, FKS must apply the presumption rules in paragraph (g)(4)(vi)(A)(*2*) of this section. FKS may presume that J is an individual because FKS has a driver's license for J. As an individual, J cannot be treated as an exempt recipient under paragraph (c)(3) of this section. FKS must treat J as a U.S. person under the presumption rules applicable to individuals in paragraph (g)(4)(vi)(A)(*2*) of this section. Thus, FKS may not treat J as an exempt foreign person with respect to J's sale of digital asset DE and must make an information return for the sale under section 6045. *See* paragraph (r) of this section for cross references to requirements for backup withholding under section 3406 that may apply to a sale required to be reported under section 6045. In connection with applying the requirements for backup withholding, because sales of DE effected by FKS for J are considered effected at an office inside the United States under paragraph (g)(4)(ii)(B) of this section, FKS may not apply the exception to backup withholding provided in § 31.3406(g)–1(e) of this chapter to the sale effected on behalf of J.

(ii) *Example 2: Foreign digital asset broker registered as MSB effecting sales at digital asset kiosks located outside the United States*—(A) *Facts.* The facts are the same as in paragraph (g)(6)(i)(A) of this section (the facts in *Example 1*), except that FKS also effects sales of digital assets for customers through digital asset kiosks physically located in country Y that FKS owns and operates. FKS is not required to implement an AML program, file reports, or otherwise comply with requirements for MSBs under the Bank Secrecy Act with respect to sales effected at digital asset kiosks physically located in country Y that FKS owns and operates.

(*1*) *Customer C.* C, an individual, utilizes a digital asset kiosk operated by FKS in country Y to sell C's digital asset DE for cash. C does not have any interaction with other parts of FKS's business (such as FKS's online digital asset trading platform or hosted wallet service). As part of FKS's documentation procedures, including the performance of local country AML program requirements, FKS collects from C a copy of C's driver's license issued by country Y and a copy of C's passport issued by country Y. FKS does not have in its account file for C any document or other information with respect to C showing any of the U.S. indicia described in paragraphs (g)(4)(iv)(B)(*1*) through (*5*) of this section.

(*2*) *Customer K.* K, an individual, utilizes a digital asset kiosk operated by FKS in country Y to sell K's digital asset DE for cash. As part of FKS's documentation procedures, including the performance of local country AML program requirements, FKS collects from K an address in country Y, a copy of K's driver's license issued by country Y, and a copy of K's U.S. passport that indicates a place of birth for K in the United States.

(B) *Broker's status and requirements.* As indicated in paragraph (g)(6)(i)(B) of this section (*Example 1*), FKS is a non-U.S. digital asset broker under paragraph (g)(4)(i)(C) of this section that is conducting activities as an MSB under paragraph (g)(4)(i)(D) of this section. As a result, FKS is subject to the requirements of paragraph (g)(4)(ii) of this section except with respect to sales it effects through foreign kiosks that are described in paragraph (g)(4)(i)(E) of this section since FKS is not required under the Bank Secrecy Act to implement an AML program, file reports, or otherwise comply with requirements for MSBs under the Bank Secrecy Act with respect to sales effected at the kiosks. Accordingly, FKS is subject to the requirements of a non-U.S. digital asset broker under paragraph (g)(4)(iv) of this section with respect to sales that it effects through its foreign kiosks.

(C) *Broker's obligation to report*—(*1*) *Customer C.* Because FKS is subject to the requirements of paragraph (g)(4)(iv) of this section with respect to C's sale at FKS's foreign kiosk and because none of the documents or other information in FKS's account file for C include any of the U.S. indicia described in paragraphs (g)(4)(iv)(B)(*1*) through (*5*) of this section, FKS may treat the sale of digital asset DE on behalf of C as effected at an office outside the United States under paragraph (g)(4)(iv)(A) of this section. Accordingly, FKS is not considered a broker under paragraph (a)(1) of this section with respect to the sale, and FKS is therefore not required to make an information return under section 6045 with respect to C's sale. The result would be the same regardless of whether FKS collected documentation for C, provided that information in the account file does not show U.S. indicia.

(*2*) *Customer K.* FKS is subject to the requirements of paragraph (g)(4)(iv) of this section with respect to K's sale at FKS's foreign kiosk. FKS collected an unambiguous indication of a U.S. place of birth for K (that is, K's U.S. passport showing a U.S. place of birth) in performing its documentation procedures. Accordingly, FKS has U.S. indicia described in paragraph (g)(4)(iv)(B)(*5*) of this section as part of its account information for K and must treat K's sale of DE as effected inside the United States under paragraph (g)(4)(iv)(B) of this section. As a result, FKS is treated as a broker under paragraph (a)(1) of this section with respect to K's sale and must apply the requirements of paragraph (g)(4)(iv)(C) of this section to determine whether it must report K's sale under section 6045. Under paragraph (g)(4)(iv)(D)(*2*) of this section, FKS may treat K as an exempt foreign person if FKS collects, prior to making the payment to K, documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing K's citizenship in a country other than the United States and either a copy of K's Certificate of Loss of Nationality of the United States, or both a valid beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section for K and a reasonable written explanation of K's renunciation of U.S. citizenship or the reason K did not obtain U.S. citizenship at birth. FKS does not have the documentary evidence described in the preceding sentence for K. FKS must therefore apply the presumption rules in paragraph (g)(4)(vi)(A)(*2*) of this section to determine whether it may treat K as an exempt foreign person. FKS may presume that K is an individual because FKS has a driver's license for K. As an individual, K cannot be treated as an exempt recipient under paragraph (c)(3) of this section. FKS must treat K as a U.S. person under the presumption

rules applicable to individuals in paragraph (g)(4)(vi)(A)(*2*) of this section because FKS has U.S. indicia associated with K's account information. Therefore, FKS must make an information return under section 6045 with respect to K's sale. However, FKS has no obligation to backup withhold on the proceeds from the sale based on the exemption under § 31.3406(g)–1(e) of this chapter, unless FKS has actual knowledge that K is a U.S. person that is not an exempt recipient under paragraph (c)(3) of this section.

(iii) *Example 3: CFC digital asset broker that is not conducting activities as an MSB*—(A) *Facts.* Corporation G (GFC) is a controlled foreign corporation under § 1.6049–5(c)(5)(i)(C) that operates a business as an online digital asset broker. Several of GFC's customers have online accounts with GFC through which they effect sales of digital assets. GFC does not register as an MSB with the Department of the Treasury.

(B) *Broker's status and requirements.* Because GFC is a controlled foreign corporation under § 1.6049–5(c)(5)(i)(C) that effects sales of digital assets on behalf of customers, GFC is a CFC digital asset broker as defined in paragraph (g)(4)(i)(B) of this section. Because GFC does not register as an MSB with the Department of the Treasury, GFC is not conducting activities as an MSB under paragraph (g)(4)(i)(D) of this section. As a result, GFC is subject to the requirements of a CFC digital asset broker under paragraph (g)(4)(iii) of this section with respect to sales of digital assets it effects for its customers.

(C) *Broker's obligation to report.* Because GFC is subject to the requirements of a CFC digital asset broker under paragraph (g)(4)(iii) of this section, GFC must make an information return for the sales it effects for its customers under section 6045 unless GFC can treat a customer as an exempt recipient under paragraph (c)(3) of this section or an exempt foreign person. Under paragraph (g)(4)(iii)(B) of this section, GFC may treat a customer (other than a foreign intermediary, foreign flow-through entity, or certain U.S. branches) as an exempt foreign person by obtaining with respect to the customer either a valid beneficial owner withholding certificate described in paragraph (g)(4)(ii)(B) of this section or the documentary evidence described in § 1.1471–3(c)(5)(i) supporting the customer's foreign status and upon which GFC may rely, pursuant to the requirements of paragraph (g)(4)(vi) of this section. If GFC does not obtain the withholding certificate or documentary evidence described in the preceding sentence prior to a customer's sale, GFC may be permitted under a presumption rule as provided in paragraph (g)(4)(vi)(A)(*2*) of this section to treat a customer as an exempt foreign person (unless GFC has actual knowledge that the customer is a U.S. person). GFC may, instead of applying the earlier-described provisions of this paragraph (g)(6)(iii)(C), treat a customer as a foreign intermediary, foreign flow-through entity, or certain U.S. branches and an exempt foreign person when it is permitted to do under paragraph (g)(4)(vi)(E) of this section. As GFC's sales are considered effected at an office outside of the United States under paragraph (g)(4)(iii)(A) of this section, GFC has no obligation to backup withhold on the proceeds from a reportable sale based on the exemption under § 31.3406(g)–1(e) of this chapter, unless GFC has actual knowledge that customer is a U.S. person that is not an exempt recipient under paragraph (c)(3) of this section.

* * * * *

(j) *Time and place for filing; cross-references to penalty and magnetic media filing requirements.* Forms 1096 and 1099 required under this section shall be filed after the last calendar day of the reporting period elected by the broker or barter exchange and on or before February 28 of the following calendar year with the appropriate Internal Revenue Service Center, the address of which is listed in the instructions for Form 1096. For a digital asset sale effected prior to January 1, 2025, for which a broker chooses under paragraph (d)(2)(iii)(B) of this section to file an information return, Form 1096 and the Form 1099–B, ''Proceeds From Broker and Barter Exchange Transactions,'' or if available the form prescribed by the Secretary pursuant to paragraph (d)(2)(i)(B) of this section, must be filed on or before February 28 of the calendar year following the year of that sale. *See* paragraph (l) of this section for the requirement to file certain returns on magnetic media. For provisions relating to the penalty provided for the failure to file timely a correct information return under section 6045(a), *see* § 301.6721–1 of this chapter. *See* § 301.6724–1 of this chapter for the waiver of a penalty if the failure is due to reasonable cause and is not due to willful neglect.

* * * * *

(m) * * *

(1) *In general.* This paragraph (m) provides rules for a broker to determine and report the information required under this section for an option that is a covered security under paragraph (a)(15)(i)(E) or (H) of this section.

(2) * * *

(ii) * * *

(C) Notwithstanding paragraph (m)(2)(i) of this section, if an option is an option on a digital asset or an option on derivatives with a digital asset as an underlying property, paragraph (m) of this section applies to the option if it is granted or acquired on or after January 1, 2023.

* * * * *

(q) *Applicability date.* Except as otherwise provided in this paragraph (q) or paragraphs (m)(2)(ii) and (n)(12)(ii) of this section, this section applies on or after January 6, 2017. (For rules that apply after June 30, 2014, and before January 6, 2017, see § 1.6045–1 in effect and contained in 26 CFR part 1, as revised April 1, 2016.) For sales of digital assets, this section applies on or after January 1, 2025. For assets that are commodities pursuant to the Commodity Futures Trading Commission's certification procedures described in 17 CFR 40.2, this section applies to sales of such commodities on or after January 1, 2025, without regard to the date such certification procedures were undertaken.

(r) *Cross-references.* For provisions relating to backup withholding for reportable transactions under this section, *see* § 31.3406(b)(3)–2 of this chapter for rules treating gross proceeds as reportable payments, § 31.3406(d)–1 of this chapter for rules with respect to backup withholding obligations, and § 31.3406(h)–3 of this chapter for the prescribed form for the certification of information required under this section.

■ **Par. 7.** Section 1.6045–4 is amended by:

■ 1. Revising the section heading and paragraph (b)(1);

■ 2. Removing the period at the end of paragraph (c)(2)(i) and adding a semicolon in its place;

■ 3. Removing the word ''or'' at the end of paragraph (c)(2)(ii);

■ 4. Removing the period at the end of paragraph (c)(2)(iii) and adding ''; or'' in its place;

■ 5. Adding paragraph (c)(2)(iv);

■ 6. Revising paragraph (d)(2)(ii)(A);

■ 7. In paragraphs (e)(3)(iii)(A) and (B), adding the language ''or digital asset'' after the language ''cash'', wherever it appears;

■ 8. Revising paragraphs (h)(1)(v)(A) and (B);

■ 9. Redesignating paragraphs (h)(1)(vii) and (viii) as paragraphs (h)(1)(viii) and (ix), respectively, and adding new paragraph (h)(1)(vii);

■ 10. Adding paragraph (h)(2)(iii);

■ 11. Revising paragraphs (i)(1) and (2), (i)(3)(ii), and (o);
■ 12. In paragraph (r), redesignating *Examples 1* through *9* as paragraphs (r)(1) through (9), respectively;
■ 13. In newly designated paragraph (r)(3), removing ''section (b)(1)'' and adding ''paragraph (b)(1)'' in its place;
■ 14. Removing and reserving newly designated paragraph (r)(5);
■ 15. Revising newly designated paragraph (r)(7);
■ 16. In newly designated paragraph (r)(8), removing ''example (6)'' and adding ''paragraph (r)(6) of this section (the facts in *Example 6*)'' in its place;
■ 17. In newly designated paragraph (r)(9), removing ''example (8)'' and adding ''paragraph (r)(8) of this section (the facts in *Example 8*)'' in its place;
■ 18. Adding paragraph (r)(10); and
■ 19. In paragraph (s), adding a sentence to the end of the paragraph.

The revisions and additions read as follows:

§ 1.6045–4 Information reporting on real estate transactions.

* * * * *

(b) * * *

(1) *In general.* A transaction is a ''real estate transaction'' under this section if the transaction consists in whole or in part of the sale or exchange of *reportable real estate* (as defined in paragraph (b)(2) of this section) for money, indebtedness, property other than money, or services. The term *sale or exchange* shall include any transaction properly treated as a sale or exchange for Federal income tax purposes, whether or not the transaction is currently taxable. Thus, for example, a sale or exchange of a principal residence is a real estate transaction under this section even though the transferor may be entitled to the special exclusion of gain up to $250,000 (or $500,000 in the case of married persons filing jointly) from the sale or exchange of a principal residence provided by section 121 of the Code.

* * * * *

(c) * * *

(2) * * *

(iv) A principal residence (including stock in a cooperative housing corporation) provided the reporting person obtain from the transferor a written certification consistent with guidance that the Secretary has designated or may designate by publication in the **Federal Register** or in the Internal Revenue Bulletin (*see* § 601.601(d)(2) of this chapter). If a residence has more than one owner, a real estate reporting person must either obtain a certification from each owner (whether married or not) or file an information return and furnish a payee statement for any owner that does not make the certification. The certification must be retained by the reporting person for four years after the year of the sale or exchange of the residence to which the certification applies. A reporting person who relies on a certification made in compliance with this paragraph (c)(2)(iv) will not be liable for penalties under section 6721 of the Code for failure to file an information return, or under section 6722 of the Code for failure to furnish a payee statement to the transferor, unless the reporting person has actual knowledge or reason to know that any assurance is incorrect.

(d) * * *

(2) * * *

(ii) * * *

(A) The United States or a State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Commonwealth of Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa, a political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing; or

* * * * *

(h) * * *

(1) * * *

(v) * * *

(A) Received (or will, or may, receive) property (other than cash, consideration treated as cash, and digital assets in computing gross proceeds) or services as part of the consideration for the transaction; or

(B) May receive property (other than cash and digital assets) or services in satisfaction of an obligation having a stated principal amount; or

* * * * *

(vii) In the case of a payment made to the transferor using digital assets, the name and number of units of the digital asset, the date and time the payment was made, the transaction identification as defined in § 1.6045–1(a)(26) and the digital asset address (or addresses) as defined in § 1.6045–1(a)(20) into which the digital assets are transferred;

* * * * *

(2) * * *

(iii) *Digital assets.* For purposes of this section, a digital asset has the meaning set forth in § 1.6045–1(a)(19).

(i) * * *

(1) *In general.* Except as otherwise provided in this paragraph (i), the term *gross proceeds* means the total cash received, including cash received from a digital asset payment processor as described in § 1.6045–1(a)(22)(i), consideration treated as cash received, and the value of any digital asset received by or on behalf of the transferor in connection with the real estate transaction.

(i) *Consideration treated as cash.* For purposes of this paragraph (i), consideration treated as cash received by or on behalf of the transferor in connection with the real estate transaction includes the following amounts:

(A) The stated principal amount of any obligation to pay cash to or for the benefit of the transferor in the future (including any obligation having a stated principal amount that may be satisfied by the delivery of property (other than cash) or services);

(B) The amount of any liability of the transferor assumed by the transferee as part of the consideration for the transfer or of any liability to which the real estate acquired is subject (whether or not the transferor is personally liable for the debt); and

(C) In the case of a contingent payment transaction, as defined in paragraph (i)(3)(ii) of this section, the maximum determinable proceeds, as defined in paragraph (i)(3)(iii) of this section.

(ii) *Digital assets received.* For purposes of this paragraph (i), the value of any digital asset received means the fair market value in U.S. dollars of the digital asset actually received. Additionally, if the consideration received by the transferor includes an obligation to pay a digital asset to, or for the benefit of, the transferor in the future, the value of any digital asset received includes the fair market value, as of the date and time the obligation is entered into, of the digital assets to be paid as stated principal under such obligation. The fair market value of any digital asset received must be determined based on the valuation rules provided in § 1.6045–1(d)(5)(ii).

(iii) *Other property.* Gross proceeds does not include the value of any property (other than cash, consideration treated as cash, and digital assets) or services received by, or on behalf of, the transferor in connection with the real estate transaction. *See* paragraph (h)(1)(v) of this section for the information that must be included on the Form 1099 required by this section in cases in which the transferor receives (or will, or may, receive) property (other than cash, consideration treated as cash, and digital assets) or services as part of the consideration for the transfer.

(2) *Treatment of sales commissions and similar expenses.* In computing gross proceeds, the total cash, consideration treated as cash, and digital assets received by or on behalf of the transferor shall not be reduced by expenses borne by the transferor (such

as sales commissions, amounts paid or withheld from consideration received to effect the digital asset transfer as described in § 1.1001–7(b)(2), expenses of advertising the real estate, expenses of preparing the deed, and the cost of legal services in connection with the transfer).

(3) * * *

(ii) *Contingent payment transaction.* For purposes of this section, the term *contingent payment transaction* means a real estate transaction with respect to which the receipt, by or on behalf of the transferor, of cash, consideration treated as cash under paragraph (i)(1)(i)(A) of this section, or digital assets under paragraph (i)(1)(ii) of this section is subject to a contingency.

* * * * *

(o) *No separate charge.* A reporting person may not separately charge any person involved in a real estate transaction for complying with any requirements of this section. A reporting person may, however, take into account its cost of complying with such requirements in establishing its fees (other than in charging a separate fee for complying with such requirements) to any customer for performing services in the case of a real estate transaction.

* * * * *

(r) * * *

(7) *Example 7: Gross proceeds (contingencies).* The facts are the same as in paragraph (r)(6) of this section (the facts in *Example 6*), except that the agreement does not provide for adequate stated interest. The result is the same as in paragraph (r)(6) (the results in *Example 6*).

* * * * *

(10) *Example 10: Gross proceeds (exchange involving digital assets)*—(i) *Facts.* K, an individual, agrees to pay 140 units of digital asset DE with a fair market value of $280,000 to J, an unmarried individual who is not an exempt transferor, in exchange for Whiteacre, which has a fair market value of $280,000. No liabilities are involved in the transaction. P is the reporting person with respect to both sides of the transaction.

(ii) *Analysis.* With respect to the payment by K of 140 units of digital asset DE to J, P must report gross proceeds received by J of $280,000 (140 units of DE). Additionally, to the extent K is not an exempt recipient under § 1.6045–1(c) or an exempt foreign person under § 1.6045–1(g), P is required to report gross proceeds paid to K, with respect to K's sale of 140 units of digital asset DE, in the amount of $280,000 pursuant to § 1.6045–1.

(s) * * * The amendments to paragraphs (b)(1), (c)(2)(iv), (d)(2)(ii), (e)(3)(iii), (h)(1)(v) through (ix), (h)(2)(iii), (i)(1) and (2), (i)(3)(ii), (o), and (r) of this section apply to real estate transactions with dates of closing occurring on or after January 1, 2025.

■ **Par. 8.** Section 1.6045A–1 is amended by:

■ 1. In paragraph (a)(1)(i), removing the language ''paragraphs (a)(1)(ii) through (v) of this section,'' and adding the language ''paragraphs (a)(1)(ii) through (vi) of this section,'' in its place; and

■ 2. Adding paragraph (a)(1)(vi).

The addition reads as follows:

§ 1.6045A–1 Statements of information required in connection with transfers of securities.

(a) * * *

(1) * * *

(vi) *Exception for transfers of specified securities that are digital assets.* No transfer statement required under paragraph (a)(1)(i) of this section is required with respect to a specified security that is also a digital asset as defined in § 1.6045–1(a)(19). A transferor that chooses to provide a transfer statement reporting some or all of the information described in paragraph (b) of this section is not subject to penalties under section 6722 of the Code for failure to report this information correctly.

* * * * *

■ **Par. 9.** Section 1.6045B–1 is amended by revising paragraph (a)(1) introductory text and adding paragraph (a)(6) to read as follows:

§ 1.6045B–1 Returns relating to actions affecting basis of securities.

(a) * * *

(1) * * * Except as provided in paragraphs (a)(3) through (6) of this section, an issuer of a specified security within the meaning of § 1.6045–1(a)(14)(i) through (iv) that takes an organizational action that affects the basis of the security must file an issuer return setting forth the following information and any other information specified in the return form and instructions:

* * * * *

(6) *Exception for specified securities that are digital assets.* No reporting is required under this paragraph (a) with respect to a specified security that is also a digital asset as defined in § 1.6045–1(a)(19). An issuer that chooses to provide the reporting and furnish statements described in this section is not subject to penalties under section 6721 or 6722 of the Code for failure to report this information correctly.

* * * * *

■ **Par. 10.** Section 1.6050W–1 is amended by:

■ 1. Adding a sentence to the end of paragraph (a)(2);

■ 2. Adding paragraph (c)(5); and

■ 3. Revising paragraph (j).

The additions and revision read as follows:

§ 1.6050W–1 Information reporting for payments made in settlement of payment card and third party network transactions.

(a) * * *

(2) * * * In the case of a third party settlement organization that has the contractual obligation to make payments to participating payees, a payment in settlement of a reportable payment transaction includes the submission of instructions to a purchaser to transfer funds directly to the account of the participating payee for purposes of settling the reportable payment transaction.

* * * * *

(c) * * *

(5) *Coordination with information returns required under section 6045 of the Code*—(i) *Reporting on exchanges involving digital assets.* Notwithstanding the provisions of paragraph (c) of this section, the reporting of a payment made in settlement of a third party network transaction in which the payment by a payor is made using digital assets as defined in § 1.6045–1(a)(19) or the goods or services provided by a payee are digital assets must be as follows:

(A) *Reporting on payors with respect to payments made using digital assets.* If a payor makes a payment using digital assets and the exchange of the payor's digital assets for goods or services is a sale of digital assets by the payor under § 1.6045–1(a)(9)(ii), the amount paid to the payor in settlement of that exchange is subject to the rules as described in § 1.6045–1 (including any exemption from reporting under § 1.6045–1) and not this section.

(B) *Reporting on payees with respect to the sale of goods or services that are digital assets.* If the goods or services provided by a payee in an exchange are digital assets and the exchange is a sale of digital assets by the payee under § 1.6045–1(a)(9)(ii), the amount paid to the payee in settlement of that exchange is subject to the rules as described in § 1.6045–1 (including any exemption from reporting under § 1.6045–1) and not this section.

(ii) *Examples.* The following examples illustrate the rules of this paragraph (c)(5) of this section.

(A) *Example 1*—(*1*) *Facts.* CRX is a ''shared-service'' organization that performs accounts payable services for numerous purchasers that are unrelated to CRX. A substantial number of sellers of goods and services, including Seller S, have established accounts with CRX and have agreed to accept payment from CRX in settlement of their transactions with purchasers. The agreement between sellers and CRX includes standards and mechanisms for settling the transactions and guarantees payment to the sellers, and the arrangement enables purchasers to transfer funds to providers. Pursuant to this seller agreement, CRX accepts cash from purchasers as payment as well as digital assets, which it exchanges into cash for payment to sellers. P, an individual not otherwise exempt from reporting, purchases one month of services from S through CRX's organization. S is also an individual not otherwise exempt from reporting. S's services are not digital assets under § 1.6045–1(a)(19). To effect this transaction, P transfers 100 units of DE, a digital asset as defined in § 1.6045–1(a)(19), to CRX. CRX, in turn, exchanges the 100 units of DE for $1,000, based on the fair market value of the DE units, and pays $1,000 to S.

(*2*) *Analysis with respect to CRX's status.* CRX's arrangement constitutes a third party payment network under paragraph (c)(3) of this section because a substantial number of persons that are unrelated to CRX, including S, have established accounts with CRX, and CRX is contractually obligated to settle transactions for the provision of goods or services by these persons to purchasers, including P. Thus, under paragraph (c)(2) of this section, CRX is a third party settlement organization and the transaction involving P's purchase of S's services using 100 units of digital asset DE is a third party network transaction under paragraph (c)(1) of this section. Additionally, CRX is a digital asset payment processor as defined in § 1.6045–1(a)(22) and, therefore, a broker under § 1.6045–1(a)(1).

(*3*) *Analysis with respect to the reporting on P.* Because CRX is a digital asset payment processor under § 1.6045–1(a)(22), P's payment of 100 units of DE to CRX in exchange for CRX's payment of $1,000 to S is a sale of the DE units as defined in § 1.6045–1(a)(9)(ii)(D). Accordingly, pursuant to the rules under paragraph (c)(5)(i)(A) of this section, CRX must file an information return under § 1.6045–1 with respect to P's sale of the DE units. CRX is not required to file an information return under paragraph (a)(1) of this section with respect to P.

(*4*) *Analysis with respect to the reporting on S.* S's services are not digital assets as defined in § 1.6045–1(a)(19). Accordingly, pursuant to the rules under paragraph (c)(5)(i)(B) of this section, CRX's payment of $1,000 to S in settlement of the reportable payment transaction is subject to the reporting rules under paragraph (a)(1) of this section and not the reporting rules as described in § 1.6045–1.

(B) *Example 2*—(*1*) *Facts.* The facts are the same as in paragraph (c)(5)(ii)(A)(*1*) of this section (the facts in *Example 1*) except that S's agreement with CRX provides that S will also accept digital assets, including digital asset DE, as payment for S's services. To process P's payment for the purchase of one month of services from S, CRX instructs P to transfer 100 units of DE directly to S's account.

(*2*) *Analysis.* CRX's instruction to P to transfer the 100 units of DE directly to S's account constitutes the making of a payment in settlement of the reportable payment transaction under paragraph (c)(2) of this section. The payment is also a sale of the DE units under § 1.6045–1(a)(9)(ii)(D). Accordingly, the reporting set forth in paragraph (c)(5)(ii)(A)(*2*) of this section (the analysis in *Example 1*) remains applicable under these facts.

(C) *Example 3*—(*1*) *Facts.* CRX is an entity that owns and operates a digital asset trading platform and provides digital asset broker services under § 1.6045–1(a)(1). CRX takes custody of and exchanges, on behalf of customers, digital assets under § 1.6045–1(a)(19), including non-fungible tokens, referred to as NFTs, representing ownership in unique digital artwork, video, or music. Exchange transactions undertaken by CRX on behalf of its customers are considered sales under § 1.6045–1(a)(9)(ii) that are effected by CRX and subject to reporting by CRX under § 1.6045–1. A substantial number of NFT sellers have accounts with CRX, into which their NFTs are deposited for sale. None of these sellers are related to CRX, and all have agreed to settle transactions for the sale of their NFTs in digital asset DE, or other forms of consideration, and according to the terms of their contracts with CRX. Buyers of NFTs also have accounts with CRX, into which digital assets are deposited for later use as consideration to acquire NFTs. Once a buyer decides to purchase an NFT for a price agreed to by the NFT seller, CRX effects the requested exchange of the buyer's consideration for the NFT, which allows CRX to guarantee delivery of the bargained for consideration to both buyer and seller. CRX charges a transaction fee on every NFT sale, which is paid by the buyer in additional units of digital asset DE. Seller J, an individual not otherwise exempt from reporting, sells NFTs representing artwork on CRX's digital asset trading platform. J does not perform any other services with respect to these transactions. Buyer B, also an individual not otherwise exempt from reporting, seeks to purchase J's NFT–4 using units of DE. Using CRX's platform, buyer B and seller J agree to exchange J's NFT–4 for B's 100 units of DE (with a value of $1,000). At the direction of J and B, CRX executes this exchange, with B paying CRX's transaction fee using additional units of DE.

(*2*) *Analysis with respect to CRX's status.* CRX's arrangement with J and the other NFT sellers constitutes a third party payment network under paragraph (c)(3) of this section because a substantial number of providers of goods or services who are unrelated to CRX, including J, have established accounts with CRX, and CRX is contractually obligated to settle transactions for the provision of goods or services, such as NFTs, by these persons to purchasers. Thus, under paragraph (c)(2) of this section, CRX is a third party settlement organization and the sale of J's NFT–4 for 100 units of DE is a third party network transaction under paragraph (c)(1) of this section. Therefore, CRX is a payment settlement entity under paragraph (a)(4)(i)(B) of this section.

(*3*) *Analysis with respect to the reporting on B.* The exchange of B's 100 units of DE for J's NFT–4 is a sale under § 1.6045–1(a)(9)(ii)(A)(*2*) by B of the 100 DE units. Accordingly, under paragraph (c)(5)(i)(A) of this section, the amount paid to B in settlement of the exchange is subject to the rules as described in § 1.6045–1, and CRX must file an information return under § 1.6045–1 with respect to B's sale of the 100 DE units. CRX is not required to also file an information return under paragraph (a)(1) of this section with respect to the amount paid to B even though CRX is a third party settlement organization.

(*4*) *Analysis with respect to the reporting on J.* The exchange of J's NFT–4 for 100 units of DE is a sale under § 1.6045–1(a)(9)(ii) by J of a digital asset under § 1.6045–1(a)(19). Accordingly, under paragraph (c)(5)(i)(B) of this section, the amount paid to J in settlement of the exchange is subject to the rules as described in § 1.6045–1, and CRX must file an information return under § 1.6045–1 with respect to J's sale of the NFT–4. CRX is not required to

also file an information return under paragraph (a)(1) of this section with respect to the amount paid to J even though CRX is a third party settlement organization.

* * * * *

(j) *Applicability date.* Except with respect to payments made using digital assets, the rules in this section apply to returns for calendar years beginning after December 31, 2010. For payments made using digital assets, this section applies on or after January 1, 2025.

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

■ **Par. 11.** The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

■ **Par. 12.** Section 31.3406(b)(3)–2 is amended by revising the section heading to read as follows:

§ 31.3406(b)(3)–2 Reportable barter exchanges and gross proceeds of sales of securities, commodities, or digital assets by brokers.

* * * * *

■ **Par. 13.** Section 31.3406(g)–1 is amended by revising paragraphs (e) and (f) to read as follows:

§ 31.3406(g)–1 Exception for payments to certain payees and certain other payments.

* * * * *

(e) *Certain reportable payments made outside the United States by foreign persons, foreign offices of United States banks and brokers, and others.* For reportable payments made after June 30, 2014, other than gross proceeds from sales of digital assets (as defined in § 1.6045–1(a)(19) of this chapter), a payor or broker is not required to backup withhold under section 3406 of the Code on a reportable payment that is paid and received outside the United States (as defined in § 1.6049–4(f)(16) of this chapter) with respect to an offshore obligation (as defined in § 1.6049–5(c)(1) of this chapter) or on the gross proceeds from a sale effected at an office outside the United States as described in § 1.6045–1(g)(3)(iii) of this chapter (without regard to whether the sale is considered effected inside the United States under § 1.6045–1(g)(3)(iii)(B) of this chapter). For a reportable payment made on or after January 1, 2025, from a sale of a digital asset, a payor or broker is not required to backup withhold under section 3406 on a sale of a digital asset that is either effected by a CFC digital asset broker (as defined in § 1.6045–1(g)(4)(i)(B) of this chapter) that is not conducting activities as a money services business (as described in § 1.6045–1(g)(4)(i)(D) of this chapter) with respect to the sale or by a non-U.S. digital asset broker (as defined in § 1.6045–1(g)(4)(i)(C) of this chapter) that is not conducting activities as a money services business with respect to the sale. The exceptions to backup withholding described in the preceding two sentences of this paragraph (e) do not apply when a payor or broker has actual knowledge that the payee is a United States person. Further, no backup withholding is required on a reportable payment of an amount already withheld upon by a participating FFI (as defined in § 1.1471–1(b)(91) of this chapter) or another payor in accordance with the withholding provisions under chapter 3 or 4 of the Code and the regulations under those chapters even if the payee is a known U.S. person. For example, a participating FFI is not required to backup withhold on a reportable payment allocable to its chapter 4 withholding rate pool (as defined in § 1.6049–4(f)(5) of this chapter) of recalcitrant account holders (as described in § 1.6049–4(f)(11) of this chapter), if withholding was applied to the payment (either by the participating FFI or another payor) pursuant to § 1.1471–4(b) or § 1.1471–2(a) of this chapter. For rules applicable to notional principal contracts, *see* § 1.6041–1(d)(5) of this chapter. For rules applicable to reportable payments made before July 1, 2014, *see* § 31.3406(g)–1(e) in effect and contained in 26 CFR part 1 revised April 1, 2013.

(f) *Applicability date.* Except with respect to sales of digital assets, this section applies on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, *see* § 31.3406(g)–1 in effect and contained in 26 CFR part 1 revised April 1, 2016.) For sales of digital assets, this section applies on or after January 1, 2025.

■ **Par. 14.** Section 31.3406(g)–2 is amended by adding a sentence to the end of paragraphs (e) and (h) to read as follows:

§ 31.3406(g)–2 Exception for reportable payment for which withholding is otherwise required.

* * * * *

(e) * * * Notwithstanding the previous sentence, a real estate reporting person must withhold under section 3406 of the Code and pursuant to the rules under § 31.3406(b)(3)–2 on a reportable payment made in a real estate transaction with respect to a purchaser that exchanges digital assets for real estate to the extent that the exchange is treated as a sale of digital assets subject to reporting under § 1.6045–1 of this chapter.

* * * * *

(h) * * * For sales of digital assets, this section applies on or after January 1, 2025.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 15.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

■ **Par. 16.** Section 301.6721–1 is amended by revising paragraph (g)(3)(iii) and adding a sentence to the end of paragraph (h) to read as follows:

§ 301.6721–1 Failure to file correct information returns.

* * * * *

(g) * * *

(3) * * *

(iii) Section 6045(a) or (d) (relating to returns of brokers, generally reported on Form 1099–B, ''Proceeds From Broker and Barter Exchange Transactions,'' for broker transactions not involving digital assets; the form prescribed by the Secretary pursuant to § 1.6045–1(d)(2)(i)(B) of this chapter for broker transactions involving digital assets; Form 1099–S, ''Proceeds From Real Estate Transactions,'' for gross proceeds from the sale or exchange of real estate; and Form 1099–MISC, ''Miscellaneous Income,'' for certain substitute payments and payments to attorneys);

* * * * *

(h) * * * Paragraph (g)(3)(iii) of this section applies to returns required to be filed on or after January 1, 2026.

■ **Par. 17.** Section 301.6722–1 is amended by revising paragraphs (d)(2)(viii) and (e) to read as follows:

§ 301.6722–1 Failure to furnish correct payee statements.

* * * * *

(d) * * *

(2) * * *

(viii) Section 6045(a) or (d) (relating to returns of brokers, generally reported on Form 1099–B, ''Proceeds From Broker and Barter Exchange Transactions,'' for broker transactions not involving digital assets; the form prescribed by the Secretary pursuant to § 1.6045–1(d)(2)(i)(B) of this chapter for broker transactions involving digital assets; Form 1099–S, ''Proceeds From Real Estate Transactions,'' for gross proceeds from the sale or exchange of real estate; and Form 1099–MISC, ''Miscellaneous Income,'' for certain substitute payments and payments to attorneys);

* * * * *

(e) *Applicability date.* The reference in paragraph (d)(3) of this section to Form 8805 shall apply to partnership taxable years beginning after April 29, 2008. Paragraph (d)(2)(viii) of this section applies to payee statements required to be furnished on or after January 1, 2026.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2023–17565 Filed 8–25–23; 8:45 am]

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Part III

Environmental Protection Agency

40 CFR Part 761
Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 761

[EPA–HQ–OLEM–2021–0556; FRL–7122–03–OLEM]

RIN 2050–AH08

Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is finalizing an expanded set of extraction and determinative methods that can be used to characterize and verify the cleanup of polychlorinated biphenyls (PCBs) waste under implementing regulations for PCB-related authority in the Federal Toxic Substances Control Act (TSCA) (also referred to as the PCB regulations). These changes are expected to greatly reduce the amount of solvent used in PCB extraction processes, thereby conserving resources and reducing waste. In addition, the changes are expected to result in quicker, more efficient, and less costly cleanups, due to greater flexibility in the cleanup and disposal of PCB waste, while still being equally protective of human health and the environment. EPA is also finalizing several other amendments to the PCB regulations, including the amendment of the performance-based disposal option for PCB remediation waste; the removal of the provision allowing PCB bulk product waste to be disposed of as roadbed material; the addition of more flexible provisions for cleanup and disposal of waste generated by spills that occur during emergency situations (*e.g.,* hurricanes or floods); harmonization of the general disposal requirements for PCB remediation waste; and other amendments to improve the implementation of the regulations, clarify ambiguity, and correct technical errors.

DATES: This rule is effective February 26, 2024. The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of February 26, 2024. The incorporation by reference of certain other material listed in the rule was approved by the Director of the Federal Register as of January 18, 2012.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OLEM–2021–0556, is available at *https://www.regulations.gov* or at the Office of Land and Emergency Management Docket (OLEM Docket), Environmental Protection Agency Docket Center (EPA/DC), William Jefferson Clinton West Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OLEM Docket is (202) 566–0270. Please review the visitor instructions and additional information about the docket available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: For further information regarding specific aspects of this document, contact Jennifer McLeod, Program Implementation and Information Division, Office of Resource Conservation and Recovery, (202) 566–0384; email address: *mcleod.jennifer@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

The information presented in this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

This rule potentially affects persons that manufacture, process, distribute in commerce, use, or dispose of PCBs. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- *Utilities:* Electric power and light companies, natural gas companies (NAICS code 22);
- *Manufacturers:* Chemical manufacturers, electronics manufacturers, end-users of electricity, general contractors (NAICS codes 31–33);
- *Transportation and Warehousing:* Various modes of transportation including air, rail, water, ground, and pipeline (NAICS code 48–49);
- *Real Estate:* People who rent, lease, or sell commercial property (NAICS code 53);
- *Professional, Scientific and Technical Services:* Testing laboratories, environmental consulting (NAICS code 54);
- *Public Administration:* Federal, State, and local agencies (NAICS code 92);
- *Waste Management and Remediation Services:* PCB waste handlers (*e.g.,* storage facilities, landfills, incinerators), waste treatment and disposal, remediation services, material recovery facilities, waste transporters (NAICS code 562);
- *Repair and Maintenance:* Repair and maintenance of appliances, machinery and equipment (NAICS code 811);

To determine whether your entity is affected by this action, you should

carefully examine the changes to the regulatory text. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What action is the Agency taking?

EPA is revising the list of extraction and determinative methods in the PCB regulations (40 CFR part 761); amending the performance-based cleanup option for PCB remediation waste under § 761.61(b); removing the provision allowing PCB bulk product waste to be disposed of as roadbed material; adding more flexible provisions for cleaning up spills that occur during emergency situations, such as during a hurricane or flood; harmonizing the general disposal requirements for PCB remediation waste; and making several other amendments to improve the implementation of the regulations, clarify ambiguity, and correct technical errors and outdated information.

C. What is the Agency's authority for taking this action?

The authority for this rule is found in section 6(e)(1) of TSCA. Specifically, section 6(e)(1)(A) gives EPA the authority to promulgate rules regarding the disposal of PCBs (15 U.S.C. 2605(e)(1)(A)).

D. What are the overall economic impacts of this action?

EPA estimated the costs and benefits of this rule in an Economic Assessment, which is available in the docket. Overall, EPA estimates that the final rule will result in quantifiable annual cost savings of approximately $14.4 million to $16.2 million when annualized at a discount rate of seven percent. The annual cost savings range from approximately $16.3 to $18.1 million when annualized at a discount rate of three percent.

E. Summary of the Final Rule

The Agency published the proposed rule titled ''Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations'' in the **Federal Register** on October 22, 2021 (86 FR 58730). The comment period, including a 30-day extension, ended on January 20, 2022 (86 FR 71862). For information on the proposed rulemaking, including a summary of the comments received and how the proposed changes are being finalized in this rule, please see *Section III. Discussion of the Public Comments and Final Rule.* Comments that warranted changes or preamble clarification are discussed in this rulemaking; for a complete response to comments, see ''Response to Comments on the Proposed PCB Rulemaking'' in the docket.

This final rule addresses several key issues related to implementing the PCB Cleanup and Disposal Program under TSCA, including:

Revise Available Extraction Methods for PCBs

EPA is adding the following extraction methods from SW–846, Test Methods for Evaluating Solid Waste, to the PCB regulations in 40 CFR part 761 for use on solid matrices: Method 3541 (Automated Soxhlet Extraction), Method 3545A (Pressurized Fluid Extraction), and Method 3546 (Microwave Extraction). EPA is also adding the following extraction methods from SW–846, Test Methods for Evaluating Solid Waste, to the PCB regulations in 40 CFR part 761 for use on aqueous matrices: Method 3510C (Separatory Funnel Liquid-Liquid Extraction), Method 3520C (Continuous Liquid-Liquid Extraction), and Method 3535A (Solid-Phase Extraction). The Agency is also incorporating by reference Methods 3541, 3545A, 3546, 3510C, 3520C, and 3535A into § 761.19.

Update and Limit the Use of Ultrasonic Extraction

EPA is revising the PCB regulations in 40 CFR part 761 to update SW–846 Method 3550B (Ultrasonic Extraction) to the newer method 3550C (Ultrasonic Extraction) and to limit the use of Method 3550C to wipe samples only.

Revise Available Determinative Methods for PCBs

EPA is adding the determinative method SW–846 Method 8082A (Polychlorinated Biphenyls (PCBs) By Gas Chromatography) to the PCB regulations in 40 CFR part 761. EPA is also updating the inclusion of Clean Water Act (CWA) Method 608 (Organochlorine Pesticides and PCBs) to the newer version, Method 608.3 (Organochlorine Pesticides and PCBs by GC/HSD).

Revise Performance-Based Disposal Under § 761.61(b)

EPA is amending the performance-based disposal option for PCB remediation waste under § 761.61(b) to include provisions for performance-based cleanup such as applicability, cleanup levels, verification sampling, and recordkeeping and notification requirements. EPA is also adding RCRA Subtitle C permitted landfills to the list of allowed performance-based disposal options for non-liquid PCB remediation waste.

Remove Regulatory Provision Allowing Disposal of PCB Bulk Product Waste as Roadbed

EPA is removing the option in § 761.62(d)(2) that allows for disposal of PCB bulk product waste under asphalt as part of a roadbed.

Add Flexible Provisions for Emergency Situations

EPA is adding new provisions for emergency situations under § 761.66 to allow individuals to request a waiver from specific requirements of §§ 761.60, 761.61, 761.62, and 761.65, when necessitated by an emergency situation. EPA is also adding two provisions to the existing PCB Spill Cleanup Policy in 40 CFR part 761, subpart G, that allow for more flexible requirements for cleanup of spills caused by and managed during emergency situations, such as hurricane or floods.

Harmonize General Disposal Requirements for PCB Remediation Waste

EPA is amending § 761.50(b)(3)(ii) to remove a phrase that was added erroneously in 1998, which could imply that waste with <50 parts per million (ppm) PCBs that meets the definition of PCB remediation waste in § 761.3 is not regulated for cleanup and/or disposal.

Make Changes To Improve Regulatory Implementation

EPA is making several supplemental amendments to improve implementation of existing requirements, clarify regulatory ambiguity, and correct technical errors in the PCB regulations.

II. Background

A. General Background on Polychlorinated Biphenyls (PCBs) and This Rulemaking

What are PCBs?

PCBs are a group of man-made organic chemicals known as chlorinated hydrocarbons, which consist of carbon, hydrogen, and chlorine atoms. PCBs were manufactured in the United States from 1929 until manufacturing was banned in 1979, with certain time-limited exemptions from the statutory prohibition that were granted by rule. Note that the PCB regulations also provide for excluded manufacturing processes, as defined in 40 CFR 761.3, which include inadvertent generation. The number of chlorine atoms and their location in a PCB molecule determine many of its physical and chemical

properties. PCBs have no known taste or smell, and range in consistency from thin, light-colored liquids to yellow or black waxy solids. Due to their non-flammability, chemical stability, high boiling point and electrical insulating properties, PCBs were previously used in hundreds of industrial and commercial applications including: electrical, heat transfer and hydraulic equipment; plasticizers in paints, plastics and rubber products; pigments, dyes and carbonless copy paper; and other industrial applications. The PCBs used in these products were chemical mixtures made up of a variety of individual chlorinated biphenyl components known as congeners. Most commercial PCB mixtures are known in the United States by their industrial trade names, the most common being Aroclor. Please visit *https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs* for more information.

PCB Exposures and Health Effects [1] [2] [3]

PCBs are persistent in the environment and can cause both acute and chronic health effects. Short-term exposure to high concentrations of PCBs can lead to skin conditions such as acne and rashes and may be associated with decreased liver function, neurological effects, and gastrointestinal effects. These high levels of exposure are generally rare in the general population. Chronic exposure to lower concentrations of PCBs may also cause health effects, as PCBs can accumulate in people over time. In animal studies, PCBs have been shown to cause effects on the immune, reproductive, nervous, hepatic, and endocrine systems. PCBs have also been shown to cause cancer in animals. Some studies in humans provide supportive evidence for some of these health effects. Studies also show that PCBs in pregnant women can affect their children's birth weight, short-term memory, and learning. Also, because of potential neurotoxic and endocrine effects, there is concern regarding children's exposures to PCBs.

PCBs are highly persistent in the environment. As such, they are still present in soils and sediments at many locations and may be found at low levels in ambient air and water, even decades after their production was banned. PCBs can be released into the environment from hazardous waste sites, illegal or improper disposal of industrial wastes and consumer products, leaks from old electrical transformers and capacitors containing PCBs and burning of some wastes in incinerators, among other sources. PCBs bioaccumulate and may be present in foods that people consume, such as fish, meat, and dairy products. Dietary consumption of contaminated foods is believed to be an important route of background exposure.

Laws and Regulations

This final rule is issued pursuant to section 6(e) of the Toxic Substances Control Act, 15 U.S.C. 2605(e). Section 6(e)(1)(A) gives EPA the authority to promulgate rules regarding the disposal of PCBs (15 U.S.C. 2605(e)(1)(A)). TSCA section 6(e)(2) and (e)(3) generally prohibit the manufacture, processing, distribution in commerce, and use (other than totally enclosed use) of PCBs (15 U.S.C. 2605(e)(2) and (e)(3)). TSCA section 6(e)(2)(B) gives EPA the authority to authorize the use of PCBs in other than a totally enclosed manner based on a finding of no unreasonable risk of injury to health or the environment (15 U.S.C. 2605(e)(2)(B)). TSCA section 6(e)(3)(B) provides that any person may petition EPA for an exemption from the prohibition on the manufacture, processing, and distribution in commerce of PCBs (15 U.S.C. 2605(e)(3)(B)). EPA may grant an exemption based on findings that an unreasonable risk of injury to health or the environment will not result, and that the petitioner has made good faith efforts to develop a substitute for PCBs.

The PCB regulations can be found in Title 40 of the Code of Federal Regulations (CFR) in Part 761. For useful interpretations of the regulations as well as answers to frequently asked questions, please visit *https://www.epa.gov/pcbs/policy-and-guidance-polychlorinated-biphenyl-pcbs.*

B. Assumptions and Terminology Used in Discussion of Various Methods

Sources of the Methods

There are two important sources of EPA methods related to this rulemaking. The first source is SW–846, also known as *The Test Methods for Evaluating Solid Waste: Physical/Chemical Methods Compendium,* which is EPA's collection of methods for use in complying with the Resource Conservation and Recovery Act (RCRA). SW–846 is organized into chapters providing guidance on how to use the methods and groups of methods, called ''series,'' which are organized by topic. The methods change over time as updates are published to keep up with evolving analytical and measurement needs.[4] The second source is the Clean Water Act (CWA) Methods, which are laboratory analytical methods, or test procedures, published by EPA that are used by industries and municipalities to analyze the chemical, physical, and biological components of wastewater and other environmental samples.[5] Methods for both SW–846 and CWA go through an extensive review and validation process before they are published and made available.

Technical Summary of New Methods

EPA Method 3540C—This Method is a procedure for extracting nonvolatile and semivolatile organic compounds from solids such as soils, sludges, and wastes. The Soxhlet extraction process ensures intimate contact of the sample matrix with the extraction solvent. This method is applicable to the isolation and concentration of water-insoluble and slightly water-soluble organics in preparation for a variety of chromatographic procedures. The solid sample is mixed with anhydrous sodium sulfate, placed in an extraction thimble or between two plugs of glass wool, and extracted using an appropriate solvent in a Soxhlet extractor. The extract is then dried, concentrated (if necessary), and, as necessary, exchanged into a solvent compatible with the cleanup or determinative step being employed.

EPA Method 3550C—This method describes a procedure for extracting nonvolatile and semivolatile organic compounds from solids such as soils, sludges, and wastes. The ultrasonic process ensures intimate contact of the sample matrix with the extraction solvent. This method is divided into two procedures, based on the expected concentration of organic compounds. Low concentration procedure—The sample is mixed with anhydrous sodium sulfate to form a free-flowing powder. The mixture is extracted with solvent three times, using ultrasonic extraction. The extract is separated from the sample by vacuum filtration or centrifugation. The extract is ready for final concentration, cleanup, and/or

[1] Thomas, Xue, Williams, Jones, and Whitaker. ''Polychlorinated Biphenyls (PCBs) in School Buildings: Sources, Environmental Levels, and Exposures''; Office of Research and Development, National Exposure Laboratory; Washington, DC September 2012.

[2] Agency for Toxic Substances and Disease Registry (ATSDR). Toxicological Profile for Polychlorinated Biphenyls (PCBs); U.S. Department of Health and Human Services, Public Health Service, Agency for Toxic Substances and Disease Registry. November 2000.

[3] ATSDR. Addendum to the Toxicological Profile for Polychlorinated Biphenyls; U.S. Department of Health and Human Services, Public Health Service, Agency for Toxic Substances and Disease Registry. April 2011.

[4] *https://www.epa.gov/hw-sw846.*

[5] *https://www.epa.gov/cwa-methods.*

analysis. Medium/high concentration procedure—The sample is mixed with anhydrous sodium sulfate to form a free-flowing powder. This is extracted with solvent once, using ultrasonic extraction. A portion of the extract is collected for cleanup and/or analysis.

EPA Method 8082A—This method may be used to determine the concentrations of polychlorinated biphenyls (PCBs) as Aroclors or as individual PCB congeners in extracts from solid, tissue, and aqueous matrices, using open-tubular, capillary columns with electron capture detectors (ECD) or electrolytic conductivity detectors (ELCD). The method also may be applied to other matrices such as oils and wipe samples, if appropriate sample extraction procedures are employed.

EPA Method 3546: Microwave Extraction—This method is known for its relatively brief extraction time and low equipment costs. In a microwave extraction, a sample is prepared for extraction by grinding it to a powder and then loading it into the extraction vessel. The appropriate solvent system is added to the vessel, which is then sealed. The extraction vessel containing the sample and solvent system is then heated to the extraction temperature and is extracted for the amount of time recommended by the instrument manufacturer. After the mixture cools, the vessel is opened and the contents are filtered. The solid material is then rinsed multiple times, and the various solvent fractions are combined. Finally, the extract may be concentrated, if necessary, and, as needed, exchanged into a solvent compatible with the cleanup or determinative procedure to be employed.

EPA Method 3545A: Pressurized Fluid Extraction (PFE)—When performing a pressurized fluid extraction, a sample is prepared for extraction either by air drying the sample, or by mixing the sample with anhydrous sodium sulfate or pelletized diatomaceous earth. The sample is then ground and loaded into an extraction cell. The extraction cell containing the ground sample is then heated to the extraction temperature, pressurized with the appropriate solvent system, and extracted for the period of time recommended by the instrument manufacturer. The solvent is then collected from the heated extraction vessel and allowed to cool. Finally, the extract may be concentrated, if necessary, and, as needed, exchanged into a solvent compatible with the cleanup or determinative step being employed.

EPA Method 3541: Automated Soxhlet Extraction—This method shares many similarities with Manual Soxhlet Extraction (EPA Method 3540C); however, it takes less time and solvent per sample. When performing an Automated Soxhlet Extraction, a moist solid sample (*e.g.,* soil/sediment samples) may be air-dried and ground prior to extraction or chemically dried with anhydrous sodium sulfate. The prepared sample is then extracted using 1:1 acetone:hexane in the automated Soxhlet system.

EPA Method 3510C: Separatory Funnel Liquid-Liquid Extraction—This method describes a procedure for isolating organic compounds from aqueous samples. The method also describes concentration techniques suitable for preparing the extract for the appropriate determinative methods. A measured volume of sample, usually 1 liter, at a specified pH, is serially extracted with methylene chloride using a separatory funnel. The extract is dried, concentrated (if necessary), and, as necessary, exchanged into a solvent compatible with the cleanup or determinative method to be used.

EPA Method 3520C: Continuous Liquid-Liquid Extraction—This method describes a procedure for isolating organic compounds from aqueous samples. The method also describes concentration techniques suitable for preparing the extract for the appropriate determinative steps. Method 3520 is designed for extraction solvents with greater density than the sample. A measured volume of sample, usually 1 liter, is placed into a continuous liquid-liquid extractor, adjusted, if necessary, to a specific pH, and extracted with organic solvent for 18–24 hours. The extract is dried, concentrated (if necessary), and, as necessary, exchanged into a solvent compatible with the cleanup or determinative method being employed.

EPA Method 3535A: Solid-Phase Extraction (SPE)—This is a procedure for isolating target organic analytes from aqueous samples using solid-phase extraction (SPE) media. It describes conditions for extracting a variety of organic compounds from aqueous matrices that include groundwater, wastewater, and Toxicity Characteristic Leaching Procedure (TCLP) leachates. The extraction procedures are specific to the analytes of interest and vary by group of analytes and type of extraction media.

ASTM D482–13—This test method covers the determination of ash in the range 0.010% to 0.180% by mass, from distillate and residual fuels, gas turbine fuels, crude oils, lubricating oils, waxes, and other petroleum products, in which any ash-forming materials present are normally considered to be undesirable impurities or contaminants (Note 1). The test method is limited to petroleum products which are free from added ash-forming additives, including certain phosphorus compounds

ASTM D5373–16—Test Method A covers the determination of carbon in the range of 54.9% to 84.7%, hydrogen in the range of 3.25% to 5.10%, and nitrogen in the range of 0.57% to 1.80% in the analysis samples (8.1) of coal and of carbon in analysis samples of coke in the range of 86.6% to 97.9%. Test Method B covers the determination of carbon in analysis samples of coal in the range of 58.0% to 84.2%, and carbon in analysis samples of coke in the range of 86.3% to 95.2%.

ASTM D3278–96(R2011)—These test methods cover procedures for determining whether a material does or does not flash at a specified temperature or for determining the lowest finite temperature at which a material does flash when using a small scale closed-cup apparatus.2 The test methods are applicable to paints, enamels, lacquers, varnishes, and related products having a flash point between 0 and 110 °C (32 and 230 °F) and viscosity lower than 150 St at 25 °C (77 °F).

ASTM E258–67(R87)—This test method covers the determination of total nitrogen in nitrogen-containing organic compounds. This test method is not applicable for use on materials containing N–O, N–N linkages.

ASTM D4059–00—This test method describes a quantitative determination of the concentration of polychlorinated biphenyls (PCBs) in electrical insulating liquids by gas chromatography. It also applies to the determination of PCB present in mixtures known as askarels, used as electrical insulating liquids.

ASTM D8174–18—This test method covers the procedure for a flash point test, within the range of −20 to 70 °C, of liquid wastes using a small-scale closed cup tester. This standard measures the ignitability properties of liquid wastes (which may be any discarded material), which may include secondary materials, off-specification products, and materials containing free liquids recovered during emergency response actions.

ASTM D8175–18—This test method covers the procedure for a finite flash point test, within the range of 20 to 70 °C, of liquid wastes using a manual or automated Pensky-Martens closed cup tester. This test method contains two procedures and is applicable to liquid waste, liquid phase(s) of multi-phase waste, liquid waste with suspended solids, or liquid waste that tends to form a surface film under test conditions.

Terminology of the Methods

To avoid confusion with the variety of methods discussed, the source of each method, and the numbering of the methods, EPA is using streamlined terminology in this preamble to improve its readability. For example, rather than stating ''SW–846, Test Methods for Evaluating Solid Waste, EPA Method 3540C (Soxhlet Extraction)'' each time this method is discussed, the preamble may refer to ''Method 3540C'' or ''Method 3540C (Soxhlet Extraction)'' instead. See Table 1 for a list of all methods referenced in this document.

TABLE 1—TABLE OF EPA METHODS DISCUSSED IN THIS RULEMAKING

Source	Method ID	Publication year	Method type	Method name	Final change
SW–846	Method 3510C[6]	1996	Extraction	Separatory Funnel Liquid-Liquid Extraction.	Added to Regulations.
SW–846	Method 3520C[7]	1996	Extraction	Continuous Liquid-Liquid Extraction.	Added to Regulations.
SW–846	Method 3535A[8]	2007	Extraction.	Solid-Phase Extraction (SPE).	Added to Regulations.
SW–846	Method 3500B	2007	Extraction	Organic Extraction and Sample Preparation.	Removed from Regulations.
SW–846	Method 3540C	1996	Extraction	Soxhlet Extraction	Remains in Regulations.
SW–846	Method 3541[9]	1994	Extraction	Automated Soxhlet Extraction.	Added to Regulations.
SW–846	Method 3545A[10]	2007	Extraction	Pressurized Fluid Extraction.	Added to Regulations.
SW–846	Method 3546[11]	2007	Extraction	Microwave Extraction	Added to Regulations.
SW–846	Method 3550B	1996	Extraction	Ultrasonic Extraction	Updated to Method 3550C and Limited to Wipe Samples Only.
SW–846	Method 3550C	2007	Extraction	Ultrasonic Extraction	Replaces Method 3550B and Limited to Wipe Samples Only.
SW–846	Method 8082	1996	Determinative	Polychlorinated Biphenyls (PCBs) by Gas Chromatography.	Removed from Regulations.
SW–846	Method 8082A	2007	Determinative	Polychlorinated Biphenyls (PCBs) by Gas Chromatography.	Added to Regulations.
SW–846	Method 8275A	1996	Extraction and Determinative.	Semivolatile Organic Compounds (PAHs and PCBs) in Soils/Sludges and Solid Wastes Using Thermal Extraction/Gas Chromatography/Mass Spectrometry (TE/GC/MS).	Not Added to Regulations.
CWA	Method 1668C	2010	Extraction and Determinative.	Chlorinated Biphenyl Congeners in Water, Soil, Sediment, Biosolids, and Tissue by HRGC/HRMS.	Not Added to Regulations.
CWA	608	2006	Extraction and Determinative.	Organochlorine Pesticides and PCBs.	Updated to CWA Method 608.3.
CWA	608.3	2016	Extraction and Determinative.	Organochlorine Pesticides and PCBs by GC/HSD.	Replaces CWA Method 608.

[6] U.S. EPA, Method 3510C Separatory Funnel Liquid-Liquid Extraction. Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division (5303P). Washington, DC December 1996.

[7] U.S. EPA, Method 3520C Continuous Liquid-Liquid Extraction. Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division (5303P). Washington, DC December 1996.

[8] U.S. EPA, Method 3535A Solid-Phase Extraction. Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division (5303P). Washington, DC February 2007.

[9] U.S. EPA, Method 3541 Automated Soxhlet Extraction. Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division (5303P). Washington, DC September 1994.

[10] U.S. EPA, Method 3545A Pressurized Fluid Extraction. Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division (5303P). Washington, DC February 2007.

[11] U.S. EPA, Method 3546 Microwave Extraction. Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division (5303P). Washington, DC February 2007.

III. Discussion of Public Comments and the Final Rule

A. Revise Available Extraction Methods for PCBs

Provisions in the Final Rule

EPA proposed to add the following extraction methods to 40 CFR part 761: Method 3541 (Automated Soxhlet Extraction), Method 3545A (Pressurized Fluid Extraction), and Method 3546 (Microwave Extraction) for extraction of PCBs from solid matrices; and Method 3510C (Separatory Funnel Liquid-Liquid Extraction), Method 3520C (Continuous Liquid-Liquid Extraction), and Method 3535A (Solid-Phase Extraction) for extraction of PCBs from aqueous matrices. EPA is finalizing these changes as proposed. EPA is allowing these methods for use, as applicable, under the following subparts of 40 CFR part 761:

- Subpart D—Storage and Disposal;
- Subpart K—PCB Waste Disposal Records and Reports;
- Subpart M—Determining a PCB Concentration for Purposes of Abandonment or Disposal of Natural Gas Pipeline: Selecting Sites, Collecting Surface Samples, and Analyzing Standard PCB Wipe Samples;
- Subpart N—Cleanup Site Characterization Sampling for PCB Remediation Waste in Accordance with § 761.61(a)(2);
- Subpart O—Sampling to Verify Completion of Self-Implementing Cleanup and On-Site Disposal of Bulk PCB Remediation Waste and Porous Surfaces in Accordance with § 761.61(a)(6);
- Subpart P—Sampling Non-Porous Surfaces for Measurement-Based Use, Reuse, and On-Site or Off-Site Disposal Under § 761.61(a)(6) and Determination Under § 761.79(b)(3);
- Subpart R—Sampling Non-Liquid, Non-Metal PCB Bulk Product Waste for Purposes of Characterization for PCB Disposal in Accordance With § 761.62, and Sampling PCB Remediation Waste Destined for Off-Site Disposal, in Accordance With § 761.61; and
- Subpart T—Comparison Study for Validating a New Performance-Based Decontamination Solvent under § 761.79(d)(4).

These modifications to 40 CFR part 761 can be found in the regulatory text section towards the end of this final rule; the specific sections of the PCB regulations affected by these changes are §§ 761.61(a)(5)(i)(B)(2)(iv), 761.253, 761.272, 761.292, 761.358, and 761.395.

EPA is adding Methods 3541, 3545A, and 3546 to the PCB regulations for extraction of PCBs from solid matrices for several reasons, including applicability of the methods to PCBs, frequency of use in EPA and commercial laboratories, and existing data supporting the effectiveness of the methods. EPA finds, based on reasonably available information, that these methods are technically sound for the extraction of PCBs from solid matrices. In addition, EPA is adding Methods 3510C, 3520C, and 3535A to the PCB regulations for extraction of PCBs from aqueous matrices because the PCB Regulations do not specify extraction methods for aqueous matrices. EPA finds, based on reasonably available information, that these methods are technically sound for the extraction of PCBs from aqueous matrices. The technical data and rationale for adding these methods to the PCB regulations can be found in *Section III.A. Expand Available Extraction Methods for PCBs* of the proposed rule ''Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations'' (86 FR 58730), which is included in the docket for this final rulemaking.

Discussion of the Public Comments

Public comments supported the Agency's proposal to add Method 3541 (Automated Soxhlet Extraction), Method 3545A (Pressurized Fluid Extraction), and Method 3546 (Microwave Extraction) for extraction of PCBs from solid matrices; and Method 3510C (Separatory Funnel Liquid-Liquid Extraction), Method 3520C (Continuous Liquid-Liquid Extraction), and Method 3535A (Solid-Phase Extraction) for extraction of PCBs from aqueous matrices. Specifically, commenters appreciated the increased flexibility of extraction methods, higher efficiency of the methods, reduced laboratory cost, and reduced waste.

EPA agrees with the public comments and is therefore finalizing its proposal to add these methods to the regulations. EPA finds, based on reasonably available information, that expanding the options for alternative extraction methods in the PCB regulations will help the regulated community investigate, clean up and dispose of PCB waste more quickly, efficiently, and economically, and in a more environmentally sound manner.

Background on Extraction Methods for PCBs

The regulated community has long expressed interest in the availability of alternative extraction methods beyond the two previously allowed under the PCB regulations—Method 3540C (Soxhlet Extraction), which is commonly referred to as ''Manual Soxhlet Extraction'', and Method 3550B (Ultrasonic Extraction).[12] In addition, because Ultrasonic Extraction methods do not use heat to speed up extraction kinetics or improve extraction efficiency, and the contact time with the solvent is relatively short, they may result in low bias measurements in some sample types, such as caulk and clay. In addition, published studies indicate that Method 3550B has the potential to produce low bias measurements in some solid matrices compared to other extraction techniques. For more information on this issue, see *Section III.B. Update and Limit the Use of Ultrasonic Extraction* of this final rule.

Manual Soxhlet Extraction was invented in the late 1800s, and the revised Method 3540C was created in 1996. It is a long-standing, effective method for PCB extraction from solid matrices; however, it has slowly been replaced by newer methods in both EPA and commercial laboratories over time.[13] This transition has caused problems with the availability of Manual Soxhlet Extraction in EPA and commercial laboratories, which could cause delays in getting samples extracted and analyzed in a timely matter. In addition, further delays could result because Manual Soxhlet Extraction takes 16–24 hours to complete the extraction of a limited number of samples, whereas other methods may take only 2–4 hours, or less. Manual Soxhlet Extraction systems also typically use heating manifolds with significant footprints that are commonly operated in fume hoods to limit operator exposure to solvent vapors, which further restricts laboratory capacity using this technique.

In addition, none of the previously allowed methods are applicable to extraction of PCBs from aqueous samples. Method 8082 was the only determinative method listed in the PCB regulations for extraction from aqueous matrices and states that ''[a]queous samples may be extracted at neutral pH with methylene chloride using either Method 3510 (separatory funnel), Method 3520 (continuous liquid-liquid extraction), Method 3535A (solid-phase

[12] Allison D. Foley ''Consolidated Petition on Behalf of USWAG Members to Use Automated Soxhlet Extraction (Method 3541) in Connection with June 10, 2014 Risk-Based Approvals to Dispose of Polychlorinated Biphenyl (PCB) Remediation Waste''; March 2015.

[13] M.D. Luque de Castro, L.E. Garcıa-Ayuso. ''Soxhlet extraction of solid materials: an outdated technique with a promising innovative future.'' Department of Analytical Chemistry, Faculty of Sciences, University of Cordoba. Cordoba, Spain. March 1998.

extraction) or other appropriate technique or solvents.''

B. Update and Limit the Use of Ultrasonic Extraction

Provisions in the Final Rule

EPA proposed to remove Method 3550B (Ultrasonic Extraction) from the PCB regulations. However, after reviewing the public comments, EPA is, instead, updating references to Method 3550B in the PCB regulations to Method 3550C and limiting the use of Method 3550C to wipe samples only. Available studies on Ultrasonic Extraction collectively demonstrate concerns about the inconsistent performance of the method and the robustness of extractions for certain matrices of interest to the TSCA PCB Cleanup and Disposal Program for compliance testing. However, EPA does not have such concerns about use of Ultrasonic Extraction for wipe samples based on reasonably available information.

The sections of the PCB regulations affected by these changes are §§ 761.61(a)(5)(i)(B)(2)(iv), 761.253, 761.272, 761.292, 761.358, and 761.395.

Discussion of the Public Comments

EPA proposed to remove Method 3550B (Ultrasonic Extraction) from the PCB regulations because the extraction efficiency may be more variable than other methods and thus it has a higher potential than other methods to be conducted improperly. However, several commenters opposed removing Method 3550B from the PCB regulations. These commenters all considered this method to be appropriate for at least some matrix types, such as sand and surface wipe samples. Some comments suggested that EPA restrict the use of the method for problematic matrices only, such as clay and caulk. Some comments stated that method quality controls, such as performance testing, visual observation of the extraction, or ability to meet the acceptance criteria for the method, were sufficient to identify whether the method is appropriate for a given sample. The commenters also voiced concern that removal of the method from the PCB regulations could lead to logistical problems and increased costs. Several of these commenters proposed updating the reference from Method 3550B to Method 3550C, which is an updated version of Method 3550B.

The Agency disagrees with comments that suggest EPA restrict the use of Method 3550B or 3550C for problematic matrices only, as it would be inefficient and complicated to make such a decision on a case-by-case basis—for example, by prohibiting the method to be used on certain types of soils, or by specifying the maximum silt or clay content of soil samples for which the method is permissible to use. The Agency also disagrees with comments that the method quality controls provide all the information needed to distinguish acceptable and poor extraction efficiency since PCBs may be more deeply integrated into soils or other solid samples and may be more difficult to efficiently extract. Based on the available studies, use of Ultrasonic Extraction in some solid matrices is likely to produce low bias measurements that are not otherwise identified with the method quality controls. This low bias may lead to decision errors that could otherwise be avoided by using the alternative extraction methods EPA is adding in this rulemaking, all of which use heat and a longer solvent contact time to speed up extraction kinetics and improve extraction efficiency.

However, the Agency agrees with comments indicating the method is appropriate for wipe samples, because PCBs do not have the same extraction kinetics or extraction efficiency limitations from wipe samples containing relatively small amounts of particulates as they may have in some types of bulk solid samples (*e.g.,* wet clay or caulk). The Agency also agrees with comments proposing that EPA update Method 3550B to Method 3550C, which is the updated version of Method 3550B. The Agency is therefore allowing use of Method 3550C for wipe samples only. Allowing use of this extraction method on wipe samples, which are a very commonly extracted item, addresses both commenters' concerns about cost and logistical problems that completely removing this extraction method from the PCB regulations could cause and the Agency's concerns regarding use of this method on other matrices.

Background on This Issue

Method 3550C (Ultrasonic Extraction) is an updated version of Method 3550B. Use of Method 3550B was previously allowed in the PCB regulations. The text in Method 3550B and Method 3550C includes caveats that ultrasonic extraction may not be as rigorous as other extraction methods for soils/solids and highlights the importance of following the method explicitly. By comparison, this issue is generally not mentioned or highlighted in other SW–846 methods. Method 3550C further emphasizes, beyond what is stated in Method 3550B, the crucial importance of conducting the method properly, in line with the manufacturer's instructions regarding operational settings.[14] For more information on the technical aspects of ultrasonic extraction, see *Section III.A.2. Technical Summary of Relevant Extraction Methods* of the proposed rule ''Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations'' (86 FR 58730), which is included in the docket for this final rulemaking.

C. Revise Available Determinative Methods for PCBs

Provisions in the Final Rule

EPA proposed to add three determinative methods to the PCB regulations: Method 8082A (Polychlorinated Biphenyls (PCBs) By Gas Chromatography), Method 8275A (Semivolatile Organic Compounds (PAHs and PCBs) In Soils/Sludges and Solid Wastes Using Thermal Extraction/Gas Chromatography/Mass Spectrometry (TE/GC/MS)), and Method 1668C (Chlorinated Biphenyl Congeners in Water, Soil, Sediment, Biosolids and Tissue by HRGC/HRMS).

EPA also proposed to update the outdated referenced methods in § 761.60(g)(1)(iii) from Method 608 to Method 608.3, and Method 8082 to Method 8082A.

The Agency is adding Method 8082A to the PCB regulations and updating Method 608 to Method 608.3 in § 761.60(g)(1)(iii), as proposed. The Agency is not adding Method 8275A or Method 1668C to the PCB regulations, due to the public comments summarized below. The main deciding factor is that the regulated community expressed satisfaction with using Method 8082 and/or Method 8082A for analysis and indicated that there is not a need to use other methods on a broad scale. Although EPA is not adding Method 8275A and Method 1668C as determinative methods to the regulations, the Agency notes that these methods, as well as other methods that have been published since the proposed rule, such as CWA Method 1628, may be appropriate and useful in certain situations. For example, a PCB congener analysis method (such as Method 1668C) may be preferred based on the

[14] Section 1.4 of Method 3550C states, ''Because of the limited contact time between the solvent and the sample, ultrasonic extraction may not be as rigorous as other extraction methods for soils/solids. Therefore, it is critical that the method (including the manufacturer's instructions) be followed explicitly, in order to achieve the maximum extraction efficiency. See Sec. 11.0 for a discussion of the critical aspects of the extraction procedure. Consult the manufacturer's instructions regarding specific operational settings.''

formulation of PCBs present in the material being analyzed per § 761.1(b)(2) and may be acceptable under a §§ 761.60(e), 761.61(c), 761.62(c), or 761.79(h) approval. EPA notes that a person may either conduct a Subpart Q comparison study or submit an appropriate application (*i.e.,* under §§ 761.60(e), 761.61(c), 761.62(c) or 761.79(h)) requesting to use an alternative determinative method for their project.

The sections of the PCB regulations affected by these changes are §§ 761.60(g)(1)(iii), 761.61(a)(5)(i)(B)(2)(iv), 761.253, 761.272, 761.292, 761.358, and 761.395.

Discussion of the Public Comments

Commenters generally opposed adding Method 8275A and Method 1668C to the PCB regulations but did not object to adding Method 8082A or updating Method 608 to Method 608.3.

Commenters pointed out that Method 8275A has a very small sample size (0.003–0.25 grams), which could lead to problems obtaining sufficient sensitivity. Comments also noted that testing such a small sample mass may lead to greater concerns about whether sample measurements are representative. Other solid sample preparation methods included in this rule specify a sample size of 10–30 grams, which is less likely to be subject to subsampling bias. In addition, comments noted that Method 8275A is not specific to quantitative analysis of PCBs as it was validated for simultaneous analysis of select PCB congeners and polycyclic aromatic hydrocarbons (PAHs). The comments also indicated that there is a lack of commercial laboratory capacity to perform this method, and that the method is not available at any National Environmental Laboratory Accreditation Program (NELAP) accredited laboratories. The comments also expressed concern that the drying and sieving process for the method could result in volatile loss of mono- and di-chlorobiphenyls, which is a common problem for any method which uses air drying. The comments identified that EPA Method 8275A has a limited scope of target analytes, and the method only specifically includes 19 out of 209 PCB congeners. Lastly, the comments expressed concern about the use of isotopically labeled PAHs in Method 8275A as internal standards for PCBs, which may lead to measurement bias if they do not perform similarly in a given sample. Considering these comments, EPA has decided not to finalize changes related to Method 8275A.

Regarding Method 1668C, commenters were primarily concerned about the availability and cost of using this method. Comments indicated that the high-resolution mass spectrometer used for this method is not widely available, and that the analytical costs are high with long turnaround times. The commenters were concerned about the parts-per-quadrillion detection limits, which are orders of magnitude more sensitive than typically needed to demonstrate compliance with the PCB regulations. The comments also noted that, due to these very low detection limits, this method is more likely to experience laboratory background contamination which could lead to problems with data interpretation. The commenters were also concerned with the fact that the method validation study for Method 1668C did not include soil or sediment matrices, and the method does not identify how to report total PCBs. Lastly, the comments noted that the regulated community never expressed concerns regarding availability of determinative methods beyond EPA Method 8082 and/or EPA Method 8082A. In light of these comments, EPA has decided not to finalize changes related to Method 1668C.

EPA did not receive any substantive comments on its proposal to update Method 608 to Method 608.3 and Method 8082 to Method 8082A in § 761.60(g)(1)(iii), and thus is finalizing those changes largely as proposed.

Background on This Issue

Previously, the PCB regulations listed Method 8082 (Polychlorinated Biphenyls (PCBs) by Gas Chromatography) as the only determinative method for PCB samples.[15] The only exception in the PCB regulations was at § 761.60(g)(1)(iii), which stated that ''[a]ny gas chromatographic method that is appropriate for the material being analyzed may be used'' and then listed several available determinative methods.[16] However, this section in the PCB regulations is restricted to samples of mineral oil dielectric fluid (MODEF) and waste oil (see §§ 761.60(g)(1) and 761.60(g)(2)). Previously, all other samples were required to be analyzed using Method 8082, and any alternative determinative method would require EPA approval. EPA had not received any significant concerns from the regulated community regarding the availability of determinative methods; however, EPA investigated additional determinative methods to include in the proposed rulemaking to provide a greater number of technically sound options for the regulated community.

Additionally, the methods previously referenced in § 761.60(g)(1)(iii) were outdated and did not reflect the most current versions. By updating these references, EPA is not requiring that only the new specifically referenced methods be used, as § 761.60(g)(1)(iii) provides that ''[a]ny gas chromatographic method that is appropriate for the material being analyzed may be used.'' EPA believes this update will avoid confusion by referencing the most up-to-date methods while still allowing flexibility in this regulatory provision.

D. Revise Performance-Based Disposal Under § 761.61(b)

Provisions in the Final Rule

EPA proposed to amend § 761.61(b) to add performance-based cleanup standards, while maintaining this option as one which does not require prior EPA approval and thus remains an expedient option for those entities removing PCB remediation waste from the site. Specifically, EPA proposed to amend § 761.61(b) to include explicit conditions for on-site remediation and cleanup of PCB remediation waste.

The Agency is finalizing the provisions in § 761.61(b) largely as proposed, with some minor changes and clarifications. The final rule includes provisions that: (1) establish cleanup levels; (2) prohibit use of § 761.61(b) where cleanup sites are near sensitive populations or environments; (3) establish verification sampling requirements; (4) establish recordkeeping requirements; (5) establish a 30-day post-cleanup notification requirement; and (6) allow disposal of non-liquid PCB remediation waste in RCRA Subtitle C landfills.

First, EPA is establishing cleanup levels for sites remediated under a § 761.61(b) performance-based cleanup. The regulations previously did not reference a specific cleanup level. The

[15] U.S. EPA, Method 8082 Polychlorinated Biphenyls (PCBs) By Gas Chromatography. Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division (5303P). Washington, DC. December 1996.

[16] The regulatory text at § 761.60(g)(1)(iii) previously listed the following methods: ''. . . EPA Method 608, ''Organochlorine Pesticides and PCBs'' at 40 CFR part 136, Appendix A;'' EPA Method 8082, ''Polychlorinated Biphenyls (PCBs) by Capillary Column Gas Chromatography'' of SW–846, ''OSW Test Methods for Evaluating Solid Waste,'' which is available from NTIS; and ASTM Standard D–4059, ''Standard Test Method for Analysis of Polychlorinated Biphenyls in Insulating Liquids by Gas Chromatography,'' which is available from ASTM.''

preamble to the proposed PCB Megarule (59 FR 62788, 62796; Dec. 6, 1994) explained that § 761.61(b) ''could be used where all PCB remediation waste would be removed from the environment, or where remediation levels were established elsewhere in these rules.'' In guidance, EPA has interpreted ''all PCB remediation waste'' to mean PCB remediation waste at >1 ppm PCBs.[17] Identifying a numerical cleanup level in the regulations will help responsible parties understand the circumstances under which they could expect to have no further cleanup responsibility at the site under § 761.61(b). EPA is therefore establishing the following cleanup levels directly in § 761.61(b): ≤1 ppm for bulk PCB remediation waste and porous surfaces; the concentrations specified in § 761.79(b)(1) and (2) for liquids; and the concentrations specified in § 761.79(b)(3) for nonporous surfaces. See § 761.61(b)(1)(ii).

Second, EPA is adding an applicability provision in § 761.61(b) to exclude the use of § 761.61(b) at sites with specific characteristics that merit additional consideration by EPA. In the PCB Megarule (63 FR 35384; June 29, 1998), EPA established that certain types of sensitive environments and populations would not be well-served by the cleanup levels prescribed in § 761.61(a)(4) and excluded those sites from the applicability of § 761.61(a). EPA also identified certain types of sites that, while subject to § 761.61(a), may call for more stringent cleanup levels. See § 761.61(a)(1) and (a)(4)(vi). The PCB Spill Cleanup Policy includes similar provisions. See § 761.120(a)(2) and (d)(2). Because performance-based cleanup under § 761.61(b) will not require consultation with EPA, the Agency is establishing a list of objective characteristics that excludes a site for cleanup using performance-based cleanup standards. This list largely mirrors the applicability section in § 761.61(a)(1) and the characteristics in §§ 761.61(a)(4)(vi), 761.120(a)(2), and 761.120(d)(2) of sites that may require more stringent cleanup levels or site-specific determinations. It also excludes sites where PCB remediation waste is found within the 100-year floodplain, which allows EPA to give additional consideration to the protection of waterways through cleanup under § 761.61(a) and/or § 761.61(c), and to the impacts of climate change on the spread of PCB contamination through flooding. See § 761.61(b)(1)(i).

Third, EPA is requiring verification sampling in accordance with the PCB regulations to ensure that the cleanup levels established in § 761.61(b) have been met. Verification sampling must be conducted in accordance with Subpart O for bulk PCB remediation waste and porous surfaces, Subpart P for nonporous surfaces, and § 761.269 for liquid PCB remediation waste. The concentration in every required sample analysis result must be below the specified cleanup levels for the cleanup to be complete. See § 761.61(b)(1)(iii).

Fourth, EPA is incorporating explicit recordkeeping requirements into performance-based cleanup. Previously, responsible parties using § 761.61(b) were only subject to the applicable recordkeeping requirements in § 761.180(a) for PCB remediation waste shipped off-site. Under the new provisions for performance-based cleanup, responsible parties must follow the recordkeeping requirements in the PCB Spill Cleanup Policy at § 761.125(c)(5) in addition to the requirements in § 761.180(a). See § 761.61(b)(1)(iv).

Fifth, EPA is incorporating a 30-day post-cleanup notification requirement into the performance-based cleanup provisions. Under performance-based cleanup and disposal, sites may be remediated without EPA involvement. Post-cleanup notification allows regulators to evaluate performance to ensure that conditions, such as cleanup levels, are met. The notification must include information about the site and point of contact, the disposal facility and waste shipments, a summary of the required records, and a certification, as defined in § 761.3, from the responsible party. While EPA proposed to require responsible parties to send a notification to EPA within 14 days of the final shipment of waste offsite for disposal from a site cleaned up under § 761.61(b), based on the public comments summarized below, this final rule revises the notification period to 30 days. See § 761.61(b)(1)(v).

Sixth, EPA is adding a RCRA Subtitle C landfill disposal option for non-liquid PCB remediation waste under § 761.61(b). RCRA Subtitle C landfills are already allowed to be used for the disposal of bulk PCB remediation waste under § 761.61(a)(5)(i)(B)(2)(iii) and for PCB bulk product waste under § 761.62(a)(3). EPA has previously stated in the preamble to the PCB Megarule that ''EPA added RCRA Subtitle C landfills as a disposal option for PCB bulk product waste because they are designed and operated in the same manner as TSCA chemical waste landfills.'' [18] As discussed further below, RCRA Subtitle C and TSCA chemical waste landfill regulations authorize the imposition of comparable protective conditions, and EPA believes that allowing this waste to go to RCRA Subtitle C landfills is protective and presents no unreasonable risk to human health or the environment. Moreover, since EPA has already determined that RCRA Subtitle C landfills are protective for PCB bulk product waste, which typically contains very high concentrations of PCBs, the Agency finds that disposal of non-liquid PCB remediation waste in RCRA Subtitle C landfills would also be protective, as non-liquid PCB remediation waste typically contains concentrations of PCBs similar to or lower than PCB bulk product waste. By adding these landfills to the list of allowable disposal options for certain PCB remediation wastes, EPA anticipates that transportation costs will decrease as the distance to the closest allowable disposal option diminishes. Furthermore, the disposal cost per ton of non-liquid, nonhazardous PCB waste is generally lower at RCRA Subtitle C landfills than it is at TSCA chemical waste landfills. More information on the estimated costs is available in the Economic Assessment. See § 761.61(b)(2)(ii)(A).

Finally, EPA is revising the language in § 761.125(a)(2) of the PCB Spill Cleanup Policy to ensure that the addition of RCRA Subtitle C landfills to § 761.61(b) does not affect the Spill Cleanup Policy. Expanding the disposal options available under the Spill Cleanup Policy is not an objective of this rulemaking and is outside the scope of this rulemaking. While EPA proposed to revise the language in the Spill Cleanup Policy to specify that only disposal facilities with TSCA approvals issued under Subpart D of the PCB regulations could be used for disposal of cleanup debris and other materials resulting from cleanup under the Policy, based on the public comment summarized below, EPA has modified the revision to ensure that Subpart D storage and disposal options other than disposal in RCRA Subtitle C landfills remain. See § 761.125(a)(2).

EPA notes that the above changes to § 761.61(b) will not impact a responsible party's ability to pair performance-based disposal under § 761.61(b)(2) with on-site cleanup under § 761.61(a), § 761.61(c), or § 761.77 (*e.g.,* state-authorized cleanup under a coordinated approval). The regulatory text explicitly preserves the ability to use

[17] Managing Remediation Waste From Polychlorinated Biphenyls (PCBs) Cleanups, *https://www.epa.gov/pcbs/managing-remediation-waste-polychlorinated-biphenyls-pcbs-cleanups.*

[18] 63 FR 35384, 35410–35411; June 29, 1998.

§ 761.61(b)(2) solely as a disposal provision. See introductory paragraph in § 761.61(b).

For more information on the changes to § 761.61(b), see *Section III.D. Revise Performance-Based Disposal Under § 761.61(b)* of the proposed rule ''Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations'' (86 FR 58730), which is included in the docket for this final rulemaking.

Discussion of the Public Comments

Comments were supportive of EPA's proposal to establish cleanup levels for sites remediated under a § 761.61(b) performance-based cleanup, and EPA is finalizing this change as proposed.

EPA proposed to limit applicability of § 761.61(b) at sites with characteristics that may warrant more stringent cleanup levels or site-specific determinations. Several commenters expressed concern that prohibiting use of § 761.61(b) at sites that are adjacent to, contain, or are proposed to be redeveloped to contain the sensitive populations or environments listed in § 761.61(b)(1)(i)(A)(7) unnecessarily limits the applicability of the § 761.61(b) performance-based cleanup option and that the § 761.61(b) cleanup levels will ensure no unreasonable risk at these sites. EPA disagrees with these comments. In EPA's experience addressing these types of sites under § 761.61(c), EPA frequently sees complex risks and exposure pathways that require extensive collaboration between EPA and responsible parties. Based on this experience, the Agency does not have confidence that these sites could be protectively managed under the performance-based cleanup option without EPA involvement and believes that the § 761.61(b) applicability provisions, which largely mirror existing provisions in §§ 761.61(a)(1), 761.61(a)(4)(vi), 761.120(a)(2), and 761.120(d)(2), are appropriately limited. EPA does, however, recognize the need for clarification in § 761.61(b)(1)(i)(A)(*7*) based on comments that questioned whether the term ''adjacent to'' in that provision referred to adjacency to a cleanup site or an entire property or facility containing a cleanup site. EPA has revised § 761.61(b)(1)(i)(A)(7) to clarify that the provision refers to a cleanup site, as defined in § 761.3.

EPA proposed to add verification sampling requirements to § 761.61(b). Some commenters sought flexibility in verification sampling to account for site-specific circumstances and for other reasons. While EPA recognizes the desire for flexibility, because § 761.61(b) is a self-implementing cleanup option without EPA involvement, the Agency believes that prescriptive verification sampling requirements are appropriate, and EPA is finalizing this change as proposed.

EPA proposed to add recordkeeping requirements from § 761.125(c)(5) of the PCB Spill Cleanup Policy to § 761.61(b). EPA received no comments regarding these recordkeeping requirements and thus is finalizing this change as proposed.

EPA proposed to add a post-cleanup notification requirement to § 761.61(b) that would require notification within 14 days of the final shipment of waste offsite for disposal from a site cleaned up under § 761.61(b). Commenters considered the 14-day notification period to be too short and sought either 30 or 60 days. EPA agrees with commenters on the need for more time to obtain all necessary information to include in the notification, including processing verification samples and confirming the manifests. EPA is therefore finalizing a post-cleanup notification requirement that requires notification within 30 days of final shipment of waste offsite for disposal from a site cleaned up under § 761.61(b). EPA finds 30 days will allow sufficient time to obtain all necessary information while providing EPA timely notification of cleanups completed under § 761.61(b).

EPA proposed to allow for disposal of non-liquid PCB remediation waste in RCRA Subtitle C permitted landfills under § 761.61(b). Most of the commenters supported the addition of RCRA Subtitle C landfills to the list of allowable disposal options for non-liquid PCB remediation waste. One commenter noted potential differences in monitoring, recordkeeping, and reporting requirements for PCBs between RCRA Subtitle C landfills and TSCA chemical waste landfills. In particular, the commenter noted that environmental monitoring requirements for RCRA Subtitle C landfills are based on RCRA hazardous waste program requirements, which are not the same as the monitoring requirements for TSCA chemical waste landfills under § 761.75 (*i.e.,* surface water, groundwater, leachate, and secondary leachate monitoring of PCBs, pH, specific conductance, and chlorinated organics). The commenter noted that additional monitoring parameters for TSCA chemical waste landfills may include soil, sediment, and ambient air monitoring, where necessary, to ensure protection of the environment from PCBs. The commenter also noted that in some States, PCBs are not a hazardous waste, which could leave State programs with a limited ability to implement environmental monitoring of PCBs at RCRA Subtitle C landfills.

PCBs are hazardous constituents under 40 CFR part 261, appendix VIII and groundwater monitoring constituents under 40 CFR part 264, appendix IX; therefore, they are regulated under the RCRA regulations and under facility permits. Specifically, they are subject to the comprehensive scheme for detecting and responding to releases to groundwater from hazardous waste management units at facilities permitted under RCRA Subtitle C. See 40 CFR part 264, subpart F. Among other things, the facility must promptly report to the Regional Administrator any detected releases (see, *e.g.,* §§ 264.98(g)(1), 264.99(h)) and maintain records of groundwater monitoring data (§ 264.97(j)). In addition, the RCRA regulations contain requirements for a liner system (under § 264.301(a)(1)), leachate collection system (under § 264.301(a)(2)), recordkeeping (under § 264.73), and reporting (under §§ 264.75, 264.76, and 264.77). Subtitle C landfills must also be permitted under RCRA § 3005 and 40 CFR part 270. The permit would flesh out these regulatory provisions to specify as appropriate, among other things, requirements to analyze groundwater samples for PCBs identified as constituents to be monitored and monitor amounts of leachate in the leachate collection and removal system. In addition to implementing the specific regulatory requirements, each permit is required to contain additional terms and conditions that EPA or the authorized State determines to be necessary to protect human health and the environment. See RCRA § 3005(c)(3); 40 CFR 270.32(b)(2). This authority is comparable to 40 CFR 761.75(c)(3)(ii), under which EPA may include in a TSCA chemical waste landfill approval any other requirements or provisions that the Agency finds are necessary to ensure that operation of the chemical waste landfill does not present an unreasonable risk of injury to health or the environment from PCBs. It is under this authority that EPA could require, for example, air monitoring at a chemical waste landfill, a measure identified by the commenter but not specifically required in § 761.75. Thus, EPA disagrees that States in which PCBs are not a hazardous waste could have limited ability to implement environmental monitoring of PCBs at RCRA Subtitle C landfills. Despite a few minor variations in monitoring, recordkeeping, and reporting requirements specified in the RCRA

Subtitle C and TSCA chemical waste landfill regulations, the regulations authorize the imposition of comparable protective conditions, and EPA believes that allowing this waste to go to RCRA Subtitle C landfills is protective and presents no unreasonable risk to human health or the environment.

EPA proposed to revise the language in § 761.125(a)(2) of the PCB Spill Cleanup Policy to ensure that the addition of RCRA Subtitle C landfills to § 761.61(b) would not affect the Spill Cleanup Policy. Specifically, EPA proposed to revise the language in the Spill Cleanup Policy to specify that only disposal facilities with TSCA approvals issued under Subpart D of the PCB regulations could be used for disposal of cleanup debris and other materials resulting from cleanup under the Policy. One commenter warned that the revision, as proposed, would inadvertently curtail the storage and disposal options for cleanup debris and other materials under the Policy. EPA agrees with the comment and has modified the revision to specifically exclude disposal of cleanup debris and other materials in RCRA Subtitle C landfills but allow all other storage and disposal conducted in accordance with the provisions of 40 CFR part 761, subpart D. See § 761.125(a)(2).

Finally, EPA's request for comments on requiring a § 761.61(b) pre-cleanup notification yielded overwhelmingly opposing comments. Commenters raised concerns that a pre-cleanup notification would cause unnecessary delay and negate one of the primary benefits of carrying out performance-based cleanups, which is the ability to perform the cleanup without EPA involvement. EPA agrees these concerns have merit and has decided to take no further action on this issue.

Background on the Issue

There are three options for addressing PCB remediation waste, listed in § 761.61 under paragraphs (a), (b) and (c). Previously, § 761.61(b) prescribed disposal methods for liquid and non-liquid PCB remediation waste but did not explicitly require or refer to cleanup requirements or cleanup levels in the regulations. In contrast, the PCB remediation waste option in § 761.61(a) for ''self-implementing on-site cleanup and disposal of PCB remediation waste'' describes in detail the requirements for notification, site characterization, cleanup levels, cleanup verification, disposal options, and more. The option in § 761.61(c) for ''risk-based disposal approval'' allows a person to apply for a risk-based approval to sample, cleanup, or dispose of PCB remediation waste in a manner other than prescribed in paragraphs (a) or (b). The language of § 761.61(b) thus did not conform to the other two options in that the provision did not state the removal requirements of PCB remediation waste at any specified concentration nor did it provide for procedures to demonstrate that on-site cleanup is complete.

Before this rulemaking, EPA had stated in guidance related to § 761.61(b) that to be completely unregulated for disposal off-site without an approval from EPA, PCB remediation waste must contain <1 ppm PCBs, and that the concentration must not be the result of dilution during remediation (*e.g.,* by mixing contaminated soil with clean soil during excavation).[19] Similarly, if someone were to use § 761.61(b) for disposal of waste but leave PCB remediation waste on-site >1 ppm, they would still have TSCA obligations for those remaining materials.[20]

While EPA's regulatory text and preamble statements refer to §§ 761.61(a), (b), and (c) as three alternatives for PCB cleanup and disposal, the previous absence of cleanup provisions, such as cleanup levels and sampling requirements, in § 761.61(b) made it challenging to determine that on-site cleanup is complete and the site is authorized for use under § 761.30(u).[21] [22] Clear regulatory requirements are warranted as EPA estimates that 50 to 60 million kilograms of PCB remediation waste are generated at 430 to 460 sites cleaned up under § 761.61(b) each year.[23]

While the new conditions for performance-based cleanup will require additional effort on the part of responsible parties, the conditions will also provide them confidence that they are satisfying the regulatory requirements. As always, failure to properly characterize PCBs on site is not a defense for noncompliant cleanup and disposal. Liability for ensuring compliance with § 761.61(b), performance-based cleanup and disposal, lies with the responsible party. In addition, while the revisions to § 761.61(b) are designed to be fully self-implementing, if the remediating party has questions as to whether a site qualifies to be cleaned up under § 761.61(b)(1)(i) of this provision, it would be in the remediating party's best interest, from a compliance assurance perspective, to contact the appropriate EPA Regional PCB Coordinator prior to commencing the cleanup and disposal activities. See EPA's PCB website for a list of the EPA Regional PCB Coordinators: *www.epa.gov/pcbs/program-contacts.*

E. Remove Regulatory Provision Allowing Disposal of PCB Bulk Product Waste as Roadbed

Provisions in the Final Rule

The Agency is removing the option provided for in § 761.62(d)(2) to dispose of PCB bulk product waste under asphalt as roadbed material, as proposed. The Agency cannot determine that the practice presents no unreasonable risk of injury to health or the environment.

Summary of the Public Comments

The public comments were supportive of removing the regulatory provision allowing the disposal of PCB bulk product waste as roadbed material. One commenter sought confirmation that this change will not impact PCB bulk product waste that was previously and lawfully disposed of as roadbed material under this option. EPA confirms that while the PCB regulations no longer allow disposal of PCB bulk product waste under asphalt as roadbed as of the effective date of this final rulemaking, this change does not have retroactive effect.

Background on the Issue

EPA established a provision allowing for disposal of PCB bulk product waste as roadbed material in the 1998 PCB Megarule. In the preamble for that rule, EPA stated that ''[b]ecause these disposal options have been restricted to materials that do not leach and because other potential routes of exposure have been controlled, EPA has concluded that the risk from these disposal options is the practical equivalent of disposal in a landfill as required in § 761.62(b)(1), and therefore that this risk is not unreasonable.'' [24] Since 1998, the assumption that PCBs do not migrate from PCB bulk product waste has been proven incorrect in many scenarios.[25] For example, studies show that caulk containing PCBs degrades, releasing PCBs to the air, stormwater, and

[19] PCB Q&A Manual. June 2014. Pg. 91. *https://www.epa.gov/sites/production/files/2015-08/documents/qacombined.pdf.*

[20] *https://www.epa.gov/pcbs/managing-remediation-waste-polychlorinated-biphenyls-pcbs-cleanups.*

[21] 59 FR 62788, 62796; Dec. 6, 1994.

[22] 40 CFR 761.61, introductory paragraph.

[23] Manifest data from 2018 and 2019 were analyzed to estimate the volume of waste and number of sites cleaned up under § 761.61(b).

[24] 63 FR 35384, 35412; June 29, 1998.

[25] Eero Priha, Sannamari Hellman, Jaana Sorvari, PCB contamination from polysulphide sealants in residential areas—exposure and risk assessment, Chemosphere, Volume 59, Issue 4, 2005, Pages 537–543. *https://www.sciencedirect.com/science/article/pii/S0045653505001074.*

adjacent soil.[26] Considering these studies, EPA questions whether potential leaching of PCBs from PCB bulk product waste used as roadbed material could lead to environmental releases of PCBs and potential exposures to humans and wildlife. As a result, EPA no longer has a basis to support the determination of no unreasonable risk of injury to health or the environment that the Agency made in 1998. EPA further believes that this disposal option is not widely used.

F. Add Flexible Provisions for Emergency Situations

Provisions in the Final Rule

EPA is adding new provisions for emergency situations under § 761.66 to allow individuals to request a waiver from specific requirements of §§ 761.60, 761.61, 761.62, and 761.65, when necessitated by an emergency situation. EPA is also adding two provisions to the existing PCB Spill Cleanup Policy in 40 CFR part 761, subpart G, that allow for more flexible requirements for cleanup of spills caused by and managed in emergency situations. Additionally, EPA is establishing a definition for ''emergency situation'' to clarify the applicability of these changes.

The Agency is also adding a provision to remind the regulated community that they must abide by all other applicable Federal, State, and local laws and regulations when conducting activities under these emergency provisions.

a. Definition of ''Emergency Situation''

EPA is adding a definition for ''emergency situation'' to §§ 761.3 and 761.123. Specifically, EPA is defining ''emergency situation'' as ''adverse conditions caused by manmade or natural incidents that threaten lives, property, or public health and safety; require prompt responsive action from the local, State, Tribal, territorial, or Federal government; and result in or are reasonably expected to result in: (1) A declaration by either the President of the United States or Governor of the affected State of a natural disaster or emergency; or (2) an incident funded under the Federal Emergency Management Agency (FEMA) via a Stafford Act disaster declaration or emergency declaration. Examples of emergency situations may include civil emergencies or adverse natural conditions, such as hurricanes, earthquakes, or tornados.'' EPA is establishing this definition because it is sufficiently broad to capture a wide range of emergencies that would be likely to significantly impact the cleanup and disposal of PCB waste. At the same time, the definition is contingent upon a declaration of disaster or emergency from an established authority, which are generally made in an objective manner. In response to a public comment indicating that such declarations are sometimes made well after incidents occur, which could create uncertainty as to whether adverse conditions caused by the incident would qualify as an emergency situation, EPA has revised the proposed definition to include situations that both result in or are reasonably expected to result in a declaration.

b. Additional Flexibilities Under the PCB Spill Cleanup Policy for Spills Caused by Emergency Situations

In this rulemaking, EPA is expanding the existing flexibilities in the PCB Spill Cleanup Policy in 40 CFR part 761, subpart G to be available in all emergency situations, rather than on a case-by-case basis. First, EPA is allowing the responsible party to clean up a spill caused by an emergency situation based on the as-found PCB concentration when the source concentration cannot readily be determined, as is common in emergency situations. See § 761.120(c)(2)(i) and the definition of ''spill'' in § 761.123.

Second, EPA is adding flexibility to the timeframe for completing notification under the PCB Spill Cleanup Policy. Generally, the PCB Spill Cleanup Policy specifies that notification be made within 24 hours after the responsible party was notified or became aware of the spill. See § 761.125(a)(1). When the Policy is used for cleanup activities undertaken directly in response to spills caused by emergency situations, EPA is extending the timeframe for reporting. EPA proposed to extend the timeframe for reporting to seven days after the adverse conditions that prevented communication have ended. However, in response to a comment summarized below, EPA is shortening the window to 48 hours after the adverse conditions that prevented communication have ended (*e.g.,* internet and phone lines are down due to an emergency situation; once one or the other is back up, notification to EPA is required within 48 hours). See § 761.120(c)(2)(ii).

These flexibilities are being finalized largely as proposed. EPA expects that these flexibilities will result in a net benefit in protection of health and the environment, given that they allow those conducting responses to spills caused by emergency situations to assess and dispose of waste more quickly and to prioritize time-sensitive remedial actions.

c. Waiver From Various Sampling, Extraction, Analysis, Cleanup, Storage, and Disposal Requirements in Emergency Situations

EPA is creating an option to apply for a waiver from various PCB waste management requirements when necessitated by emergency situations. Responsible parties will be able to request a waiver from the provisions of §§ 761.60, 761.61, 761.62, and 761.65, which provide requirements for sampling, extraction, analysis, cleanup, storage, and disposal of all types of regulated PCB wastes.

Cleanup and disposal activities often cannot be initiated promptly in emergency situations, such as hurricanes or wildfires, due to necessary emergency response actions taking place. EPA recognizes that spills caused by an emergency situation may not be discovered or be able to be cleaned up until after the emergency ends or until after the initial emergency response. EPA regularly negotiates and implements special arrangements during emergency situations on a case-by-case basis, which can delay implementation of remedial actions. EPA is therefore modifying the PCB regulations to allow the person managing the cleanup and/or disposal of PCB waste caused by an emergency situation to request waivers from applicable PCB sampling, extraction, analysis, cleanup, storage, disposal and other regulatory requirements when there is an emergency situation and the existing regulatory requirements (*e.g.,* timeframes, sampling protocols) are impracticable due to the nature of the emergency situation. This waiver option is being finalized as proposed, except as described in the response to comments below.

Discussion of the Public Comments

The public comments pertaining to emergency situations were generally supportive of most of the provisions and additional flexibilities put forward by the Agency in the proposed rulemaking. There were three main issues raised by the commenters.

First, some commenters expressed that the proposed definition of ''emergency situation'' was too limiting and may leave individuals unsure if they would be able to use the flexible

[26] Luca Rossi, Luiz de Alencastro, Thomas Kupper, Joseph Tarradellas, Urban stormwater contamination by polychlorinated biphenyls (PCBs) and its importance for urban water systems in Switzerland, Science of The Total Environment, Volume 322, Issues 1–3, 2004, Pages 179–189. *https://www.sciencedirect.com/science/article/pii/S0048969703003619.*

provisions for emergency situations in § 761.66 and in the PCB Spill Cleanup Policy. One commenter stated that emergency and disaster declarations may be delayed, even for several weeks, after adverse conditions occur and provided several examples where delay has occurred in the past. The commenter opposed tying the definition of emergency situation to the issuance of a declaration because delays could create uncertainty as to whether regulated parties could use the flexible provisions for emergency situations when they are most needed. EPA recognizes that delays in issuance of declarations could create uncertainty and has therefore revised the proposed definition to include not only situations that result in declarations, but also situations where an individual could reasonably expect a declaration will be made. Other commenters requested that EPA broaden the definition of ''emergency situation'' to include activities such as power restoration and emergency utility repairs. EPA notes that the flexible provisions for emergency situations may be used for activities involving power restoration and utility repair that are caused by emergency situations. However, those activities by themselves do not constitute emergency situations that warrant flexibility. EPA does not expect there to be barriers to compliance with the regular requirements in the normal course of power restoration or utility repairs, such as communications lines being fully inaccessible or utilities conducting other competing emergency response actions.

Second, a commenter stated the proposed seven-day timeframe for completing notification under the PCB Spill Cleanup Policy would give individuals too much time to notify the Agency in an emergency situation. The Agency agrees with this commenter and is shortening the timeframe to 48 hours, which is now closer in length to the 24-hour timeframe for notification under the PCB Spill Cleanup Policy for spills not related to emergency situations. See § 761.125(a)(1).

Third, some commenters were confused by the waiver option and did not see how it differed from a formal PCB approval. While the waiver request is submitted to and approved by the Regional Administrator, it is not a formal PCB approval. The waiver is only for temporary measures in emergency situations. Examples of such situations might include excavating visibly contaminated soil near storm drains or removing and storing leaking electrical equipment that contains PCB oil before the remaining oil is released to the environment. As emergency situations may be complex and often time-sensitive, the waiver option allows one path for entities to request changes to multiple standards at once, rather than seeking individual approvals under several regulatory standards.

A comment was received requesting that a copy of the waiver request be sent to the Director of the State or Tribal environmental agency. The Agency agrees with this change and has incorporated the language into the final rule. Therefore, the Agency is finalizing the waiver request option generally as proposed with the additional language that a copy of the waiver request must be sent to the Director of the State or Tribal environmental agency.

Other comments were either supportive of the proposed changes or requested minor changes. One commenter requested that the Agency include language to remind the regulated community that they must abide by all other Federal, State, and local laws and regulations; the Agency agrees with this change and has incorporated the language in the final rule.

Background on the Issue

The TSCA PCB Spill Cleanup Policy was first published on April 2, 1987 (52 FR 10688), and is codified at 40 CFR part 761, subpart G. The Policy establishes criteria to determine the adequacy of the cleanup of spills resulting from the release of materials containing PCBs at concentrations of 50 ppm or greater which occur after May 4, 1987. The PCB Spill Cleanup Policy requires cleanup of PCBs to different levels depending upon spill location, the potential for exposure to residual PCBs remaining after cleanup, the concentration of PCBs initially spilled (high or low concentration), and the nature and size of the population potentially at risk of exposure to residual PCBs. The Policy applies the most stringent requirements for PCB spill cleanup to non-restricted access areas where there is a greater potential for human exposures to spilled PCBs and less stringent requirements to restricted access areas where there is little potential for human exposures.[27]

When the spilled material contains 50 to less than 500 ppm PCBs and the total quantity of material spilled involves less than 1 pound of PCBs, the Policy allows for cleanup in accordance with procedural performance requirements (*i.e.,* double wash/rinse for solid surfaces and removal of visible traces plus a 1-foot lateral boundary for soil and other ground media provided that the minimum depth of excavation is 10 inches) rather than requiring sampling to verify that numerical cleanup standards have been met. When the spilled material contains PCBs equal to or greater than 500 ppm PCBs, or the total quantity of material spilled containing PCBs at or below 500 ppm involves 1 pound or more of PCBs by weight, the Policy provides numerical cleanup standards based on the accessibility of the area and the potential for human exposure. Post-cleanup sampling is required to verify that the cleanup standards have been met.

EPA may allow flexibility such as less stringent or alternative requirements based upon site-specific considerations. See § 761.120(a)(4). EPA has used this provision to issue storm-specific guidance in Regions 4 and 6 for Hurricanes Katrina (2005),[28] Harvey (2017),[29] Irma (2017),[30] Florence (2018),[31] Michael (2018),[32] Dorian (2019),[33] [34] and Tropical Storm Barry (2019).[35] [36] Generally, EPA extended the time frame for notification and allowed spills to be managed based on the as-found concentration for spills directly caused by the emergency situation.

EPA recognizes that issuing guidance on a case-by-case basis can create some inefficiencies. First, since disasters can develop without forewarning, they can put pressure upon EPA to develop the guidance quickly so that it may be distributed to the regulated community in time for facilities to use it. Also, the fast-paced nature of the response to such events means that entities that could use the guidance may not become aware that it was issued in time to use

[27] 59 FR 62788, 62793; Dec. 6, 1994.

[28] Letter from Jesse Baskerville to Mary Davis, Nov 9, 2005. Guidance for Addressing Spills from Electrical Equipment [damaged by Hurricane Rita or Katrina].

[29] Correspondence from James Sales, EPA to Mary Davis. Aug 29, 2017. PCB Disaster Debris Cleanup Guidance.

[30] Memo from Alan Farmer to Barnes Johnson, Sept 8, 2017. EPA Region 4 Issuance of Disaster Waste Guidance.

[31] Memo from Susan Hansen to Barnes Johnson. Sept 13, 2018. EPA Region 4 Issuance of Disaster Waste Guidance.

[32] Memo from Susan Hansen to Barnes Johnson. Oct 10, 2018. EPA Region 4 Issuance of Disaster Waste Guidance.

[33] Memo from John Armstead to Barnes Johnson. Sept 4, 2019. EPA Region 3 Issuance of Disaster Waste Guidance.

[34] Memo from Carol J. Monell to Barnes Johnson. Sept 3, 2019. EPA Region 4 Issuance of Disaster Waste Guidance.

[35] Memo from Ronnie Crossland to Barnes Johnson. July 11, 2019. EPA Region 6 Issuance of Disaster Waste Guidance.

[36] Memo from Carol J. Monell to Barnes Johnson. July 18, 2019. EPA Region 4 Issuance of Disaster Waste Guidance.

it. Finally, due to uncertainty regarding whether a guidance document will be issued, it is often challenging for regulated facilities to include the flexibilities offered in the EPA guidance into their disaster preparation protocols. EPA received requests from industry requesting a more standardized set of flexibilities, citing several of these reasons.

Independent of EPA's additions above, EPA notes that § 761.61 currently ''does not prohibit any person from implementing temporary emergency measures to prevent, treat, or contain further releases or mitigate migration to the environment of PCBs or PCB remediation waste.'' This means that immediate measures may be taken to contain PCBs during an emergency situation prior to receiving approval from the EPA Regional Administrator as described in § 761.66(b).

G. Harmonize General Disposal Requirements for PCB Remediation Waste

Provisions in the Final Rule

The Agency is finalizing the proposed change to the language in § 761.50(b)(3)(ii) by removing the phrase ''at as found concentrations ≥50 ppm.'' The language now reads: ''(ii) Any person responsible for PCB waste that was either placed in a land disposal facility, spilled, or otherwise released into the environment on or after April 18, 1978, but prior to July 2, 1979, where the concentration of the spill or release was ≥500 ppm; or placed in a land disposal facility, spilled, or otherwise released into the environment on or after July 2, 1979, where the concentration of the spill or release was ≥50 ppm, must dispose of it in accordance with either of the following''.

Discussion of the Public Comments

All of the public comments were either supportive or did not object to EPA's proposal to modify the language in § 761.50(b)(3)(ii). EPA is thus finalizing this change as proposed.

Background on This Issue

In the 1998 PCB Megarule, EPA promulgated both the definition of PCB remediation waste in § 761.3 and a guide to the cleanup and disposal obligations for PCB remediation waste in § 761.50(b)(3). At the time of the 1998 PCB Megarule, § 761.50(b)(3) failed to account for the fact that disposal of PCBs <500 ppm was not regulated between April 18, 1978, (the effective date of the Disposal and Marking Rule, which set the 500 ppm threshold) and July 2, 1979 (the effective date of the PCB Ban Rule, which replaced the 500 ppm level with 50 ppm). EPA issued a technical amendment to correct this discrepancy in 1999 (64 FR 33755; June 24, 1999). The preamble text addressed changes made to § 761.50(b)(3)(i), which was amended accordingly. Section 761.50(b)(3)(ii) was also amended, presumably to correct the same discrepancy for the time between April 18, 1978, and July 2, 1979. However, the phrase ''at as-found concentrations ≥50 ppm'' was added to § 761.50(b)(3)(ii) unnecessarily. This addition was apparently an error; there is no justification in the preamble for the change, and it could be read to cut against the apparent intent to better align § 761.50(b)(3) with the definition of PCB remediation waste and the general direction in § 761.50(b)(3) that PCB remediation waste ''is regulated for cleanup and disposal in accordance with § 761.61.''

In keeping with the regulatory text overall, preamble and guidance statements, and interactions with the regulated community, EPA has not interpreted the ''as found'' language in § 761.50(b)(3)(ii) as limiting the cleanup and disposal obligations for PCB remediation waste created by releases that occurred on or after the dates referenced in that clause, where the as-found PCB concentration is <50 ppm. Rather, EPA maintains that all materials that fit the definition of PCB remediation waste in § 761.3—including materials which are currently at any volume or concentration where the original source was ≥500 ppm PCBs beginning on April 18, 1978, or ≥50 ppm PCBs beginning on July 2, 1979—are regulated for cleanup and disposal under § 761.61. The introductory language to § 761.50(b)(3) provides, without exception, that ''PCB remediation waste [. . .] is regulated for cleanup and disposal in accordance with § 761.61.'' EPA has published guidance affirming that PCB remediation waste, even if <50 ppm, is regulated under § 761.61.[37] EPA has also issued numerous risk-based disposal approvals in the past five years that apply only to <50 ppm PCB remediation waste.[38]

In EPA's view, the function of § 761.50(b)(3)(ii) is to clarify that PCB remediation waste created by releases that occurred on or after the dates referenced in that clause can be managed either in accordance with the PCB Spill Cleanup Policy if it meets the criteria established in the Policy, as provided in § 761.50(b)(3)(ii)(A); or in accordance with § 761.61, as provided in § 761.50(b)(3)(ii)(B) and the introductory text to § 761.50(b)(3). This intention is reflected in the 1998 PCB Megarule preamble, which states: ''With regard to sites containing PCB remediation wastes generated on or after April 18, 1978, owners or operators of those sites now have two choices: they may clean up the wastes in accordance with the new § 761.61, or, if applicable, they may clean up the wastes in accordance with EPA's Spill Cleanup Policy, part 761, subpart G.'' [39] In contrast, the older PCB remediation waste addressed under § 761.50(b)(3)(i) is not eligible for management under the PCB Spill Cleanup Policy. Thus, as EPA interprets § 761.50(b)(3)(ii), the effect of adding the ''as-found'' limitation to the provision was to suggest that PCB remediation waste created by releases that occurred on or after the dates referenced in that clause, where the as-found PCB concentration is <50 ppm, is not eligible for management under the PCB Spill Cleanup Policy, but only under § 761.61 as provided in the introductory text. EPA did not intend to so limit the Policy, which applies to the cleanup of certain spills resulting from the release of materials containing PCBs ≥50 ppm but is not dependent on the as-found concentrations of the materials contaminated by such spills.

H. Make Changes To Improve Regulatory Implementation

EPA proposed several supplemental amendments to improve implementation of existing requirements, clarify regulatory ambiguity, and correct technical errors in the PCB regulations. EPA requested comment and is finalizing changes for each item listed below. For more information on the proposed changes, see *Section III.H. Make Changes to Improve Regulatory Implementation* of the proposed rule, ''Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations'' (86 FR 58730), which is included in the docket for this final rulemaking.

1. Medium Density Plastics as Non-Porous Surfaces

Provisions in the Final Rule

The definition of ''non-porous surface'' in § 761.3 includes several examples, including high-density

[37] PCB Q&A Manual. June 2014. Pg. 49 Q.3 *https://www.epa.gov/sites/production/files/2015-08/documents/qacombined.pdf.*

[38] Nationwide Risk-based PCB Remediation Waste Disposal Approvals. *https://www.epa.gov/pcbs/nationwide-risk-based-pcb-remediation-waste-disposal-approvals.*

[39] 63 FR 35384, 35402; June 29, 1998.

plastics. The Agency is modifying the definition of ''non-porous surface'' in § 761.3 to include medium-density plastics as an example of a non-porous surface.

Discussion of the Public Comments

The public comments were supportive of adding medium density plastics to the definition of a non-porous surface, and thus EPA is finalizing this change as proposed.

Background on the Issue

In December 2018, EPA issued an interpretive letter to the American Gas Association which found that medium- and high-density polyethylene used in natural gas distribution piping meet the definition of a ''non-porous surface'' under § 761.3.[40] EPA found that the study titled *Assessment of Polychlorinated Biphenyls (PCBs) in Polyethylene (PE) Gas Distribution Piping,* conducted by NYSEARCH and National Grid, demonstrated that the amount of PCB absorption into medium- and high-density polyethylene pipe was minimal, and penetration of PCBs beyond the immediate surface was limited.[41] EPA is therefore including medium-density plastics in the definition of non-porous surface. See § 761.3.

2. Temporary Storage in Containers at the Site of Generation

Provisions in the Final Rule

The PCB regulations permit the storage of bulk PCB remediation waste in piles at the site of generation for up to 180 days under § 761.65(c)(9). In response to requests from generators, EPA is allowing, under the same provision, the use of non-leaking, covered containers to be used at the site of generation for up to 180 days. Waste stored in containers must meet the same criteria as waste stored in piles, and thus do not incur additional risk.

Discussion of the Public Comments

The public comments were all supportive or did not object to allowing temporary storage in containers at the site of generation, and thus EPA is finalizing this change as proposed. Several comments did request clarification on what qualifies as a container, including whether a container encompasses drums or roll-off boxes. Drums and roll-off boxes which meet the definition of a container under § 761.65(c)(9) (*e.g.,* constructed of appropriate materials, non-leaking, covered) would qualify as a container. EPA is clarifying that under this provision a liner is required only for piles, to prevent soil contamination, and is not required for containers. Please see ''Response to Comments on the Proposed PCB Rulemaking'' in the docket for further clarification.

3. Language Modifications for Financial Assurance Instruments

Provisions in the Final Rule

The Agency is finalizing the change to allow the Regional Administrator (RA) the flexibility to modify the language required in financial assurance instruments for the purposes of implementation under TSCA. These changes allow the RA to request modification to the terms of those instruments to account for the fact that they are being used to fulfill a financial assurance obligation under TSCA; for example, modifications may include changes to the instrument wording so that references to RCRA are replaced with references to TSCA, or changes to the instruments to better comport with the legal authorities under, and applicable to, TSCA. The changes are made throughout § 761.65(g), once for each of the financial instruments. See §§ 761.65(g)(1), 761.65(g)(1)(iv), 761.65(g)(2), 761.65(g)(3)(i), 761.65(g)(4)(i), 761.65(g)(5), 761.65(g)(6), and 761.65(g)(7).

Discussion of the Public Comments

EPA received one public comment in support and one public comment in opposition to the proposed revision to allow Regional Administrators discretion to modify the required language in financial assurance instruments. The latter commenter was concerned with the possibility of different standards applying in different Regions. However, this is not the intention of the change. The wording of the change, ''except when the Regional Administrator specifies modifications for the purposes of implementation under TSCA,'' that applies to each of the allowed financial assurance instruments limits changes to those that are necessary for implementation under and in alignment with TSCA. Any necessary changes to financial assurance instruments should therefore be narrow. Further, the TSCA PCB program is implemented by EPA Headquarters and Regions with a high level of coordination; therefore, EPA expects any necessary modifications to be broadly and consistently applied across the program. EPA is finalizing this change as proposed.

Background on This Issue

The PCB regulations at § 761.65(g) require commercial storers of PCB waste to establish financial assurance for closure of PCB storage facilities by choosing from financial assurance mechanisms in the RCRA regulations under 40 CFR part 264. Part 264 includes prescribed language that must be included in each type of financial instrument. Some variation from the RCRA instrument wording may be necessary for the purposes of effectuating the financial assurance requirements under TSCA. EPA is therefore revising § 761.65(g) to allow the RA the flexibility to modify the language required in financial assurance instruments for the purposes of implementation under TSCA.

5. Remove Manifest Tracking Numbers From Annual Reports

Provisions in the Final Rule

EPA is removing the provision at § 761.180(b)(3)(ii) requiring owners or operators of PCB disposal facilities or commercial storage facilities to include in their annual reports lists of manifest tracking numbers of signed PCB manifests either received by or generated at the facility during that year. The Agency is finalizing this change as proposed to reduce the burden on reporting facilities and to simplify the annual reporting process. In place of the aforementioned requirement, EPA is marking § 761.180(b)(3)(ii) as ''[Reserved].''

Discussion of the Public Comments

No commenters were opposed to the removal of manifest tracking numbers from the Annual Reports and thus EPA is finalizing this change as proposed. Commenters did encourage EPA to look for additional ways to coordinate the PCB manifest requirements with EPA's RCRA hazardous waste electronic manifest (e-Manifest) system to avoid duplication and unnecessary burdens. EPA notes that the Agency recently proposed, in a separate rulemaking, further regulatory changes to more closely align PCB manifest regulations with the RCRA manifest regulations with respect to e-Manifest (87 FR 19290; April 1, 2022). Commenters also requested that the owner or operator of a facility should be allowed to exclude manifest tracking numbers from their annual document log since that information is also uploaded to the e-Manifest system. EPA did not propose changes to remove the requirement to

[40] Letter from Barnes Johnson to Pamela Lacey. Dec 14, 2018. *https://www.epa.gov/pcbs/epas-response-letter-aga-regarding-mdpe-and-hdpe-non-porous-surface.*

[41] JANA on behalf of NYSEARCH NGA. Oct 19, 2018. Assessment of Polychlorinated Biphenyls (PCBs) in Polyethylene (PE) Gas Distribution Piping. Revision 2.

maintain manifest tracking numbers in the annual document log and thus is not making any changes at this time.

Background on This Issue

As of June 30, 2018, receiving facilities must submit final, signed manifests to EPA's e-Manifest system. Since PCB manifests can now be obtained from the e-Manifest system, EPA no longer needs this information to be submitted as part of the annual reporting requirement.

6. Mandatory Form for Annual Reports

Provisions in the Final Rule

The Agency is finalizing a requirement to use a standard form for the submission of annual reports under § 761.180(b)(3). Use of a standard form will create a consistent reporting format that will reduce burden for EPA and regulated entities.

Discussion of the Public Comments

Most commenters supported use of a standard form for submission of annual reports, and thus EPA is finalizing this change as proposed. EPA notes that, one commenter opposed the standard form, asserting that it would be a burden to the facilities that had adopted their own format and methods for compiling the annual report. While EPA acknowledges that facilities will have to adjust their current practices to adopt the new form, the Agency finds that a standard form will reduce burden overall and result in more complete and higher quality data submitted. Another commenter was amenable to the addition of the form but did not agree that use of the form should be mandatory; specifically, the commenter noted that if annual reports contain all required information, failure to use the standard form should not result in a TSCA violation. The Agency disagrees with this comment and believes that mandatory use of the form for submission of annual reports is appropriate. This is consistent with how EPA requires use of other forms, such as the Uniform Hazardous Waste Manifest form (EPA form 8700–22) and the RCRA Subtitle C Site Identification Form (EPA form 8700–12). Moreover, allowing use of the standard form on a voluntary basis would likely diminish the impacts of the form on burden reduction and submission of more complete and higher quality data. Some commenters also requested a two-year transition period before use of the form becomes mandatory. EPA finds that an additional transition period is not necessary given that use of the form will not be required until the first July 15 (*i.e.,* the due date for the annual report) following the effective date of the rulemaking. Another commenter asked if EPA could develop a standardized online reporting portal; EPA acknowledges this comment and may consider it for future implementation efforts.

Background on This Issue

While § 761.180(b)(3) describes the information EPA requires in the annual report, it does not specify a format. This lack of clarity could lead to confusion for regulated entities. Use of the form will standardize the format and improve data quality, allowing EPA to process the reports in less time. The form will also reduce the reporting burden on members of the regulated community who submit more than the required information, such as facilities that send copies of every manifest instead of every manifest tracking number. Furthermore, the instructions for the form clarify EPA's expectations; for example, facilities should report ''zero'' in all categories for which they did not manage PCB waste in that calendar year. At present, many facilities omit categories in annual reports, making it unclear as to whether this is an oversight or an indication that the categories do not pertain to them.

7. PCB Waste Categories on the Manifest and Annual Reports

Provisions in the Final Rule

The Agency is finalizing changes to the categories of PCB waste specified by the generator on the manifest to align with the categories of PCB waste specified by the commercial storer or disposer in the annual report. Specifically, EPA is modifying the categories of PCB waste in § 761.207(a) to list the five categories from § 761.180(b)(3)(iii)–(vi): ''bulk PCBs,'' ''PCB Transformers,'' ''PCB Large High or Low Voltage Capacitors,'' ''PCB Article Containers,'' and ''PCB Containers.'' In response to comments summarized below, the Agency is also adding a sixth category of PCB waste in § 761.207(a) and § 761.180(b)(3)(iii)–(vi): ''Other.'' Additional required data elements (*e.g.,* unique identification number, weight in kilograms, date removed from service) remain the same. EPA notes that the additional category of PCB waste on the manifest, ''Other,'' does not impact the categories of PCB waste submitted in the annual document log under § 761.180(a)(2). EPA is also removing references to instructions in the appendix of 40 CFR part 262 because these instructions were removed from the regulations and are instead available on EPA's website.[42]

Discussion of the Public Comments

The commenters were divided on this change. One commenter fully supported this change. Another commenter did not object to the revision of PCB waste categories on the manifest but requested that stakeholders be given enough time to prepare for the changes and that the changes only be applicable to manifests prepared after the effective date of the rule. EPA confirms that the revised categories of PCB waste are only applicable to manifests prepared after the effective date of the rule. The Agency also notes that the effective date of this rule is 180 days after the date of publication in the **Federal Register**, which should provide sufficient time for stakeholders to prepare. One commenter was concerned that none of the proposed categories covered PCB-Contaminated transformers with concentrations ≥50 to <500 ppm, which previously were classified under the category ''PCB Article not in a PCB Container or PCB Article Container,'' which EPA is eliminating. Another commenter requested clarification from the Agency on whether PCB-Contaminated transformers and other electrical equipment would be required to be identified on the manifest, as it is not included in the five proposed categories. To address these aforementioned comments, the Agency is adding an additional category of PCB waste to the manifest (and the annual report), ''Other.'' EPA also notes that PCB-Contaminated transformers and other electrical equipment will be required to be marked on the manifest under this new category. Another commenter opposed the requirements in § 761.207(a)(4) and (a)(5) to specify the type of PCB waste for each PCB Article Container or PCB Container, asserting that such information takes up already limited space on the manifest form and is unnecessary because it can be found in waste characterization forms on-site at generator and treatment or disposal facilities. EPA disagrees with the comment, noting that previous requirements for the now-eliminated ''PCB Article Container or PCB Container'' category of PCB waste also required specification on the manifest of the type of PCB waste for each PCB Article Container or PCB Container. EPA believes that such information on the manifest is valuable because this allows EPA to track the type of waste in

[42] *https://www.epa.gov/hwgenerators/uniform-hazardous-waste-manifest-instructions-sample-form-and-continuation-sheet.*

e-Manifest without having to obtain waste characterization forms, which are not easily accessed.

Background on This Issue

Previously, § 761.207(a) required PCB waste to be listed on the manifest as either ''bulk PCBs,'' ''PCB Article Container or PCB Container,'' or ''PCB Article not in a PCB Container or PCB Article Container.'' These categories, however, did not match the categories of PCB waste specified by the commercial storer or disposer in the annual report under § 761.180(b)(3). Harmonizing these PCB waste categories streamlines recordkeeping for commercial storers and disposers, while imposing negligible burden on the generators.

8. Define ''As-Found Concentration''

Provisions in the Final Rule

The Agency is adding a definition of ''as-found concentration'' to § 761.3, as proposed. The final definition reads: ''As-found concentration means the concentration measured in samples of environmental media or material collected in-situ (*i.e.,* prior to being moved or disturbed for cleanup and/or disposal), unless otherwise specifically provided. For example, media must not be disturbed, nor may they be diluted (*e.g.,* excavated, placed on a pile, and sampled after such placement), before characterization sampling is conducted. Sampling media in piles and existing accumulations would be considered ''as-found'' if the media were already in piles when the site was first visited by the responsible party, such as during the redevelopment of abandoned properties with historic PCB contamination. The as-found concentration is distinct from the source concentration, which is the concentration of the PCBs in the material that was originally spilled, released, or otherwise disposed of at the site.''

The definition clarifies that the as-found concentration must be measured from samples collected in-situ, unless otherwise specifically provided. Existing accumulations, as described in § 761.340(a) would be one such exception. Ex-situ sampling often reduces the concentration of PCBs in environmental media through dilution.

Discussion of the Public Comments

Commenters expressed concerns that the proposed definition of as-found concentration would be unworkable for situations where soils are excavated and generated during emergency underground utility repairs, routine maintenance activities, replacement of utility poles damaged by weather events, or otherwise generated and tested ex-situ for the purposes of characterization for disposal. EPA acknowledges that there are scenarios where in-situ sampling to characterize potential PCB remediation waste for disposal may not be feasible such as certain emergency repair situations. It is EPA's intent to encourage PCB sampling of in-situ environmental media prior to making emergency repairs if it is feasible to do. If PCBs are discovered after ex-situ sampling in an emergency repair scenario, or from materials excavated from an area where there was no known PCB use or release, they may be disposed of under the performance based disposal requirements of § 761.61(b)(2), or a person may take additional steps to determine if the PCBs are regulated under TSCA (*i.e.,* originated from a regulated source or were otherwise potentially diluted from in-situ levels exceeding 50 mg/kg). If you are uncertain about whether such materials are regulated under the TSCA PCB regulations, you are encouraged to consult with your Regional PCB Coordinator. EPA believes that routine maintenance activities or general utility repairs would not rise to the level of an emergency and would provide for the opportunity to perform in-situ sampling to check for the presence of PCB contamination prior to soil excavation. For scenarios such as downed utility poles which cause releases of PCBs or suspected PCBs to the environment, the PCB Spill Cleanup Policy in 40 CFR part 761, subpart G offers an approach for such scenarios.

In addition, commenters stated that the definition of as-found concentration should not be restricted to in-situ sampling due to the heterogeneous nature of PCB contamination at cleanup sites. EPA acknowledges that PCB remediation waste such as soils can be heterogeneous; however, the regulations require adequate site characterization to determine the concentration and extent of PCB contamination at a cleanup site. The Subpart N cleanup site characterization sampling procedures were included in the 1998 PCB Megarule as an optional method for collecting new data at a cleanup site under 40 CFR 761.61. The regulations do not preclude a person from using a characterization sampling procedure designed to reduce the deleterious effects that soil heterogeneity has on environmental data prior to soil excavation.

EPA finds that no changes are necessary based on public comments, as addressed above. Therefore, EPA is finalizing the definition of ''as-found concentration'' as proposed.

Background on This Issue

In the 1998 PCB Megarule, EPA allowed for a variance from the anti-dilution provision for certain PCB remediation waste.[43] Such remediation waste is managed for disposal based on the concentration of the PCBs found in the affected media at the time the waste is discovered as opposed to the concentration of PCBs in the material that was originally spilled, released, or otherwise disposed of at the site. TSCA does not allow further iterative stages of successive dilution such as by intentionally or fortuitously excavating soils affected by a release from a regulated source into stockpiles with subsequent characterization for disposal testing. The Agency clarified this position by developing specific questions and answers related to as-found concentrations in EPA's PCB Q&A Manual available on the EPA PCB website at *https://www.epa.gov/pcbs/polychlorinated-biphenyl-pcb-question-and-answer-manual-and-response-comment-documents.* ''As-found concentration'' is used in the PCB regulations particularly in reference to PCB remediation waste. See §§ 761.50(b) and 761.61.

9. Clarify § 761.61(a) Cleanups Must Comply With All Applicable Requirements

Provisions in the Final Rule

EPA is finalizing the changes to § 761.61(a)(3)(ii) as proposed. EPA is removing the phrase ''assume that it is complete and acceptable'' from § 761.61(a)(3)(ii) and adding text to that provision clarifying that the subsequent cleanup and disposal must comply with all applicable requirements in § 761.61(a)(4) through (9). See § 761.61(a)(3)(ii). EPA is not making any other changes to § 761.61(a)(3)(ii). EPA is finalizing the changes to § 761.61(a)(3)(ii) to ensure the notification that responsible parties submit under § 761.61(a) complies with all requirements of § 761.61(a)(3)(i) and the subsequent cleanup and disposal complies with all applicable requirements in § 761.61(a)(4) through (9). The person submitting the notification is responsible for verifying its completeness and accuracy.

The changes to 761.61(a)(3)(ii) do not impact the responsible party's ability to proceed with the cleanup if the Agency does not respond within 30 days. However, if upon review of the notification, EPA determines that the notification does not contain all information required by

[43] 63 FR 35384, 35388; June 29, 1998.

§ 761.61(a)(3)(i), sufficient to ensure compliance with § 761.61(a)(4) through (a)(9) at the site, the Agency may require the submission of additional information. Furthermore, regardless of the content of the notification, the cleanup and disposal must meet all requirements of § 761.61(a)(4) through (9). If the responsible party has reason to believe their implementation of § 761.61(a) may not satisfy the regulatory requirements, it would be in their best interest, from a compliance assurance perspective, to contact the appropriate EPA Regional PCB Coordinator before the end of the 30-day period, or at least before commencing the cleanup and disposal activities. EPA also encourages responsible parties to contact the appropriate EPA Regional PCB Coordinator to discuss the notification and cleanup plan before submitting it to EPA. See the EPA PCB website for a list of the EPA Regional PCB Coordinators at *www.epa.gov/pcbs/program-contacts.* In addition, PCB cleanup guidance (*e.g.,* PCB Facility Approval Streamlining Toolbox) is available on the EPA PCB website at *https://www.epa.gov/pcbs.*

Discussion of the Public Comments

EPA proposed to remove the phrase ''assume that it is complete and acceptable'' from 761.61(a)(3)(ii) and to add language clarifying that the subsequent cleanup and disposal must comply with all applicable requirements in § 761.61(a)(4) through (9). Two commenters supported the proposed clarification that responsible parties must ensure that notifications submitted to EPA under § 761.61(a) and the subsequent cleanup and disposal of PCB remediation waste under § 761.61(a) comply with all applicable requirements. Several commenters opposed the proposed deletion of the phrase ''assume that it is complete and acceptable'' from § 761.61(a)(3)(ii). Commenters proposed that EPA extend the 30-day timeframe for EPA to respond to a notification to 60 days, expressed concerns with EPA identifying issues after the responsible party begins the cleanup, and voiced concerns with delayed cleanup implementation and increased cleanup costs. The 30-day timeframe for EPA to respond to a notification is intended to prevent compromising the expeditious nature of § 761.61(a) self-implementing cleanups. The responsible party has the option to contact EPA before submitting the notification to ensure they are preparing a notification that meets all the requirements of § 761.61(a). In addition, the responsible party may contact EPA during the 30-day period to go over the submitted notification with EPA. If EPA needs additional information, EPA expects to request it within those 30 days.

EPA finds that no changes are necessary based on public comments, as addressed above. Therefore, EPA is finalizing changes to § 761.61(a)(3)(ii) as proposed.

10. Harmonize PCB Concentration Language Regarding Cap Material

The Agency is finalizing the proposal to correct a PCB remediation waste cap requirement to provide consistency with the rest of the PCB regulations. EPA received one public comment in support of this provision.

Previously, § 761.61(a)(7) required that ''a cap shall not be contaminated at a level ≥1 ppm PCB per Aroclor™ (or equivalent) or per congener.'' EPA is deleting ''per Aroclor™ (or equivalent) or per congener'' to make this requirement consistent with the rest of the PCB regulations. A PCB congener is a single PCB molecular structure, with (a) chlorine atom(s) attached to the benzene rings in different configurations. Aroclors are mixtures of these PCB congeners that were manufactured between 1929 and 1979. There are 209 congeners and sixteen known Aroclors.[44] [45]

The rest of the PCB regulations only specify requirements or restrictions based on PCB concentrations, rather than PCB congener concentrations or PCB Aroclor concentrations. The PCB regulations at § 761.1(b)(2) state ''Unless otherwise provided, PCBs are quantified based on the formulation of PCBs present in the material analyzed,'' which means that when PCBs are present as Aroclors (*e.g.,* in PCB transformer oil), they may be measured and reported as Aroclors. When PCBs are present as congeners that do not match an Aroclor pattern (*e.g.,* in weathered environmental samples), they should be measured as congeners and reported as a sum of those congeners. Furthermore, there is no technical or risk-based reason why PCB remediation waste cap requirements should differ from other sections of the PCB regulations. As a result, the new language simply requires that ''a cap shall not be contaminated at a level ≥1 ppm PCBs.'' This change is consistent with how PCB concentrations are described in the rest of the TSCA PCB regulations. See § 761.61(a)(7).

[44] *https://www.epa.gov/pcbs/table-polychlorinated-biphenyl-pcb-congeners.*

[45] *https://www.epa.gov/pcbs/table-aroclors.*

11. Clarify Applicability of Deed Restrictions

The Agency is finalizing the proposed clarifications to the requirements for deed restrictions associated with PCB remediation waste being left on-site under a self-implementing cleanup and disposal activity under § 761.61(a). EPA received one public comment in support of this provision.

The self-implementing cleanup and disposal option for PCB remediation waste provides for varying cleanup levels based on the occupancy level and the presence of a fence or cap. When cleanup levels are based upon low occupancy of the cleanup area or the existence of a fence or cap (either in high or low occupancy areas), deed restrictions are required. See § 761.61(a)(8). EPA's 2005 PCB Site Revitalization Guidance confirms that § 761.61(a)(8) requires a deed restriction for all cleanups requiring caps or fences, and all cleanups based on low-occupancy uses.[46] However, portions of the regulatory text previously suggested that the deed restriction must reference low-occupancy status *and* the existence of a cap or fence in every case, even though some sites with low occupancy cleanups will not have caps or fences and some sites with caps or fences will not be low-occupancy. To remedy any potential for confusion, EPA is finalizing several minor edits to § 761.61(a)(8) to clarify that deed restrictions apply to any area with a cap, a fence, or a low occupancy designation.

In addition, EPA is clarifying in § 761.61(a)(8)(i)(A) that the deed restriction should designate the portion of a property that is subject to the deed restriction, when applicable. The deed restriction should reference the location of the cap, fence, or low occupancy portion in a format that makes sense for the site, for example, latitude/longitude coordinates, street address, or annotated areal image. EPA intends for the December 2012 Institutional Controls document to provide guidance on how to effectively plan, implement, maintain, and enforce deed restrictions required under § 761.61(a)(8).[47]

[46] Polychlorinated Biphenyl (PCB) Site Revitalization Guidance Under the Toxic Substances Control Act (TSCA). November 2005. Page 13. *https://www.epa.gov/sites/production/files/2015-08/documents/pcb-guid3-06.pdf.*

[47] Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites. December 2012. *https://www.epa.gov/sites/production/files/documents/final_pime_guidance_december_2012.pdf.*

12. Include Alternate Extraction and Analysis Under § 761.61(c)—PCB Remediation Waste

The Agency is finalizing its proposal to clarify that, under a § 761.61(c) risk-based approval, a responsible party can be permitted to perform extraction or analysis of PCB remediation waste in a manner other than prescribed in § 761.61(a) or (b), including in lieu of a Subpart Q comparison study. Prior to this change, EPA's practice has been to allow responsible parties to request the use of a different extraction or analysis method for PCB remediation waste under § 761.61(c), as they are considered part of sampling requirements. This change clarifies that responsible parties have this option, by adding extraction and analysis to the list of modifiable requirements under a § 761.61(c) risk-based approval. EPA received two public comments in support of this provision.

13. Include Alternate Extraction and Analysis Under § 761.62(c)—PCB Bulk Product Waste

The Agency is finalizing its proposal to clarify that, under a § 761.62(c) risk-based approval, a responsible party can be permitted to perform extraction or analysis of PCB bulk product waste in a manner other than prescribed in § 761.62(a) or (b). Prior to this change, EPA's practice has been to allow responsible parties to request the use of a different extraction or analysis method for PCB bulk product waste under § 761.62(c), as they are considered part of sampling requirements. This change clarifies that responsible parties have this option, by adding extraction and analysis to the list of modifiable requirements under a § 761.62(c) risk-based approval. EPA received no public comments on this provision.

14. Include Alternate Extraction and Analysis Under § 761.79(h)—Decontaminated Material

The Agency is clarifying that, under a § 761.79(h) approval, a responsible party can be permitted to perform extraction or analysis of decontaminated material in a manner other than prescribed in § 761.79(f). Prior to this change, EPA's practice has been to allow responsible parties to request to modify or replace the use of an extraction or analysis method for decontaminated material under § 761.79(h), as they are considered part of sampling procedure. This change clarifies that responsible parties have this option, by adding extraction and analysis to the list of modifiable requirements under a § 761.79(h) approval. EPA received no public comments on this provision.

15. Clarify Sampling Procedure for Non-Porous Surfaces

The Agency is finalizing its proposal to correct an inconsistency with respect to non-porous surfaces in the site characterization requirements for self-implementing cleanups of PCB remediation waste under § 761.61(a). The site characterization requirements in § 761.61(a)(2) provide that site characterization may be conducted using procedures included in 40 CFR part 761, subpart N. The method found in Subpart N for sampling non-porous surfaces specifies that the sampling area shall be divided into ''square portions approximately 2 meters on each side'' and to ''[f]ollow the procedures in § 761.302(a).'' See § 761.267(a). However, § 761.302(a), which is the section of the PCB regulations pertaining to post-cleanup sampling of non-porous surfaces, specifies dividing the surface into 1-meter square portions instead of 2-meter square portions. EPA is amending § 761.267 by adding the following italicized language to this provision, ''Follow the procedures in § 761.302(a), *with the exception of the sampling grid size,*'' to correct the inconsistency. This change reflects the way in which EPA has already been addressing the inconsistency. EPA received two public comments in support of this provision.

16. Add Unit to Concentration in § 761.1(b)(3)

The Agency is finalizing its proposal to modify text in § 761.1(b)(3) to read ''PCB concentrations of >10 µg/100 cm^2.'' Previously, § 761.1(b)(3) listed a concentration with only partial units of reference, ''PCB concentrations of >10/100 cm^2,'' which was meaningless as written. It is clear from context that the text should have read ''PCB concentrations of >10 µg/100 cm^2,'' which is how surface concentrations otherwise appear throughout the PCB regulations, including, for example in § 761.79(b). EPA received one public comment in support of this revision. EPA also proposed to harmonize the ''greater/less than'' and ''greater/less than or equal to'' symbols in this section but is not finalizing that change, as doing so might create some inconsistency with the definitions section of the PCB regulations.

17. Update References to ASTM Methods

The regulations at § 761.19 incorporate by reference several ASTM test method standards that have since been updated. EPA is adding three updated methods, removing a withdrawn method, updating a method which was withdrawn and replaced with a newer method, and updating references to two methods which are currently unavailable on ASTM's website. These ASTM standards reflect the current consensus of ASTM members. EPA is making the following changes:

ASTM D93–09, Standard Test Methods for Flash Point by Pensky-Martens Closed Tester, was approved by ASTM in 2009 and added to the PCB regulations in 2012 at §§ 761.71(b)(2)(vi) and 761.75(b)(8)(iii).[48] EPA is adding as an alternative ASTM D8175–18, Test Method for Finite Flash Point Determination of Liquid Wastes by Pensky-Martens Closed Cup Tester.

ASTM D3278–89, Standard Test Methods for Flash Point of Liquids by Setaflash Closed-Cup Apparatus, was approved by ASTM in 1989 and added to the PCB regulations in 1992 at § 761.75(b)(8)(iii).[49] EPA is replacing the updated version, ASTM D3278–96 (Reapproved 2011), Standard Test Methods for Flash Point of Liquids by Small Scale Closed-Cup Apparatus, and adding ASTM D8174–18, Test Method for Finite Flash Point Determination of Liquid Wastes by Small Scale Closed Cup Tester.

EPA is removing ASTM D2784–89, Standard Test Method for Sulfur in Liquified Petroleum Gases (Oxy-hydrogen Burner or Lamp) from § 761.19 and § 761.71(a)(2)(vi). This test method was withdrawn in June 2016 because it is archaic and not used in the industry.[50]

EPA is removing ASTM D3178–84, Standard Test Methods for Carbon and Hydrogen in the Analysis Sample of Coke and Coal, replacing it with D5373–16, Standard Test Methods for Determination of Carbon, Hydrogen and Nitrogen in Analysis Samples of Coal and Carbon in Analysis Samples of Coal and Coke, in §§ 761.19 and 761.71(b)(2)(vi). ASTM D3178–84 was replaced in June 2007 because there was no reproducibility statement for D3178.[51]

EPA is replacing ASTM D482–87, Standard Test Method for Ash from Petroleum Products, with ASTM D482–13, Standard Test Method for Ash from Petroleum Products, in § 761.71(a)(2)(vi). EPA is also replacing

[48] 77 FR 2463, Jan. 18, 2012.

[49] 57 FR 13323, Apr. 16, 1992.

[50] *https://compass.astm.org/Standards/WITHDRAWN/D2784.htm.*

[51] *https://compass.astm.org/Standards/WITHDRAWN/D3178.htm.*

ASTM D3278–89, Standard Test Methods for Flash Point of Liquids by Setaflash Closed-Cup Apparatus, with ASTM D3278–96(R2011), Standard Test Methods for Flash Point of Liquids by Small Scale Closed-Cup Apparatus, in § 761.75(b)(8)(iii) (see above). ASTM began building its electronic library of standards in the 1990s, so the 1987 version of ASTM D482 and the 1989 version of ASTM D3278 are no longer available from the ASTM website. Therefore, the Agency is updating ASTM D482–87 and ASTM D3278–89 to list the most recent versions of the methods.

EPA has found that most of the entities that would have to comply with these standards are already familiar with them, since it would be difficult to be in the business of testing for PCBs without being familiar with these industry consensus standards. The standards are all readily available electronically or in print and are relatively inexpensive. See § 761.19. EPA received one public comment in support of this provision.

18. Require a Wipe Sample Under § 761.30(i)(4)

Section 761.30(i)(4), which governs characterization of PCB contamination in natural gas pipe or natural gas pipeline systems, previously read, in part, ''if no liquids are present, they must use standard wipe samples in accordance with Subpart M of this part.'' This language might be read to mean that all natural gas pipe or natural gas pipeline systems must be characterized using standard wipe samples if no liquids are present. However, this text was meant to convey that if any person *chooses* to characterize natural gas pipe or natural gas pipeline systems that do not contain liquids, then they must do so using wipe samples.[52] Therefore, EPA is finalizing its proposal to replace the text with: ''if no liquids are present and they decide, in their discretion, to characterize PCB contamination, the person must use standard wipe samples in accordance with Subpart M of this part.'' See § 761.30(i)(4). EPA received three public comments in support of this provision.

19. High Efficiency Boilers Approval Application Requirements

EPA is finalizing its proposal to correct an editorial error in § 761.71. This section describes the required operating parameters for high efficiency boilers that dispose of PCB waste. The requirements for high efficiency boilers are divided into two sections, a section for burning PCB-contaminated mineral oil dielectric fluid at § 761.71(a) and a section for burning any other PCB-contaminated fluids at § 761.71(b). Mineral oil dielectric fluid is an insulating fluid used in electrical equipment such as transformers. Other PCB-contaminated fluids might include used oil, contaminated water, and hydraulic fluid. Section 761.71(b) regulates high efficiency boilers that burn PCB liquids *other* than mineral oil dielectric fluid, so EPA is amending § 761.71(b)(2)(iv) to correct an error by replacing the phrase ''mineral oil dielectric fluid'' with ''PCB liquids.'' See § 761.71(b)(2)(iv). EPA received one public comment in support of this provision.

20. Mailing Address for Annual Reports

The owner or operator of any PCB disposal facility or commercial storage facility submits an annual report to the EPA Regional Administrator for the region in which the facility is located, pursuant to § 761.180(b)(3). EPA is finalizing its proposal to change the recipient of the annual reports from the Regional Administrator to the Director of the Office of Resource Conservation and Recovery, which is the office in EPA Headquarters that manages the PCB cleanup and disposal program. An analogous change is also being made in § 761.3 under the definition of *annual report.* This change will reduce the administrative burden on the Agency of compiling the data in the annual reports, which is used to inform Agency actions. The address for submission will be displayed prominently on the mandatory form. See §§ 761.3 and 761.180(b)(3). EPA received one public comment in support of this provision.

21. Update Address for Submission of EPA Form 7710–53

EPA is finalizing its proposal to remove the address for submission of EPA form 7710–53, ''Notification of PCB Activity,'' from the regulations. This change will allow EPA to more easily update the mailing address in the future without undertaking a regulatory change. The mailing address will continue to appear on the form itself and can be updated through the Information Collection Request (ICR) process. This change will expedite future address changes and thus streamline the distribution of mail and reduce the processing time for these forms. See §§ 761.205(a)(3) and 761.205(d). EPA received one public comment in support of this provision.

22. Add Field for Facility Email Address and EPA PCB Email Address to EPA Form 7710–53

EPA is finalizing its proposal to require that an email address must be submitted on the EPA form 7710–53, ''Notification of PCB Activity.'' Additionally, EPA is adding the EPA PCB email address (*ORCRPCBs@epa.gov*) to the notification form to facilitate any questions from members of the public. These changes will improve communication and reduce the processing time for these forms. Any Notification of PCB Activity form submitted prior to the effective date of this rulemaking will not be required to be resubmitted, unless the facility would like to add or update information (including the email address). See §§ 761.205(a)(3) and 761.205(d).

EPA received one public comment in support of this provision and one public comment which questioned if EPA form 7710–53 will need to be resubmitted to provide an email address. The form will not be required to be resubmitted to provide an email address, and only needs to be resubmitted if something changes at the site. While not mandating resubmission, the Agency does encourage sites to resubmit the form to supply an email address.

23. Sample Site Selection Instructions for Pipelines

Subpart M provides a number of steps that must be followed when selecting the locations for sampling to characterize natural gas pipeline. EPA found that, due to rounding errors, the instructions for a length of pipe greater than seven segments but shorter than three miles in length were incorrect. EPA is finalizing its proposal to modify the instructions and the example given in § 761.247(b)(2)(ii)(B) to clarify where each sample must be taken along pipes of this length. This change is a technical correction and does not influence the number of samples taken or the burden on the owner or operator of the pipe. See § 761.247(b)(2)(ii)(B). EPA received one public comment in support of this provision.

24. Remove Reference to Method 3500B

SW–846 is organized such that several similar methods are grouped together in

[52] See PCB Q&A Manual. June 2014. Pg. 23 (''Under the use authorization provisions at § 761.30(i), if a pipeline system once contained liquids at 50 ppm or greater but is now relatively dry (*i.e.,* there are no liquids available to test at existing condensate collection points), then the owner/operator of the pipeline system has no further sampling and analysis to do until such time as liquids appear. EPA did not intend to require wipe sampling for characterizing natural gas pipeline systems in use. . . .''). *https://www.epa.gov/sites/production/files/2015-08/documents/qacombined.pdf.*

a series. The 3500 series contains extraction procedures used for the preparation of samples for analysis of organic parameters. These techniques include Liquid-Liquid Extraction, Solid-Phase Extraction, Soxhlet Extraction, and Supercritical Fluid Extraction, among others. Method 3500B (recently updated to Method 3500C) is not a detailed method where step-by-step instructions are discussed.[53] [54] Rather, Method 3500B simply provides general guidance for all the methods within its series (*i.e.,* the 3500 series), including the extraction methods being added as part of this rulemaking. Also, Method 3500B or 3500C is already referenced in every 3500 series method EPA is adding to the PCB regulations. Therefore, EPA feels that it is unnecessary to reference Method 3500B in the PCB regulations directly and is removing the reference from the PCB regulations. The removal of Method 3500B from the regulations does not influence any of the 3500 series methods currently in or being added to the PCB regulations. The PCB regulatory sections affected are §§ 761.61(a)(5)(i)(B)(*2*)(*iv*), 761.253, 761.272, 761.292, 761.358, and 761.395. EPA received one public comment in support of this provision.

25. Correct References to SW–846

The official title of the EPA publication known as SW–846 was updated from ''Test Methods for Evaluating Solid Waste'' to ''Test Methods for Evaluating Solid Waste: Physical/Chemical Methods.'' There are several references to this publication throughout the PCB regulations. EPA is finalizing its proposal to update the definition of SW–846 in § 761.3 with the current official title and to refer to it as ''SW–846'' throughout the PCB regulations, for readability. See §§ 761.3, 761.60(g)(1)(iii), 761.61(a)(5)(i)(B)(2)(iv), 761.253(a), 761.272, 761.292, 761.358, 761.395(b)(1). EPA received one public comment in support of this provision.

26. Correct References to EPA's PCB Website

Throughout the PCB regulations, there are several references to EPA's PCB website. In 2015, as part of a redesign, the URL for the EPA PCB web page changed from *https://www.epa.gov/pcb* to *https://www.epa.gov/pcbs.* EPA is finalizing its proposal to update those references throughout the PCB regulations. See §§ 761.130(e), 761.205(a)(3), 761.243(a), 761.386(e). EPA received one public comment in support of this provision, and one comment that suggested removing weblinks completely from the PCB regulations to avoid the need for future updates. EPA finds, however, that periodic maintenance of web links in the regulations is outweighed by the benefits of providing a direct link in the PCB regulations to applicable information for the regulated community.

27. Change ''He'' to ''They''

The PCB regulations previously referred to generic individuals such as the Regional Administrator or facility owners as ''he,'' ''his,'' ''he/she,'' or ''he or she.'' EPA is finalizing its proposal to replace all such references with the gender neutral ''they'' and ''their.'' See §§ 761.3, 761.20(e)(3)(ii)(B), 761.20(e)(4)(i), 761.20(e)(4)(ii), 761.50(b)(3)(i)(A), 761.60(b)(2)(v)(C), 761.61(a)(8)(i)(B), 761.65(g), 761.65(h), 761.70(d)(4)(i), 761.75(c)(3)(i), 761.75(c)(4), 761.77(a)(1)(ii)(B), 761.77(a)(2), 761.77(b), 761.120(b)(2), 761.125(c)(3)(iii), 761.125(c)(4)(iv), 761.180(b)(4), 761.207(c), 761.212(a), 761.213(a)(4), 761.213(b), 761.214(a), 761.216(a), 761.217(a)(2)(ii). EPA received one public comment in support of this provision.

28. Change ''On Site'' to ''On-Site''

The term ''on site'' is included in the definitions at § 761.3, but the PCB regulations previously used the term ''on-site'' throughout. EPA is finalizing its proposal to modify § 761.3 to read ''on-site'' to improve the readability of the PCB regulations. See § 761.3. EPA received no public comments on this provision.

29. Correct Reference to Methods for Standard Wipe Test Samples

Section 761.314 ''Chemical analysis of standard wipe test samples'' previously instructed the reader to ''perform the chemical analysis of standard wipe test samples in accordance with § 761.272.'' While § 761.272 does contain the allowable methods for wipe test samples, it also lists several other methods that would not be appropriate for wipe test samples. This reference has been corrected to § 761.253, which is specific to wipe samples. EPA received one public comment in support of this provision.

30. Incorporation by Reference

The Agency is incorporating by reference SW–846 Test Methods 3541, 3545A, 3546, 3510C, 3520C, 3535A, 3550C, and 8082A into 40 CFR part 761 under §§ 761.60, 761.61, 761.253, 761.272, 761.292, 761.358, and 761.395. Finally, the Agency is incorporating by reference ASTM standards D482–13, D3278–96(R2011), D4059–00, D5373–16, D8174–18, and D8175–18 into 40 CFR part 761 under §§ 761.60, 761.71, and 761.75. (See section II.B of this preamble for summaries of the IBR material.)

The following standards appear in the amendatory text of this document and have already been approved for the locations in which they appear: ASTM D93–09, D129–64(R1968), D240–87, D524–88, D808–87, D923–86, D923–89, D1266–87, D1796–83, D2158–89, D2709–88, and E258–67.

The SW–846 Test Methods being incorporated by reference are published in the test methods compendium known as, ''Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,'' EPA Publication SW–846, Third Edition, available at *https://www.epa.gov/hw-sw846.* ASTM materials may be obtained from ASTM International, 100 Barr Harbor Dr., P.O. Box C700, West Conshohocken, PA 19428–2959, or by calling (877) 909–ASTM, or at *www.astm.org.* EPA methods being incorporated by reference are also included in the docket. EPA received one public comment in support of this provision.

IV. Economic Impacts of the Final Rulemaking

One focus of the final rule is expanding the allowable PCB extraction methods, which impacts testing laboratories (NAICS code 541380) that currently perform PCB extractions under TSCA. Based on method-specific certifications and communication with laboratory personnel, EPA estimates that approximately 19 laboratories are impacted by the rule. Further, EPA estimates that these 19 laboratories perform approximately 65,000 relevant extractions each year. Some laboratories may experience a one-time cost of purchasing equipment used to perform one of the extraction methods. However, the decreases in solvent and labor hours required to perform the extraction methods are expected to result in net annual cost savings of approximately $4.7 million, annualized at a discount rate of seven percent. The cost savings at a discount rate of three percent is $6.6 million.

[53] U.S. EPA, Method 3500B Organic Extraction and Sample Preparation. Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division (5303P). Washington, DC December 1996.

[54] U.S. EPA, Method 3500C Organic Extraction and Sample Preparation. Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division (5303P). Washington, DC February 2007.

The revisions to § 761.61(b) may impact any facility performing a PCB site remediation under § 761.61(b). No data are available on the exact number of § 761.61(b) remediations performed annually, but EPA estimates that there will be between 430 and 460 relevant remediations per year, based on an analysis of 2018 and 2019 hazardous waste manifests. Certain aspects of this provision increase burden on the regulated community through certain requirements (*e.g.,* recordkeeping, notification, sampling). However, EPA is also allowing for disposal of relevant waste at RCRA Subtitle C landfills under § 761.61(b), in addition to the existing disposal options (*e.g.,* TSCA landfills, TSCA incinerators), which will decrease transportation and disposal costs related to non-hazardous, non-liquid PCB remediation waste for the regulated community. Overall, the revisions to § 761.61(b) are expected to result in net annual cost savings between $9.8 million and $11.5 million, annualized at a discount rate of seven percent and three percent, respectively.

Disallowing PCB bulk product waste to be used as roadbed material has the potential to create a slight increase in costs for the regulated community. Facilities that would have used PCB bulk product waste on-site as roadbed material under asphalt now have to pay to transport the waste to a municipal solid waste landfill and pay the associated tipping fee for disposal. EPA believes that the practice of using PCB bulk product waste as roadbed is exceedingly rare. However, in an effort to incorporate all potential impacts of the final rule, the Economic Assessment modeled a single party using PCB bulk product waste as roadbed per year. EPA estimates that the cost increase for the regulated community will be between $740 and $6,630 per year.

EPA anticipates that the added flexibilities for emergency situations will result in cost savings for the regulated community. EPA estimates that there will be between 12 and 60 emergencies each year where the regulated community may use the flexibilities. A lack of data prevents an overall quantitative estimate of the cost savings from this provision. However, impacted parties are expected to save money and time by avoiding delays associated with searches for the source of the spill during an emergency situation where the search is likely to be time-consuming and unsuccessful, and by being able to manage waste under the less burdensome procedures of § 761.125(b), rather than § 761.125(c). The regulated community is also expected to see a decrease in sampling and testing expenditures.

The change to harmonize the general disposal requirements for PCB remediation waste is in line with current EPA policy, guidance and practice. Therefore, EPA estimates that this change will not have any economic impact.

The Economic Assessment for the final rule is constrained by the lack of relevant data, largely because the final rule makes changes to provisions that are self-implementing and/or require no EPA notification. EPA has quantified costs and cost savings when possible. When quantification has not been possible, EPA has analyzed the costs and cost savings qualitatively. The Economic Assessment associated with the final rule can be referenced for a greater level of detail related to the costs and benefits of the revisions.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket. The Economic Assessment is available in the docket and is summarized in *Section I.D What are the projected economic impacts of this action?* of the preamble.

B. Paperwork Reduction Act (PRA)

The information collection activities in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2688.02 (2050–NEW). You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

Respondents/affected entities: The information collection requirements of the final rule affect facilities that will read the final rule, responsible parties using § 761.61(b)(1) performance-based cleanup, responsible parties using § 761.66 waivers in emergency situations, commercial storers and disposers submitting annual reports, and entities submitting Notification of PCB Activity forms.

Respondent's obligation to respond: The recordkeeping and notification requirements are required for parties performing relevant activities (*e.g.,* using § 761.66 waivers in emergency situations). These requirements are described in detail in the ICR Supporting Statement.

Estimated number of respondents: 1,085.

Frequency of response: On occasion/as necessary.

Total estimated burden: 8,276 hours.

Total estimated cost: $1,051,643.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under RFA, 5 U.S.C. 601 *et seq.* In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves burden or has no net burden on the small entities subject to the rule. These changes would reduce the impacts on all small entities subject to the rule, so there are no significant impacts to any small entities. We have therefore concluded that this action will relieve regulatory burden for all directly regulated small entities. Details of this analysis are presented in the Economic Assessment, which is in the public docket for this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. EPA estimates that the final rule would result in net annual cost savings of between $14.4 and $16.2 million, assuming a seven percent discount rate ($16.3 to $18.1 at a three percent discount rate). As a result, EPA expects that the rule would not result in annual expenditures exceeding $100 million annually and therefore would not be subject to requirements of section 202 of UMRA as listed above.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and

responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have Tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000) because the action is not expected to result in any adverse environmental or human health impacts on Tribal entities. In addition, the action is expected to result in a cost savings and is not expected to result in any adverse financial impacts on Tribal entities. Thus, Executive Order 13175 does not apply to this rule. Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA prepared a Tribal consultation and coordination plan and sent a letter to the tribes on July 13, 2021, inviting consultation. EPA did not receive any comments from tribes.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR. 19885, April 23, 1997) because it is not an economically significant regulatory action as defined by Executive Order 12866. In addition, because the rule would not increase risk related to exposure to hazardous materials, the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' under Executive Order 13211, ''Actions Concerning Regulations that Affect Energy Supply, Distribution, or Use'' (May 18, 2001) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. The proposed rule would not directly regulate energy production or consumption and is expected to result in net cost savings.

I. National Technology Transfer and Advancement Act (NTTAA)

This action involves technical standards. In this rulemaking, the EPA incorporates voluntary consensus standards (VCSs) developed by both ASTM and the Agency into the rulemaking, consistent with the National Technology Transfer and Advancement Act (NTTAA). These VCSs support PCB cleanups as well sampling activities including the extraction and analysis of PCBs. For more details on the technical standards that EPA is using in this rulemaking, please see *Section III.G.—Incorporation by Reference.*

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or indigenous peoples) and low-income populations.

The EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on people of color, low-income populations and/or indigenous peoples. Examples of these potential disproportionate effects include PCB contamination occuring more frequently in these communities, as well as disproportionate effects from emergency situations and climate change.

The EPA believes that this action is likely to reduce existing disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples. Generally, the final rule will modernize the PCB regulations, making it easier and more affordable to clean up contaminated sites, while continuing to ensure that the requirements remain protective of health and the environment. Underserved, disadvantaged, and overburdened communities are expected to benefit from quicker, more cost-effective, compliant cleanups under the final rule. For example, adding explicit cleanup provisions under § 761.61(b), including the requirements to notify EPA and follow specific sampling protocols, will provide additional assurance that sites are properly remediated and enhance compliance and enforcement. Furthermore, the increased flexibility for emergency situations provided under § 761.66 will allow the Agency to work collaboratively with responsible parties to more quickly respond to releases of PCBs caused by natural disasters and other emergency situations, which can disproportionately impact such communities.

K. Congressional Review Act (CRA)

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

List of Subjects in 40 CFR Part 761

Environmental protection, Hazardous substances, Incorporation by reference, Labeling, Polychlorinated biphenyls (PCBs), Reporting and recordkeeping requirements.

Barry N. Breen,

Principal Deputy Assistant Administrator, Office of Land and Emergency Management.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations, part 761 is amended as follows:

PART 761—POLYCHLORINATED BIPHENYLS (PCBs) MANUFACTURING, PROCESSING, DISTRIBUTION IN COMMERCE, AND USE PROHIBITIONS

■ 1. The authority citation for part 761 continues to read as follows:

Authority: 15 U.S.C. 2605, 2607, 2611, 2614, and 2616.

Subpart A—General

■ 2. Amend § 761.1 by revising paragraph (b)(3) to read as follows:

§ 761.1 Applicability.

* * * * *

(b) * * *

(3) Most provisions in this part apply only if PCBs are present in concentrations above a specified level. Provisions that apply to PCBs at concentrations of <50 ppm apply also to contaminated surfaces at PCB concentrations of ≤10 µg/100 cm^2. Provisions that apply to PCBs at concentrations of ≥50 to <500 ppm apply also to contaminated surfaces at PCB concentrations of >10 µg/100 cm^2 to <100 µg/100 cm^2. Provisions that apply to PCBs at concentrations of ≥500 ppm apply also to contaminated surfaces at PCB concentrations of ≥100 µg/100 cm^2.

* * * * *

■ 3. Amend § 761.3 by:

■ a. Revising definitions for ''Administrator'' and ''Annual report'';

■ b. Adding in alphabetical order the definition for ''As-found concentration'';

■ c. Revising the definition for ''ASTM'';

■ d. Adding in alphabetical order definitions for ''CWA'', ''Director, Office

of Resource Conservation and Recovery'', and ''Emergency situation'';
■ e. Revising definitions for ''Non-porous surface'' and ''NTIS'';
■ f. Removing the definition for ''On site'' and adding in its place the definition for ''On-site''; and
■ g. Revising definition for ''SW–846''.

The revisions and additions read as follows:

§ 761.3 Definitions.

* * * * *

Administrator means the Administrator of the Environmental Protection Agency, or any employee of the Agency to whom the Administrator may either herein or by order delegate their authority to carry out their functions, or any person who shall by operation of law be authorized to carry out such functions.

* * * * *

Annual report means the completed EPA Form 6200–025 submitted each year by each disposer and commercial storer of PCB waste to the Director, Office of Resource Conservation and Recovery. The annual report is a brief summary of the information included in the annual document log.

* * * * *

As-found concentration means the concentration measured in samples collected in-situ (*i.e.,* prior to being moved or disturbed for cleanup and/or disposal) from environmental media or material, unless otherwise specifically provided. For example, media must not be disturbed, nor may they be diluted (*e.g.,* excavated, placed on a pile, and sampled after such placement), before characterization sampling is conducted. Sampling media in piles and existing accumulations would be considered ''as-found'' if the media were already in piles when the site was first visited by the responsible party, such as during the redevelopment of abandoned properties with historic PCB contamination. The as-found concentration is distinct from the source concentration, which is the concentration of the PCBs in the material that was originally spilled, released, or otherwise disposed of at the site.

ASTM means ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428–2959.

* * * * *

CWA means Clean Water Act, also known as the Federal Water Pollution Control Act (33 U.S.C. 12–51 *et seq.*).

* * * * *

Director, Office of Resource Conservation and Recovery means the Director of the Office of Resource Conservation and Recovery of the Office of Land and Emergency Management of the United States Environmental Protection Agency. Submissions to the Director shall be sent to 1200 Pennsylvania Ave. NW, MC5303T, Washington, DC 20460 or through an electronic method of submission, as applicable.

* * * * *

Emergency situation means adverse conditions caused by manmade or natural incidents that threaten lives, property, or public health and safety; require prompt responsive action from the local, State, Tribal, territorial, or Federal government; and result in or are reasonably expected to result in: (1) A declaration by either the President of the United States or Governor of the affected State of a natural disaster or emergency; or, (2) an incident funded under FEMA via a Stafford Act disaster declaration or emergency declaration. Examples of emergency situations may include civil emergencies or adverse natural conditions, such as hurricanes, earthquakes, or tornados.

* * * * *

Non-porous surface means a smooth, unpainted solid surface that limits penetration of liquid containing PCBs beyond the immediate surface. Examples are: smooth uncorroded metal; natural gas pipe with a thin porous coating originally applied to inhibit corrosion; smooth glass; smooth glazed ceramics; impermeable polished building stone such as marble or granite; and medium- and high-density plastics, such as polycarbonates and melamines, that do not absorb solvents.

NTIS means the National Technical Information Service, 5301 Shawnee Road, Alexandria, VA 22312, telephone: (703) 605–6000.

On-site means within the boundaries of a contiguous property unit.

* * * * *

SW–846 means the document having the title ''SW–846, Test Methods for Evaluating Solid Waste: Physical/Chemical Methods,'' also known as the SW–846 Compendium, which is available online at *https://www.epa.gov/hw-sw846.*

* * * * *

■ 4. Section 761.19 is revised to read as follows:

§ 761.19 Incorporation by reference.

Certain material is incorporated by reference into this part with the approval of the Director of the **Federal Register** under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at the Environmental Protection Agency (EPA) and at the National Archives and Records Administration (NARA). Contact EPA at EPA Docket Center (EPA/DC), Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW, Washington, DC 20460–0001; (202) 566–0270; *www.epa.gov/dockets.* For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* The material may be obtained from the following sources:

(a) ASTM International, 100 Barr Harbor Dr., P.O. Box C700, West Conshohocken, PA 19428–2959; (877) 909–ASTM *www.astm.org.*

(1) ASTM D93–09, Standard Test Methods for Flash Point by Pensky-Martens Closed Tester, approved December 15, 2009; IBR approved for §§ 761.71; 761.75.

(2) ASTM D129–64 (Reapproved 1968), Standard Test Method for Sulfur in Petroleum Products (General Bomb Method), approved 1968; IBR approved for § 761.71.

(3) ASTM D240–87, Standard Test Method for Heat of Combustion of Liquid Hydrocarbon Fuel by Bomb Calorimeter, approved March 27, 1987; IBR approved for § 761.71.

(4) ASTM D482–13, Standard Test Method for Ash from Petroleum Products, approved June 15, 2013; IBR approved for § 761.71.

(5) ASTM D524–88, Standard Test Method for Ramsbottom Carbon Residue of Petroleum Products, approved 1988; IBR approved for § 761.71.

(6) ASTM D808–87, Standard Test Method for Chlorine in New and Used Petroleum Products (Bomb Method), approved 1987; IBR approved for § 761.71.

(7) ASTM D923–86, Standard Test Method for Sampling Electrical Insulating Liquids, Approved 1986, IBR approved for § 761.60.

(8) ASTM D923–89, Standard Methods of Sampling Electrical Insulating Liquids, approved 1989; IBR approved for § 761.60.

(9) ASTM D1266–87, Standard Test Method for Sulfur in Petroleum Products (Lamp Method), approved 1987; IBR approved for § 761.71.

(10) ASTM D1796–83 (Reapproved 1990), Standard Test Method for Water and Sediment in Fuel Oils by the Centrifuge Method (Laboratory Procedure), approved 1990; IBR approved for § 761.71.

(11) ASTM D2158–89, Standard Test Method for Residues in Liquified Petroleum (LP) Gases, approved 1989; IBR approved for § 761.71.

(12) ASTM D2709–88, Standard Test Method for Water and Sediment in

Distillate Fuels by Centrifuge, approved 1988; IBR approved for § 761.71.

(13) ASTM D3278–96 (Reapproved 2011), Standard Test Methods for Flash Point of Liquids by Small Scale Closed-Cup Apparatus, approved June 1, 2011; IBR approved for § 761.75.

(14) ASTM D4059–00, Standard Test Method for Analysis of Polychlorinated Biphenyls in Insulating Liquids by Gas Chromatography, approved October 10, 2000; IBR approved for § 761.60.

(15) ASTM D5373–16, Standard Test Methods for Determination of Carbon, Hydrogen and Nitrogen in Analysis Samples of Coal and Carbon in Analysis Samples of Coal and Coke, approved September 1, 2016; IBR approved for § 761.71.

(16) ASTM D8174–18, Test Method for Finite Flash Point Determination of Liquid Wastes by Small Scale Closed Cup Tester, approved March 15, 2018; IBR approved for §§ 761.71; 761.75.

(17) ASTM D8175–18, Test Method for Finite Flash Point Determination of Liquid Wastes by Pensky-Martens Closed Cup Tester, approved March 15, 2018; IBR approved for §§ 761.71; 761.75.

(18) ASTM E258–67 (Reapproved 1987), Standard Test Method for Total Nitrogen Inorganic Material by Modified KJELDAHL Method approved 1987; IBR approved for § 761.71.

(b) *EPA, Office of Resource Conservation and Recovery, 1200 Pennsylvania Ave. NW (5304T), Washington, DC 20460; www.epa.gov/hw-sw846.*

(1) SW–846 Method 3510C, Separatory Funnel Liquid-Liquid Extraction, Revision 3, Approved December 1996; IBR approved for §§ 761.61, 761.272, and 761.292.

(2) SW–846 Method 3520C, Continuous Liquid-Liquid Extraction, Revision 3, Approved December 1996; IBR approved for §§ 761.61, 761.272, and 761.292.

(3) SW–846 Method 3535A, Solid-Phase Extraction (SPE), Revision 1, Approved February 2007; IBR approved for §§ 761.61, 761.272, and 761.292.

(4) SW–846 Method 3540C, Soxhlet Extraction, Revision 3, Approved December 1996; IBR approved for §§ 761.61, 761.253, 761.272, 761.292, 761.358, and 761.395.

(5) SW–846 Method 3541, Automated Soxhlet Extraction, Approved September 1994; IBR approved for §§ 761.61, 761.253, 761.272, 761.292, 761.358, and 761.395.

(6) SW–846 Method 3545A, Pressurized Fluid Extraction (PFE), Revision 1, Approved February 2007; IBR approved for §§ 761.61, 761.253, 761.272, 761.292, 761.358, and 761.395.

(7) SW–846 Method 3546, Microwave Extraction, Approved February 2007; IBR approved for §§ 761.61, 761.253, 761.272, 761.292, 761.358, and 761.395.

(8) SW–846 Method 3550C, Ultrasonic Soxhlet Extraction, Revision 3, Approved February 2007; IBR approved for §§ 761.253, and 761.395.

(9) SW–846 Method 8082A, Polychlorinated Biphenyls (PCBs) By Gas Chromatography, Revision 1, Approved February 2007; IBR approved for §§ 761.60, 761.61, 761.253, 761.272, 761.292, 761.358, and 761.395.

Note 1 to paragraph (b): Hard copies of these materials may be obtained from the National Technical Information Service, 5301 Shawnee Road, Alexandria, VA 22312, or by calling (800) 553–6847 or (703) 605–6000.

Subpart B—Manufacturing, Processing, Distribution in Commerce, and Use of PCBs and PCB Items

■ 5. Amend § 761.20 by revising paragraphs (e)(3)(ii)(B), (e)(4)(i), and (ii) to read as follows:

§ 761.20 Prohibitions and exceptions.

* * * * *

(e) * * *

(3) * * *

(ii) * * *

(B) The burner will burn the used oil only in a combustion facility identified in paragraph (e)(1) of this section and identify the class of burner they qualify under.

(4) * * *

(i) *Marketers.* Marketers who first claim that the used oil fuel contains no detectable PCBs must include among the records required by 40 CFR 279.72(b) and 279.74(b) and (c), copies of the analysis or other information documenting their claim, and they must include among the records required by 40 CFR 279.74(a) and (c) and 279.75, a copy of each certification notice received or prepared relating to transactions involving PCB-containing used oil.

(ii) *Burners.* Burners must include among the records required by 40 CFR 279.65 and 279.66, a copy of each certification notice required by paragraph (e)(3)(ii) of this section that they send to a marketer.

* * * * *

■ 6. Amend § 761.30 by revising paragraph (i)(4) to read as follows:

§ 761.30 Authorizations.

* * * * *

(i) * * *

(4) Any person characterizing PCB contamination in natural gas pipe or natural gas pipeline systems must do so by analyzing organic liquids collected at existing condensate collection points in the pipe or pipeline system. The level of PCB contamination found at a collection point is assumed to extend to the next collection point downstream. Any person characterizing multi-phasic liquids must do so in accordance with § 761.1(b)(4); if no liquids are present and they choose, in their discretion, to characterize PCB contamination, the person must use standard wipe samples in accordance with subpart M of this part.

* * * * *

Subpart D—Storage and Disposal

■ 7. Amend § 761.50 by revising paragraphs (b)(3)(i)(A) and (b)(3)(ii) introductory text to read as follows:

§ 761.50 Applicability.

* * * * *

(b) * * *

(3) * * *

(i) * * *

(A) Sites containing these wastes are presumed not to present an unreasonable risk of injury to health or the environment from exposure to PCBs at the site. However, the EPA Regional Administrator may inform the owner or operator of the site that there is reason to believe that spills, leaks, or other uncontrolled releases or discharges, such as leaching, from the site constitute ongoing disposal that may present an unreasonable risk of injury to health or the environment from exposure to PCBs at the site, and may require the owner or operator to generate data necessary to characterize the risk. If after reviewing any such data, the EPA Regional Administrator makes a finding, that an unreasonable risk exists, then they may direct the owner or operator of the site to dispose of the PCB remediation waste in accordance with § 761.61 such that an unreasonable risk of injury no longer exists.

* * * * *

(ii) Any person responsible for PCB waste that was either placed in a land disposal facility, spilled, or otherwise released into the environment on or after April 18, 1978, but prior to July 2, 1979, where the concentration of the spill or release was ≥500 ppm; or placed in a land disposal facility, spilled, or otherwise released into the environment on or after July 2, 1979, where the concentration of the spill or release was ≥50 ppm, must dispose of it in accordance with either of the following:

* * * * *

■ 8. Amend § 761.60 by revising paragraphs (b)(2)(v)(C), (g)(1)(iii), and (g)(2)(ii) to read as follows:

§ 761.60 Disposal requirements.

* * * * *

(b) * * *

(2) * * *

(v) * * *

(C) There is other good cause shown. As part of this evaluation, the Assistant Administrator will consider the impact of their action on the incentives to construct or expand PCB incinerators.

* * * * *

(g) * * *

(1) * * *

(iii) Unless otherwise specified in this part, any person conducting the chemical analysis of PCBs shall do so using gas chromatography. Any gas chromatographic method that is appropriate for the material being analyzed may be used, including EPA Method 608.3, ''Organochlorine Pesticides and PCBs'' (see 40 CFR part 136, Appendix A), or SW–846 Method 8082A (incorporated by reference in § 761.19); and ASTM D4059–00 (incorporated by reference, see § 761.19).

(2) * * *

(ii) For purposes of complying with the marking and disposal requirements, representative samples may be taken from either the common containers or the individual electrical equipment to determine the PCB concentration. Except, that if any PCBs at a concentration of 500 ppm or greater have been added to the container or equipment then the total container contents must be considered as having a PCB concentration of 500 ppm or greater for purposes of complying with the disposal requirements of this subpart. For purposes of this paragraph, representative samples of mineral oil dielectric fluid are either samples taken in accordance with ASTM D923–86 or ASTM D923–89 (both incorporated by reference, see § 761.19) or samples taken from a container that has been thoroughly mixed in a manner such that any PCBs in the container are uniformly distributed throughout the liquid in the container.

* * * * *

■ 9. Amend § 761.61 by revising paragraphs (a)(3)(ii), (a)(5)(i)(B)(*2*)(*iv*), (a)(7), (a)(8) introductory text, (a)(8)(i)(A) and (B), (a)(8)(ii) introductory text, (b), (c) paragraph heading, and (c)(1) to read as follows:

§ 761.61 PCB remediation waste.

* * * * *

(a) * * *

(3) * * *

(ii) Within 30 calendar days of receiving the notification, the EPA Regional Administrator will respond in writing approving of the self-implementing cleanup, disapproving of the self-implementing cleanup, or requiring additional information. If the EPA Regional Administrator does not respond within 30 calendar days of receiving the notice, the person submitting the notification may proceed with the cleanup according to the information the person provided to the EPA Regional Administrator. If, upon review of the notification, the EPA Regional Administrator determines that the notification does not contain all of the information required by paragraph (a)(3)(i) of this section, sufficient to ensure compliance with paragraphs (a)(4) through (9) of this section at the site, they may require the submission of additional information. The cleanup and disposal must comply with all applicable requirements of paragraphs (a)(4) through (9) of this section. Once cleanup is underway, the person conducting the cleanup must provide any proposed changes from the notification to the EPA Regional Administrator in writing no less than 14 calendar days prior to the proposed implementation of the change. The EPA Regional Administrator will determine in their discretion whether to accept the change and will respond to the change notification verbally within 7 calendar days and in writing within 14 calendar days of receiving it. If the EPA Regional Administrator does not respond verbally within 7 calendar days and in writing within 14 calendar days of receiving the change notice, the person who submitted it may proceed with the cleanup according to the information in the change notice provided to the EPA Regional Administrator, subject to the submission of additional information if the Regional Administrator determines it is needed to address the elements of paragraph (a)(3)(i), of this section and in compliance with all applicable requirements of paragraphs (a)(4) through (9) of this section and other applicable requirements of this part.

* * * * *

(5) * * *

(i) * * *

(B) * * *

(*2*) * * *

(*iv*) The generator must provide written notice, including the quantity to be shipped and highest concentration of PCBs at least 15 days before the first shipment of bulk PCB remediation waste from each cleanup site by the generator, to each off-site facility where the waste is destined for an area not subject to a TSCA PCB Disposal Approval. The generator must select applicable method(s) from the following list to extract PCBs and determine the PCB concentration from individual and composite samples of PCB remediation waste: SW–846 Method 3510C, SW–846 Method 3520C, SW–846 Method 3535A, SW–846 Method 3540C, SW–846 Method 3541, SW–846 Method 3545A, SW–846 Method 3546, or SW–846 Method 8082A (all incorporated by reference, see § 761.19). Modifications to the methods listed in this paragraph or alternative methods not listed may be used if validated under Subpart Q of this part or authorized in a § 761.61(c) approval.

* * * * *

(7) *Cap requirements.* A cap means, when referring to on-site cleanup and disposal of PCB remediation waste, a uniform placement of concrete, asphalt, or similar material of minimum thickness spread over the area where remediation waste was removed or left in place in order to prevent or minimize human exposure, infiltration of water, and erosion. Any person designing and constructing a cap must do so in accordance with § 264.310(a) of this chapter, and ensure that it complies with the permeability, sieve, liquid limit, and plasticity index parameters in §§ 761.75(b)(1)(ii) through (v). A cap of compacted soil shall have a minimum thickness of 25 cm (10 inches). A concrete or asphalt cap shall have a minimum thickness of 15 cm (6 inches). A cap must be of sufficient strength to maintain its effectiveness and integrity during the use of the cap surface which is exposed to the environment. A cap shall not be contaminated at a level ≥1 ppm PCB. Repairs shall begin within 72 hours of discovery for any breaches which would impair the integrity of the cap.

(8) *Deed restrictions for caps, fences and low occupancy areas.* When a cleanup activity conducted under this section includes the use of a fence or a cap, the owner of the site must maintain the fence or cap, in perpetuity. In addition, whenever a fence, a cap, or the procedures and requirements for a low occupancy area, is used, the owner of the site must meet the following conditions:

(i) * * *

(A) Record, in accordance with State law, a notation on the deed to the property, or on some other instrument which is normally examined during a title search, that will in perpetuity notify any potential purchaser of the property:

(*1*) That the land, or the specific portion thereof identified in the instrument when only a portion is subject to the instrument, has been used

for PCB remediation waste disposal and, when applicable, that the area is restricted to use as a low occupancy area as defined in § 761.3;

(*2*) Of the existence of the fence or cap and the requirement to maintain the fence or cap, when applicable; and

(*3*) The applicable cleanup levels left at the site, including inside any fence, under any cap, and/or in a low occupancy area.

(B) Submit a certification, signed by the owner, that they have recorded the notation specified in paragraph (a)(8)(i)(A) of this section to the EPA Regional Administrator.

(ii) The owner of a site being cleaned up under this section may remove a fence, cap, or low occupancy designation after conducting additional cleanup activities and achieving cleanup levels, specified in paragraph (a)(4) of this section, which do not require a fence, cap, or low occupancy designation. The owner may remove the notice on the deed no earlier than 30 days after achieving the cleanup levels specified in this section which do not require a fence, cap, or low occupancy designation.

* * * * *

(b) *Performance-based cleanup and disposal.* Any person may clean up and dispose of PCB remediation waste at a site in full compliance with the performance-based cleanup provisions of paragraph (b)(1) of this section and disposal provisions of paragraph (b)(2) of this section.

Alternatively, any person may dispose of PCB remediation waste in accordance with paragraph (b)(2) of this section, but such disposal does not relieve them of cleanup and disposal obligations for any PCBs that remain on-site if the provisions of paragraph (b)(1) of this section are not complied with.

(1) *Performance-based cleanup of PCB remediation waste*—(i) *Applicability.* (A) The performance-based cleanup option may not be used to clean up:

(*1*) Surface or ground waters.

(*2*) Sediments in marine and freshwater ecosystems.

(*3*) Sewers or sewage treatment systems.

(*4*) Any private or public drinking water sources or distribution systems.

(*5*) Grazing or agricultural lands.

(*6*) Vegetable gardens.

(*7*) Sites where the cleanup site, as defined in § 761.3, is adjacent to, contains, or is proposed to be redeveloped to contain: residential dwellings, hospitals, schools, nursing homes, playgrounds, parks, day care centers, endangered species habitats, estuaries, wetlands, national parks, national wildlife refuges, commercial fisheries, sport fisheries, or surface waters.

(*8*) Sites where the PCB contamination is in the 100-year floodplain.

(B) The performance-based cleanup provisions shall not be binding upon cleanups conducted under other authorities, including but not limited to, actions conducted under section 104 or section 106 of CERCLA, or section 3004(u) and (v) or section 3008(h) of RCRA.

(ii) *Cleanup level.* All on-site PCB remediation waste above the following cleanup levels must be disposed of or decontaminated in accordance with paragraph (2).

(A) The cleanup level for bulk PCB remediation waste and porous surfaces is ≤1 ppm PCBs.

(B) The cleanup levels for liquids are the concentrations specified in §§ 761.79(b)(1) and (b)(2).

(C) The cleanup levels for non-porous surfaces are the concentrations specified in § 761.79(b)(3).

(iii) *Verification sampling.* Verification sampling for bulk PCB remediation waste and porous surfaces must be conducted in accordance with Subpart O. Verification sampling for non-porous surfaces must be conducted in accordance with Subpart P. Verification sampling for liquid PCB remediation waste must be conducted in accordance with § 761.269. When analysis of each sample results in a measurement of PCBs less than or equal to the levels specified in paragraph (ii) of this section, on-site performance-based cleanup is complete.

(iv) *Recordkeeping.* Recordkeeping is required in accordance with § 761.125(c)(5).

(v) *Cleanup Completion Notification.* Within 30 days of sending the final shipment of waste offsite for disposal from a site cleaned up under this paragraph, the person in charge of the cleanup or the owner of the property where the PCB remediation waste was located shall notify, in writing, the EPA Regional Administrator, the Director of the State or Tribal environmental protection agency, and the Director of the county or local environmental protection agency where the cleanup was conducted. EPA may require additional on-site cleanup upon finding that the cleanup level(s) in (b)(1)(ii) of this section have not been met. Upon review of the cleanup completion notification, EPA may request that the responsible party submit additional information related to the records required under (b)(1)(iv) of this section to clarify that the cleanup has been completed in accordance with the requirements of this section. The notification shall include:

(A) Site identification information, including the site address and the name, phone number, and email address of the site contact;

(B) Disposal facility and shipment information, including the disposal facility's name and address, the manifest tracking number(s), and the quantity of waste shipped;

(C) A summary of all applicable components of the records in § 761.125(c)(5); and

(D) A certification using the language in § 761.3.

(2) *Performance-based disposal.* (i) Any person disposing of liquid PCB remediation waste under this subsection shall do so according to §§ 761.60(a) or (e) or decontaminate it in accordance with § 761.79.

(ii) Any person disposing of non-liquid PCB remediation waste under this subsection shall do so by one of the following methods:

(A) Dispose of it in a high temperature incinerator approved under § 761.70(b), an alternate disposal method approved under § 761.60(e), a chemical waste landfill approved under § 761.75, a facility with a coordinated approval issued under § 761.77, or a hazardous waste landfill permitted by EPA under section 3005 of RCRA, or by a State or territory authorized under section 3006 of RCRA.

(B) Decontaminate it in accordance with § 761.79.

(iii) Any person may manage or dispose of material containing <50 ppm PCBs that has been dredged or excavated from waters of the United States:

(A) In accordance with a permit that has been issued under section 404 of the Clean Water Act, or the equivalent of such a permit as provided for in regulations of the U.S. Army Corps of Engineers at 33 CFR part 320.

(B) In accordance with a permit issued by the U.S. Army Corps of Engineers under section 103 of the Marine Protection, Research, and Sanctuaries Act, or the equivalent of such a permit as provided for in regulations of the U.S. Army Corps of Engineers at 33 CFR part 320.

(c) *Risk-based cleanup and disposal approval.* (1) Any person wishing to sample, extract, analyze, cleanup, or dispose of PCB remediation waste in a manner other than prescribed in paragraphs (a) or (b) of this section, or store PCB remediation waste in a manner other than prescribed in § 761.65, must apply in writing to the Regional Administrator in the Region

where the sampling, extraction, analysis, cleanup, disposal, or storage site is located, for sampling, extraction, analysis, cleanup, disposal, or storage occurring in a single EPA Region; or to the Director, Office of Resource Conservation and Recovery, for sampling, extraction, analysis, cleanup, disposal, or storage occurring in more than one EPA Region. Each application must include information described in the notification required by paragraph (a)(3) of this section. EPA may request other information that it believes necessary to evaluate the application. No person may conduct cleanup activities under this paragraph prior to obtaining written approval by EPA.

* * * * *

■ 10. Amend § 761.62 by revising paragraphs (c)(1) and (d) to read as follows:

§ 761.62 Disposal of PCB bulk product waste.

* * * * *

(c) * * *

(1) Any person wishing to sample, extract, analyze, or dispose of PCB bulk product waste in a manner other than prescribed in paragraphs (a) or (b) of this section, or store PCB bulk product waste in a manner other than prescribed in § 761.65, must apply in writing to the Regional Administrator in the Region where the sampling, extraction, analysis, disposal, or storage site is located, for sampling, extraction, analysis, disposal, or storage occurring in a single EPA Region; or to the Director, Office of Resource Conservation and Recovery, for sampling, extraction, analysis, disposal, or storage occurring in more than one EPA Region. Each application must contain information indicating that, based on technical, environmental, or waste-specific characteristics or considerations, the proposed sampling, extraction, analysis, disposal, or storage methods or locations will not pose an unreasonable risk of injury to health or the environment. EPA may request other information that it believes necessary to evaluate the application. No person may conduct sampling, extraction, analysis, disposal, or storage activities under this paragraph prior to obtaining written approval by EPA.

* * * * *

(d) *Disposal as daily landfill cover.* Bulk product waste described in paragraph (b)(1) of this section may be disposed of as daily landfill cover, as long as the daily cover remains in the landfill and is not released or dispersed by wind or other action.

■ 11. Amend § 761.65 by revising paragraphs (c)(9)(i) and (iii), (g) introductory text, (g)(1) introductory text, (g)(1)(iv), (g)(2), (g)(3)(i), (g)(4)(i), (g)(5), (6), (7) and (h) to read as follows:

§ 761.65 Storage for disposal.

* * * * *

(c) * * *

(9) * * *

(i) The waste is placed in a pile or non-leaking, covered container designed and operated to control dispersal of the waste by wind, where necessary, by means other than wetting.

* * * * *

(iii) The storage site must have:

(A) A liner or container that is designed, constructed, and installed to prevent any migration of wastes off or through the liner or container into the adjacent subsurface soil, ground water or surface water at any time during the active life (including the closure period) of the storage site. The liner or container may be constructed of materials that may allow waste to migrate into the liner or container. The liner or container must be:

(*1*) Constructed of materials that have appropriate chemical properties and sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrogeologic forces), physical contact with the waste or leachate to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operation.

(*2*) Placed upon a foundation or base capable of providing support to the liner or container and resistance to pressure gradients above and below the liner or container to prevent failure of the liner or container due to settlement, compression, or uplift.

(*3*) In the case of liners, installed to cover all surrounding earth likely to be in contact with the waste.

(B) A cover that meets the requirements of paragraph (c)(9)(iii)(A) of this section, is installed to cover all of the stored waste likely to be in contact with precipitation, and is secured so as not to be functionally disabled by winds expected under normal seasonal meteorological conditions at the storage site.

* * * * *

(g) *Financial assurance for closure.* A commercial storer of PCB waste shall establish financial assurance for closure of each PCB storage facility that they own or operate. In establishing financial assurance for closure, the commercial storer of PCB waste may choose from the following financial assurance mechanisms or any combination of mechanisms:

(1) The ''closure trust fund,'' as specified in § 264.143(a) of this chapter, except for paragraph (a)(3) of § 264.143 and except when the Regional Administrator specifies modifications for the purposes of implementation under TSCA. For purposes of this paragraph, the following provisions also apply:

* * * * *

(iv) The submission of a trust agreement with the wording specified in § 264.151(a)(1) of this chapter, including any reference to hazardous waste management facilities, shall be deemed to be in compliance with the requirement to submit a trust agreement under this subpart except when the Regional Administrator specifies modifications for the purposes of implementation under TSCA.

(2) The ''surety bond guaranteeing payment into a closure trust fund,'' as specified in § 264.143(b) of this chapter, including the use of the surety bond instrument specified at § 264.151(b) of this chapter and the standby trust specified at § 264.143(b)(3) of this chapter except when the Regional Administrator specifies modifications for the purposes of implementation under TSCA. The use of the surety bonds, surety bond instruments, and standby trust agreements specified in §§ 264.143(b) and 264.151(b) of this chapter, with any modifications specified by the Regional Administrator, shall be deemed to be in compliance with this subpart.

(3)(i) The ''surety bond guaranteeing performance of closure,'' as specified at § 264.143(c) of this chapter, except for § 264.143(c)(5) of this chapter and except when the Regional Administrator specifies modifications for the purposes of implementation under TSCA. The submission and use of the surety bond instrument specified at § 264.151(c) of this chapter and the standby trust specified at § 264.143(c)(3) of this chapter, with any modifications specified by the Regional Administrator, shall be deemed to be in compliance with the requirements under this subpart relating to the use of surety bonds and standby trust funds.

* * * * *

(4)(i) The ''closure letter of credit'' specified in § 264.143(d) of this chapter, except for paragraph (d)(8) and except when the Regional Administrator specifies modifications for the purposes of implementation under TSCA. The submission and use of the irrevocable letter of credit instrument specified in § 264.151(d) of this chapter and the standby trust specified in § 264.143(d)(3) of this chapter, with any

modifications specified by the Regional Administrator, shall be deemed to be in compliance with the requirements of this subpart relating to the use of letters of credit and standby trust funds.

* * * * *

(5) ''Closure insurance,'' as specified in § 264.143(e) of this chapter, utilizing the certificate of insurance for closure specified at § 264.151(e) of this chapter except when the Regional Administrator specifies modifications for the purposes of implementation under TSCA. The use of closure insurance as specified in § 264.143(e) of this chapter and the submission and use of the certificate of insurance specified in § 264.151(e) of this chapter, with any modifications specified by the Regional Administrator, shall be deemed to be in compliance with the requirements of this subpart relating to the use of closure insurance.

(6) The ''financial test and corporate guarantee for closure,'' as described in § 264.143(f) of this chapter except when the Regional Administrator specifies modifications for the purposes of implementation under TSCA, including a letter signed by the owner's or operator's chief financial officer as specified at § 264.151(f) of this chapter and, if applicable, the written corporate guarantee specified at § 264.151(h) of this chapter. The use of the financial test and corporate guarantee specified in § 264.143(f) of this chapter, the submission and use of the letter specified in § 264.151(f) of this chapter, and the submission and use of the written corporate guarantee specified at § 264.151(h) of this chapter, with any modifications specified by the Regional Administrator, shall be deemed to be in compliance with the requirements of this subpart relating to the use of financial tests and corporate guarantees.

(7) The corporate guarantee as specified in § 264.143(f)(10) of this chapter except when the Regional Administrator specifies modifications for the purposes of implementation under TSCA.

* * * * *

(h) *Release of owner or operator.* Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, EPA will notify the owner or operator in writing that the owner or operator is no longer required by this section to maintain financial assurance for final closure of the facility, unless EPA has reason to believe that final closure has not been completed in accordance with the approved closure plan. EPA shall provide the owner or operator with a detailed written statement stating the reasons why EPA believed closure was not conducted in accordance with the approved closure plan.

* * * * *

■ 12. Add § 761.66 to subpart D to read as follows:

§ 761.66 Emergency situations.

This section establishes procedures that may be used for purposes of the cleanup and/or disposal of PCB releases caused by an emergency situation as defined in § 761.3. This section allows the request of a waiver of any of the requirements in §§ 761.60, 761.61, 761.62, or 761.65. Any person conducting activities under these emergency provisions is also responsible for determining and complying with all other applicable Federal, State, and local laws and regulations. This section does not prohibit any person from implementing temporary emergency measures to prevent, treat, or contain further releases or mitigate migration to the environment of PCBs or PCB remediation waste.

(a) *Applicability.* This section may only be applied to the cleanup and/or disposal of PCB releases caused by an emergency situation as defined in § 761.3.

(b) *Waiver Request.* Any person intending or planning to sample, extract, analyze, clean up, store, and/or dispose of PCBs under this section shall submit a waiver request to the Regional Administrator in the EPA Region where the sampling, extraction, analysis, cleanup, storage, and/or disposal would occur, in writing and/or by email no later than seven (7) days after discovery of the release or implementation of any temporary emergency measures, as applicable. The requestor must also send a copy of the waiver request to the Director of the State or Tribal environmental agency where the sampling, extraction, analysis, cleanup, storage, and/or disposal would occur. If the sampling, extraction, analysis, cleanup, storage, and/or disposal activities in the waiver request would be conducted in more than one Region, then the waiver request must be submitted, in its entirety, to the Regional Administrators for all affected Regions.

(1) This request shall include:

(i) The contact information for the person requesting the waiver.

(ii) Location(s) of the release(s).

(iii) A description of the emergency situation, including information about adverse conditions and the incident(s) that caused them.

(iv) The type(s) of material(s) that are contaminated and the source of the release, if known.

(v) The as-found PCB concentrations in the PCB waste, unless the materials are being managed as if they contain ≥500 ppm PCBs. If actual PCB concentrations have not yet been determined, then estimated concentrations may be provided in the request. Actual PCB concentrations shall be determined before disposal activities commence, unless the waste is being managed as if it contains ≥500 ppm PCBs.

(vi) The provisions of §§ 761.60, 761.61, 761.62, or 761.65 that the person requests to waive or modify (or to use alternative procedures for) and an explanation of why compliance with the existing provisions would be impracticable as a result of the emergency situation.

(vii) The plan for how sampling, extraction, analysis, storage, cleanup, and/or disposal of the PCB waste would be conducted if the waiver were granted. The plan shall provide information to support how the actions described in the plan do not pose an unreasonable risk of injury to health or the environment. This plan shall be based on the as-found PCB concentrations in the materials unless waste is being managed as if it contains PCBs ≥500 ppm.

(viii) Whether or not the PCB waste is near, or likely to impact, surface waters, ground waters, drinking water sources or distribution systems, wells, sediments, sewers or sewage treatment systems, grazing lands, vegetable gardens, residential dwellings, hospitals, schools, nursing homes, playgrounds, parks, day care centers, endangered species habitats, estuaries, wetlands, national parks, national wildlife refuges, commercial fisheries, or sport fisheries and how those areas and potential impacts will be addressed.

(2) To make changes to submitted information described in paragraph (b)(1) of this section, the requestor shall submit the new information to the EPA Regional Administrator(s) in writing and/or by email. Changes must also be sent to the Director of the State or Tribal environmental agency or agencies where the request is applicable.

(c) *Approval of waiver requests.* The EPA Regional Administrator may approve the waiver request, request additional information, approve the waiver request with specified changes or additional conditions, or deny the waiver request, in writing, by telephone, or by email. An approval, with or without changes or conditions, shall be based on the Regional Administrator's

finding that compliance with the regulatory requirements from which a waiver is sought is impracticable and that the action approved under the waiver will not pose an unreasonable risk of injury to health or the environment. At any point, EPA may impose additional sampling, extraction, analysis, cleanup, storage, and/or disposal requirements, or require the requestor to delay acting on their proposed plan, in order to ensure the actions will not pose an unreasonable risk of injury to health or the environment.

(d) *Steps after approval of waiver request.* Sampling, extraction, analysis, cleanup, storage, and disposal activities as described in the waiver request may begin after the EPA Regional Administrator responds with approval of the waiver request. All sampling, extraction, analysis, cleanup, storage, and disposal activities shall be conducted in compliance with the terms of the approval and all applicable provisions of §§ 761.60, 761.61, 761.62, and 761.65 not expressly waived by the approval.

(e) *As-found concentration.* Sampling, extraction, analysis, cleanup, storage, and disposal activities conducted under this section shall be based on the as-found concentration of the PCB waste unless the materials are being managed as if they contain ≥500 ppm PCBs.

(f) *Records, manifests, and certification.* Recordkeeping and certification are required in accordance with § 761.125(c)(5). The manifesting and reporting requirements in Subpart K apply to waste disposed of under this section. However, if the person requesting a waiver has not previously submitted a notification of PCB activity as described in § 761.205 and the requirements of § 761.205 specify that such notification is required for the cleanup, storage, and/or disposal activity, the requestor shall submit the notification within ten (10) business days of their waiver request. The requestor does not have to wait to obtain their EPA identification number before initiating cleanup and/or disposal activities described in their approved waiver request. While waiting for their identification number, the requestor may use the generic identification ''40 CFR PART 761'' in lieu of an EPA identification number on manifests for PCB waste. The requestor may alternatively use an EPA identification number they previously obtained from EPA under RCRA or a State or territory under an authorized RCRA program, if they have one. Once the requestor receives an EPA identification number, they shall use it on manifests for PCB waste.

■ 13. Amend § 761.70 by revising paragraph (d)(4)(i) to read as follows:

§ 761.70 Incineration.

* * * * *

(d) * * *

(4) * * *

(i) Except as provided in paragraph (d)(5) of this section, the Regional Administrator or the appropriate official at EPA Headquarters may not approve an incinerator for the disposal of PCBs and PCB Items unless they find that the incinerator meets all of the requirements of paragraphs (a) and/or (b) of this section.

* * * * *

■ 14. Amend § 761.71 by revising paragraphs (b)(2)(iv) and (vi) to read as follows:

§ 761.71 High efficiency boilers.

* * * * *

(b) * * *

(2) * * *

(iv) The type of equipment, apparatus, and procedures to be used to control the feed of PCB liquids to the boiler and to monitor and record the carbon monoxide concentration and excess oxygen percentage in the stack.

* * * * *

(vi) The concentration of PCBs and of any other chlorinated hydrocarbon in the waste and the results of analyses using ASTM methods as follows: Carbon and hydrogen content using ASTM D5373–16, nitrogen content using ASTM E258–67 (Reapproved 1987) or ASTM D5373–16, sulfur content using ASTM D1266–87, or ASTM D129–64 (Reapproved 1968), chlorine content using ASTM D808–87, water and sediment content using either ASTM D2709–88 or ASTM D1796–83 (Reapproved 1990), ash content using ASTM D482–13, calorific value using ASTM D240–87, carbon residue using either ASTM D2158–89 or ASTM D524–88, and flash point using ASTM D93–09, ASTM D8174–18, or ASTM D8175–18 (all standards incorporated by reference, see § 761.19).

* * * * *

■ 15. Amend § 761.75 by revising paragraphs (b)(8)(iii) and (c)(3)(i) and (c)(4) to read as follows:

§ 761.75 Chemical waste landfills.

* * * * *

(b) * * *

(8) * * *

(iii) Ignitable wastes shall not be disposed of in chemical waste landfills. Liquid ignitable wastes are wastes that have a flash point less than 60 degrees C (140 degrees F) as determined by the following method or an equivalent method: Flash point of liquids shall be determined by a Pensky-Martens Closed Cup Tester, using the protocol specified in ASTM D93–09 or ASTM D8175–18, a Small Scale Closed Cup Tester, using the protocol specified in ASTM D3278–96 (Reapproved 2011) or ASTM D8174–18, or the Setaflash Closed Tester using the protocol specified in ASTM D3278–96 (Reapproved 2011) (all standards incorporated by reference, see § 761.19).

* * * * *

(c) * * *

(3) * * *

(i) Except as provided in paragraph (c)(4) of this section, the Regional Administrator may not approve a chemical waste landfill for the disposal of PCBs and PCB Items, unless they find that the landfill meets all of the requirements of paragraph (b) of this section.

* * * * *

(4) *Waivers.* An owner or operator of a chemical waste landfill may submit evidence to the Regional Administrator that operation of the landfill will not present an unreasonable risk of injury to health or the environment from PCBs when one or more of the requirements of paragraph (b) of this section are not met. On the basis of such evidence and any other available information, the Regional Administrator may in their discretion find that one or more of the requirements of paragraph (b) of this section is not necessary to protect against such a risk and may waive the requirements in any approval for that landfill. Any finding and waiver under this paragraph will be stated in writing and included as part of the approval.

* * * * *

■ 16. Amend § 761.77 by revising paragraphs (a)(1)(ii)(B), (a)(2), and (b) introductory text to read as follows:

§ 761.77 Coordinated approval.

(a) * * *

(1) * * *

(ii) * * *

(B) Issue a letter granting or denying the TSCA PCB Coordinated Approval. If the EPA Regional Administrator grants the TSCA PCB Coordinated Approval, they may acknowledge the non-TSCA approval meets the regulatory requirements under TSCA as written, or require additional conditions the EPA Regional Administrator has determined are necessary to prevent unreasonable risk of injury to health or the environment.

* * * * *

(2) The EPA Regional Administrator may issue a notice of deficiency, revoke

the TSCA PCB Coordinated Approval, require the person to whom the TSCA PCB Coordinated Approval was issued to submit an application for a TSCA PCB approval, or bring an enforcement action under TSCA if they determine that:

* * * * *

(b) Any person who owns or operates a facility that they intend to use to landfill PCB wastes; incinerate PCB wastes; dispose of PCB wastes using an alternative disposal method that is equivalent to disposal in an incinerator approved under § 761.70 or a high efficiency boiler operating in compliance with § 761.71; or store PCB wastes may apply for a TSCA PCB Coordinated Approval. The EPA Regional Administrator may approve the request if the EPA Regional Administrator determines that the activity will not pose an unreasonable risk of injury to health or the environment and the person:

* * * * *

■ 17. Amend § 761.79 by revising paragraph (h)(3) to read as follows:

§ 761.79 Decontamination standards and procedures.

* * * * *

(h) * * *

(3) Any person wishing to sample, extract, or analyze decontaminated material in a manner other than prescribed in paragraph (f) of this section must apply in writing to the Regional Administrator in the Region where the activity would take place, for decontamination activity occurring in a single EPA Region; or to the Director, Office of Resource Conservation and Recovery, for decontamination activity occurring in more than one EPA Region. Each application must contain a description of the material to be decontaminated, the nature and PCB concentration of the contaminating material (if known), the decontamination method, the proposed extraction, analysis, and/or sampling procedure, and a justification for how the proposed extraction, analysis, and/or sampling procedure is equivalent to or more comprehensive than the extraction, analysis, and/or sampling procedure required under paragraph (f) of this section.

* * * * *

Subpart G—PCB Spill Cleanup Policy

■ 18. Amend § 761.120 by revising paragraphs (b)(2) and (c) to read as follows:

§ 761.120 Scope.

* * * * *

(b) * * *

(2) In those situations, the Regional Administrator may require cleanup in addition to that required under § 761.125(b) and (c). However, the Regional Administrator must first make a finding, based on the specific facts of a spill, that additional cleanup is necessary to prevent unreasonable risk. In addition, before making a final decision on additional cleanup, the Regional Administrator must notify the Director, Office of Resource Conservation and Recovery of their finding and the basis for the finding.

(c) *Flexibility to allow less stringent or alternative requirements.* (1) EPA retains the flexibility to allow less stringent or alternative decontamination measures based upon site-specific considerations. EPA will exercise this flexibility if the responsible party demonstrates that cleanup to the numerical decontamination levels is clearly unwarranted because of risk-mitigating factors, that compliance with the procedural requirements or numerical standards in the policy is impracticable at a particular site, or that site-specific characteristics make the costs of cleanup prohibitive. The Regional Administrator will notify the Director, Office of Resource Conservation and Recovery of any decision and the basis for the decision to allow less stringent cleanup. The purpose of this notification is to enable the Director, Office of Resource Conservation and Recovery to ensure consistency of spill cleanup standards under special circumstances across the regions.

(2) In emergency situations, as defined in § 761.123, the following provisions of this Policy are hereby modified as follows:

(i) For actions taken directly in response to spills caused by emergency situations, responsible parties may use the as-found concentrations in the spill materials when determining whether to manage the spill under §§ 761.125(b) or (c) of this Policy when it is not possible to readily determine the spill source concentration at a site.

(ii) For spills caused by emergency situations, the applicable notifications in § 761.125(a)(1) must be submitted as soon as possible, but no later than 48 hours after the adverse conditions that prevented communication have ended.

* * * * *

■ 19. Amend § 761.123, by:

■ a. Adding the definition in alphabetical order for ''Emergency situation''; and

■ b. Revising the definitions for ''Other restricted access (nonsubstation) locations'' and ''Spill''.

The addition and revisions read as follows:

§ 761.123 Definitions.

* * * * *

Emergency situation means adverse conditions caused by manmade or natural incidents that threaten lives, property, or public health and safety; require prompt responsive action from the local, State, Tribal, territorial, or Federal government; and result in or are reasonably expected to result in: (1) A declaration by either the President of the United States or Governor of the affected State of a natural disaster or emergency; or, (2) an incident funded under FEMA via a Stafford Act disaster declaration or emergency declaration. Examples of emergency situations may include civil emergencies or adverse natural conditions, such as hurricanes, earthquakes, or tornados.

* * * * *

Other restricted access (nonsubstation) locations means areas other than electrical substations that are at least 0.1 kilometer (km) from a residential/commercial area and limited by man-made barriers (*e.g.,* fences and walls) or substantially limited by naturally occurring barriers such as mountains, cliffs, or rough terrain. These areas generally include industrial facilities and extremely remote rural locations. (Areas where access is restricted but are less than 0.1 km from a residential/commercial area are considered to be residential/commercial areas.)

* * * * *

Spill means both intentional and unintentional spills, leaks, and other uncontrolled discharges where the release results in any quantity of PCBs running off or about to run off the external surface of the equipment or other PCB source, as well as the contamination resulting from those releases. This policy applies to spills of 50 ppm or greater PCBs. The concentration of PCBs spilled is determined by the PCB concentration in the material spilled as opposed to the concentration of PCBs in the material onto which the PCBs were spilled, except where authorized in § 761.120(c). Where a spill of untested mineral oil occurs, the oil is presumed to contain greater than or equal to 50 ppm, but less than 500 ppm PCBs and is subject to the relevant requirements of this policy.

* * * * *

■ 20. Amend § 761.125 by revising paragraphs (a)(2), (c)(3)(iii), and (c)(4)(iv) to read as follows:

§ 761.125 Requirements for PCB spill cleanup.

(a) * * *

(2) *Disposal of cleanup debris and materials.* All concentrated soils, solvents, rags, and other materials resulting from the cleanup of PCBs under this policy shall be properly stored, labeled, and disposed of in accordance with the provisions of Subpart D of this part, except that such materials shall not be disposed of in a hazardous waste landfill permitted by EPA under section 3005 of RCRA or by a State or territory authorized under section 3006 of RCRA pursuant to § 761.61(b)(2)(ii)(A).

* * * * *

(c) * * *

(3) * * *

(iii) At the option of the responsible party, low-contact, indoor, nonimpervious surfaces will be cleaned either to 10 µg/100 cm^2 or to 100 µg/100 cm^2 and encapsulated. The Regional Administrator, however, retains the authority to disallow the encapsulation option for a particular spill situation upon finding that the uncertainties associated with that option pose special concerns at that site. That is, the Regional Administrator would not permit encapsulation if they determine that if the encapsulation failed the failure would create an imminent hazard at the site.

* * * * *

(4) * * *

(iv) At the option of the responsible party, low-contact, outdoor, nonimpervious solid surfaces shall be either cleaned to 10 µg/100 cm^2 or cleaned to 100 µg/100 cm^2 and encapsulated. The Regional Administrator, however, retains the authority to disallow the encapsulation option for a particular spill situation upon finding that the uncertainties associated with that option pose special concerns at that site. That is, the Regional Administrator would not permit encapsulation if they determine that if the encapsulation failed the failure would create an imminent hazard at the site.

* * * * *

■ 21. Amend § 761.130 by revising paragraph (e) to read as follows:

§ 761.130 Sampling requirements.

* * * * *

(e) EPA recommends the use of a sampling scheme developed by the Midwest Research Institute (MRI) for use in enforcement inspections: ''Verification of PCB Spill Cleanup by Sampling and Analysis.'' Guidance for the use of this sampling scheme is available in the MRI report ''Field Manual for Grid Sampling of PCB Spill Sites to Verify Cleanup.'' Both the MRI sampling scheme and the guidance document are available on EPA's PCB website at *https://www.epa.gov/pcbs,* or from the Program Implementation and Information Division, Office of Resource Conservation and Recovery (5303T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. The major advantage of this sampling scheme is that it is designed to characterize the degree of contamination within the entire sampling area with a high degree of confidence while using fewer samples than any other grid or random sampling scheme. This sampling scheme also allows some sites to be characterized on the basis of composite samples.

* * * * *

Subpart J—General Records and Reports

■ 22. Amend § 761.180 by revising paragraphs (b)(3) introductory text, removing and reserving paragraph (b)(3)(ii), revising paragraphs (b)(3)(iii) and (v), and (b)(4).

The revisions read as follows:

§ 761.180 Records and monitoring.

* * * * *

(b) * * *

(3) The owner or operator of a PCB disposal facility (including an owner or operator who disposes of their own waste and does not receive or generate manifests) or a commercial storage facility shall submit an annual report using EPA Form 6200–025, which briefly summarizes the records and annual document log required to be maintained and prepared under paragraphs (b)(1) and (b)(2) of this section to the Director, Office Resource Conservation and Recovery at the address listed on the form, by July 15 of each year, beginning with July 15, 1991. The first annual report submitted on July 15, 1991, shall be for the period starting February 5, 1990, and ending December 31, 1990. The annual report shall contain no confidential business information. The annual report shall consist of the information listed in paragraphs (b)(3)(i) through (vi) of this section.

* * * * *

(iii) The total weight in kilograms of PCB waste in PCB Large High or Low Voltage Capacitors, PCB waste in PCB Article Containers, PCB waste in PCB Transformers, bulk PCB waste, PCB waste in PCB Containers, and other PCB waste in storage at the facility at the beginning of the calendar year, received or generated at the facility, transferred to another facility, or disposed of at the facility during the calendar year. The information must be provided for each of these categories, as appropriate.

* * * * *

(v) The total weight in kilograms of each of the following PCB categories: PCB waste in PCB Large High or Low Voltage Capacitors, PCB waste in PCB Article Containers, PCB waste in PCB Transformers, bulk PCB waste, PCB waste in PCB Containers, and other PCB waste remaining in storage for disposal at the facility at the end of the calendar year

* * * * *

(4) Whenever a commercial storer of PCB waste accepts PCBs or PCB Items at their storage facility and transfers the PCB waste off-site to another facility for storage or disposal, the commercial storer of PCB waste shall initiate a manifest under subpart K of this part for the transfer of PCBs or PCB Items to the next storage or disposal facility.

Note 1 to paragraph (b)(4): Any requirements for weights in kilograms of PCBs may be calculated values if the internal volume of PCBs in containers and transformers is known and included in the reports, together with any assumptions on the density of the PCBs contained in the containers or transformers. If the internal volume of PCBs is not known, a best estimate may be used.

* * * * *

Subpart K—PCB Waste Disposal Records and Reports

■ 23. Amend § 761.205 by revising paragraphs (a)(3), (a)(4)(v), and (d) to read as follows:

§ 761.205 Notification of PCB waste activity (EPA Form 7710–53).

(a) * * *

(3) Any person required to notify EPA under this section shall file with EPA Form 7710–53. A copy of EPA Form 7710–53 is available on EPA's website at *https://www.epa.gov/pcbs,* or from the Program Implementation and Information Division, Office of Resource Conservation and Recovery (5303T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001 ATTN: PCB Notification. Descriptive information and instructions for filling in the form are included in paragraphs (a)(4)(i) through (vii) of this section.

(4) * * *

(v) The facility's installation contact, telephone number, and email address.

* * * * *

(d) Persons required to notify under this section shall file EPA Form 7710–

53 with EPA by mailing the form to the address listed on the form.

* * * * *

■ 24. Amend § 761.207 by revising paragraph (a), and paragraph (c) and to read as follows:

§ 761.207 The manifest—general requirements.

(a) A generator who transports, or offers for transport, PCB waste for commercial off-site storage or off-site disposal, and a commercial storage or disposal facility who offers for transport a rejected load of PCB waste, must prepare a manifest on EPA Form 8700–22 and, if necessary, a continuation sheet. The generator shall specify:

(1) For each bulk load of PCBs, the identity of the PCB waste, the earliest date of removal from service for disposal, and the weight in kilograms of the PCB waste. (Item 14—Special Handling Instructions box)

(2) For each PCB transformer, the serial number if available, or other identification if there is no serial number; the date of removal from service for disposal; and weight in kilograms of the PCB waste in each PCB transformer. (Item 14—Special Handling Instructions box)

(3) For each PCB Large High or Low Voltage Capacitor, the serial number if available, or other identification if there is no serial number; the date of removal from service for disposal; and weight in kilograms of the PCB waste in each PCB Large High or Low Voltage Capacitor. (Item 14—Special Handling Instructions box)

(4) For each PCB Article Container, the unique identifying number, type of PCB waste (*e.g.,* small capacitors), earliest date of removal from service for disposal, and weight in kilograms of the PCB waste contained therein. (Item 14—Special Handling Instructions box)

(5) For each PCB Container, the unique identifying number, type of PCB waste (*e.g.,* soil, debris, small capacitors), earliest date of removal from service for disposal, and weight in kilograms of the PCB waste contained therein. (Item 14—Special Handling Instructions box)

(6) For each Other item, the type of PCB waste (*e.g.,* small capacitors, circuit breakers, PCB-Contaminated transformers, pipeline), earliest date of removal from service for disposal, and weight in kilograms of the PCB waste.

Note 1 to paragraph (a): EPA Form 8700–22A is not required as the PCB manifest continuation sheet. In practice, form 8700–22A does not have adequate space to list required PCB-specific information for several PCB articles. However, if form 8700–22A fits the needs of the user community, the form is permissible.

Note 2 to paragraph (a): PCB waste handlers should use the EPA Form 8700–22 instructions as a guide, but should defer to the Part 761 manifest regulations whenever there is any difference between the Part 761 requirements and the instructions. The differences should be minimal.

Note 3 to paragraph (a): PCBs are not regulated under RCRA, thus do not have a RCRA waste code. EPA does not require boxes 13 and 31 on forms 8700–22 and 8700–22A (if used), respectively, to be completed for shipments only containing PCB waste. However, some States track PCB wastes as State-regulated hazardous wastes, and assign State hazardous waste codes to these wastes. In such a case, the user should follow the State instructions for completing the waste code fields.

* * * * *

(c) A generator may also designate on the manifest one alternate facility which is approved to handle their PCB waste in the event an emergency prevents delivery of the waste to the primary designated facility.

* * * * *

■ 25. Amend § 761.212 by revising paragraph (a) introductory text to read as follows:

§ 761.212 Transporter compliance with the manifest.

(a) The transporter must deliver the entire quantity of PCB waste which they have accepted from a generator or a transporter to:

* * * * *

■ 26. Amend § 761.213 by revising paragraphs (a)(2) introductory text and (b) introductory text to read as follows:

§ 761.213 Use of manifest—Commercial storage and disposal facility requirements.

(a) * * *

(2) If a commercial storage or disposal facility receives an off-site shipment of PCB waste accompanied by a manifest, the owner or operator, or their agent, shall:

* * * * *

(b) If a commercial storage or disposal facility receives, from a rail or water (bulk shipment) transporter, PCB waste which is accompanied by a shipping paper containing all the information required on the manifest (excluding the EPA identification numbers, generator's certification, and signatures), the owner or operator, or their agent, must:

* * * * *

■ 27. Amend § 761.214 by revising paragraph (a)(1) to read as follows:

§ 761.214 Retention of manifest records.

(a)(1) A generator must keep a copy of each manifest signed in accordance with § 761.210(a) for three years or until they receive a signed copy from the designated facility which received the PCB waste. This signed copy must be retained as a record for at least three years from the date the waste was accepted by the initial transporter. A generator subject to annual document requirements under § 761.180 shall retain copies of each manifest for the period required by § 761.180(a).

* * * * *

■ 28. Amend § 761.216 by revising paragraphs (a) introductory text and (a)(6) to read as follows:

§ 761.216 Unmanifested waste report.

(a) If a facility accepts for storage or disposal any PCB waste from an offsite source without an accompanying manifest, or without an accompanying shipping paper as described by § 761.211(e), and the owner or operator of the commercial storage or disposal facility cannot contact the generator of the PCB waste, then they shall notify the Regional Administrator of the EPA region in which their facility is located of the unmanifested PCB waste so that the Regional Administrator can determine whether further actions are required before the owner or operator may store or dispose of the unmanifested PCB waste, and additionally the owner or operator must prepare and submit a letter to the Regional Administrator within 15 days after receiving the waste. The unmanifested waste report must contain the following information:

* * * * *

(6) Signature of the owner or operator of the facility or their authorized representative; and

* * * * *

■ 29. Amend § 761.217 by revising paragraph (a)(2)(ii) to read as follows:

§ 761.217 Exception reporting.

(a) * * *

(2) * * *

(ii) A cover letter signed by the generator or their authorized representative explaining the efforts taken to locate the PCB waste and the results of those efforts.

* * * * *

Subpart M—Determining a PCB Concentration for Purposes of Abandonment or Disposal of Natural Gas Pipeline: Selecting Sample Sites, Collecting Surface Samples, and Analyzing Standard PCB Wipe Samples

■ 30. Amend § 761.243 by revising paragraph (a) to read as follows:

§ 761.243 Standard wipe sample method and size.

(a) Collect a surface sample from a natural gas pipe segment or pipeline section using a standard wipe test as defined in § 761.123. Detailed guidance for the entire wipe sampling process appears in the document entitled, ''Wipe Sampling and Double Wash/Rinse Cleanup as Recommended by the Environmental Protection Agency PCB Spill Cleanup Policy,'' dated June 23, 1987, and revised on April 18, 1991. This document is available on EPA's website at *https://www.epa.gov/pcbs,* or from the Program Implementation and Information Division, Office of Resource Conservation and Recovery (5303T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

* * * * *

■ 31. Amend § 761.247 by revising paragraph (b)(2)(ii)(B)*(2)* to read as follows:

§ 761.247 Sample site selection for pipe segment removal.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(B) * * *

(2) Divide the total number of segments, save one, by six. The resulting number is the interval between the segments you will sample. Do not round this interval. For example, cut a 2.9-mile length of pipe into segments of no more than 40 feet by first, dividing 2.9 miles (15,312 feet) by 40 feet per segment, resulting in 382.8 total segments. Do not round this result. Subtract 1 from the total number of segments and then divide the remaining number of segments, 381.8, by six. The resulting number in this example is 63.6. Do not round. Add 63.6 to the first segment (number 1) to select segment 64.6. Next, add 63.6 to 64.6 to select segment 128.3. Continue in this fashion to select all seven segments: 1, 64.6, 128.3, 191.9, 255.5, 319.2, and 382.8. Now round these numbers to the nearest whole number to determine which segment to sample: 1, 65, 128, 192, 256, 319, and 383.

* * * * *

■ 32. Amend § 761.253 by revising paragraph (a) to read as follows:

§ 761.253 Chemical Analysis.

(a) Select applicable method(s) from the following list to extract PCBs and determine the PCB concentration from the standard wipe sample collection medium: SW–846 Method 3540C, Method 3550C, Method 3541, Method 3545A, Method 3546, or Method 8082A (all standards incorporated by reference in § 761.19). Modifications to the methods listed in this paragraph or alternative methods not listed may be used if validated under Subpart Q of this part or authorized in a § 761.61(c) approval.

* * * * *

Subpart N—Cleanup Site Characterization Sampling for PCB Remediation Waste in Accordance With § 761.61(a)(2)

■ 33. Amend § 761.267 by revising paragraph (a) to read as follows:

§ 761.267 Sampling non-porous surfaces.

(a) Sample large, nearly flat, non-porous surfaces by dividing the surface into roughly square portions approximately 2 meters on each side. Follow the procedures in § 761.302(a) with the exception of the sampling grid size.

* * * * *

■ 34. Revise § 761.272 to read as follows:

§ 761.272 Chemical extraction and analysis of samples.

Select applicable method(s) from the following list to extract PCBs and determine the PCB concentration from individual and composite samples of PCB remediation waste: SW–846 Method 3510C, Method 3520C, Method 3535A, Method 3540C, Method 3541, Method 3545A, Method 3546, or Method 8082A (all standards incorporated by reference in § 761.19). Modifications to the methods listed in this paragraph or alternative methods not listed may be used if validated under Subpart Q of this part or authorized in a § 761.61(c) approval.

Subpart O—Sampling To Verify Completion of Self-Implementing Cleanup and On-Site Disposal of Bulk PCB Remediation Waste and Porous Surfaces in Accordance With § 761.61(a)(6)

■ 35. Revise § 761.292 to read as follows:

§ 761.292 Chemical extraction and analysis of individual samples and composite samples.

Select applicable method(s) from the following list to extract PCBs and determine the PCB concentration from individual and composite samples of PCB remediation waste: SW–846 Method 3510C, Method 3520C, Method 3535A, Method 3540C, Method 3541, Method 3545A, Method 3546, or Method 8082A (all standards incorporated by reference in § 761.19). Modifications to the methods listed in this paragraph or alternative methods not listed may be used if validated under Subpart Q of this part or authorized in a § 761.61(c) approval.

Subpart P—Sampling Non-Porous Surfaces for Measurement-Based Use, Reuse, and On-Site or Off-Site Disposal Under § 761.61(a)(6) and Determination Under § 761.79(b)(3)

■ 36. Revise § 761.314 to read as follows:

§ 761.314 Chemical analysis of standard wipe test samples.

Perform the chemical analysis of standard wipe test samples in accordance with § 761.253. Report sample results in micrograms per 100 cm^2.

Subpart R—Sampling Non-Liquid, Non-Metal PCB Bulk Product Waste for Purposes of Characterization for PCB Disposal in Accordance With § 761.62, and Sampling PCB Remediation Waste Destined for Off-Site Disposal, in Accordance With § 761.61

■ 38. Revise § 761.358 to read as follows:

§ 761.358 Determining the PCB concentration of samples of waste.

Select applicable method(s) from the following list to extract PCBs and determine the PCB concentration from individual and composite samples of PCB remediation waste or PCB bulk product waste: SW–846 Method 3540C, Method 3541, Method 3545A, Method 3546, or Method 8082A (all standards incorporated by reference in § 761.19). Modifications to the methods listed in this paragraph or alternative methods not listed may be used if validated under subpart Q of this part or authorized in a §§ 761.61(c) or 761.62(c) approval.

Subpart T—Comparison Study for Validating a New Performance-Based Decontamination Solvent Under § 761.79(d)(4)

■ 39. Amend § 761.386 by revising paragraph (e) to read as follows:

§ 761.386 Required experimental conditions for the validation study and subsequent use during decontamination.

* * * * *

(e) *Confirmatory sampling for the validation study.* Select surface sample locations using representative sampling or a census. Sample a minimum area of 100 cm^2 on each individual surface in the validation study. Measure surface

concentrations using the standard wipe test, as defined in § 761.123, from which a standard wipe sample is generated for chemical analysis. Guidance for wipe sampling appears in the document entitled ''Wipe Sampling and Double Wash/Rinse Cleanup as Recommended by the Environmental Protection Agency PCB Spill Cleanup Policy,'' available on EPA's website at *https://www.epa.gov/pcbs,* or from the Program Implementation and Information Division, Office of Resource Conservation and Recovery (5303T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

* * * * *

■ 40. Amend § 761.395 by revising paragraph (b)(1) to read as follows:

§ 761.395 A validation study.

* * * * *

(b)(1) Select applicable method(s) from the following list to extract PCBs and determine the PCB concentration from the standard wipe sample collection medium: SW–846 Method 3540C, Method 3550C, Method 3541, Method 3545A, Method 3546, or Method 8082A (all standards incorporated by reference in § 761.19). Modifications to the methods listed in this paragraph or alternative methods not listed may be used if validated under subpart Q of this part.

* * * * *

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Foothill Yellow-Legged Frog; Threatened Status With Section 4(d) Rule for Two Distinct Population Segments and Endangered Status for Two Distinct Population Segments; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2021–0108; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BE90

Endangered and Threatened Wildlife and Plants; Foothill Yellow-Legged Frog; Threatened Status With Section 4(d) Rule for Two Distinct Population Segments and Endangered Status for Two Distinct Population Segments

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status for two distinct population segments (DPSs) and threatened status for two DPSs of the foothill yellow-legged frog (*Rana boylii*), a stream-dwelling amphibian from Oregon and California. After review of the best scientific and commercial information available, we have determined endangered status for the South Sierra and South Coast DPSs and threatened status for the North Feather and Central Coast DPSs of the foothill yellow-legged frog under the Endangered Species Act of 1973 (Act), as amended. This rule adds the four DPSs to the List of Endangered and Threatened Wildlife and extends the Act's protections to these DPSs. We also finalize rules under the authority of section 4(d) of the Act for the North Feather and Central Coast DPSs that provide measures that are necessary and advisable to provide for the conservation of these two DPSs. We have determined that designation of critical habitat for the four DPSs is not determinable at this time.

DATES: This rule is effective September 28, 2023.

ADDRESSES: This final rule is available on the internet at *https://www.regulations.gov* under Docket No. FWS–R8–ES–2021–0108. Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *https://www.regulations.gov* at Docket No. FWS–R8–ES–2021–0108.

FOR FURTHER INFORMATION CONTACT: Michael Fris, Field Supervisor, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Sacramento, CA 95825; telephone 916–414–6700. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the South Sierra and South Coast DPSs of the foothill yellow-legged frog both meet the definition of an endangered species and the North Feather and Central Coast DPSs of the foothill yellow-legged frog both meet the definition of a threatened species; therefore, we are listing them as such. We have determined that designation of critical habitat for the four DPSs is not determinable at this time. Listing a species or DPS as an endangered or threatened species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. This rule lists the South Sierra and South Coast DPSs of the foothill yellow-legged frog as endangered and lists the North Feather and Central Coast DPSs of the foothill yellow-legged frog as threatened with rules issued under section 4(d) of the Act (''4(d) rules'').

The basis for our action. Under the Act and our 1996 DPS policy (61 FR 4722; February 7, 1996), we may determine that a species or DPS is endangered or threatened because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the following threats are driving the status of the foothill yellow-legged frog within the areas occupied by the DPSs: altered hydrology (Factor A; largely attributable to dams, water diversions, channel modifications), nonnative species (Factors C and E), and the effects of climate change (Factor E; exacerbating drought, high-severity wildfire, extreme flood conditions). Other threats currently impacting the species include disease and parasites, agriculture (including pesticide drift), mining, urbanization (including development and roads), and recreation.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Due to our statutory requirements to complete a final determination within 12 months of issuing a proposed rule, we have not yet been able to obtain the necessary economic information needed to develop a proposed critical habitat designation for the four DPSs of the foothill yellow-legged frog. Therefore, we find that designation of critical habitat for the four DPSs is currently not determinable. Once we obtain the necessary economic information, we will propose critical habitat designations for the four DPSs.

Previous Federal Actions

On December 28, 2021, we published in the **Federal Register** (86 FR 73914) a proposed rule to list the North Feather and Central Coast DPSs of the foothill yellow-legged frog as threatened and the South Sierra and South Coast DPSs of the foothill yellow-legged frog as endangered under the Act (16 U.S.C. 1531 *et seq.*). In that proposed rule, we also completed not-warranted 12-month findings for the North Coast and North Sierra DPSs of the foothill yellow-legged frog. The proposed rule opened a 60-day comment period, ending February 28, 2022. On February 28, 2022, in response to a request we received during the comment period, we published in the **Federal Register** (87 FR 11013) a document extending the comment period on the December 28, 2021, proposed rule for an additional 30 days, ending March 30, 2022. Please refer to the December 28, 2021, proposed rule for information regarding the status of the North Coast and North Sierra DPSs, as well as other previous Federal actions concerning the foothill yellow-legged frog.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the foothill yellow-legged frog. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report

represents a compilation of the best scientific and commercial data available concerning the biological status of the species and the four DPSs we are listing, including the impacts of past, present, and future factors (both negative and beneficial) affecting them.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the foothill yellow-legged frog SSA report. We received peer review from three appropriate specialists regarding the SSA. The peer reviews can be found at *https://www.regulations.gov.* In preparing the proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which was the foundation for the proposed rule and this final rule. A summary of the peer review comments and our responses can be found in the Summary of Comments and Recommendations below. The peer review comments as well as a copy of the most current SSA report (Service 2023, entire) and other materials relating to this rule can be found on *https://www.regulations.gov* at Docket No. FWS–R8–ES–2021–0108.

Summary of Changes From the Proposed Rule

In preparing this final rule, we reviewed and fully considered the comments we received during the comment period on our December 28, 2021, proposed rule (see 86 FR 73914, December 28, 2021; 87 FR 11013, February 28, 2022). This final rule reflects minor, nonsubstantive changes to the SSA report and clarification of threat information based on the comments we received, as discussed below under Summary of Comments and Recommendations. However, the information we received during the comment period did not change our determinations for the four DPSs: we found in the December 28, 2021, document that the North Coast and North Sierra DPSs are not warranted for listing under the Act.

Summary of Comments and Recommendations

In the proposed rule published in the **Federal Register** on December 28, 2021 (86 FR 73914), we requested that all interested parties submit written comments on the proposal by February 28, 2022. On February 28, 2022, we published in the **Federal Register** (87 FR 11013) a document extending the comment period by 30 days, until March 30, 2022. We also contacted appropriate Federal and State agencies, Tribes, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published throughout the range of the species in the Monterey Herald, Oregonian, Sacramento Bee, San Luis Obispo Tribune, Santa Barbara News-Press, and Ventura County Star. We did not receive any requests for a public hearing. All substantive information regarding the four DPSs received during the comment period has either been incorporated directly into the SSA or this final determination as appropriate. A summary of the substantive comments is outlined below.

Peer Reviewer Comments

As discussed in Peer Review above, we received comments from three peer reviewers on the draft SSA report. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the information and analysis contained in the SSA report. The peer reviewers generally concurred with our information, methods, and conclusions, and they provided additional information, clarifications, and suggestions to improve the SSA report. Peer reviewer comments addressed issues related to the effects of disease, mining, wildfire, climate change, and watershed impairment on the species, as well as its preferred hydraulic conditions, potential for species hybridization, breeding conditions, metapopulation dynamics, and elevational range. All substantive peer review comments were incorporated into version 2.11 of the SSA report (Service 2023, entire) as appropriate. A summary of the peer review comments is outlined below.

(1) Comment: A peer reviewer commented that there was insufficient evidence to claim that threats to the species from the disease chytridiomycosis primarily affects populations in the [Central Coast, South Coast, and South Sierra DPSs] because of a lack of studies of chytridiomycosis in the species in the more northern DPSs.

Our Response: We have changed the latest draft of the SSA to remove reference to chytridiomycosis as primarily affecting populations in the Central Coast, South Coast, and South Sierra DPSs.

(2) Comment: A peer reviewer commented that tributary habitat is not necessarily ''non-breeding'' because the species can use also use tributary habitat for breeding, depending on environmental conditions at the time, such as in the Sierra Nevada Mountains.

Our Response: We have changed the latest draft of the SSA to reflect that tributary habitat can also be used as breeding habitat when environmental conditions are favorable. Specifically, we updated the Upland and Tributary (Nonbreeding) Habitat Section (Section 4.8) to note that tributary habitat can be used as breeding habitat in favorable environmental conditions.

(3) Comment: A peer reviewer commented that the conclusions from Dever *et al.* (2007) are not necessarily applicable for use in delineating metapopulations. Specifically, Dever *et al.* (2007) found genetic differentiation between subpopulations along the Eel River at distances of 10 kilometers (km) between subpopulations. The peer reviewer commented that they had observed genetic connectivity between populations at distances greater than 10-km along the North Fork of the American River and thus using a 10-km distance as a benchmark distance for genetic differentiation may not be accurate.

Our Response: We have changed the latest draft of the SSA to reflect that a metapopulation can maintain genetic cohesion with distances greater than 10-km between populations. Specifically, we removed discussions of using the 10-km distance observed by Dever *et al.* (2007) to delineate metapopulations from the Metapopulation Structure (Section 2.9) and Metapopulation Connectivity (Section 5.5) Sections.

(4) Comment: A peer reviewer commented that Figure 33, a diagram of the interactions between drying and drought on habitat elements and demographic and distribution parameters, should reflect that drought has a direct effect on the abundance of the species.

Our Response: We changed Figure 33 during revisions from v1.0 to v 2.0 of the SSA to reflect this relationship between drying and drought and species abundance.

Federal Agency Comments

(5) Comment: The U.S. Forest Service (Sierra National Forest) commented that they had performed surveys for the species in the Jose and Mill Creek basin following the 2020 Creek Fire and that they detected the species in only one survey reach of Mill Creek, Fresno County, California. In addition, the Plumas National Forest informed us that a foothill yellow-legged frog observation in their Natural Resource Information Strategy Project (NRIS) Aquatic Survey

database located in the disjunct eastern portion of the North Feather DPS was erroneous and should not be used to inform the geographic extent of the species in the North Feather DPS.

Our Response: The current version of the SSA report (version 2.0) reflects the presence of the species in Mill Creek based on information provided to us. For the North Feather DPS, we reviewed and concurred with the California Department of Fish and Wildlife (CDFW) assessment of the DPS's range based on multiple observations of the DPS prior to 1969 (CDFW 2019b, p. 32), and thus we did not use the Forest Service's NRIS database entry to inform our delineation of the DPS's range or the DPS boundary.

Comments From Local Government

(6) Comment: The Tulare County Board of Supervisors commented that they were opposed to the designation of the South Sierra DPS as endangered because of their concern that management of the DPS would reduce water availability for agriculture. They stated that the South Sierra DPS has not been adequately surveyed, and, therefore, the DPS may be more abundant. The board recommended addressing wildfire management and removing invasive species as an alternative to listing the South Sierra DPS.

Our Response: At this time, we have no information to indicate that listing or management of the South Sierra DPS would reduce water availability for agriculture or other purposes. We acknowledge the importance of water availability and delivery for both agricultural and municipal purposes throughout the San Joaquin Valley and California, and we will cooperate and assist water management and delivery entities as they meet the water needs of the public. With regard to the sufficiency of occurrence data available for determining the status of the South Sierra DPS, the Act requires our listing determinations to be based solely on the best scientific and commercial information available at the time of our rulemaking; using that information, we determine whether the listable entity meets the Act's definition of an endangered or a threatened species. In our efforts to determine the status of the species and DPSs (including the South Sierra DPS), we contacted numerous Federal, State, and academic researchers and species experts, as well as other land management entities, and requested occurrence information, survey information, and information regarding threats impacting the foothill yellow-legged frog and its habitat. We have determined that the information we have received is the best scientific and commercial information available at this time regarding occurrence information for the DPSs, including the South Sierra DPS. With regard to alternative management strategies as opposed to listing the DPS under the Act, both wildfires and invasive species are identified as threats to the South Sierra DPS, but they are only two of many threats currently impacting the DPS and its habitat. We have determined that listing the South Sierra DPS as endangered will provide the regulatory protections needed to prevent further decline of the DPS and its habitat.

Public Comments

(7) Comment: A commenter requested the Service work with water management agencies to ensure that water management practices are beneficial to the foothill yellow-legged frog. Specifically, the commenter was concerned that current dam relicensing efforts on the Stanilaus River have not engaged stakeholders and will not consider the needs of the species. The commenter requested the Service create guidelines for water management practices by dam licensees, formulate mitigation requirements for water projects, require water agencies to fund recovery efforts, prioritize removal of nonnative invasive predators of the species, include protective measures for the species in existing National Forest Plans, and engage the State Water Board in ''formal consultation'' regarding suction dredging activities.

Our Response: While we are not the lead government agency or have the decision-making authority for the actions that were referenced in this comment, as part of our mission to conserve and protect sensitive species and their habitats, we are required to coordinate with Federal regulatory and land management agencies such as the Federal Energy Regulatory Commission (responsible for licensing privately owned dams), U.S. Army Corps of Engineers (regulation authorized by the Clean Water Act (33 U.S.C. 1251 *et seq.*)), the U.S. Forest Service (Forest Service), Bureau of Land Management (BLM), and the National Park Service (NPS). Part of this coordination is to provide recommendations for the types of actions identified by the commenter. These Federal entities are also required under sections 2 and 7 of the Act to use their authorities to conserve endangered and threatened species and their habitats and to consult with us on their activities. Federally approved, authorized, or funded activities that may adversely affect listed species or jeopardize a listed species' continued existence require formal consultation under section 7 of the Act. We also coordinate with our State partners, such as the California Department of Fish and Wildlife and the State Water Resource Control Board, to assist in protecting and conserving listed and sensitive species and their habitats. Suction dredging activities within streams by nonfederal entities are managed by the State, unless Federal authorization, funding, or permitting is required, at which point we would coordinate with the Federal entity on such activities.

(8) Comment: Several commenters disagreed with our proposed determinations for the Central Coast and North Feather DPSs and recommended endangered rather than threatened status. The commenters' reasoning included information from the SSA report that states the Central Coast DPS has substantially reduced resiliency because of poor occupancy, poor connectivity, and a relatively high risk of decline, and that the DPS faces substantial threats. The commenters also note that the SSA identifies a reduction in resiliency under the mean change scenario, which would put the Central Coast DPS at risk of functional extirpation or extirpation within 40 years. The commenters also state that the SSA report and proposed rule include discussion of the beneficial effects of two habitat conservation plans (HCPs) (East Contra Costa HCP and Santa Clara Valley HCP) that provide conservation for the Central Coast DPS despite the DPS appearing to be absent from one of the HCP planning areas (East Contra Costa HCP). The commenters reference foothill yellow-legged frog information in the 2006 Contra Costa HCP that states the species had not been documented in the planning area (Jones & Stokes 2006, appendix D). The commenters' rationale for endangered status for the North Feather DPS is that the CDFW determined that the DPS is endangered under the California Endangered Species Act (CESA), and, therefore, a Federal listing under the Act should be endangered as well.

Our Response: In making our status determinations for the Central Coast and North Feather DPSs of the foothill yellow-legged frog, we used the best scientific and commercial data available; we conclude that our threatened determinations continue to be appropriate based on whether the factors influencing each DPS's status and the DPS's response are occurring now or in the future. In the proposed rule and this final rule, we outline our

reasoning for our threatened status determinations for the Central Coast and North Feather DPSs of the foothill yellow-legged frog. One aspect in determining whether a species or DPS is considered either endangered or threatened under the Act is whether the threats facing the entity are influencing the current or future conditions of the DPS to the extent that we find that the entity requires listing under the Act. A threatened determination reflects that the threats may act on the species' future condition such that it is likely to become endangered in the foreseeable future throughout all or a significant portion of its range; an endangered determination means that the species is in danger of extinction now, throughout all or a significant portion of its range.

We acknowledge the commenter's characterization from the SSA report for the Central Coast DPS's current and future condition. The population size and abundance for the Central Coast DPS has historically been and continues to be small, and this population information did influence our characterization of the DPS's resiliency. However, we do not agree with the commenter's conclusions that the Central Coast DPS should be listed as endangered under the Act. Mainly The Central Coast DPS currently sustains numerous populations and habitat distributed throughout the DPS's range with the populations in the southern portion of its range largely intact and having limited or no development pressure and those populations in the northern part of the DPS's range are located in areas not associated with largescale urbanization and have conservation measures in place to protect the species or its habitat. The northern populations have been impacted by development; however, these impacts are associated mostly with past and not current development pressure. In our determination of the current and future condition of the Central Coast DPS, we consider not only the resiliency of the DPS but also its redundancy and resiliency (all 3R's) as outlined in our guidance for assessing the status of a species (Service 2016, entire). Although the modeling identified in the SSA report identified the resiliency of the Central Coast DPS as reduced, this reduction would be occurring in the future, which is consistent with our threatened determination. Because the current threats facing the DPS are not influencing the current status of existing populations of the DPS to the degree that it is currently in danger of extinction, we do not find that the DPS warrants endangered status. However, based on our projections of future occupancy, modeled future risk of decline, and the increased threats from future drought conditions and increasing water demands, as well as increased wildfire frequency and intensity due to future climate change conditions, we continue to find that the appropriate listing status under the Act for the Central Coast DPS is threatened.

We also acknowledge that the East Contra Costa County HCP planning document does state that occupancy of the foothill yellow-legged frog in the HCP's planning area is unknown (Jones & Stokes 2006, appendix D). However, the document also cites older survey information and concludes that there are potential occurrences that are concentrated around the Mount Diablo area (Jennings and Hayes 1994, pp. 66–69). In 2019, the CDFW's status assessment of the species for State listing does not rule out occupancy in and around Mount Diablo (CDFW 2019b, p. 42, figure 16). Based on this information, we included the East Contra Costa County HCP in our discussion regarding conservation actions being implemented for the Central Coast DPS of the foothill yellow-legged frog (see East Contra Costa County HCP (Jones & Stokes 2006, chapter 5)).

In our analysis of the status of the North Feather DPS, we looked at the currently known occurrence records from the 2010–2020 timeframe, the current implementation of modified flow regime measures to mimic more natural hydrograph, the effects of the modified flows on improving current habitat conditions, and the current efforts of in-situ and ex-situ rearing efforts on enhancing populations of the North Feather DPS. All these factors informed our decision that the current condition of the DPS, although reduced, still exhibits sufficient resiliency, redundancy, and representation and would provide for, at a minimum, pockets of favorable conditions that allow the North Feather DPS to currently sustain its existing populations in the wild. Therefore, the current condition of the North Feather DPS has not been reduced to such a degree to consider it in danger of extinction throughout its range. However, the impacts from future effects of climate change related to changes in snowpack, precipitation timing, and drought (intensity, frequency, and duration), and from the climate-related impacts to wildfire severity, led us to conclude that the DPS will likely become in danger of extinction in the future and is appropriately identified as a threatened species under the Act. The State's determination of endangered under CESA looks at the species within California, and an endangered status under CESA, although similar, does not equate to the standards set forth for determining an entity to be endangered under the Act.

(9) Comment: Several commenters assert that we did not consider the effects of the invasive algae *Didymosphenia geminata* on the foothill yellow-legged frog. The commenters also cited to CDFW's determination that the North Sierra (Northeast/Northern Sierra) DPS is threatened under CESA in support of their view that the North Sierra and North Coast DPSs should be listed as threatened under the Act.

Our Response: While we did not specifically discuss the effects of the invasive aquatic diatom *Didymosphenia geminata,* commonly known as didymo or rock snot, in the SSA report, we did discuss the importance of having healthy ecosystems with suitable macroalgae communities and rock substrate that provide unaltered aquatic habitat for appropriate foraging opportunities for the foothill yellow-legged frog as part of the species' needs (see SSA report (Service 2023, chapter 4, pp. 52–66)). In our SSA report, we referenced research specific to *D. geminata* (Furey et al. 2014, entire) in relation to regulated and unregulated stream reaches associated with dams. This study examined the potential impacts of how altered hydrologic conditions may change the composition of the algae community and how these changes may limit growth of foothill yellow-legged frog tadpoles. Moreover, as a result of the comment, we reviewed the information and updated our SSA report to reflect specific information on *D. geminata* and how it was used in our analysis and status determinations.

In response to the comment that we should follow the State's listing determination, we note that under the Act, we are required to use the best scientific and commercial information available when making a listing determination. For our listing determination we use information on occurrences, occupancy, abundance, and population trends and worked with U.S. Geological Survey (USGS) researchers to complete a rangewide population viability analysis (PVA) for the foothill yellow-legged frog (Rose et al. 2020, entire). We used the information from the PVA to inform each DPS's current condition (Service 2023, chapter 8, pp. 127–172) and potential future condition (Service 2023, chapter 9, pp. 173–199). The PVA and

associated modeling was completed in 2020, and thus was not available at the time the State made its listing determination under the CESA in 2019. In addition, the processes and criteria used to determine the listing status of a species under the CESA and the Act, although similar, are not completely interchangeable as regulatory mechanisms. The Service must conduct its independent analysis regarding threats in order to make its determination under the Act. It would not be appropriate for the Service to simply adopt the State's determination of threatened status for the North Sierra DPS without providing specific information regarding threats or conducting an analysis.

Our determination of status of the North Coast DPS is contained in the December 28, 2021, 12-month finding and proposed rule (86 FR 73936–73938).

(10) Comment: A commenter stated that the Service is required to designate critical habitat at the time a species is proposed for listing if such designation is prudent and determinable. The commenter contends that the Service's justification of not having completed an economic analysis should not impede the Service from designation of critical habitat for the species. The commenter stated that a delay in designation will further hamper conservation of the foothill yellow-legged frog.

Our Response: We acknowledge our responsibilities to determine critical habitat for a species or DPS at the time of listing if such designation is both prudent and determinable. As we stated in our proposed listing rule (see 86 FR 73942) and below (see **CRITICAL HABITAT DETERMINABILITY**), a careful assessment of the economic impacts that may occur due to a critical habitat designation is still ongoing. Under our regulations at 50 CFR 424.19 and policies for designating critical habitat, we are required to complete an economic analysis of the incremental costs related to the designation and whether those costs exceed certain thresholds and make that draft economic analysis available for public comment at the time of the proposed rule to designate critical habitat. The economic analysis is not a discretionary action we can avoid completing prior to issuing a proposed rule to designate critical habitat. We will publish a proposed critical habitat designation following completion of our draft economic analysis.

(11) Comment: Several commenters requested the Service develop a section 4(d) rule under the Act to exempt timber harvest practices if the timber harvest activities follow the California Forest Practice Rules. The commenters indicated that the beneficial effect of these California Forest Practice Rules is indicated by the continued presence of the species within timber harvest areas.

Our Response: The 4(d) rules excepting certain activities from section 9 prohibitions against take for the North Feather and Central Coast DPSs promote conservation of the species by encouraging management of the species' stream habitat and landscape in ways that meet both resource management considerations and the conservation needs of the species. Specifically, the 4(d) rules we are making final in this document (see Regulation Promulgation, below) except wildfire prevention and suppression activities, fuels reduction activities related to forest management, and habitat restoration efforts that benefit the DPSs and their habitats. Such activities are often identified in timber harvest plans required under the California Forest Practice Rules. However, because the habitat and condition of the DPSs being listed are variable and timber harvest or other timber management activities are usually site-specific, we have determined that an exception to all activities that follow the California Forest Practice Rules is not appropriate for conservation of the North Feather and Central Coast DPSs and that the current 4(d) exceptions will provide sufficient regulatory relief for forest management and fire prevention activities that benefit the species and their habitats and allow for conservation of the two threatened DPSs.

(12) Comment: A commenter provided information on current management efforts for riparian areas on the Stanislaus River in Tuolumne County and stated that these efforts are sufficient to protect the species in this area.

Our Response: We acknowledge that the habitat restoration and current management efforts identified along the Stanislaus River presented by the commenter may benefit the South Sierra DPS and its habitat. However, we are listing the South Sierra DPS due to the numerous and persistent threats across multiple drainages throughout the range of the DPS. We will take into consideration the management efforts along the Stanislaus River during any consultation on activities occurring in the area under our section 7 process, permit activities occurring under section 10 of the Act, or through other mechanisms such as our safe harbor process.

(13) Comment: A commenter presented breeding information from the North Fork of the Mokelumne River and requested the Service place guidelines on hydroperiods and require conservation measures as part of the hydropower licensing process, update rangeland management guidelines, and encourage research on the effect of hydroperiod regimes on species recovery.

Our Response: The breeding information presented by the commenter contributed to our understanding of the species' oviposition sites in the Mokelumne River watershed, and we added this information to the SSA report (Service 2023, pp. 16 and 55). However, the information does not change our position on the South Sierra DPS' status regarding listing. While we are not the lead government agency or have the decision-making authority for hydropower licenses or rangeland management, we will use our authorities under the Act to encourage Federal agencies and others (*e.g.,* Federal Energy Regulatory Commission, U.S. Forest Service, Bureau of Land Management, nonprofit land management entities, local water management entities) to include measures in their decisions that will promote the recovery of the species.

(14) Comment: Several commenters provided additional foothill yellow-legged frog occurrence information for the Tuolumne and South Fork American River watersheds in the range of the South Sierra DPS of the foothill yellow-legged frog and stated that the additional records were evidence that foothill yellow-legged frog populations are increasing in the watersheds following voluntary implementation of a flow management regime intended to reduce impacts on aquatic species and recommended we take this information into consideration in our listing determination for the South Sierra DPS.

Our Response: The provided survey information extends our understanding of the distribution of the foothill yellow-legged frog in the Lumsden Reach of the Tuolumne River by about one-half of a river mile and our knowledge of abundance of foothill yellow-legged frogs in both the identified areas of the Tuolumne River and South Fork of the American River. As discussed in the SSA report and in our proposed rule and this final rule, alterations of stream hydrology and flows can have a large negative influence on foothill yellow-legged frog distribution, abundance, and metapopulation dynamics (Hayes et al. 2016, pp. 24–25; Yarnell et al. 2020, entire; Service 2023, figure 21, p. 77, section 7.1). We also stated that measures taken on regulated streams to account for the foothill yellow-legged frog and its ecological needs have

improved foothill yellow-legged frog habitat and persistence in some areas; however, modified flow regimes are not the only threat facing the South Sierra DPS. Other factors, including, but not limited to, the effects of climate change, habitat alteration, and nonnative predators, also are impacting the DPS and its habitat. Due to the increased attention by researchers, land and water managers, and the public to the State listing of the foothill yellow-legged frog and now this final listing rule, we expect additional information to become available regarding the distribution of the foothill yellow-legged frog, which will increase our knowledge of the status of the species. However, based on the abundance of past and current research regarding the species, we do not anticipate that this information will represent a significant change to the distribution of the species or DPSs such that it would change our determinations regarding listing. Therefore, given the range of threats impacting the South Sierra DPS of foothill yellow-legged frog and its habitat now and info the future, we continue to find that listing the DPS under the Act is warranted and finalize those determinations in this rule.

(15) Comment: A commenter expressed concerns that the geographic division between the North Sierra DPS and South Sierra DPS was based on insufficient data and that habitat on the North Fork American River in the range of the North Sierra DPS should not be split from the South Fork American River in the range of the South Sierra DPS based on presumed historical genetic connectivity between these forks of the American River.

Our Response: We identified geographic boundaries between the North Sierra DPS and South Sierra DPS along the North Fork and South Fork American Rivers. The extend and boundaries of each DPS was based on the CDFW's final status review of the species (A Status Review of the Foothill Yellow-Legged Frog (*Rana Boylii*) in California (CDFW 2019b, entire)), except for the area for the North Coast DPS in Oregon (Service 2023, section 2.6 ''Genetic Clades'') since the State's responsibility only includes California. The information used to determine the boundaries of each DPS included genetic information from researchers that divided the species into numerous clades (McCartney-Melstad et al. 2018, entire; Peek 2018, entire). The clades in both studies were found to be deeply divergent and geographically cohesive. We used the best scientific and commercial information available to determine the location and extent of the areas for each DPS identified. Additionally, the Service reviewed the best available scientific and commercial data and concurred with the State's geographic boundaries. The Act provides for revision of listing and critical habitat rules upon receipt of new scientific information. If the Service receives new scientific information regarding the contemporary genetic relationships or other relevant factors between populations in the North Fork and South Fork of the American River, then we will review this information and revise DPS geographic boundaries as appropriate.

(16) Comment: A commenter stated that our proposed 4(d) rule was arbitrary and capricious because we did not assess the costs and benefits of the rule and, therefore, did not establish that the proposed 4(d) rule was necessary and advisable. Additionally, the commenter stated that the proposed 4(d) rule requires analysis under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An additional commenter stated that the proposed 4(d) rules for the North Feather DPS and Central Coast DPS should also exempt actions in compliance with California Forest Practice Rules and CDFW's lake and streambed alteration permits, as well as livestock grazing. The commenter was concerned that listing of the species would affect timber harvest activities, water management, and pesticide applications for agriculture. The commenter stated that doing so would benefit the species.

Our Response: In 1982, Congress amended the Act to add the requirement that listing determinations are to be made solely on the basis of the best scientific and commercial data available. In the Conference Report for the 1982 amendments to the Act, Congress specifically stated that economic considerations are not to be considered in determinations regarding the status of species and that the economic analysis requirements of Executive Order 12291 and such statutes as the Regulatory Flexibility Act do not apply to any phase of determining the listing status of an entity under the Act. If we determine that a species or DPS is threatened under the Act, part of our consideration for completing the listing process is to consider what options are necessary and advisable to provide for the conservation of the species or DPS under section 4(d) of the Act. As a result, a cost benefit analysis is not part of the process required to propose or finalize a section 4(d) rule.

We are also not required to complete a NEPA analysis for section 4(d) rules promulgated at the time the species or DPS is concurrently being considered for listing, or listed, under the Act. This is because NEPA would conflict with the requirement in section 4(b) of the Act that classification decisions be made solely on the basis of the best scientific and commercial data available regarding the five factors set out in section 4(a)(1) of the Act. Applying NEPA to a concurrent section 4(d) rule could cause a similar conflict with the requirement in section 4(d) that we issue for threatened species such regulations as we deem necessary and advisable to provide for the conservation of such species. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

In establishing exceptions to regulations under a 4(d) rule, our guidance states that we should identify and incentivize known beneficial actions for the species, as well as rules that remove the regulatory burden on forms of take that are considered inconsequential to the conservation of the species and put in place protections that will both prevent the species from becoming endangered and promote the recovery of species. Although the State's Forest Practice Rules and streambed alteration permitting processes may include measures to conserve foothill yellow-legged frog habitat, the activities undertaken, in some cases, may also involve more than minimal impacts on the DPSs by removing habitat or having direct or indirect impacts on individuals. As a result, we do not consider including these measures as part of our species specific 4(d) rule appropriate for the two DPSs. We find that the section 4(d) rules for the North Feather and Central Coast DPSs are necessary to provide significant benefits for conservation of the species and are not arbitrary and capricious. In the proposed rule and this final rule to list the North Feather and Central Coast DPSs as threatened, we outline our rationale and establish our reasoning on why the 4(d) rules are necessary and advisable to provide for the conservation of the two DPSs (see December 28, 2021, proposed rule at 86 FR 73939–73941 and Determination of Status for the Foothill Yellow-Legged Frog, below).

(17) Comment: A commenter stated that existing protections for the species under CESA are sufficient to protect the species and, therefore, regulations under the Act are not necessary.

Our Response: We were petitioned to determine the listing status of the foothill yellow-legged frog under the Act. Once we are petitioned to list a species, we are required to complete our regulatory processes regardless of any State listing determination. Although the regulations implementing protections for listed species under the CESA and the Act are similar, we cannot defer to any State listing. Under requirements of the Act, we must conduct the required analysis and list the species if it is found to be warranted.

I. Final Listing Determination

Background

Below is a brief description of the foothill yellow-legged frog, its habitat, distribution, and information regarding our determination of DPSs under our 1996 DPS policy (61 FR 4722; February 7, 1996); for a thorough discussion of the ecology and life history of the species, the species' biological and ecological needs, as well as factors influencing those needs, please see the SSA report (Service 2023, chapter 2, pp. 15–34).

Distinct Population Segment Conclusion

Our DPS policy directs us to evaluate whether populations of a species are separate from each other to the degree they qualify as discrete segments and whether those segments are significant to the remainder of the species to which it belongs. Based on an analysis of the best available scientific and commercial data, including recent genetic information and research (McCartney-Melstad et al. 2018, entire; Peek 2018, entire), we conclude that the North Feather, South Sierra, Central Coast, and South Coast clades of the foothill yellow-legged frog's range are each discrete due to their marked genetic separation. Furthermore, we conclude that each of the four clades of the foothill yellow-legged frog's range being listed are significant, based on evidence that a loss of any of the population segments would result in a significant gap in the range of the taxon and on evidence that the discrete population segments differ markedly from other populations of the species in their genetic characteristics. Therefore, we conclude that the four clades within the foothill yellow-legged frog's range being listed are both discrete and significant under our DPS policy and are, therefore, unique entities under the Act. For additional information regarding taxonomy, genetic information, and our DPS determinations according to our 1996 DPS policy (61 FR 4722; February 7, 1996), see the December 28, 2021, proposed rule (86 FR 73916–73920).

Species Information

The foothill yellow-legged frog is a small- to medium-sized stream-dwelling frog with fully webbed feet and rough pebbly skin. Coloring of the foothill yellow-legged frog is highly variable but is usually light and dark mottled gray, olive, or brown, with variable amounts of brick red. The foothill yellow-legged frog is a stream-obligate species. Stream habitat for the species is highly variable and keyed on flow regimes. The current distribution of the four DPSs of the foothill yellow-legged frog generally follows the historical distribution of the species except with range contractions in the southern California Coast Range and southern Sierra Nevada. A map of the distribution of the four DPSs we are listing as well as the remainder of the species' range is provided in the figure below.

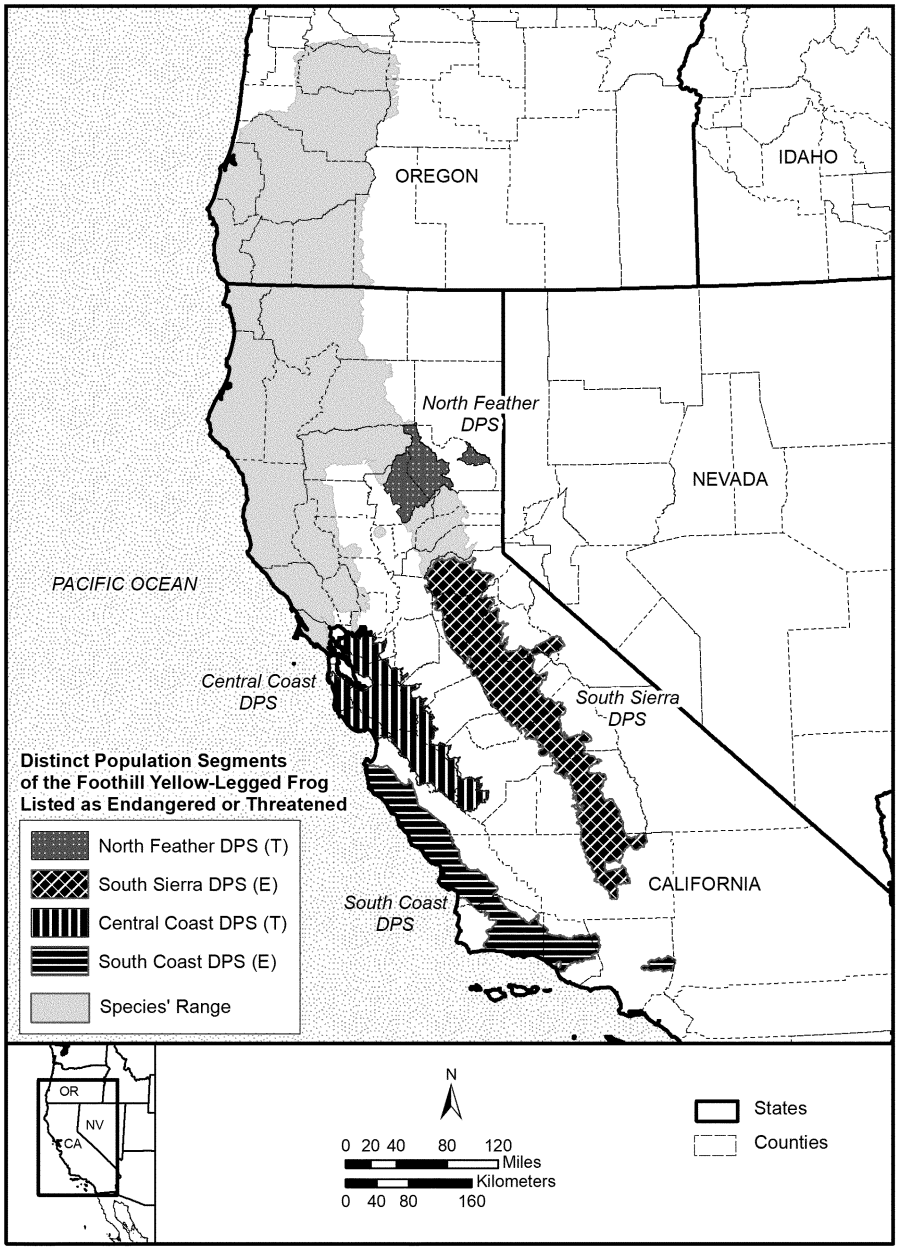


Figure: DPSs of the Foothill Yellow-Legged Frog Listed as Endangered or Threatened

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Service can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be listed as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess the viability of the four DPSs of the foothill yellow-legged frog (North Feather, South Sierra, Central Coast, and South Coast), we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of each DPS to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of each DPS to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of each DPS to adapt over time to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, DPS viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified each DPS's ecological requirements for survival and reproduction at the individual, population, and DPS level, and described the beneficial and risk factors influencing each DPS's viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated each individual DPS's life-history needs. The next stage involved an assessment of the historical and current condition of each DPS's demographics and habitat characteristics, including an explanation of how each of the DPSs arrived at its current condition. The final stage of the SSA involved making predictions about each DPS's response to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of the DPSs to sustain themselves in the wild over time. We use this information to inform our regulatory decisions.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket FWS–R8–ES–2021–0108 on *https://www.regulations.gov* and from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Summary of Biological Status and Threats

In this discussion, we review the biological condition of each of the four DPSs (North Feather, South Sierra, Central Coast, and South Coast) and their resources, and the influences on viability for each of the four DPS's current and future condition, in order to assess each of the four DPS's overall viability and the risks to that viability.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on each of the four DPSs, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of each of the four DPSs. To assess the current and future condition of each of the four DPSs, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing each of the four DPSs, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to each of the four DPSs in their entirety, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Species Needs

Stream Habitat

The foothill yellow-legged frog is a stream-obligate species and is primarily observed in or along the edges of streams (Zweifel 1955, p. 221; Kupferberg 1996a, p. 1339). Most foothill yellow-legged frogs breed along mainstem water channels and overwinter along smaller tributaries of the mainstem channel (Kupferberg 1996a, p. 1339; GANDA 2008, p. 20). Habitat within the stream includes rocky substrate mostly free of sediments with interstitial spaces to allow for predator avoidance. Stream morphology is a strong predictor of breeding habitat because it creates the microhabitat conditions required for successful oviposition (*i.e.,* egg-laying), hatching, growth, and metamorphosis. Foothill yellow-legged frogs that overwinter along tributaries often congregate at the same breeding locations along the mainstem each year (Kupferberg 1996a, p. 1334; Wheeler and Welsh 2008, p. 128). During the nonbreeding season, the smaller tributaries, some of which may only flow during the wet winter season, provide refuge while the larger breeding channels may experience overbank flooding and high flows (Kupferberg 1996a, p. 1339). Habitat elements that provide both refuge from winter peak flows and adequate moisture for foothill yellow-legged frogs include pools, springs, seeps, submerged root wads, undercut banks, and large boulders or debris at high-water lines (van Wagner 1996, pp. 74–75, 111; Rombough 2006b, p. 159).

The streams occupied by foothill yellow-legged frogs occur in a wide variety of vegetation types including valley-foothill hardwood, valley-foothill hardwood-conifer, valley-foothill riparian, ponderosa pine, mixed conifer, mixed chaparral, and wet meadow (Hayes et al. 2016, p. 5). The extensive range of habitat types used by the foothill yellow-legged frog demonstrates the species' non-specificity in regard to vegetation type and macroclimate of the species' terrestrial habitat component. While habitat conditions can be vastly different among these stream sizes, and across the species' geographic range, only a narrow range of abiotic conditions are tolerated by early life stages (*i.e.,* eggs, tadpoles, and metamorphs) (Kupferberg 1996a, p. 1336; Bondi et al. 2013, p. 101; Lind et al. 2016, p. 263; Catenazzi and Kupferberg 2018, pp. 1044–1045). The abiotic conditions that directly influence the success of early life stages are those associated with stream velocity, water depth, water temperature, and streambed substrate. Foothill yellow-legged frogs also require stream flow regimes to have or mimic natural flow patterns, which includes high winter flows with a slowly diminishing hydrograph with increasing water temperature and decreasing flows into the spring and summer. Higher winter flows can maintain and/or increase breeding habitat by widening and diversifying channel morphology, improving rocky substrate conditions, and increasing sunlight (Lind et al. 1996, pp. 64–65; Lind et al. 2016, p. 269; Power et al. 2016, p. 719). The reduction in flows and increasing water temperatures are also cues to initiate breeding. As a result, foothill yellow-legged frogs rely on natural, predictable changes during the hydrological cycle to optimize early life-stage growth and survival (Kupferberg 1996a, p. 1332; Bondi et al. 2013, p. 100).

Food Resources

During their lifecycle, foothill yellow-legged frogs feed on a variety of plants and animals. During early development, food sources include algae, diatoms, and detritus that are scraped from submerged rocks and vegetation (Ashton et al. 1997, p. 7; Fellers 2005, p. 535). Juvenile and adult foothill yellow-legged frogs prey upon many types of aquatic and terrestrial invertebrates including snails, moths, flies, water striders, beetles, grasshoppers, hornets, and ants (Nussbaum et al. 1983, p. 165).

Migration/Dispersal Routes and Connectivity

Adult foothill yellow-legged frogs primarily use waterway corridors to migrate or disperse (Bourque 2008, p. 70) and make their movements over multiple days (GANDA 2008, p. 22). While most foothill yellow-legged frogs are found in, or very close to, water, juveniles and adults have also been observed moving through upland areas along intermittent drainages or in moist habitat outside of riparian corridors (Service 2023, section 4.8 ''Upland and Tributary (Nonbreeding) Habitat'', pp. 64–65). The habitat characteristics needed by foothill yellow-legged frogs for migration and dispersal are largely the same as they are for upland and tributary habitat. However, movement routes do not need to be moist for extended periods. Routes need to connect breeding areas and overwintering habitat without exposing frogs to large physical barriers (*e.g.,* roads, development, reservoirs) or a high risk of predation. These migration and dispersal routes provide for metapopulation connectivity and allow for ease of mobility (for post-metamorphic frogs) within a metapopulation and between different metapopulations. Both breeding/rearing and overwintering sites need to be distributed across the metapopulation area. Foothill yellow-legged frog occupancy (*i.e.,* presence of breeding adults in a given area) must also be well distributed, such that dispersers are able to repopulate extirpated areas of the metapopulation. A sufficiently resilient foothill yellow-legged frog metapopulation should have a network of quality breeding/rearing sites (often on or near the mainstem channel) and overwintering sites (often on tributaries of the mainstem) that are connected by habitat suitable for migration and dispersal (Service 2023, p. 65). An in-depth discussion of habitat and population elements required for the foothill yellow-legged frog is in the SSA report (Service 2023, chapters 4 and 5, pp. 52–70).

Threats Influencing Current and Future Condition

Below are summary evaluations of the threats analyzed in the SSA report for the foothill yellow-legged frog. The discussion focuses on those threats impacting the North Feather, South Sierra, Central Coast, and South Coast DPSs. The specific threats associated with each DPS we identified for listing under the Act are identified in the status discussion for each appropriate DPS below and in the SSA report (Service 2023, chapter 7, pp. 74–126).

Those threats having the greatest impacts on the species or its habitat include: Altered stream hydrology and flow regimes (Factor A) associated with dams, surface water diversions, and channel modifications or alterations and their impact on the species and its habitat; predation and resource competition from nonnative species (Factor C and Factor E, respectively), such as American bullfrogs (*Lithobates catesbeianus*), smallmouth bass (*Micropterus dolomieu*), and crayfish species (*Pacifastacus* spp.); disease (Factor C); habitat degradation, loss, and fragmentation associated with wildfire (Factor A); the effects of climate change, including increased temperatures, drying and drought, and extreme flood events (Factor E); habitat modification and altered hydrology as a result of conservation efforts for salmonid species (colder water temperatures, timing and intensity of water flows) (Factor E); other habitat loss, degradation, and fragmentation (Factor A) or direct negative effects to individuals (Factor E) from nonnative fauna (*i.e.,* invasive algae such as *Didymosphenia geminata*) or other

anthropogenic activities such as agriculture, mining, urbanization, roads, and recreation. Within our threat discussion, we also evaluate existing regulatory mechanisms (Factor D) and ongoing conservation measures that may ameliorate threat impacts on the four DPSs.

Livestock grazing and timber harvest were discussed as potential threats and potential beneficial influences in the recent status assessment for the foothill yellow-legged frog in California (California Department of Fish and Wildlife (CDFW) 2019b, pp. 64–65, 67). These activities were also considered in the conservation assessment developed by the Forest Service and BLM as part of their sensitive species program for the species in Oregon (Olson and Davis 2009, pp. 18–20). While there is potential for harm to the species (*e.g.,* when grazing and timber practices cause excessive erosion and sedimentation into streams), there are also potential positive benefits to foothill yellow-legged frog habitat from these practices (Olson and Davis 2009, pp. 18–20; CDFW 2019b, pp. 64–65, 67). We captured and evaluated the potential negative impacts associated with grazing and timber harvest (*e.g.,* water impoundments for cattle, erosion, logging roads) in our assessment of altered hydrology, sedimentation, and roads. For full descriptions of all threats and how they impact the species, please see the SSA report (Service 2023, pp. 74–126).

Altered Stream Hydrology and Flow Regimes

Foothill yellow-legged frog ecology and habitat needs are closely tied to the natural hydrological cycle of the streams they inhabit. Foothill yellow-legged frog breeding and recruitment are dependent upon specific stream morphologies and upon predictable hydrological patterns that are synchronized with other climatic cues for foothill yellow-frog populations to be successful (Kupferberg 1996a, p. 1337). Strong stream flow events typical during winter under natural flow regimes help maintain and create foothill yellow-legged frog breeding habitat by widening and diversifying channel morphology, improving rocky substrate conditions, removing sediment and algal growth from rocky substrate, and increasing sunlight by limiting vegetation encroachment (Lind et al. 1996, pp. 64–65; Lind et al. 2016, p. 269; Power et al. 2016, p. 719; GANDA 2018, pp. 37–38). Dams, water management, and other waterway modifications alter the hydrology, timing, temperature, and morphology of foothill yellow-legged frog stream habitat (Service 2023, pp. 76–80). Alterations to flow regimes also occur for hydropeaking (for energy production) and recreational activities, such as spring and summer releases for whitewater boating (Kupferberg et al. 2012, p. 518) (see *Recreational Activities,* below). These pulse flows are generally much greater in frequency and intensity as compared to other flow fluctuations and, during spring and summer, can detrimentally affect early life stages of foothill yellow-legged frog during breeding and rearing season (Greimel et al. 2018, p. 92, Kupferberg et al. 2009c, p. ix; Kupferberg et al. 2011b, p. 144). Therefore, alterations of stream hydrology and flows can have a large influence on foothill yellow-legged frog distribution and metapopulation dynamics (Hayes et al. 2016, pp. 24–25; Service 2023, figure 21, p. 77).

The effects of altered streams also impede foothill yellow-legged frog dispersal and metapopulation connectivity, which can prevent recolonization of extirpated areas and cause genetic bottlenecks (Peek 2010, p. 44; Peek 2012, p. 15). Genetic comparisons among subpopulations demonstrated that gene flow is decreased in regulated river systems, even when the amount of regulation is low (Peek 2012, p. 15; Peek et al. 2021, p. 14).

Many population declines across the foothill yellow-legged frog's range have been attributed to the altered flow regimes and habitat fragmentation associated with water storage and hydropower dams (Kupferberg et al. 2009c, p. ix). Where populations of foothill yellow-legged frogs persist in these areas, breeding population densities were more than five times smaller below dams than in free-flowing rivers (based on breeding populations in the North Coast DPS, North Feather DPS, and Central Coast DPS) (Kupferberg et al. 2012, p. 520). Dams and impoundments have also presumably caused localized extirpations of the species and altered stream characteristics in some locations (Miller 2010, pp. 14, 61–63, 70–71, table 2.9; Linnell and Davis 2021, not paginated, figures 6 and 7).

Some measures have been implemented to reduce the threat of altered flow regimes on regulated streams. In 2001, the Federal Energy Regulatory Commission (FERC) issued an order to the licensee responsible for flow regulation on the Cresta and Poe reaches of the North Feather River (Rock Creek–Cresta Hydroelectric Project (FERC Project No. 1962) Pacific Gas and Electric Company (PG&E)). The order requires PG&E to develop a plan to ensure recreational and pulse flow releases do not negatively impact the foothill yellow-legged frog. The order also requires the establishment of an Ecological Resources Committee (ERC) to evaluate effects of flows and provide adaptive management strategies if flows had a negative impact on the foothill yellow-legged frog populations within the two reaches. In 2006, flow releases for recreational boating were discontinued on the Cresta reach due to possible impacts from flows resulting in low foothill yellow-legged frog egg masses that year. In 2009 and again in 2014, modified flow programs were implemented to mimic natural flow regimes by reducing flows in spring and summer (April through the foothill yellow-legged frog's breeding season) (GANDA 2018, pp. 1–2). We expect these measures to continue in accordance with the adaptive management strategies implemented under the ERC based on ongoing monitoring of the two reaches. As a result, there are some signs of improved abundance since 2018 in at least the Cresta reach of the North Feather River following the above-described modifications of the regulated flow regime to more natural conditions.

Altered flow regimes and water diversions (as well as several anthropogenic activities, such as mining, agriculture, overgrazing, timber harvest, and poorly constructed roads), as described in greater detail below, can cause or increase sedimentation in breeding habitat for the foothill yellow-legged frog (Moyle and Randall 1998, pp. 1324–1325). Increased sedimentation can increase turbidity, impact algae and other food resources, or impede foothill yellow-legged frog egg mass attachment to substrate (Cordone and Kelley 1961, pp. 191–192; Ashton et al. 1997, p. 13). Fine sediments can also fill interstitial spaces between rocks, which provide shelter from high velocity flows, cover from predators, and sources of aquatic invertebrate prey (Harvey and Lisle 1998, pp. 12–14; Olson and Davis 2009, p. 11; Kupferberg et al. 2011b, pp. 147–149). The nonnative algae (*Didymosphenia geminata*) has also been associated with areas below dams and causes impacts to food resources and alters habitat conditions by forming thick algal mats on rocky substrate within foothill yellow-legged frog habitat (Spaulding and Elwell 2007, entire; Furey et al. 2014, pp. 8–10).

Predation

Foothill yellow-legged frogs can be negatively affected by several native and

nonnative animal species. The American bullfrog, native and nonnative fish, and nonnative crayfish have all been linked to impacting populations of foothill yellow-legged frogs (Olson and Davis 2009, pp. 17–18; Hayes et al. 2016, pp. 49–51). The following discussion provides details on how these predatory species affect the foothill yellow-legged frog at various life stages through predation and competition.

American bullfrogs: American bullfrogs are considered a threat to all four DPSs. Bullfrogs affect foothill yellow-legged frog populations in several ways because they are simultaneously competitors, predators, and disease vectors, and they impact life stages from tadpoles to adults (see figure 23 in the SSA report, Service 2023, p. 81). Bullfrogs impact foothill yellow-legged frogs by direct predation (Crayon 1998, p. 232; Hothem et al. 2009, pp. 279–280) and indirectly by reducing survival. In one experiment, the presence of bullfrog tadpoles reduced foothill yellow-legged frog tadpole survival by 48 percent and mass at metamorphosis by 24 percent (Kupferberg 1997, p. 1736). Additionally, the algal and macroinvertebrate assemblages available to foothill yellow-legged frogs were significantly reduced due to the presence of bullfrog tadpoles (Kupferberg 1996b, p. 2; Kupferberg 1997, p. 1736), which would negatively affect food sources for foothill yellow-legged frog tadpoles, juveniles, and adults. The spread of bullfrogs is facilitated by altered hydrology, land-use change, drought, and increasing water temperatures (Moyle 1973, p. 21; Fuller et al. 2011, pp. 210–211; Adams et al. 2017a, p. 13).

Fish: Fish such as smallmouth bass, green sunfish (*Lepomis cyanellus*), mosquitofish (*Gambusia affinis*), and trout (*Oncorhynchus, Salmo,* and *Salvelinus* spp.) are predators of foothill yellow-legged frogs and may also potentially compete with them for invertebrate food resources (Hayes et al. 2016, p. 51). However, of these fish, smallmouth bass are the greatest threat to foothill yellow-legged frogs. Adult smallmouth bass consume amphibian tadpoles (Kiesecker and Blaustein 1998, pp. 776–787), as well as foothill yellow-legged frog tadpoles and adults (Rombough 2006a, unpaginated; Paoletti et al. 2011, p. 166). The distribution of smallmouth bass in California includes the entire South Coast DPS, lower elevation areas of the South Sierra and North Feather DPSs in the Central and Sacramento Valleys, and areas in the Central Coast DPS's range in the Salinas and Santa Clara Valleys.

Nonnative crayfish: Several nonnative crayfish species prey upon early life stages of foothill yellow-legged frog. The signal crayfish (*Pacifastacus leniusculus*) has been introduced into several areas within the coast ranges of northern California and the Sierra Nevada (Wiseman et al. 2005, p. 162; Pintor et al. 2009, p. 582; CDFW 2019b, p. 56). The signal crayfish preys upon foothill yellow-legged frog egg masses, and likely contributes to dislodging egg masses from substrate, potentially allowing them to be transported to unsuitable habitat (Rombough and Hayes 2005, p. 163; Wiseman et al. 2005, p. 162). Signal crayfish also prey on foothill yellow-legged frog tadpoles in laboratory settings (Kerby and Sih 2015, p. 266), and observations of tail injuries in wild tadpoles suggest crayfish predation also occurs in the wild (Rombough and Hayes 2005, p. 163; Wiseman et al. 2005, p. 162).

Disease

Foothill yellow-legged frogs can be negatively affected by amphibian chytrid fungus (*Batrachochytrium dendrobatidis* (Bd)), parasitic copepods, and *Saprolegnia* fungus (see figure 24 in the SSA report, Service 2023, p. 84).

Bd is implicated in the declines or presumed extinctions of hundreds of amphibian species (Scheele et al. 2019, p. 1). The spread of Bd in the range of the foothill yellow-legged frog is presumably linked to increased human use of habitat and the introduction of nonnative bullfrogs, which are Bd reservoir hosts (Huss et al. 2013, p. 341; Adams et al. 2017b, pp. 10225–10226; Yap et al. 2018, pp. 1–2; Byrne et al. 2019, p. 20386). The southern California precipitation regime (*i.e.,* alternation of extreme droughts and floods) may increase the likelihood of disease outbreaks by causing favorable habitat conditions for bullfrogs, warmer water temperatures, and increased stress on foothill yellow-legged frogs (Adams et al. 2017b, p. 10228). Bullfrog presence is a positive predictor of Bd prevalence and load in foothill yellow-legged frogs (Adams et al. 2017a, p. 1). The Bd pathogen has been documented within all four DPSs (Yap et al. 2018, p. 5, figure 1), and evidence of Bd prevalence suggests that Bd played a role in the precipitous decline of the foothill yellow-legged frog in southern California. Bd has been implicated in the decline of the foothill yellow-legged frog in both the Central Coast DPS and South Coast DPS (Adams et al. 2017b, p. 10224). Bd may also have sublethal effects on foothill yellow-legged frogs. Foothill yellow-legged frogs that tested positive for Bd had lower body mass to length ratios, although the frogs showed no other signs of infection (Lowe 2009, pp. 180–181). Tadpole susceptibility experiments with other western anurans documented species-specific effects of Bd exposure such as tadpole lethargy (motionless at bottom of tank), disorientation, weak response to prodding, and increased incidence of tadpole mouthpart deformities (Blaustein et al. 2005, pp. 1464–1466).

Parasitism of foothill yellow-legged frogs by the Eurasian copepod, *Lernaea cyprinacea,* is linked to malformations in tadpole and juvenile foothill yellow-legged frogs (Kupferberg et al. 2009a, p. 529). In addition to malformations, this parasite likely has other sublethal effects on foothill yellow-legged frogs, such as stunted growth (Kupferberg et al. 2009a, p. 529). Although direct foothill yellow-legged frog mortality from this parasite has not been documented in the wild, copepod parasitism may be responsible for mortality of tadpoles in captivity (Kupferberg 2019, entire; Oakland Zoo 2019, p. 1; Rousser 2019, entire). The changes predicted by climate change models (*i.e.,* increased summer water temperatures and decreased daily discharge) may promote outbreaks of this parasite throughout the foothill yellow-legged frog's range (Kupferberg et al. 2009a, p. 529).

The water fungus (*Saprolegnia* sp.) causes egg mortality in amphibians of the Pacific Northwest (Blaustein et al. 1994, p. 251). Fungal infections of foothill yellow-legged frog egg masses, potentially from *Saprolegnia* but not confirmed, have been observed in the mainstem Trinity River (North Coast DPS) (Ashton et al. 1997, pp. 13–14), in approximately 25 percent of egg masses during a study in the South Fork Eel River (North Coast DPS) (Kupferberg 1996a, p. 1337), and in 14 percent of egg masses during 2002 and nearly 50 percent of egg masses during 2003 in the Cresta reach of the North Fork Feather River (North Feather DPS) (GANDA 2004, p. 55). While fungal infections are not a major source of mortality for foothill yellow-legged frogs, this threat has had a strong effect in other amphibian populations (Blaustein et al. 1994, pp. 251–253).

Habitat Loss, Degradation, and Fragmentation

Habitat loss, degradation, and fragmentation occurs throughout the species' range and is attributed to numerous factors including agricultural activities, mining, urbanization, roads, recreation, and wildfire.

Agriculture/Pesticides: Agriculture is a source of threats to the foothill yellow-legged frog because of agriculture's role in habitat degradation, the contribution of pesticides and pollutants to the environment, and its role as a driver of other threats such as altered hydrology and spread of nonnative species (see figure 26 in the SSA report, Service 2023, p. 89). Agricultural land uses have been linked to declines in foothill yellow-legged frog populations due to the impacts described above (Davidson et al. 2002, p. 1597; Lind 2005, pp. 19, 51, 62, table 2.2; CDFW 2019b, p. 58). Foothill yellow-legged frog presence is negatively associated with agriculture within 5 kilometers (km) (3.1 miles (mi)) (Olson and Davis 2009, pp. 15, 22; Linnell and Davis 2021, not paginated, figures 6 and 7).

The proximity of foothill yellow-legged frog habitat downwind of the San Joaquin Valley (greatest use of airborne pesticides) suggests that foothill yellow-legged frog declines in the South Sierra unit may be linked to agricultural pesticide use (Davidson et al. 2002, p. 1594; Davidson 2004, pp. 1900–1901; Bradford et al. 2011, p. 690). Water samples from low elevations in the Sierra Nevada have had concentrations of pesticides that were within the lethal range for foothill yellow-legged frogs (Bradford et al. 2011, p. 690). Foothill yellow-legged frog tadpoles are especially vulnerable to pesticides, especially if pesticide exposure occurs in the presence of other threats, such as competition or predation (Davidson et al. 2007, entire; Sparling and Fellers 2007, entire; Sparling and Fellers 2009, entire; Kerby and Sih 2015, entire). Impacts from pesticides include reduced body size, slower development rate, and increased time to metamorphosis, as well as decreased development of natural anti-microbial skin peptides (presumably a defense against the disease, chytridiomycosis) (Davidson et al. 2007, p. 1774; Sparling and Fellers 2009, pp. 1698, 1701; Kerby and Sih 2015, pp. 255, 260).

Trespass Cannabis Cultivation: Trespass cannabis cultivation (illegally establishing largescale cannabis farms) occurs throughout the species' range, but the Central Coast and South Coast DPSs may be most at risk from this threat (CDFW 2019b, pp. 61–62). These unregulated activities impact the foothill yellow-legged frog by destroying or degrading habitat, increasing water diversion, increasing sedimentation, and introducing pesticides and other chemicals that reduce water quality and impact the species (Bauer et al. 2015, entire; National Marijuana Initiative 2020, pp. 50–60, 68–75).

Mining Activities: Mining activities, including aggregate, hard-rock, and suction-dredge mining, are sources of threats to the foothill yellow-legged frog habitat because of their role in habitat destruction and degradation, pollution, and expansion of nonnative species (Hayes et al. 2016, pp. 52–54; Service 2023, figure 29, p. 96). Hydraulic mining, although outlawed, has had and continues to have long-lasting legacy effects and is still affecting aquatic ecosystems in California, with the North Feather DPS being the most impacted (Hayes et al. 2016, pp. 52–54; CDFW 2019b, pp. 57–58). The immediate and legacy effects and extent of mining practices are outlined in table 8 of the SSA report (Service 2023, pp. 93–96), and include habitat destruction and alteration, sedimentation, changes in stream morphology, decreased stream heterogeneity, creation of ponded habitat (that supports nonnative species), decreased water quality, and contamination. A moratorium of suction-dredging in streams is currently in place for California. However, the State is currently developing new guidance and permitting processes for potentially reinitiating suction-dredging activities (State Water Resources Control Board 2020, entire).

Urbanization: Urbanization (development and roads) can affect foothill yellow-legged frogs and their habitat through direct mortality and from habitat destruction, degradation, and fragmentation. Urbanization can also contribute to increased occurrence of pesticides and pollutants being introduced to the environment, contribute to increases in other threats such as altered hydrology and introduction and spread of nonnative species, and assist in disease transmission (see figure 30 in the SSA report, Service 2023, p. 97). Conversion or alteration of natural habitats for urban land uses has been linked to declines in foothill yellow-legged frog populations (Davidson et al. 2002, p. 1597; Lind 2005, pp. 19, 51, 62, table 2.2). Foothill yellow-legged frog presence is negatively associated with cities and road density (Davidson et al. 2002, p. 1594; Olson and Davis 2009, p. 22). Increases in urbanization and roads have been reportedly associated with foothill yellow-legged frog extirpations in the South Coast DPS, possibly by facilitating the spread of Bd and nonnative species (Adams et al. 2017b, p. 10227).

Recreational Activities: Some recreational activities can affect foothill yellow-legged frogs in a variety of ways, depending on the region and type of recreation. Impacts from recreation can be localized, such as trampling or dislodging of egg masses, while others are greater in extent or contribute to other threats. These greater threats include off-highway vehicle use causing habitat degradation and increased sedimentation (Olson and Davis 2009, p. 23), nonnative sportfish stocking of smallmouth bass (see ''Predation,'' above) (CDFW 2019a, entire), and altered hydrology due to whitewater boating (Borisenko and Hayes 1999, pp. 18, 28; Kupferberg et al. 2012, p. 518). Some dam operations include planned, short pulse flows during the spring and summer to specifically provide recreation opportunities for whitewater boaters (Kupferberg et al. 2012, p. 518). As with other impacts associated with water management, the timing of these strong unseasonal flows has coincided with the foothill yellow-legged frog breeding and rearing season, leading to negative population-level impacts in the North Feather DPS (Kupferberg et al. 2012, pp. 518, 520–521, figure 3b).

Wildfire: Wildfire is a natural phenomenon throughout the range of the foothill yellow-legged frog, and its occurrence and severity are positively influenced by urbanization, roads, recreation, and the effects of climate change. The effects on foothill yellow-legged frogs from wildfire and its suppression are not well understood and have not been directly studied (Hayes et al. 2016, p. 35, table 6; CDFW 2019b, p. 71). The impacts of wildfire are also a function of the severity and intensity of the wildfire, which can be extremely variable across the landscape depending on topography and vegetation. Anecdotally, foothill yellow-legged frog populations have survived low- to moderate-severity wildfires (Lind et al. 2003, p. 27; CDFW 2019b, p. 71), and it is suspected that low-severity fires do not have adverse effects on the foothill yellow-legged frog (Olson and Davis 2009, p. 24). In fact, wildfires may benefit habitat quality by decreasing canopy cover and increasing habitat heterogeneity (Pilliod et al. 2003, pp. 171, 173; Olson and Davis 2009, p. 24). Direct mortality from scorching is unlikely, given the species' aquatic nature and the sightings of foothill yellow-legged frogs immediately after wildfires (CDFW 2019b, p. 71). In contrast, high-severity wildfires can greatly alter water and habitat quality, remove all vegetative canopy, and reduce habitat heterogeneity by burning vegetative and woody debris that foothill yellow-legged frogs use for shelter. Short- and long-term effects of severe wildfires include potentially harmful changes in water chemistry and

increased erosion and sedimentation from flooding (CDFW 2019b, pp. 71–72), which can destroy or degrade breeding habitat and interstitial spaces. Furthermore, the use of fire retardants and suppressants during wildland firefighting can affect amphibians by harming water quality and by direct toxicity to amphibians and their food sources (Pilliod et al. 2003, pp. 174–175; Service 2018, pp. 42–44). See the SSA report for additional information regarding trends and impacts of wildfire (Service 2023, section 7.9, pp. 103–113).

Effects of Climate Change

The effects of climate change are already having impacts in the areas occupied by the four DPSs in California (Bedsworth et al. 2018, p. 13; Mote et al. 2019, p. ii, summary). Overall trends in climate conditions across the foothill yellow-legged frog's range include increasing temperatures; greater proportion of precipitation falling as rain instead of snow; earlier snowmelt (influencing streamflow); and increased frequency, duration, and severity of extreme events such as droughts, heat waves, wildfires, and floods (Public Policy Institute of California 2020, not paginated). A rangewide study of occupancy found that foothill yellow-legged frog presence is negatively related to the frequency of dry years and to precipitation variability, suggesting that the species may already be declining due to the effects from climate change (Lind 2005, p. 20).

Projected increases in temperature are likely to affect foothill yellow-legged frogs differently in different parts of the range. Warming temperatures are likely to have some positive effects in areas where stream temperatures are typically colder, allowing for greater foothill yellow-legged frog population growth rates and early life stage survival (Kupferberg et al. 2011a, p. 72; Rose et al. 2020, p. 41). However, researchers observed an unexpected die-off (unknown cause) of late-stage tadpoles that coincided with maximum daily temperatures exceeding 25 degrees Celsius (°C) (77 degrees Fahrenheit (°F)) (Kupferberg et al. 2011a, pp. 14, 58; Catenazzi and Kupferberg 2018, pp. 43–44, figure 2). Temperatures greater than the preferred thermal range may also have lethal or sublethal effects on tadpoles and metamorphs from parasites (Kupferberg et al. 2009a, p. 529; Kupferberg et al. 2011a, p. 15). There may be additional negative consequences to rising stream temperatures, even where temperatures are currently cold. Increasing temperatures may facilitate colonization by nonnative species (Fuller et al. 2011, pp. 210–211; Kiernan et al. 2012, pp. 1480–1481). Bd prevalence in bullfrogs was also found to be greater when water temperature was warmer than 17 °C (63 °F) (Adams et al. 2017a, pp. 12–13).

In California, a 25 to 100 percent increase in the frequency of extreme dry-to-wet precipitation events (such as that of the 2012–2016 drought followed by the extremely wet winter of 2016–2017) is projected during the 21st century (Swain et al. 2018, p. 427). This information indicates that the threats of drought and extreme flood events may increase by 25 to 100 percent in California. In order to assess future conditions, including future climatic conditions for the foothill yellow-legged frog, we developed a population viability analysis (PVA) (Rose et al. 2020, entire) that used climate and habitat change information consistent with current emission estimates such as those identified as representative concentration pathway (RCP) 4.5 and RCP 8.5 (see ''Population Viability Analysis,'' below).

The projected changes in temperature, precipitation, and climate variability may exacerbate the effects of other threats on the foothill yellow-legged frog (Service 2023, figure 46, p. 120). The potential interactions (between climate change effects and other threats) that can negatively affect the foothill yellow-legged frog include:

- An increased risk to human safety from flooding and increased risk of water shortages may necessitate more hydrological alterations (*e.g.,* dams, surface-water diversions, changes to water releases, and channel modifications). By mid-century, the projected increases in watersheds experiencing climate-induced water stress in California ranges from 5 to 30 percent, with the South Sierra DPS experiencing the greatest amount of change (Averyt et al. 2013, p. 7, figure 7).
- Increased frequency of drought, decreased spring/summer streamflow, and warmer water temperature may benefit nonnative predators and competitors such as bullfrogs and nonnative fish (Brown and Ford 2002, pp. 332, 338–340, figure 3; Fuller et al. 2011, pp. 210–211; Adams et al. 2017a, p. 13).
- Increased summer water temperatures and/or decreased daily stream discharge and other increases in climate variability are expected to increase copepod parasitism in foothill yellow-legged frogs (Kupferberg et al. 2009a, p. 529) or exacerbate the effects of disease outbreaks (Raffel et al. 2013, p. 147; Adams et al. 2017b, p. 10228).
- Observed and projected trends toward warmer and drier wildfire seasons in the western United States are likely to continue the trend toward higher-severity wildfires and larger burn areas (Parks and Abatzoglou 2020, pp. 1, 5–6). This would result in additional loss, degradation, fragmentation, and alteration of habitat, and secondary impacts from increased sedimentation and flooding for the foothill yellow-legged frog across its range.

Competing Conservation Interests

Many of the conservation activities that support native salmonid fishes (*e.g.,* natural flow management, prevention of sedimentation) have positive influences on foothill yellow-legged frog habitat, connectivity, and juvenile and adult survival (Service 2023, section 7.12, figure 45, p. 117). However, some measures that are taken to improve habitat for cold-water salmonid fishes reduce habitat quality for the foothill yellow-legged frog by decreasing stream temperature and increasing tree canopy cover over streams which negatively influence breeding conditions (such as delaying breeding cues or shortening breeding season) and potentially slow maturation rates for tadpoles. One of the management techniques used to support salmonid recruitment is to release high volumes of cold water from dams in the spring (to trigger spawning runs or to flush smolts out to the ocean) (Kupferberg 1996a, p. 1342; Kiernan et al. 2012, p. 1474). The timing of such flow events can negatively affect foothill yellow-legged frog breeding and recruitment (Kupferberg 1996a, pp. 1336–1337, 1342).

Current and Future Condition Analysis

In our analysis of the current and future condition, we assessed resiliency for each of the four DPSs of the foothill yellow-legged frog by evaluating the health and number of metapopulations for each DPS. A healthy metapopulation is defined in terms of its abundance, level of reproduction and recruitment, juvenile and adult survival, and connectivity between populations. To assess the current representation for the foothill yellow-legged frog, we considered the current diversity of ecological conditions and the genetic makeup of each DPS as a proxy for the DPS's adaptive capacity. Redundancy for the foothill yellow-legged frog was measured by the quantity and spatial distribution of metapopulations that have been identified as having sufficient resiliency (based on breeding information) across each DPS's range. Generally speaking, the greater the number of healthy metapopulations that

are distributed (and connected) across the landscape, the greater the DPS's ability to withstand catastrophic events and, thus, the greater the DPS's overall viability.

Population Structure

Foothill yellow-legged frog distributions and movements across the species' range and within each DPS exhibit the characteristics of metapopulations (Lind 2005, p. 49; Kupferberg et al. 2009b, p. 132). A metapopulation consists of a network of spatially separated population units, or subpopulations, that interact at some level. Subpopulations are subject to periodic extirpation from demographic or environmental stochasticity, but then are naturally repopulated via colonization from nearby subpopulations. Numerous metapopulations may occur within a single stream reach or watershed depending on whether the subpopulations are interacting with each other. Each DPS is made up of numerous metapopulations. In our analysis for determining the range of each DPS, we considered this metapopulation structure when determining whether certain populations or segments interacted with each other and helped define boundaries for the DPSs, especially where some other natural or manmade barrier was not evident.

Current Distribution, Occupancy, Abundance, and Population Trends

The current distribution of the foothill yellow-legged frog generally follows its historical distribution (see the SSA report (Service 2023, pp. 15–19) and December 28, 2021, proposed rule (see 86 FR 73926–73927) for discussion of the historical distribution of the foothill yellow-legged frog) except with range contractions in the southern and, to a lesser extent, northern parts of the species' range. Within areas currently occupied, foothill yellow-legged frog distribution is currently in a declining trend in several parts of the species' range with the species having disappeared from more than half of its historically occupied locations (Lind 2005, pp. 38, 61, table 2.1).

There has not been any rangewide occupancy or population abundance survey effort for the species, and some areas are more heavily surveyed than others. Because of this variation in the available data, we use presence in stream segments as an indicator of occupancy and spatial connectivity of populations. In our review of occupancy, distribution, and abundance, we used information from the California Natural Diversity Database (CNDDB) (CDFW 2020, foothill yellow-legged frog information) and other survey information obtained from Federal and other academic and private resource entities throughout the species' range. The factors we analyzed to determine the condition of a population are (1) spatial and temporal trends in occupancy and reports of population abundance where available, (2) connectivity and isolation among occupied areas, (3) modeled risk of population decline that incorporates demographic and environmental information, and (4) status of threats and their effects (see chapter 8 of the SSA report, Service 2023, pp. 127–172).

Foothill yellow-legged frog occupancy varies widely, with generally greater occupancy in the northern half of the range. Proportions of presumed occupied stream segments were lowest in the South Coast DPS, followed by the South Sierra DPS, Central Coast DPS, and North Feather DPS (see table 10 in the SSA report, Service 2023, p. 130).

Based on current occurrence data (Element Occurrences) for California (CDFW 2020, entire) from the time period between 2000–2020, 70 percent of all known occurrence locations are presumed to be occupied by the foothill yellow-legged frog in the North Feather DPS (Service 2023, table 10, p. 130). However, looking at a more recent timeframe (2010–2020) the occupancy of foothill yellow-legged frogs in the North Feather DPS's range has been reduced to 42 percent (Service 2023, table 10, figure 49, pp. 130, 137). In the South Sierra DPS the number of occupied locations is 43 percent, the Central Coast DPS is 42 percent, and the South Coast DPS is 8 percent (Service 2023, table 10, p. 130). Based on patterns of current occupancy by decade of most recent detections (Service 2023, figures 47–53, pp. 133–145), occupied areas are declining in parts of each of the four DPSs. There are large regions in the South Sierra DPS, Central Coast DPS, and South Coast DPS that have not had any reported observations of foothill yellow-legged frogs for two or more decades. Foothill yellow-legged frogs are mostly extirpated in the South Coast DPS and currently occur only in two streams.

Population Viability Analysis

In addition to our assessments of occupancy, abundance, and trends, using occurrence information, we worked with USGS researchers to complete a rangewide population viability analysis (PVA) for the foothill yellow-legged frog (Rose et al. 2020, entire). We used the information from the PVA to inform both the species' current condition (Service 2023, chapter 8, pp. 127–172) and potential future condition (Service 2023, chapter 9, pp. 173–199). The methods and information used for developing the models used in the PVA are described in section 8.4 of the SSA report (Service 2023, pp. 152–159). The results of the PVA focus on identifying patterns in risk attributed to areas having a greater than or equal to 50 percent decline within and between DPSs (analysis units) and characterize this as the ''risk of decline.''

The ''risk of decline'' results from the PVA reflect many of the geographical patterns that we described above for occupancy data (Service 2023, section 8.2, pp. 128–145). A summary of the PVA results for the current condition of foothill yellow-legged frog populations within the boundaries of the four DPSs combined with our analysis of occupancy information is discussed below.

The North Feather DPS has a medium-high average relative risk of decline and an intermediate proportion of occupied stream segments (relative to potential stream segments). The southern DPSs (Central Coast, South Coast, and South Sierra DPSs) exhibit the strongest patterns of declining occupancy, with all stream segments within each DPS having either a medium or high relative risk of decline.

Chapter 9 of the SSA report (Service 2023, pp. 173–199) discusses the potential change in magnitude and extent of threats and the species' response to those threats into the future. We have determined that the effects of climate change and its impact on increasing temperatures, changes to precipitation and hydrology, and influence on wildfire and drought, as well as the continued regulated flows from managed streams, will affect its status into the future. The timeframe of our analysis for these threats is approximately 40 years. This period represents our best understanding of the projected future environmental conditions related to threats associated with climate change that would impact the species (increasing temperatures; greater proportion of precipitation falling as rain instead of snow; earlier snowmelt (influencing streamflow); and increased frequency, duration, and severity of extreme events such as droughts, heat waves, wildfires, and floods). The 40-year timeframe was also used in our PVA as part of its analysis on determining risk for the species into the future (Rose et al. 2020, entire). Although we possess climate and habitat change projections that go out beyond 40 years, there is greater

uncertainty between these model projections in the latter half of the 21st century and how the effects of the modeled changes will affect the species' response when projected past 40 years. Accordingly, we determined that the foreseeable future extends only 40 years for the purpose of this analysis, and we rely upon projections out to approximately 2060 for predicting changes in the species' conditions. This timeframe allows us to be more confident in assessing the impact of climate and habitat changes on the species. Therefore, based on the available climate and modeling projections and information we have on the species, we have determined 2060 as the foreseeable future timeframe for the foothill yellow-legged frog.

Our assessment of future condition interprets the effects that the future changes to threats would potentially have on foothill yellow-legged frog resiliency, representation, and redundancy. In order to accomplish our review, three plausible future scenarios were considered and each DPS's future resiliency, redundancy, and representation under each scenario was assessed. As discussed above, we used information from a PVA (Rose et al. 2020, pp. 22–27) to assist us in determining the potential condition of foothill yellow-frog populations into the future. Although there are an infinite number of possible future scenarios, the chosen scenarios (*i.e.,* lower change scenario, mean change scenario, and higher change scenario) reflect a range of reasonable scenarios based on the current understanding of climate change models, threats, and foothill yellow-legged frog ecology. The environmental conditions in each future scenario are plausible in that they are not meant to represent the lowest and highest projections of what is possible. Rather, the lower change and higher change scenarios are at the lower and upper ends of confidence intervals from climate change projections, land cover models, and stream temperature models (Rose et al. 2020, pp. 22–23). Environmental conditions for the three future scenarios are based on published studies that used ensembles of global climate models (Isaak et al. 2017, p. 9188; Swain et al. 2018, p. 427; Sleeter et al. 2019, p. 3336). For the projections of spatially explicit covariates (*i.e.,* land cover and stream temperature), downscaled regional climate model data were used (Isaak et al. 2017, p. 9186; Sleeter et al. 2019, p. 3339). The information from these studies reflects the best scientific and commercial information available for projections of land cover (Sleeter et al. 2019; Sleeter and Kreitler 2020, unpublished data), stream temperature (Isaak et al. 2017), and climate variability (Swain et al. 2018) within the range of the foothill yellow-legged frog.

Descriptions of each scenario and the anticipated effects of each scenario on resiliency, representation, and redundancy for each foothill yellow-legged frog DPS are provided in the SSA report (Service 2023, table 17, sections 9.3–9.5, pp. 177, 180–199) and are summarized below.

Resiliency

Resiliency is the ability of a species (or DPS) to sustain populations through the natural range of favorable and unfavorable conditions. For the foothill yellow-legged frog, we determined that resiliency is a function of metapopulation health and the distribution and connectivity among metapopulations and subpopulations. To determine if foothill yellow-legged frog populations are sufficiently resilient, we first assessed spatial and temporal trends in occupancy and abundance. We then assessed structural and functional connectivity among occupied areas. We also evaluated results from a study that modeled the risk of greater than or equal to 50 percent decline in occupied stream segments using demographic and environmental information. Finally, we related our results to information from scientific literature, reports, and species experts. The table below summarizes the current condition and future conditions of resiliency for each of the four foothill yellow-legged frog DPSs. The current condition column reflects the current resiliency of the DPS. The current resiliency of each of the four DPSs was characterized as having an intact, reduced, substantially reduced, or extensively reduced condition. Under each future scenario, we assessed how the following resiliency measures would change from current condition: (1) occupancy and abundance, (2) connectivity, (3) modeled risk of population decline, and (4) status of threats. Because changes to environmental conditions under the future scenarios were reflected by environmental covariates in the PVA (see Service 2023, section 9.2 (Scenarios) and table 17), we were able to forecast the magnitudes of changes in resiliency by comparing the modeled risk of decline (Rose et al. 2020, entire) under current conditions to modeled risk under the three future scenarios. The lower, mean, and higher change scenario columns represent any changes from each DPS's current resiliency. For this analysis, ''functional extirpation'' is defined as such extensive reduction in condition that extirpation of the entire unit is likely to eventually occur as remnant populations experience normal environmental and demographic fluctuations. For additional details on current and future conditions of the DPSs, see the SSA report (Service 2023, chapters 8 and 9, pp. 127–199).

TABLE—RESILIENCY OF THE FOUR FOOTHILL YELLOW-LEGGED FROG DPSS

Distinct population segment	Current condition	Lower change scenario	Mean change scenario	Higher change scenario
North Feather DPS	Reduced resiliency	No change	Markedly reduced from current. *Risk of functional extirpation.*	Greatly reduced from current. *Risk of functional extirpation or extirpation.*
South Sierra DPS	Substantially reduced resiliency.	Slightly reduced from current.	Markedly reduced from current. *Risk of functional extirpation or extirpation.*	Greatly reduced from current. *Risk of functional extirpation or extirpation.*
Central Coast DPS	Substantially reduced resiliency.	Slightly reduced from current.	Markedly reduced from current. *Risk of functional extirpation or extirpation.*	Greatly reduced from current. *Risk of functional extirpation or extirpation.*
South Coast DPS	Extensively reduced resiliency.	Slightly reduced from current.	Markedly reduced from current.	Greatly reduced from current.

TABLE—RESILIENCY OF THE FOUR FOOTHILL YELLOW-LEGGED FROG DPSS—Continued

Distinct population segment	Current condition	Lower change scenario	Mean change scenario	Higher change scenario
		Risk of extirpation	*Risk of extirpation*	*Risk of extirpation.*

Representation

Representation describes the ability of a species or DPS to adapt to changing environmental conditions. This includes both near-term and long-term changes in its physical (*e.g.,* climate conditions, habitat conditions, habitat structure, etc.) and biological (*e.g.,* pathogens, competitors, predators, etc.) environments. This ability of a species or DPS to adapt to these changes is often referred to as ''adaptive capacity.'' To assess the current condition of representation for the four DPSs of the foothill yellow-legged frog, we considered the current diversity of ecological conditions and of genetic material throughout the range of each of the DPSs.

There are considerable ranges of ecological conditions under which the four DPSs occur. As discussed in the SSA report (Service 2023, pp. 23, 37–51), there are substantial differences in latitude, elevation, precipitation, average temperature, and vegetative community across the areas occupied by the four DPSs' ranges. The areas occupied by the four DPSs also differ in terms of species composition and in hydrology (rain-fed versus snow-fed systems). Exemplary of these different ecological conditions, foothill yellow-legged frog tadpoles from snow-fed Sierra Nevada populations (North Feather and South Sierra DPSs) have higher intrinsic growth rates than tadpoles from rain-fed coastal populations (Central Coast and South Coast DPSs), likely due to their constraint to a shorter rearing season in the Sierra Nevada (Catenazzi and Kupferberg 2017, pp. 1255, 1260–1261).

As described in the SSA report (Service 2023, pp. 20–23), two rangewide assessments of foothill yellow-legged frog genomic datasets revealed that this taxon is extremely differentiated following biogeographical boundaries (McCartney-Melstad et al. 2018, p. 112; Peek 2018, p. 76). The clades that are most genetically divergent (*i.e.,* South Sierra, Central Coast, and South Coast clades), and thus could contribute most to the overall adaptive capacity of this taxon (McCartney-Melstad et al. 2018, p. 120; Peek 2018, p. 77), are also the clades with the lowest levels of population resiliency. The South Sierra and Central Coast clades have substantially reduced resiliency and the South Coast clade has extensively reduced resiliency (Service 2023, pp. 167–170). The reduced resiliency in these clades means that the foothill yellow-legged frog is especially vulnerable to loss of this genetic diversity. The Central Coast and South Coast clades are the most genetically divergent, indicating that a significant amount of the taxon's overall genetic diversity would be lost if either clade were extirpated. The Central Coast and South Coast clades are also ecologically unique because they have lower annual precipitation and higher mean annual temperatures than elsewhere in the range of the species (PRISM Climate Group 2012, 30-year climate dataset; Service 2023, pp. 47–51) and the region hosts the highest freshwater endemism of anywhere in the species' California range (Howard et al. 2013, p. 5).

While the foothill yellow-legged frog clearly has a range of genetically divergent populations, it has likely already lost diversity due to large extirpations in the southern DPSs. The loss of diversity for the four DPSs is at further risk amidst trends toward decreasing occupancy and decreasing connectivity (McCartney-Melstad et al. 2018, pp. 120–121; Peek 2018, p. 74).

The trend of decreasing genetic diversity in the foothill yellow-legged frog may be leading to losses in adaptive capacity (*i.e.,* ability to adapt to change). Loss of adaptive capacity lowers a species' viability because the decrease in ability to adapt to change increases extinction risk in the face of future changes. For foothill yellow-legged frog conservation, researchers strongly recommended that each of the major genetic groups be managed as independent recovery units (McCartney-Melstad et al. 2018, p. 122) and that conservation actions should prioritize protecting foothill yellow-legged frogs in the Central Coast, South Coast, and South Sierra clades because they are simultaneously the most distinct, divergent, and at-risk populations (Peek 2018, p. 77).

Redundancy

Redundancy describes the ability of a species to withstand catastrophic events. To assess redundancy for each of the four DPSs, we considered the (1) quantity of occupied stream segments (proxy for subpopulations) (see table 10 of the SSA report (Service 2023, p. 130)), (2) spatial distribution of occupied stream segments (see figure 55 of the SSA report (Service 2023, p. 157)), and (3) population-level factors such as connectivity, relative risk of decline, and level of threats. These factors were assessed in terms of their potential influence on the ability of foothill yellow-legged frog metapopulations to survive and recover after a plausible catastrophic event. For example, isolation of occupied stream segments or lack of functional connectivity in a DPS could prevent recolonization of extirpated areas after a massive die-off or temporary habitat destruction.

The North Feather DPS occupies a relatively small area and several streams or occurrences have been extirpated from past impacts (eastern portion of range, southwestern area near Lake Oroville, and some occurrences in northern Butte County) (CDFW 2020, dataset, entire; Service 2023, figure 49, p. 137). The North Feather DPS also has the highest average relative risk of population decline with only 16 (15 percent) of the 109 analyzed stream segments in the low risk category and 34 stream segments (31 percent) in the high risk category. Overall abundance of foothill yellow-legged frogs for the North Feather DPS is largely unknown, but egg mass densities are very low in the two regulated stream reaches that have long-term monitoring (Rose et al. 2020, pp. 63–64, table 1). For example, sections of the Cresta reach of the North Feather River that historically had relatively high numbers of foothill yellow-legged frog egg masses did not have egg masses or were extremely reduced for several years (2006–2017) (CDFW 2019b, p. 31; Dillingham 2019, p. 7). As a result, redundancy is limited in the North Feather DPS. The North Feather DPS is not only the smallest clade, but its occupied stream segments are not well-distributed over the geographical area (see figure 55 of the SSA report (Service 2023, p. 157)). The extant North Feather populations occupy an area small enough that a large catastrophic event, such as a high-severity wildfire or drought, could

result in functional extirpation. Furthermore, the North Feather DPS has reduced resiliency because of poor occupancy and relatively high risk of population decline.

Redundancy is poor in the South Sierra and Central Coast clades. Both the South Sierra and Central Coast clades have substantially reduced resiliency because of poor occupancy, poor connectivity, relatively high risk of decline, and substantial threats. A single catastrophic event would be unlikely to extirpate the entirety of either unit, but the patchy distribution of occurrences (see figure 55 of the SSA report (Service 2023, p. 157)) and limited connectivity would make it extremely unlikely that extirpated areas would be recolonized naturally.

Redundancy within the South Coast clade is nearly zero. Not only is the resiliency in this clade extensively reduced, but there are only two known populations (see section 8.2 of the SSA report (Service 2023, pp. 128–145)) in the South Coast clade. These two populations (comprised of seven stream segments) are also very close in proximity (see figure 55 of the SSA report (Service 2023, p. 157)). These streams are located close to one another, but the foothill yellow-legged frog populations within them appear to have lost genetic connectivity. Although the stream flows are not regulated by dams, the risk of population decline continues to be medium or high under current conditions due to the combination of threats identified above altering habitat and impacting the DPS. Furthermore, the close proximity of the stream segments to each other makes the South Coast DPS especially vulnerable to extirpation from a single catastrophic event.

Overall Current and Future Condition

As discussed above, we used the information from the PVA to inform both the current condition (Service 2023, chapter 8, pp. 127–172) and potential future condition (Service 2023, chapter 9, pp. 173–199) of the four DPSs. The PVA assessed how the following measures would change from current condition: (1) occupancy and abundance, (2) connectivity, (3) modeled risk of population decline, and (4) status of threats under each future scenario. Because changes to environmental conditions under the future scenarios were reflected by environmental covariates in the PVA (see Service 2023, section 9.2 (Scenarios), pp. 176–180, and table 17), we were able to forecast the magnitudes of changes in resiliency by comparing the modeled risk of decline (Rose et al. 2020, entire) under current conditions to modeled risk under the three future scenarios. The results of the analysis showed that the average risk of population decline for each of the four DPSs increased under the three future scenarios (Rose et al. 2020, p. 39). Under current conditions and all future scenarios, the average relative risk of decline was highest in the South Sierra and Central Coast units (Service 2023, tables 18 and 19, pp. 184 and 186). Under the lower change scenario, decreases in resiliency, compared to current conditions, were small. However, decreases in resiliency were more dramatic under the mean and higher change scenarios. These declines in resiliency put the four DPSs at risk of extirpation or functional extirpation in the future (*i.e.,* such extensive reduction in condition that extirpation of the entire unit is likely to eventually occur as remnant populations experience normal environmental and demographic fluctuations) under the mean and higher change scenarios (see table 19 of the SSA report (Service 2023, p. 186)). The South Coast DPS is at risk of extirpation under all three of the future scenarios due to its low population numbers.

Conservation Efforts and Regulatory Mechanisms

Several initiatives and conservation efforts are in place and being implemented for foothill yellow-legged frog conservation, including measures for rearing (headstarting), nonnative species removal, development of reintroduction feasibility studies, and habitat conservation planning for the species (Service 2023, table 9, pp. 122–125). The headstarting (hatching eggs and rearing into releasable frogs) program has just been started on the North Feather River in a portion of the range of the North Feather DPS (GANDA 2018, pp. 1–3, 13, table 2; Dillingham 2019, pp. 7–9; Rose et al. 2020, pp. 63–64, 76, table 1, figure 4). The Forest Service has noted habitat improvements in breeding areas where these in-situ and ex-situ rearing efforts have taken place (Dillingham 2019, pp. 7–9). Also benefitting the species (through regulatory protection) is the State of California's listing under the CESA for each of the four DPSs in 2020 (Commission 2020, p. 1). Another regulatory benefit that applies to breeding and rearing habitat is the 2009 moratorium on suction-dredge mining in California. However, benefits to the foothill yellow-legged frog from the moratorium have not been studied, and permitting processes are in development so that the moratorium may be lifted (State Water Resources Control Board 2020, entire).

The foothill yellow-legged frog is listed as a sensitive species by the BLM and the Forest Service under their Sensitive Species Programs (BLM 2014a, entire; USFS 2013, entire). These agencies define sensitive or at-risk species as those species that require special management consideration to promote their conservation and reduce the likelihood and need for future listing under the Act. Any actions conducted by these agencies would take into consideration impacts to sensitive species and, if possible, implement best management practices to limit impacts to the species or its habitat.

As discussed above, FERC issues licenses for the operation of non-Federal hydropower projects. Within the range of the foothill yellow-legged frog, numerous hydropower projects require FERC licensing to operate. Part of the licensing process includes consideration of recommendations for the protection of fish and wildlife. Some FERC license requirements have included measures to help protect and conserve foothill yellow-legged frogs, such as collection of data, implementation of modified flow regimes to mimic more natural conditions, and other standard best management practices.

Two joint Federal and State habitat conservation plans (HCPs) and California State natural community conservation plans (NCCPs) (Santa Clara Valley HCP/NCCP and East Contra Costa HCP/NCCP) have been approved and implemented for the foothill yellow-legged frog as a covered species and assist in local population and habitat conservation and restoration (Jones & Stokes 2006, entire; ICF International 2012, entire). Both HCP/NCCPs are in the northern portion of the Central Coast DPS's range.

Due to the limited nature of existing conservation efforts and no rangewide planning or coordination, the current conservation efforts are localized. In addition, several ongoing efforts are preliminary steps to on-the-ground conservation (*e.g.,* feasibility research) and other efforts have not had enough time to verify long-term success (*e.g.,* population headstarting) or determine if and how the condition of a foothill yellow-legged frog population may have improved (*e.g.,* bullfrog removal) (Service 2023, section 7.15, pp. 121–126). Therefore, large-scale conservation efforts currently being implemented are not known to be ameliorating any of the threats described above for the four DPSs but may reduce some effects at the individual or smaller localized population levels.

Determination of Status for the Foothill Yellow-Legged Frog

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In determining potential future threats facing the North Feather, South Sierra, Central Coast, and South Coast DPSs, we evaluated various future conditions based on projections of changes in threats. Our timeframe for review looked out approximately 40 years based on the effects of climate change and information developed for the PVA. This was our timeframe for our threats analysis of future conditions for the four DPSs to determine if they were likely to become endangered within the foreseeable future (*i.e.,* if they meet the Act's definition of ''threatened species'') throughout their ranges.

Status of the South Sierra DPS and the South Coast DPS of the Foothill Yellow-Legged Frog Throughout All of Their Ranges

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the South Sierra and South Coast DPSs of the foothill yellow-legged frog and their habitats. Below, we summarize our assessment of status of the South Sierra DPS and South Coast DPS under the Act.

South Sierra DPS

Threats are numerous and severe for the South Sierra DPS and include altered hydrology (Factor A), agriculture (including airborne pesticide drift) (Factor A), illegal cannabis cultivation (Factor A), predation by nonnative species (Factor C), disease and parasites (Factor C), mining (Factor A), urbanization (including development and roads) (Factor A), recreation (Factor E), severe wildfire (Factor A), drought (Factor E), extreme flooding (Factor E), and the effects of climate change (*e.g.,* increased temperatures, variability in precipitation events, increased drought frequency) (Factor E). Existing regulatory mechanisms are not sufficient to ameliorate the identified threats (Factor D). After evaluating threats to the DPS and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we conclude that under current conditions, resiliency, redundancy, and representation are substantially reduced due to existing range contractions and the DPS's extensive extirpations and patchy distribution within and between stream segments. Both structural and functional connectivity are also poor in the South Sierra DPS. Populations within the DPS are relatively small and isolated, and are impacted by numerous threats that are of such great extent and magnitude that they are making the South Sierra DPS more susceptible to loss from stochastic or catastrophic events. The South Sierra DPS also has a high average risk of decline with no stream segments in lower risk categories under current conditions. As a result, we find that the magnitude and imminence of threats facing the South Sierra DPS of the foothill yellow-legged frog place the DPS in danger of extinction now, and therefore a threatened status is not appropriate. Thus, after assessing the best scientific and commercial information available, we determine that the South Sierra DPS of the foothill yellow-legged frog is in danger of extinction throughout all of its range.

South Coast DPS

There are numerous, severe threats to the South Coast DPS of the foothill yellow-legged frog, including altered hydrology (Factor A), drought (Factor E), nonnative species (Factor C), disease and parasites (Factor C), urbanization (including development and roads (Factor A) and recreation (Factor E)), illegal cannabis cultivation (Factor A), extreme floods (Factor E), severe wildfire (Factor A), the effects of climate change (*e.g.,* increased temperatures, precipitation variability, and increased drought frequency and duration) (Factor E). Existing regulatory mechanisms are not sufficient to ameliorate the identified threats (Factor D). After evaluating threats to the DPS and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we conclude that under current conditions, resiliency, redundancy, and representation are poor for the South Coast DPS. Foothill yellow-legged frogs are mostly extirpated in this DPS and currently occur only in two streams. These streams are located close to one another, but the foothill yellow-legged frog populations within them appear to have lost genetic connectivity. Although the stream flows are not regulated by dams, the risk of population decline continues to be medium or high under current conditions due to the combination of threats identified above altering habitat and impacting the DPS. Furthermore, the close proximity of the stream segments to each other makes the South Coast DPS especially vulnerable to extirpation from a single catastrophic event. The area associated with the South Coast DPS is subject to reduced precipitation and drying, which (1) shortens the hydroperiod and negatively affects habitat elements that are hydrology-dependent; (2) limits recruitment, survival, and connectivity; and (3) exacerbates the effects of other threats, such as predation and wildfire. In addition, the current occupancy within the DPS is extremely low and the threats acting on the DPS are of such extent and magnitude to result in significant declines. As a result, we find that the magnitude and imminence of threats facing the South Coast DPS of the foothill yellow-legged frog place the DPS in danger of extinction now, and therefore a threatened status is not appropriate. Thus, after assessing the best scientific and commercial information available, we determine that currently the South Coast DPS of the foothill yellow-legged frog is in danger of extinction throughout all of its range.

Status of the South Sierra DPS and South Coast DPS Throughout a Significant Portion of Their Ranges

Under the Act and our implementing regulations, a species or DPS may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the South Sierra DPS and the South Coast DPS of the foothill yellow-legged frog are in danger of extinction throughout all of their ranges, and accordingly we did not undertake an analysis of any significant portion of the range for these two DPSs. Because both DPSs warrant listing as endangered throughout all of their ranges, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), which vacated the provision of the Final Policy on

Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (Final Policy) (79 FR 37578, July 1, 2014) providing that if the Services determine that a species is threatened throughout all of its range, the Services will not analyze whether the species is endangered in a significant portion of its range.

Determination of Status for the South Sierra DPS and South Coast DPS

Our review of the best available scientific and commercial information indicates that the South Sierra DPS and the South Coast DPS meet the Act's definition of endangered species. Therefore, we are listing the South Sierra DPS and the South Coast DPS of the foothill yellow-legged frog as endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Status of the North Feather DPS and Central Coast DPS of the Foothill Yellow-Legged Frog Throughout All of Their Ranges

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the North Feather and Central Coast DPSs of the foothill yellow-legged frog and their habitats. Below, we summarize our assessment of status of the North Feather DPS and Central Coast DPS under the Act.

North Feather DPS

Numerous threats are currently acting on the North Feather DPS. The North Feather DPS is within the most hydrologically altered part of the foothill yellow-legged frog's range (Factor A) and potentially is among the most impacted by the latent effects from historical mining (Hayes et al. 2016, pp. 53–54) (Factor A). Other threats to the DPS include nonnative species (bullfrogs and crayfish) (Factor C), impacts to habitat (agriculture, urbanization, severe wildfire) (Factor A), recreation (Factor E), the effects of climate change (Factor E). Existing regulatory mechanisms are not sufficient to ameliorate the identified threats (Factor D). After evaluating threats to the DPS and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we conclude that under current conditions, resiliency, redundancy, and representation for the North Feather DPS are reduced.

The North Feather DPS occupies a relatively small area and several streams or occurrences have been extirpated from past impacts (eastern portion of range, southwestern area near Lake Oroville, and some occurrences in northern Butte County) (CDFW 2020, dataset, entire; Service 2023, figure 49, p. 137). The North Feather DPS also has the highest average relative risk of population decline with only 16 (15 percent) of the 109 analyzed stream segments in the low risk category and 34 stream segments (31 percent) in the high risk category. Overall abundance of foothill yellow-legged frogs for the North Feather DPS is largely unknown, but egg mass densities are very low in the two regulated stream reaches that have long-term monitoring (Rose et al. 2020, pp. 63–64, table 1). For example, sections of the Cresta reach of the North Feather River that historically had relatively high numbers of foothill yellow-legged frog egg masses did not have egg masses or were extremely reduced for several years (2006–2017) (CDFW 2019b, p. 31; Dillingham 2019, p. 7).

Under current conditions, resiliency in the North Feather DPS has been reduced based on recent occupancy information, largely because of the DPS's occupation of a small geographic area, range contraction, the relatively high risk of the DPS's decline, and the area's high degree of hydrological alteration. However, the North Feather DPS still currently contains a relatively high proportion of occurrence records with 42 percent of all known occurrences being from the 2010–2020 timeframe (Service 2023, table 10, figure 49, pp. 130, 137). In addition, conservation measures to improve flow regimes to more natural conditions and rearing efforts to augment foothill yellow-legged frog populations have reduced some current impacts and improved occupancy in some areas and as a result have assisted in improving the DPS's current condition in these areas. As a result, we consider the current occupancy for the North Feather DPS to be stable, based on a majority of records being within the 2000–2020 timeframe, but recognize population monitoring indicates that the DPS has low abundance and limited distribution. Current redundancy is limited in the North Feather DPS. The North Feather DPS not only occupies the smallest area, but its occupied stream segments are not well-distributed over the geographical area it occupies. Current representation of the DPS is most likely reduced due to past loss of populations.

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we have determined that, even with the current condition of the DPS being reduced, the population and habitat factors used to determine the resiliency, representation, and redundancy for the DPS have not been reduced to such a degree to consider the North Feather DPS currently in danger of extinction throughout its range.

However, threat conditions in the future are likely to substantially impact populations of the North Feather DPS. Because of the current cold stream temperatures, future climatic conditions that may increase stream temperatures may potentially benefit many of the North Feather DPS populations; however, the negative effects of increases in streamflow variability due to climate change (*i.e.,* drought/flood events, snow/rain events) and residual environmental stochasticity likely outweigh the benefit of any warmer stream temperatures. Increased water demand and anticipated additional regulation to an already highly regulated hydrologic condition of the DPS's habitat will further limit the DPS's capability to maintain adequate population sizes to support the DPS's metapopulation structure. Nonnative species (bullfrogs and crayfish) will continue to impact the DPS, and their impacts may increase as temperatures warm, allowing for spread of warm water species such as bullfrogs and smallmouth bass. Trends indicate that the amount of area severely burned annually by wildfires has been growing sharply in the range of the North Feather DPS (Service 2023, figures 38 and 39, pp. 109–110), and negative consequences from wildfire-related sedimentation to foothill yellow-legged frog reproduction have been documented in this DPS (Service 2023, pp. 103–113). The populations of the North Feather DPS occupy an area small enough that a large catastrophic event, such as a severe wildfire or prolonged drought, could result in a severe reduction in population size and extent for the DPS. In the SSA report we identified three future scenarios to assist in evaluating the future resiliency of the DPSs. These included a lower change scenario, a higher change scenario, and a mean change scenario. All three of these scenarios took into account each DPSs current resiliency and provided information on any changes from the DPSs current resiliency. For the North Feather DPS, the DPS's current resiliency is considered reduced. Under the lower change scenario the DPS is continued to have reduced resiliency, under the mean change scenario the DPS is expected to have a markedly reduced resiliency and be at risk of functional extirpation, and under the higher change scenario the DPS is

expected to have a greatly reduced resiliency and be at risk of functional extirpation or be extirpated. Based on this information, we have determined that the future resiliency for the North Feather DPS will be markedly reduced as a result of the increases in threats and increases in the synergistic effects of threat interactions on the DPS, as well as the DPS's response to the threats as identified above. Thus, the projected increases in average relative risk of decline under future conditions under the mean change scenario are likely to decrease occupancy, abundance, and connectivity, with resiliency being markedly reduced from the DPS's current condition within 40 years.

As a result of the DPS having a large percentage (70 percent) of stream segments occupied (since 2000) with a large proportion of those segments (42 percent) being occupied since 2010, and implementation of conservation measures to reduce the effects of altered stream hydrology and provide for an increase in populations, we have determined that the current condition of the DPS, although reduced, still exhibits sufficient resiliency, redundancy, and representation and provide for, at a minimum, areas of favorable conditions that allow the North Feather DPS to currently sustain its existing populations. However, future impacts from the threats facing the DPS are likely to cause declines in the DPS's population size and distribution. Thus, after assessing the best available information, we conclude that the North Feather DPS of the foothill yellow-legged frog is not currently in danger of extinction but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Central Coast DPS

Numerous threats are currently acting on the Central Coast DPS, including altered hydrology (Factor A), disease (Factor C), drought (Factor A), nonnative bullfrogs (Factor C), impacts to habitat (urbanization (including development and roads), agriculture, trespass cannabis cultivation, extreme floods, and wildfire) (Factor A), recreation (Factor E), the effects of climate change (Factor E). Existing regulatory mechanisms are not sufficient to ameliorate the identified threats (Factor D). Human land use and population (urban development) in the northern portions of the DPS's range are high, and the proportion of forest and shrub cover across the DPS's range is low, with large areas being made up of lower elevation open oak woodlands or foothill grassland habitats. Seasonal precipitation within the range of the Central Coast DPS is extremely variable year-to-year, making stream habitat for the Central Coast DPS subject to drying. This, in turn, shortens the breeding season; negatively affects habitat elements that are hydrology-dependent; limits recruitment, survival, and connectivity; and exacerbates the effects of other threats (*e.g.,* wildfire, drought, nonnative predators, disease, and the effects of climate change). However, this variability has also resulted in the Central Coast area of California (including the area occupied by the Central Coast DPS) containing a high number of freshwater species that have evolved adaptations to their environment (Howard et al. 2013, p. 5). Below, we summarize the resiliency, redundancy, and representation of the Central Coast DPS.

The Central Coast DPS has undergone historical range contraction in portions of its northern (Contra Costa, Alameda, San Mateo, and northern Santa Cruz Counties) and central (southern Santa Clara and northern San Benito Counties) regions. Currently, two clusters of stream segments have had recent (2000–2020) detections of the species, one cluster in the southern part and one cluster in the northern part of the DPS's range (Service 2023, figure 52, p. 143). Population size and abundance for the Central Coast DPS have been historically and continue to be small, with those populations in unregulated streams being larger and more productive (Service 2023, pp. 142–143). The southern cluster appears to have functional connectivity and therefore have the ability to share genetic material between populations (McCartney-Melstad et al. 2018, p. 117, figure 3 (2C)), which assists in maintaining the cluster's metapopulation integrity. The southern cluster also has fewer human-caused threats (*e.g.,* urbanization, recreation) due to its distance away from highly human-populated areas and its location on public lands (BLM's Clear Creek Management Area (CCMA)). Populations within the CCMA in San Benito and Fresno Counties are being monitored and managed by BLM, and currently appear to be self-sustaining (BLM 2014b, pp. 4–77, 99–100). The northern cluster is proximate to highly urbanized areas of the south San Francisco Bay area and San Jose, California. The northern cluster exhibits some genetic differentiation among subpopulations, indicating that the DPS has a lack of functional connectivity (McCartney-Melstad et al. 2018, p. 117, figure 3 (4B)). However, two HCP/NCCPs (East Contra Costa and Santa Clara Valley) (Jones & Stokes 2006, entire; ICF International 2012, entire) that identify the foothill yellow-legged frog as a covered species have been approved and implemented. These plans assist in ameliorating the current threats acting on the northern populations of the Central Coast DPS and help conserve the DPS and its habitat within their jurisdictional boundaries.

Current resiliency of the Central Coast DPS is substantially reduced due to past impacts limiting connectivity between populations and existing populations having smaller population abundance and breeding (Rose et al. 2020, p. 63, table 1). The average risk of population decline for the Central Coast DPS is considered high and numerous threats (altered hydrology, drought, nonnative species, disease, and urbanization) are currently acting on the DPS. The current overall redundancy for the Central Coast DPS is considered adequate to guard against catastrophic events. This is because the Central Coast DPS has numerous occupied stream segments that are spatially distributed across the DPS's range, and those stream segments exhibit variable environmental conditions providing for, at a minimum, refugia for the population. As a result of this distribution, the likelihood that a single catastrophic event would impact a significant proportion of the Central Coast DPS's populations to the point of extirpation or functional extirpation is extremely small. Current representation for the Central Coast DPS is considered sufficient to maintain its adaptive capacity. The Central Coast DPS has evolved in an area with high climatic variability and is most likely adapted to environmental changes. The Central Coast DPS is also one of the most genetically divergent for the foothill yellow-legged frog, indicating that the DPS still contains a significant amount of the taxon's overall genetic diversity.

In the future, the average risk of decline for the existing populations is expected to increase by 14 percent and the number of populations at high risk of decline are expected to increase by 69 percent, under the mean change scenario. The lower change scenario identified resiliency as slightly reduced from the DPSs current reduced resiliency and the high change scenario identified the resiliency for the DPS to be greatly reduced with a risk of functional extirpation or extirpation due to its reduced ability to withstand stochastic events. These changes are a result of increases in threats such as climate-induced demand for surface waters that is projected to increase by 5 to 20 percent (from 1900–1970 levels)

by mid-century (2050) (Averyt et al. 2013, p. 7, figure 7). Future increases in severe wildfires are expected. Despite wildfire trends in the Central Coast DPS being stable between 1950 and 2018 (Service 2023, figure 38, p. 109), recent events such as the fires in 2020 in the San Mateo-Santa Cruz Unit (CZU) (35,009 hectares (ha) (86,509 acres (ac)) (Santa Cruz and San Mateo Counties) and Santa Clara Unit (SCU) (160,508 ha (396,624 ac)) (Santa Clara, Alameda, and Stanislaus Counties) Lightning Complex are examples of expected increasing trends in wildfire activity in the future (CALFIRE 2021, entire). Under the lower change scenario, the Central Coast DPS's resiliency would be slightly reduced. Under the mean change scenario, resiliency would be markedly reduced from current condition due to reductions in population numbers and distribution (reduction in redundancy). This reduction in resiliency under the mean change scenario would put the Central Coast DPS at risk of functional extirpation or extirpation within 40 years.

After evaluating threats to the Central Coast DPS and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we find that the Central Coast DPS of the foothill yellow-legged frog currently sustains numerous populations and contains habitat distributed throughout the DPS's range (redundancy). These widely distributed populations provide for the genetic and ecological representation for the DPS across its range. Therefore, the current resiliency, redundancy, and representation are sufficient to prevent the current threats acting on the Central Coast DPS from causing it to be in danger of extinction currently. Thus, the Central Coast DPS of the foothill yellow-legged frog is not currently in danger of extinction throughout its range, and, therefore, the Central Coast DPS does not meet the Act's definition of an endangered species. However, based on our projections of future occupancy, modeled risk of decline assessments from the PVA, and the existing and increased threats in the future on the DPS from increasing water demand, increases in wildfire frequency and intensity due to climate change conditions will further impact abundance and connectivity of populations and cause the DPS's habitat to become increasingly less able to support foothill yellow-legged frog populations into the future. Thus, after assessing the best information available, we conclude that the Central Coast DPS of the foothill yellow-legged frog is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Status of the North Feather DPS and Central Coast DPS of the Foothill Yellow-Legged Frog Throughout a Significant Portion of Their Ranges

Under the Act and our implementing regulations, a species or DPS may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), vacated the provision of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (herein after ''Final Policy''; 79 FR 37578, July 1, 2014) that provided if the Services determine that a species or DPS is threatened throughout all of its range, the Services will not analyze whether the species or DPS is endangered in a significant portion of its range.

Therefore, we proceed to evaluating whether the North Feather DPS or Central Coast DPS is endangered in a significant portion of its range—that is, whether there is any portion of either DPS's range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of either DPS's range.

Following the court's holding in *Everson,* we now consider whether there are any significant portions of either of the two DPSs' ranges where either DPS is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for the North Feather DPS and Central Coast DPS, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the two DPSs face to identify any portions of either DPS's range where either is endangered. Below we provide our significant portion of the range analysis for the North Feather DPS and Central Coast DPS.

North Feather DPS

We evaluated the range of the North Feather DPS to determine if the DPS is in danger of extinction now 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. For the North Feather DPS, due to its relatively small distribution, 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 in that portion.

For the North Feather DPS, we examined the following major threats: altered stream hydrology or other habitat impacts, nonnative species, severe wildfire, recreation, and the effects of climate change, including cumulative effects.

The current resiliency of the North Feather DPS is considered reduced when compared to conditions prior to the year 2000, with approximately 70 percent of locations being occupied over the 2000–2020 timeframe. However, the DPS still has a relatively high proportion of presumed occupied and well distributed stream segments relative to the number of potential stream segments. Most of the recent records of the DPS are distributed within two major stream segments and their tributaries within the DPS's range. The major driving threats identified above are currently acting uniformly within these stream segments and tributaries. The implementation of conservation efforts such as reintroductions and stream flow management on regulated streams have assisted in maintaining and reducing the current threats for the DPS. The major driving threats associated with severe wildfire, altered hydrology, and the effects of climate change are all expected to increase in the future but we expect the DPS to have sufficient resiliency, redundancy, and representation to maintain populations in the wild as based on occupancy over the last 20 years. The current threat conditions and impacts from those threats on the North Feather DPS across its range are relatively uniform as based on the modeling efforts used to determine the species current conditions (Service 2023, table 19, p. 186). This information regarding the DPS's current condition, risk of decline, and uniformity and timing of threats all confirm our determination that the DPS currently meets the definition of threatened and that there are no portions of its range where the DPS is currently endangered.

We found no biologically meaningful portion of the North Feather DPS's range where threats are impacting individuals

differently from how they are affecting the DPS elsewhere in its range, or where the biological condition of the DPS differs from its condition elsewhere in its range such that the status of the DPS in that portion differs from any other portion of the DPS's range.

Therefore, no portion of the North Feather DPS's range provides a basis for determining that the DPS is in danger of extinction in a significant portion of its range, and we determine that the DPS is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Central Coast DPS

We evaluated the range of the Central Coast DPS to determine if the DPS is in danger of extinction now in any portion of its range. The range of a species or DPS can theoretically be divided into portions in an infinite number of ways. We focused our analysis on portions of the DPS's range that may meet the definition of an endangered species. For the Central Coast DPS, 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 in that portion.

The statutory difference between an endangered species and a threatened species is the timeframe in which the species or DPS becomes in danger of extinction; an endangered species is in danger of extinction now while a threatened species is not in danger of extinction now but is likely to become so in the foreseeable future. Thus, we reviewed the best scientific and commercial data available regarding the time horizon for the threats that are driving the Central Coast DPS to warrant listing as a threatened species throughout all of its range. We then considered whether these threats or their effects are occurring (or may imminently occur) in any portion of the species' range with sufficient magnitude such that the DPS is in danger of extinction now in that portion of its range. We examined the following threats: altered hydrology, drought, nonnative bullfrogs, Bd (disease), agriculture (especially illegal cannabis cultivation), mining, urbanization (including roads and recreation), extreme flood events, and the effects of climate change, including cumulative effects. For the Central Coast DPS, we have determined that urbanization and associated human impacts (roads and recreation) most likely have disproportional impacts in certain areas in the northern portion of the DPS's range.

In the northern portion of the Central Coast DPS's range at lower elevation in highly urbanized areas (such as San Francisco and East Bay), impacts from threats associated with development and human land use are particularly high (Service 2023, figure 55, p. 157). This corresponds to an observed pattern of historical decline of the Central Coast DPS's occupancy in this northern portion of its range where few recent (*i.e.,* 2000–2020) records exist directly south or directly east of the San Francisco Bay (Service 2023, figure 52, p. 143). According to the PVA, the stream segments in this northern portion were also identified as having the highest risks of decline when compared to stream segments in other parts of the Central Coast DPS's range (Service 2023, figure 55, p. 157). This pattern of elevated risk suggests that extirpations of the foothill yellow-legged frog in the northern portion of the Central Coast DPS's range are more likely to occur. However, within this northern portion currently the Central Coast DPS is still well distributed with approximately 50 percent of records since between 2000 and 2020 being confirmed over the 2010–2020 timeframe. In addition, foothill yellow-legged frog populations within this northern portion are located in streams and watersheds outside the lower elevation areas and are not currently subject to widespread or significant threats from urban development. In addition, current conservation efforts in the northern portion associated with the East Contra Costa HCP and the Santa Clara Valley HCP are currently being implemented to protect and conserve foothill yellow-legged frogs and their habitat and we expect that these efforts will reduce the level of threats and provide benefits to the DPS's habitat in this northern portion.

Although within the northern portion of the Central Coast DPS's range, some threats to the DPS are impacting individuals differently from how they are affecting the species elsewhere in its range, the best scientific and commercial data available do not indicate that the threats, or the DPS's responses to the threats, are such that the Central Coast DPS is in danger of extinction now in the northern portion of its range. Therefore, we determine, that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Therefore, no portions of the North Feather DPS or Central Coast DPS ranges provides a basis for determining that either DPS is in danger of extinction in a significant portion of its respective range, and we determine that the DPSs are likely to become in danger of extinction within the foreseeable future throughout all of their ranges. This does not conflict with the courts' holdings in *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018) and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy, including the definition of ''significant'' that those court decisions held to be invalid.

Determination of Status for the North Feather DPS and Central Coast DPS of the Foothill Yellow-Legged Frog

Our review of the best scientific and commercial information available indicates that the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog are likely to become endangered species within the foreseeable future throughout their ranges and thus meet the Act's definition of threatened species. Therefore, we are listing the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog as threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species or DPSs listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-

sustaining, and functioning components of their ecosystems.

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline and making it available to the public within 30 days of a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (*https://www.fws.gov/program/endangered-species*), or from our Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Once this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of California will be eligible for Federal funds to implement management actions that promote the protection or recovery of the DPSs. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance.*

Please let us know if you are interested in participating in recovery efforts for the foothill yellow-legged frog. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with the Service.

Examples of Federal agency actions within the species' habitat within the DPSs that may require conference or consultation or both, as described in the preceding paragraph, include, but are not limited to, management and any other landscape-altering activities on Federal lands administered by the U.S. Fish and Wildlife Service, Forest Service, BLM, and National Park Service; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; construction and maintenance of roads, bridges, or highways by the Federal Highway Administration; water management and conveyance activities by the Bureau of Reclamation; and licensing for hydropower and safety of dams by the FERC.

South Sierra DPS and South Coast DPS—Endangered Status

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any species listed as an endangered species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of the listed species.

Because activities being implemented in the range of the species are variable and have variable impacts depending on the nature of the project, we are unable at this time to identify any specific activities within the range of the species that would not constitute a violation of section 9, as effects of any actions on the species are fact-pattern specific. However, actions whose effects do not extend into foothill yellow-legged frog habitat are unlikely to result in section 9 violations.

Based on the best available information, the following activities that the Service believes could potentially harm the foothill yellow-legged frog and result in ''take'' and, therefore, may result in a violation of section 9 of the Act if they are not authorized in accordance with applicable law include, but are not limited to:

(1) Unauthorized handling or collecting of the species;

(2) Destruction/alteration of the species' habitat by discharge of fill material, draining, ditching, tiling, pond construction, stream channelization or

diversion, or diversion or alteration of surface or ground water flow;

(3) Inappropriate livestock grazing that results in direct or indirect destruction of riparian habitat;

(4) Pesticide applications in violation of label restrictions;

(5) Introduction of nonnative species that compete with or prey upon foothill yellow-legged frogs, such as the introduction of nonnative bullfrogs or nonnative fish; and

(6) Modification of the channel or water flow of any stream or removal or destruction of vegetation or stream substrate in any body of water in which the foothill yellow-legged frog is known to occur.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

North Feather DPS and Central Coast DPS—Threatened Status

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of the listed species. The discussion below regarding protective regulations under section 4(d) of the Act for the North Feather DPS and Central Coast DPS, which we are listing as threatened in this rule, complies with our policy.

II. Final Rules Issued Under Section 4(d) of the Act for the North Feather DPS and the Central Coast DPS of the Foothill Yellow-Legged Frog

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary shall issue such regulations as she deems necessary and advisable to provide for the conservation of species listed as threatened. The U.S. Supreme Court has noted that statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9 for any particular threatened species or DPS.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibit take of threatened wildlife or include a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history of the Act, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to [her] with regard to the permitted activities for those species. [She] may, for example, permit taking, but not importation of such species, or [she] may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising this authority under section 4(d), we have developed rules that are designed to address the conservation needs of the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog. Although the statute does not require us to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that these rules as a whole satisfy the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog. As discussed above under Summary of Biological Status and Threats, we have concluded that the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog are likely to become in danger of extinction within the foreseeable future throughout their respective ranges primarily due to threats associated with altered stream hydrology, nonnative species, impacts to habitat (agriculture, mining, urbanization, roads, recreation), disease, drought, extreme floods, high-severity wildfire, and the exacerbation of threats from the effects of climate change. The provisions of these 4(d) rules will promote conservation of the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog by encouraging management of each of the DPS's stream habitat and landscape in ways that meet both resource management considerations and the conservation needs of the DPSs. The provisions of these rules are one of many tools that we will use to promote the conservation of the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog. For these reasons, we find the 4(d) rules as a whole are necessary and advisable to provide for the conservation of the North Feather and Central Coast DPSs of the foothill yellow-legged frog.

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with the Service. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, a license from the FERC under the Federal Power Act (16 U.S.C. 791a *et seq.*), or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

This obligation does not change in any way for a threatened species with a species-specific 4(d) rule. Actions that result in a determination by a Federal

agency of ''not likely to adversely affect'' continue to require the Service's written concurrence and actions that are ''likely to adversely affect'' a species require formal consultation and the formulation of a biological opinion.

Provisions of the 4(d) Rules for the North Feather DPS and the Central Coast DPS of the Foothill Yellow-Legged Frog

The 4(d) rules will provide for the conservation of the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog by prohibiting the following activities, except as otherwise authorized or permitted: import or export; take; possession and other acts with unlawfully taken specimens; delivery, receipt, carriage, transportation, or shipment in interstate or foreign commerce in the course of commercial activity; or sale or offer for sale in interstate or foreign commerce. These prohibitions mirror those prohibitions afforded to endangered species under section 9(a)(1) of the Act.

In addition to the prohibited activities identified above, we also provide standard and other exceptions to those prohibitions for certain activities as described below.

We note that the long-term viability of the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog, as with many wildlife species, is intimately tied to the condition of their habitat. As described in our analysis of the species' status, one of the major threats to the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog's continued viability is habitat loss, degradation, and fragmentation resulting from past or current anthropogenic impacts or from catastrophic wildfires. The potential for an increase in frequency and severity of catastrophic wildfires from the effects of climate change subsequently increases the risk to the DPSs posed by this threat. An additional threat is the occurrence of nonnative species that may predate upon and compete for resources with the foothill yellow-legged frog.

We have determined that actions taken by forest management entities in the range of the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog for the purpose of reducing the risk or severity of catastrophic wildfires and protecting stream habitat, even if these actions may result in some short-term or low level of localized negative effect to the North Feather DPS and/or Central Coast DPS of the foothill yellow-legged frog, will further the goal of reducing the likelihood of either DPS becoming endangered, and will also likely contribute to their conservation and long-term viability. This includes measures to conduct wildfire prevention activities, non-emergency suppression activities, and other silviculture best management practices that are in accordance with an established forest or fuels management plan that follow current State of California Forest Practice Rules, State fire codes, or local fire codes/ordinances as appropriate.

In addition, habitat restoration efforts that specifically provide for the habitat needs of the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog and include measures that minimize impacts to the species and its habitat are an exception to the prohibitions. These efforts must be carried out in accordance with finalized conservation plans or strategies specifically identified for the foothill yellow-legged frog and include measures that minimize impacts to the North Feather and Central Coast DPSs. These activities will most likely have some limited short-term impacts but overall will provide for conservation of the two DPSs.

Removal and restoration of trespass cannabis cultivation sites are also excepted from prohibitions. These activities will benefit the foothill yellow-legged frog, especially in the Central Coast DPS area. Trespass cannabis cultivation sites cause several issues for the foothill yellow-legged frog, including water diversion, pollution, sedimentation, and introduction of pesticides and fertilizers to streams occupied by the foothill yellow-legged frog. When these sites are found, they often require reclamation (waste cleanup and removal of fertilizers, pesticides, and debris) and restoration to precultivation conditions. Cleanup of these sites may involve activities that may cause localized, short-term disturbance to the North Feather DPS and Central Coast DPS of the foothill yellow-legged frog. However, the removal of pesticides and other chemicals that can affect the North Feather DPS or Central Coast DPS of the foothill yellow-legged frog and the surrounding environment is encouraged. Removal and restoration of trespass cannabis cultivation sites is expected to have long-term benefits for resiliency of the North Feather DPS and Central Coast DPS.

Nonnative species removal will significantly increase the viability of the foothill yellow-legged frog. As discussed above, bullfrogs, nonnative fish, and nonnative crayfish contribute to foothill yellow-legged frog predation and increase competition for resources. Bullfrogs also are vectors for disease that affects the foothill yellow-legged frog. Actions with the primary or secondary purpose of removing nonnative animal species that compete with, predate upon, or degrade the habitat of the foothill yellow-legged frog that are conducted in unoccupied habitat are provided as an exception to the prohibitions. Actions that disturb habitat, involve the use of chemicals, or are conducted in occupied stream segments are not included.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulations at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating take will help preserve the species' remaining populations, slow their rate of decline, and decrease synergistic, negative effects from other ongoing or future threats.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act and are included as standard exceptions in the 4(d) rule.

We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Service in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Service shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her

agency for such purposes, will be able to conduct activities designed to conserve the foothill yellow-legged frog, that may result in otherwise prohibited take, without additional authorization.

Nothing in these 4(d) rules change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the foothill yellow-legged frog. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service, where appropriate.

III. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

As discussed earlier in this document, we did not identify an imminent threat of collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our SSA report and this final listing determination for the four DPSs of the foothill yellow-legged frog, we determined that the present or threatened destruction, modification, or curtailment of habitat or range (Factor A) is a threat to the four DPSs and that the Factor A threats in some way can be addressed by the Act's section 7(a)(2) consultation measures. The four DPSs occur wholly in the jurisdiction of the United States, and we are able to identify areas that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met and because the Secretary has not identified other circumstances for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat is prudent for the four DPSs of the foothill yellow-legged frog.

Critical Habitat Determinability

Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

We reviewed the available information pertaining to the biological needs of the four DPSs of the foothill yellow-legged frog and habitat characteristics where the four DPSs are located. A careful assessment of the economic impacts that may occur due to a critical habitat designation is still ongoing, and we are in the process of working with the State and other partners in acquiring the complex information needed to perform that assessment. Therefore, due to the current lack of data sufficient to perform required analyses, we conclude that the designation of critical habitat for the four DPSs of the foothill yellow-legged frog is not determinable at this time. The Act allows the Service an additional year to publish a critical habitat designation that is not determinable at the time of listing (16 U.S.C. 1533(b)(6)(C)(ii)).

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations and species-specific protective regulations promulgated concurrently with a decision to list or reclassify a species as threatened. The courts have upheld this position (*e.g., Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995) (critical habitat); *Center for Biological Diversity* v. *U.S. Fish and Wildlife Service,* 2005 WL 2000928 (N.D. Cal. Aug. 19, 2005) (concurrent 4(d) rule)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We solicited information from all of the Tribes within the entire range of the foothill yellow-legged frog to inform the development of the SSA report, and we notified Tribes of our proposed and this final listing determination. We also

provided these Tribes the opportunity to review a draft of the SSA report and provide input prior to making our determination on the status of the foothill yellow-legged frog, but we did not receive any responses. We will continue to coordinate with Tribal entities throughout the recovery and critical habitat designation processes for the foothill yellow-legged frog.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and Field Office staff in the Sacramento Fish and Wildlife Office and Ventura Fish and Wildlife Office in California.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.11, amend paragraph (h) by adding entries for ''Frog, foothill yellow-legged [Central Coast DPS]'', ''Frog, foothill yellow-legged [North Feather DPS]'', ''Frog, foothill yellow-legged [South Coast DPS]'', and ''Frog, foothill yellow-legged [South Sierra DPS]'' to the List of Endangered and Threatened Wildlife in alphabetical order under AMPHIBIANS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	* * *
AMPHIBIANS				
*	*	*	*	* * *
Frog, foothill yellow-legged [Central Coast DPS].	*Rana boylii* ..	California (All foothill yellow-legged frogs in the Central Coast Range south of San Francisco Bay to San Benito and Fresno Counties).	T	88 FR [Insert **Federal Register** page where the document begins], 8/29/2023; 50 CFR 17.43(g).[4d]
Frog, foothill yellow-legged [North Feather DPS].	*Rana boylii* ..	California (All foothill yellow-legged frogs in the North Feather River watershed largely in Plumas and Butte Counties).	T	88 FR [Insert **Federal Register** page where the document begins], 8/29/2023; 50 CFR 17.43(g).[4d]
Frog, foothill yellow-legged [South Coast DPS].	*Rana boylii* ..	California (All foothill yellow-legged frogs in the Coast Range from Coastal Monterey County south to Los Angeles County).	E	88 FR [Insert **Federal Register** page where the document begins], 8/29/2023.
Frog, foothill yellow-legged [South Sierra DPS].	*Rana boylii* ..	California (All foothill yellow-legged frogs in the Sierra Nevada Mountains south of the American River sub-basin south to the Transverse Range in Kern County).	E	88 FR [Insert **Federal Register** page where the document begins], 8/29/2023.
*	*	*	*	* * *

■ 3. Amend § 17.43 by adding a paragraph (g) to read as follows:

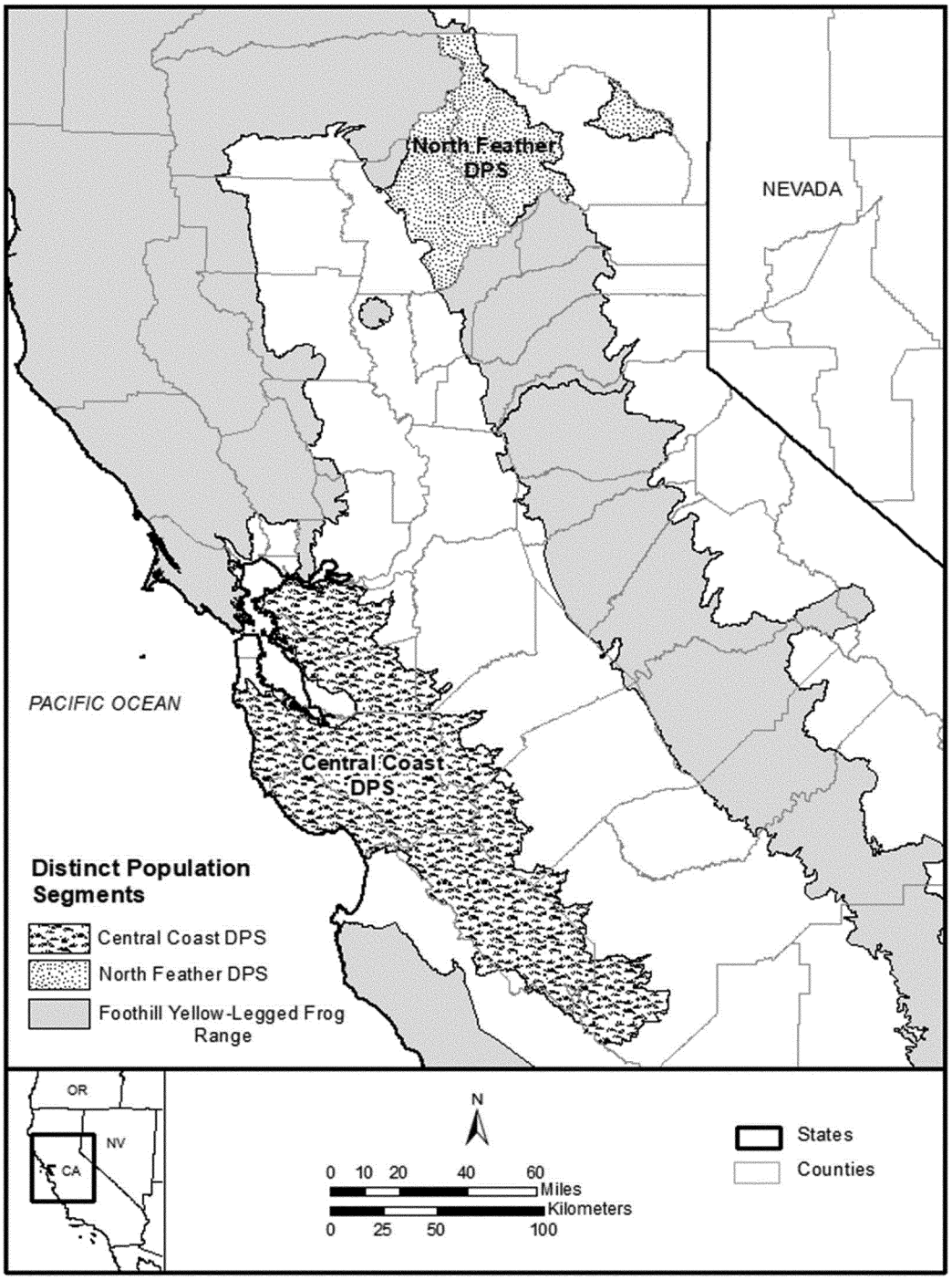
§ 17.43 Special rules—amphibians.

* * * * *

(g) Foothill yellow-legged frog (*Rana boylii*), Central Coast Distinct Population Segment (DPS) and North Feather DPS.

(1) *Location.* The Central Coast DPS and North Feather DPS of the foothill yellow-legged frog are shown on the map that follows:

Figure 1 to paragraph (g)



(2) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to the Central Coast DPS and North Feather DPS of the foothill yellow-legged frog. Except as provided under paragraph (g)(3) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(3) *Exceptions from prohibitions.* In regard to the Central Coast DPS and North Feather DPS of the foothill yellow-legged frog, you may:

(i) Conduct activities as authorized by a permit under § 17.32.

(ii) Take, as set forth at § 17.21(c)(2) through (c)(4) for endangered wildlife.

(iii) Take as set forth at § 17.31(b).

(iv) Take incidental to an otherwise lawful activity caused by:

(A) Forest management activities for the purposes of reducing the risk or severity of catastrophic wildfire, which include fuels reduction activities, non-emergency firebreak establishment or maintenance, and other non-emergency wildfire prevention and suppression activities that are in accordance with an established forest or fuels management plan that follow current State of California Forest Practice Rules, State fire codes, or local fire codes/ordinances as appropriate.

(B) Habitat restoration efforts that are specifically designed to provide for the conservation of the foothill yellow-legged frog. These efforts must be part of and carried out in accordance with finalized conservation plans or strategies specifically identified for the foothill yellow-legged frog and include measures that minimize impacts to the North Feather DPS or Central Coast DPS. Habitat restoration efforts for other species that may not share habitat requirements (*e.g.,* salmonid species) are not included in this exception.

(C) Efforts to remove and clean up trespass cannabis cultivation sites and related water diversion infrastructure and restore areas to precultivation conditions.

(D) Removal or eradication of nonnative animal species including, but not limited to, American bullfrogs, smallmouth bass, and nonnative crayfish species occurring within stream reaches unoccupied by the foothill yellow-legged frog within the range of the Central Coast DPS or North Feather DPS. Actions involving habitat disturbance or the use of chemical treatments are not included.

(v) Possess and engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2) for endangered wildlife.

Wendi Weber,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–17675 Filed 8–28–23; 8:45 am]

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Part V

Department of Homeland Security

Federal Emergency Management Agency

44 CFR Part 296

Hermit's Peak/Calf Canyon Fire Assistance; Final Rule

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 296

[Docket ID FEMA–2022–0037]

RIN 1660–AB14

Hermit's Peak/Calf Canyon Fire Assistance

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This final rule sets out the procedures for claimants to seek compensation for injury or loss of property resulting from the Hermit's Peak/Calf Canyon Fire.

DATES: This rule is effective August 29, 2023.

FOR FURTHER INFORMATION CONTACT: Angela Gladwell, Office of Response and Recovery, 202–646–2500, *FEMA-Hermits-Peak@fema.dhs.gov.* Persons with hearing or speech challenges may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Summary of Legal Authority

Congress enacted the Hermit's Peak/Calf Canyon Fire Assistance Act (''Act'') as part of the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117–180, 136 Stat. 2114 (2022), and directed FEMA to issue an Interim Final Rule (''IFR'') within 45 days of enactment. Congress passed the Act to compensate those parties who suffered injury and loss of property from the Hermit's Peak/Calf Canyon Fire (''Fire''). The Act requires FEMA to design and administer a claims program to compensate victims of the Fire for injuries resulting from the Fire and to provide for the expeditious consideration and settlement for those claims and injuries. The Act further directs FEMA to establish an arbitration process for disputes regarding claims. On December 29, 2022, the Consolidated Appropriations Act, 2023, Public Law 117–328, 136 Stat. 4459 provided additional funding for the Act's implementation.

B. Summary of the IFR

On November 14, 2022, FEMA published the IFR that established the procedures for processing and paying claims for property, business, and/or financial losses to those sustaining losses from the Fire. FEMA's procedures in the IFR were generally consistent with those established for claims associated with the Cerro Grande Fire Assistance Act.[1] Under the IFR procedures, a claimant initiates a claim by filing a Notice of Loss with the Office of Hermit's Peak/Calf Canyon Fire Claims (''Claims Office''). After receipt and acknowledgement by the Claims Office, the Claims Office contacts the claimant to review the claim and helps the claimant formulate a strategy for obtaining any necessary supporting documentation to complete the Proof of Loss. After coordinating with the Claims Reviewer, the claimant reviews and signs a Proof of Loss and submits it to the Claims Office. The Claims Reviewer reviews and evaluates the Proof of Loss and submits a report to the Authorized Official for review to determine whether compensation is due to the claimant. The Authorized Official's written decision is provided to the claimant. If satisfied with the decision, the claimant receives payment after returning a completed Release and Certification Form. If the claimant is not satisfied with the decision, an Administrative Appeal could be filed with the Director of the Claims Office. If the claimant is not satisfied after appeal, the dispute could be resolved through binding arbitration or heard in the United States District Court for the District of New Mexico.

C. Summary of Changes From the IFR to the Final Rule

FEMA is making changes from the IFR to the Final Rule to reflect the concerns raised by commenters and better adhere to the intent of the Act by addressing the needs of the communities impacted by the Fire. Given the geographic, economic, and cultural distinctions between the impacted communities of the Cerro Grande and the Hermit's Peak/Calf Canyon Fires, FEMA is revising some sections of the regulatory text to ensure the claims process is more tailored to claimants impacted by the Fire. FEMA is revising the regulatory text in the Final Rule to eliminate the 25 percent formulas associated with reforestation and revegetation in § 296.21(c)(2) and with heightened risk reduction in § 296.21(e)(5) that were based on the Cerro Grande Fire Assistance process. FEMA recognizes the distinct geographic, economic, and cultural differences between these impacted communities and that these formulas, while an efficient way to process claims in the Cerro Grande Fire Assistance process, are not easily adapted to meet the needs of claimants injured by the Fire. FEMA agrees with the majority of commenters that removal of these formulas is essential to ensuring claimants in the Hermit's Peak/Calf Canyon Fire Assistance process are compensated for their actual compensatory damages resulting from the Fire. FEMA is modifying § 296.21(c)(3)(ii) regarding claims for a decrease in the value of real property. Distinct from Cerro Grande, the claimants impacted by this Fire have commented that they are more likely to have significant acreage damaged that has the potential for long-term natural restoration. Requiring that the property value be permanently diminished for a decrease in property value claim, as provided in the IFR, is inconsistent with the geography, economy, and real estate valuations of the impacted communities.[2] Based on comments received and to ensure the Final Rule accommodates the needs of claimants and impacted communities, FEMA is revising the language in 296.21(c)(3)(ii) to allow a claimant to establish that the value of the real property was ''significantly'' diminished ''long-term'' as a result of the Fire. FEMA is adding paragraph (c)(5) to incorporate language from the Act regarding physical infrastructure to ensure that claimants understand compensatory damages may be awarded for damage or destruction of physical infrastructure, including damage to irrigation infrastructure such as acequia systems. Acequia systems are unique to the communities impacted by

[1] The Cerro Grande Fire Assistance Act (Pub. L. 106–246 (2001)) required FEMA to design and administer a program to fully compensate those who suffered injuries resulting from the Cerro Grande Fire. The Cerro Grande Fire resulted from a prescribed fire ignited on May 4, 2000, by National Park Service fire personnel at the Bandelier National Monument, New Mexico under an approved prescribed fire plan. That fire burned approximately 47,750 acres and destroyed over 200 residential structures. The Cerro Grande Fire Assistance Act process is detailed in an Interim Final Rule (65 FR 52259 (Aug. 27, 2000) and a Final Rule (66 FR 15847 (Mar. 21, 2001) that is now codified at 44 CFR part 295.

[2] ''On the flip side, economic strategies traditionally employed in the Santa Fe National Forest assessment area, typically combining ranching, acequia agriculture, wood collection and other communal land uses, appear to be less viable in the context of rising land values and declining prices for primary commodities. Consequently, many of these traditional uses are party to the transformation of land use patterns, as ranches and agricultural lands are sold for residential and second home development.'' University of New Mexico Bureau of Business and Economic Research, ''Socioeconomic Assessment of the Santa Fe National Forest,'' August 2007 at pg. 99, found at *https://www.fs.usda.gov/internet/FSE_DOCUMENTS/fsbdev3_021243.pdf* (last accessed July 5, 2023).

the Fire and, just as the Act recognizes this distinction, FEMA is also recognizing it and incorporating it into the Final Rule.

In the IFR, FEMA requested additional feedback on some of the dates set relating to claims for financial losses. Based on comments received, FEMA is making changes to those dates. FEMA currently requires claimants seeking compensation for out-of-pocket expenses for treatment of mental health conditions to submit claims for treatment rendered on or before April 6, 2024. FEMA is revising this paragraph to allow claims for treatment identified on or before November 14, 2024, consistent with the timeframe for submitting a claim under the Act. FEMA recognizes that mental health treatment may extend beyond the deadline for filing a claim and claimants may reopen claims under § 296.35 for good cause. FEMA is also making a clarifying edit in the Final Rule by specifying that the treatment can be for a condition that resulted from the Fire or for conditions worsened by the Fire. Based on comments received, this edit helps clarify that treatment for conditions worsened by the Fire will also be compensated. In the IFR, FEMA allows compensation for donations provided no later than September 20, 2022. FEMA is revising § 296.21(c)(4) to allow claimants to seek actual compensatory damages for donations provided to survivors no later than November 14, 2022. FEMA is setting the date of the IFR publication as the timeframe by which donations will be considered compensable.

FEMA is modifying the language in § 296.31(a) regarding reimbursement for expert opinions. FEMA understands that claimants impacted by this Fire are more likely to need the services of experts to help better value their claims than the claimants in the Cerro Grande Fire Assistance process given the scope of the Fire and the geographic, economic, and cultural distinctions between the impacted communities. FEMA is revising the regulatory text to allow for reimbursement for expert opinions that the Claims Office deems necessary to determine the amount of the claim. This additional flexibility will help claimants and FEMA better understand and process claims.

FEMA is also revising § 296.35 of the regulatory text in the Final Rule regarding reopening a claim. The IFR provides that claimants can seek to reopen their claim to consider issues raised when the claimant closes on the sale of a home and wishes to present a claim for a decrease in the value of their real property under § 296.21(c)(3). FEMA is revising this language in the Final Rule to allow claimants to reopen their claim when the claimant closes on the sale of real property, expanding the ability to reopen a claim beyond just a home. This change reflects the unique geographic area impacted by the Fire and the reality that claimants may sell a portion of their land without necessarily selling their home and experience a loss for which compensation should be made available. FEMA is also revising the timeline by which a request to reopen must be submitted for claims related to additional losses as part of a reconstruction in excess of those previously awarded or for good cause. Recognizing the challenges claimants face with reconstruction and other potential issues that can arise that require a claim to be reopened, FEMA is revising § 296.35 to set the deadline by which requests to reopen these types of claims must be submitted as a date in the future that the Director of the Claims Office will set and publish in the **Federal Register** and at *https://www.fema.gov/hermits-peak.*

FEMA is making some clarifying revisions in the Final Rule. Currently in § 296.1, FEMA states the purpose of the rule is to pay for actual compensatory damages for injuries suffered from the Fire (emphasis added). FEMA is revising this language, consistent with the language from the Act, to pay for actual compensatory damages for injuries resulting from the Fire (emphasis added). FEMA is making this edit to better communicate to claimants that all injuries resulting from the Fire, including injuries resulting from flooding, mudflow, mold, and debris flow in the aftermath of the Fire, are compensable. However, a claimant may not be eligible for compensation if their injuries resulted from flooding, mudflow, mold, or debris unrelated to the Fire. FEMA is also updating the definition of ''subsistence resources'' to include ''other natural resource'' gathering, consistent with how the impacted communities are engaged in subsistence activities. FEMA is updating § 296.12 regarding election of remedies. The IFR discusses how claimants waive their right to pursue claims if they accept an award. FEMA is revising this section to clarify that the claimant waives their right to pursue other claims only after acceptance of a final award, consistent with commenters' request for additional clarity on this point and for consistency with the Act. Consistent with the Act, FEMA is incorporating language in § 296.13 to reiterate the prioritization of claims for injured persons over subrogees. In § 296.21(a), FEMA is resolving a grammatical error by changing ''Injury'' to ''injury'' and another grammatical error by adding ''that'' to § 296.21(f) to read that the Act allows FEMA to compensate Injured Persons only for damages not paid, or that will not be paid, by insurance or other third-party payments or settlements.

II. Background and Legal Authority

On September 30, 2022, President Biden signed the Act into law as part of the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117–180, 136 Stat. 2114 (2022).[3] Congress passed the Act to compensate those parties who suffered injury and loss of property from the Hermit's Peak/Calf Canyon Fire. On April 6, 2022, the U.S. Forest Service initiated the Las Dispensas-Gallinas prescribed burn on Federal land in the Santa Fe National Forest in San Miguel County, New Mexico. That same day the prescribed burn, which became known as the ''Hermit's Peak Fire,'' escaped the burn unit's boundaries and was declared a wildfire, spreading to other Federal and non-Federal lands.[4] On April 19, 2022, the Calf Canyon Fire, also in San Miguel County, New Mexico, began burning on Federal land and was later identified as the result of a pile burn in January 2022 that remained dormant under the surface before reemerging.[5] The Hermit's Peak and Calf Canyon Fires merged on April 27, 2022, and both fires were reported as the Hermit's Peak Fire or the Hermit's Peak/Calf Canyon Fire. By May 2, 2022, the fire had grown, causing evacuations in multiple villages and communities in San Miguel County and Mora County, including the San Miguel County jail, the State's psychiatric hospital, the United World College, and New Mexico

[3] As mentioned above, Division N, Title VI of the Consolidated Appropriations Act, 2023, Public Law 117–328, 136 Stat. 4459 authorized additional funding to implement the Act.

[4] Section 102(a)(1) and (2), Hermit's Peak/Calf Canyon Fire Assistance Act, Public Law 117–180, 136 Stat. 2114 (2002). *See also* ''Las Dispensas Prescribed Burn Declared Wildfire,'' Apr. 6, 2022 found at *https://inciweb.nwcg.gov/incident/article/8049/68044/* (last accessed July 5, 2023 Sept. 15, 2022) and Theresa Davis, ''How 'good fires' can turn into wildfires,'' Albuquerque Journal, Apr. 30, 2022 found at *https://www.alqjournal.com/2494692/how-good-fires-can-turn-into-wildfires.html* (last accessed Sept. 15, 2022).

[5] *See* Bill Gabbert, ''Investigators determine Calf Canyon Fire caused by holdover from prescribed fire,'' Wildfire Today, May 27, 2022 found at *https://wildfiretoday.com/?s=calf+canyon+holdover&apbct__email_id__search_form_34270=* (last accessed Oct. 6, 2022).

Highlands University.[6] At the request of New Mexico Governor Lujan Grisham, President Biden issued a major disaster declaration on May 4, 2022.[7] The Hermit's Peak/Calf Canyon Fire was not 100 percent contained until August 21, 2022.[8]

The Act provides compensation to injured persons impacted by the Fire. It requires FEMA to design and administer a claims program to compensate injured parties for injuries resulting from the Fire and to provide for the expeditious consideration and settlement for those claims and injuries. The Act further directs FEMA to establish an arbitration process for disputes regarding claims.

On November 14, 2022, FEMA published an IFR with a 60-day comment period that established the procedures for the processing and payment of claims to those injured by the Fire sustaining property, business, and/or financial losses. FEMA held public meetings during the comment period to further gather public feedback on the rule. Based on public comment, FEMA is making changes to the Final Rule to better reflect the differences between the Cerro Grande Fire and the Hermit's Peak/Calf Canyon Fire, as the Hermit's Peak/Calf Canyon Fire destroyed a significant amount of forested private lands, communities, acequias, ranches, and farms, and to further reflect the specific cultural, economic, and geographic distinctions between the areas impacted by the Hermit's Peak/Calf Canyon Fire. This rule finalizes the IFR, with changes in response to public comments received on the IFR.

III. Discussion of Public Comments and FEMA's Responses

A. Summary of Public Comments

The public comment period on the IFR closed on January 13, 2023, and FEMA received 190 germane written comments.[9] FEMA hosted six public meetings on the IFR and received 103 germane comments from those public meetings.[10] FEMA also hosted a meeting with the State of New Mexico's Department of Homeland Security and Emergency Management and supporting contract staff, and received comments during that meeting.[11] Commenters included individuals, State and local government entities, congressional representatives, associations, law firms, and non-profit organizations. Some commenters appreciated FEMA's effort to publish the IFR in a timely manner, arrange public meetings to listen to concerns in-person, and launch the claims process. Most commenters offered recommendations for changes to the IFR. FEMA describes the specific revisions to the Final Rule and addresses the specific concerns of commenters below.

B. Differences Between the Hermit's Peak/Calf Canyon Fire and the Cerro Grande Fire

Some commenters recommended changes to the IFR based on the distinctions between the Cerro Grande and Hermit's Peak/Calf Canyon Fires.

Comment: Several commenters stated distinctions between the two areas where the fires were located. As one commenter stated, the Hermit's Peak/Calf Canyon Fire ''destroyed significant forested private lands, communities, acequias, ranches, and farms.'' Another commenter stated that the Cerro Grande Fire ''burned a mostly urban environment of high-value homes on mostly small tracts of land'' while the Hermit's Peak/Calf Canyon Fire burned ''mostly rural land with relatively fewer and lower value structures.''

FEMA Response: FEMA agrees that the challenges facing the communities and claimants impacted by the Hermit's Peak/Calf Canyon Fire are distinct and that the IFR should be revised to better reflect those distinctions. The Cerro Grande Fire burned approximately 47,000 forested acres, causing $1 billion in property damage with over 280 homes destroyed or damaged and 40 laboratory structures burned.[12] In contrast, the Hermit's Peak/Calf Canyon Fire burned more than 340,000 acres, just under 200,000 of which were privately owned, and destroyed at least 160 homes and over 900 structures.[13] According to the 2020 Census, Los Alamos County's population density is 178 people per square mile compared to 5.8 people per square mile in San Miguel County and 2.2 people per square mile in Mora County.[14] In the Socioeconomic Assessment of the Santa Fe National Forest, provided to the U.S. Forest Service by the University of New Mexico, Bureau of Business and Economic Research, approximately one third of privately held land within the Santa Fe National Forest is located in San Miguel County.[15] Given the Hermit's Peak/Calf Canyon Fire's scope and the type of land impacted by that fire, FEMA is proposing changes to sections 296.4, 296.21(c)(2), 296.21(c)(3)(ii), 296.21(e)(5), 296.31(a), and 296.31(c)(3) while adding § 296.21(c)(5) to address the concerns raised that are unique to those communities. Changes to each of these sections is further described below.

Comment: Commenters reiterated the communities impacted by the Hermit's Peak/Calf Canyon Fire also had different economic and cultural practices. One commenter stated that ''FEMA is totally unfamiliar with how land management, including use of resources is conducted in an area where descendants of an individual land grant have access to and use of resources within that grant.'' The commenter went on to note that the Cerro Grande Fire impacted a part of the State that ''has little in common with the cultural and economic practices in this area.'' As one commenter stated, ''Individuals and businesses relied on

[6] *See* Bill Gabbert, ''Calf Canyon/Hermits Peak Fire grows to more than 120,000 acres,'' Wildfire Today, May 2, 2022 found at *https://wildfiretoday.com/2002/05/02/calf-canyon-hermits-peak-fire-grows-to-more-than-120000-acres/* (last accessed Sept. 15, 2022). *See also* Bryan Pietsch and Jason Samenow, ''New Mexico blaze is now largest wildfire in state history,'' The Washington Post, May 17, 2022, found at *https://www.washingtonpost.com/nation/2022/05/17/calf-canyon-hermits-peak-fire-new-mexico/* (last accessed July 27, 2023).

[7] 87 FR 33808 (June 3, 2022).

[8] ''Hermits Peak/Calf Canyon Fire 100 percent contained, fire officials say,'' The New Mexican, Aug. 21, 2022 found at *https://www.santafenewmexican.com/news/local_news/hermits-peak-calf-canyon-fire-100-percent-contained-fire-officials-say/articles_5ac054fc-21a1-11ed-9401-134e852ee0a8.html* (last accessed July 5, 2023).

[9] FEMA received three comments that did not address the Interim Final Rule or the claims process: One commenter asked where the regulation could be read, and FEMA contacted the commenter to provide this information; another commenter shared a poem to reflect their feelings during the holiday season after the Fire; one comment from a law firm was incomplete without attachments referenced.

[10] FEMA also received an inquiry on the status of another FEMA application at a public meeting. A commenter offered their services to assist with claims, filling out applications for Federal agencies, internet use, mental health assistance, etc. at two public meetings. Another commenter from the same organization also offered services during a public meeting.

[11] Transcripts of that meeting have been posted to the public docket at *https://www.regulations.gov/docket/FEMA-2022-0037*.

[12] Bill Gabbert, ''Cerro Grande fire, 10 years ago today,'' May 10, 2010 found at *https://wildfiretoday.com/2010/05/10/cerro-grande-fire-10-years-ago-today/* (last accessed July 5,, 2023).

[13] *See* New Mexico Forest and Watershed Restoration Institute, ''Hermit's Peak and Calf Canyon Fire: The largest wildfire in New Mexico's recorded history and its lasting impacts'' Aug. 24, 2022, found at *https://storymaps.arcgis.com/stories/d48e2171175f4aa4b5613c2d11875653* (last accessed Mar. 3, 2023).

[14] *See https://www.census.gov/library/stories/state-by-state/new-mexico-population-change-between-census-decade.html* (last accessed July 5, 2023).

[15] University of New Mexico Bureau of Business and Economic Research, ''Socioeconomic Assessment of the Santa Fe National Forest,'' August 2007 at pg. 5, found at *https://www.fs.usda.gov/internet/FSE_DOCUMENTS/fsbdev3_021243.pdf* (last accessed Mar. 3, 2023).

the forests not just for subsistence, but also for their annual income for themselves and others in the community.'' Another commenter stated, ''The use of the land's timber in small (family) enterprises is one of the keys to the livelihoods of this area. Another is the small farming enterprises consisting of small orchards, raising hay, cattle, and horses. This is not a region of city life and landscaping, but is rural, with a deep heritage of independent living and family business.''

FEMA Response: FEMA agrees that the losses facing the communities and claimants impacted by the Hermit's Peak/Calf Canyon Fire are distinct and that the IFR should be revised to better reflect those distinctions. The Act requires FEMA to compensate claimants for injuries resulting from the Fire and the injuries suffered by claimants in this community are distinct from those suffered in Cerro Grande. Specifically, FEMA notes the economic differences between the two impacted communities resulted in different losses within each community. Los Alamos County has an economy ''almost entirely composed of government, retail, and service sector jobs. These three sectors combined make up more than 90 percent of the county's employment . . . Los Alamos is somewhat unique in its lack of farming and other 'core' industry sectors such as construction and manufacturing . . . Mora County is by far the smallest county in the region, in terms of size as well as economy . . . San Miguel County is fairly small, and farm employment makes up a larger portion of overall employment there than in any other county in the region except Rio Arriba. San Miguel and Mora County contain minor, though substantial, sections of the Santa Fe N[ational] F[orest]. These two counties, as the smaller and poorer economies of the region, likely rely more heavily on the benefits of the forest as a provider of primary products such as fuel wood and food, as well as land for ranching and logging.'' [16] The communities impacted by the Hermit's Peak/Calf Canyon Fire rely much more on the land for their economic viability than the Los Alamos County community that was impacted by the Cerro Grande Fire. Additionally, the population per square mile in the impacted communities demonstrates a much higher density in Los Alamos County compared to Mora and San Miguel Counties and requiring FEMA to consider the differences in the residential areas impacted by the two fires.[17] To fully implement the intent of the Act, FEMA must consider these differences between the impacted communities and address the specific injuries suffered by the Hermit's Peak/Calf Canyon Fire communities around the use of the land in those communities. FEMA is proposing changes to §§ 296.4, 296.21(c)(2), 296.21(c)(3)(ii), 296.21(e)(5), 296.31(a), and 296.35 while adding § 296.21(c)(5) to address the concerns raised that are unique to these communities. Changes to each of these sections are further described below.

Comment: Commenters stated another distinction between those impacted by the Hermit's Peak/Calf Canyon Fire and those impacted by the Cerro Grande Fire included the number of claimants that are insured, stating more claimants in the Cerro Grande Fire were insured than in the Hermit's Peak/Calf Canyon Fire.

FEMA Response: FEMA agrees that the challenges facing the claimants impacted by the Hermit's Peak/Calf Canyon Fire are distinct and that the IFR should be revised to better reflect those distinctions. Specifically, FEMA is proposing changes to sections 296.21(c)(2), 296.21(e)(5), 296.31(a), and 296.35 while adding § 296.21(c)(5) to address the concerns raised regarding the number of uninsured claimants impacted by the fire.

Comment: A commenter suggested FEMA look at other wildfires beyond Cerro Grande, including the recent California wildfire involving a utility company.

FEMA Response: FEMA appreciates the suggestion and has reviewed some of the best practices associated with the California compensation process referenced by the commenter. That process, however, involved a bankruptcy settlement of a private corporation under California law. FEMA is required to follow the statutory framework provided in the Act. While the Claims Office is reviewing some of the best practices from the California incident, that incident and the compensation process implemented to compensate those injured thereby are factually and legally too distinct from the Act's requirements to be considered a full template for implementation in regulation.

C. Comments on §§ 296.1 and 296.3, the Rule's Purpose and Information

Comment: FEMA received comments stating the IFR's purpose should be revised to reflect the Act's purpose language. Specifically, a commenter wrote ''The Hermit's Peak/Calf Canyon Fire Assistance Act provides one of the purposes of the Act is 'to compensate victims of the Hermit's Peak/Calf Canyon Fire, for injuries resulting from the fire.' . . . FEMA's [I]nterim [F]inal [R]ule's current phrase 'suffered from the Hermit's Peak/Calf Canyon Fire' (emphasis added) could result in limiting allowable losses to solely fire damages, in violation of the Act.''

FEMA's Response: FEMA agrees that the Act's purpose as stated in section 102(b)(1) is to compensate victims for ''injuries resulting from the Fire'' (emphasis added) and is amending § 296.1 to state that the Claims Office will receive, evaluate, process, and pay actual compensatory damages for injuries resulting from the Hermit's Peak/Calf Canyon Fire. This technical edit provides consistency with the language of the Act.

Comment: Some commenters requested FEMA change the purpose of the rule in § 296.1 to include flood damages, as well as throughout the rest of the rule.

FEMA Response: The Final Rule language as revised in § 296.1 as explained above is sufficiently broad to encompass a range of damages claimants may have suffered, including flood and flood-related damages. Further, the definition of ''injured person'' includes injuries ''resulting from the Hermit's Peak/Calf Canyon Fire'' and is sufficiently broad to encompass flooding, mudflow, mold, and debris flow, as well as other types of injuries that may result from the Fire.

Comment: One commenter suggested that FEMA include specific reference to mitigation efforts in the rule's purpose.

FEMA Response: Section 296.1 does not require any edits to incorporate mitigation efforts into the rule. The purposes of the Act are to compensate Fire victims for injuries resulting from the Fire and the expeditious consideration and settlement of claims for those injuries. Further, the Act requires FEMA to promulgate a regulation ''for the processing and payment of claims under the Act.'' Consistent with the Act, FEMA's Final Rule states the purpose of the regulation is to ''establish the Office of Hermit's Peak/Calf Canyon Fire Claims ('Claims Office') to receive, evaluate, process,

[16] University of New Mexico Bureau of Business and Economic Research, ''Socioeconomic Assessment of the Santa Fe National Forest,'' August 2007 at pgs. 78–79 and 89, found at *https://www.fs.usda.gov/internet/FSE_DOCUMENTS/fsbdev3_021243.pdf* (last accessed Mar. 3, 2023).

[17] The population per square mile in 2020 was 178 in Los Alamos County, 5.8 in San Miguel County, and 2.2 in Mora County. *See* U.S. Census Quick Facts—Los Alamos County, New Mexico found at *https://www.census.gov/quickfacts/losalamoscountynewmexico, https://www.census.gov/quickfacts/sanmiguelcountynewmexico,* and *https://www.census.gov/quickfacts/moracountynewmexico* (last accessed July 5, 2023).

and pay actual compensatory damages for injuries resulting from the Hermit's Peak/Calf Canyon Fire.'' The Act authorizes FEMA to compensate claimants for the ''costs of reasonable efforts, as determined by the Administrator, to reduce the risk of wildfire, flood, or other natural disaster in the counties impacted by the Hermit's Peak/Calf Canyon Fire to risk levels prevailing in those counties before the Hermit's Peak/Calf Canyon Fire,'' and FEMA details this compensation in § 296.21(e)(5). Section 296.1 does not require revision to allow for compensation for eligible risk reduction measures.

Comment: Some commenters suggested FEMA amend the information and assistance section to incorporate details regarding the Claims Office addresses and phone number. One commenter suggested FEMA allow for applications, correspondence, and supporting documentation to be exchanged by postal mail. This commenter also recommended FEMA create centralized locations where northern New Mexicans can physically go to access the electronic application and receive assistance in filling out the applications in multiple languages so that the application and supporting documentation can be timely submitted.

FEMA Response: FEMA appreciates these suggestions and plans to provide further details regarding the Claims Office operation and opportunities for claimants to obtain assistance online at *https://www.fema/gov/hermits-peak* as explained in the regulation. Because FEMA wants to continue adapting to claimants' needs in this process, it is best to direct claimants to the website in the regulations for the latest information available on the process. FEMA will continue to provide outreach efforts to the community in addition to posting at *https://www.fema.gov/hermits-peak.*

D. Comments on § 296.4 Definitions

Some commenters suggested FEMA modify the definitions provided in the IFR to better reflect the unique challenges presented by the Hermit's Peak/Calf Canyon Fire.

Comment: One commenter recommended FEMA amend the definition of ''Authorized Official's Determination'' to include determinations by mail and electronically.

FEMA Response: FEMA does not believe edits to the regulatory text are required as ''mailed'' can incorporate both physical and electronic mailing. FEMA anticipates that, where applicants have provided contact information to allow for electronic mailing of this determination, the Agency will provide the Authorized Official's determination both by mail and electronically. However, there may be instances where the claimant has not provided contact information to allow for electronic mailing and thus FEMA could only provide the determination by physical mail. To ensure flexibility in these instances, FEMA is not amending the regulatory language.

Comment: One commenter also recommended adding a definition of a ''Claims Navigator'' to the regulation, providing suggestions on how these Navigators would work with claimants in the process.

FEMA Response: FEMA does not believe this change is needed. The Agency is not referencing this term in the regulatory text. Terms not used in the regulatory text do not need to be defined in the definitions section of the regulation.[18]

Comment: A commenter suggested revision to the definition of ''good cause'' to include ''or any circumstance where the Administrator determines that good cause would further the mission of the Claims Office to pay compensatory damages for injuries suffered from the Hermit's Peak/Calf Canyon Fire.''

FEMA Response: FEMA disagrees with the comments that the additional language in the definition of ''good cause'' is required. The Act authorizes the Director of the Claims Office to assume the duties of the Administrator.[19] Adding language to the definition of ''good cause'' to allow the Administrator to make a good cause determination would result in a redundancy as the IFR language provides the Director discretion to make good cause determinations. As written, the IFR provides for the use of good cause in circumstances regarding deadlines or supplementing and reopening claims.

Comment: Some commenters also requested the definition of ''good cause'' be amended to include ''or where damage from post-fire flooding is suffered by the claimant after filing a claim.''

FEMA Response: FEMA disagrees that the ''good cause'' definition must be revised to consider flooding damage after filing a claim. As explained above, the definition of ''injured person'' includes injuries ''resulting from the Hermit's Peak/Calf Canyon Fire'' and is broad enough to encompass flooding, mudflow, mold, and debris flow, as well as other types of injuries that may be considered as a result of the Fire. The current language allows for good cause ''where damage is found after a claim has been submitted'' and this language, read in conjunction with the definition of ''injured person'' addresses concerns regarding whether such damage could constitute good cause to supplement or reopen a claim.

Comment: One commenter raised concerns that ''good cause'' was too subjective.

FEMA Response: The application of a good cause definition requires use of discretion that by nature contains some subjectivity that cannot be fully eliminated from the determination.

Comment: A commenter recommended FEMA change the definition of the ''Hermit's Peak/Calf Canyon Fire'' to add ''flooding, mudflow, mold, and debris flow resulting from the two fires.'' The commenter requested FEMA specifically reference flooding, mudflow, mold, and debris flow as a cause of injury and as a damage that can be compensated.

FEMA Response: FEMA disagrees that this change is needed to the definition of ''Hermit's Peak/Calf Canyon Fire'' to compensate claimants for these types of injuries resulting from the Fire. The definition of ''injured person'' includes injuries ''resulting from the Hermit's Peak/Calf Canyon Fire'' and is broad enough to encompass flooding, mudflow, mold, and debris flow, as well as other types of injuries that may be considered as a result of the Fire. Adding this language may narrow the scope of damages an injured person may seek to claim, and FEMA prefers to retain the current definition of the Fire while allowing claimants suffering injuries resulting from the Fire be allowed to present their claims.

Comment: Three commenters recommended that FEMA modify the definition of household ''to clarify that it does not exclude the claims of owners that did not live at the property on a continuous basis'' and that rather, these individuals should be included. While including them in the definition of household, the commenters recommended that these individuals ''not be compensated for financial damages already paid to the primary resident.'' Rather, the individuals should be ''eligible for compensation based on their individual loss.''

FEMA Response: FEMA is not amending the definition of ''household'' as requested by these comments. Claimants can file a claim as a

[18] *See* ''Writing Resources for Federal Agencies, Regulatory Drafting Guide, Definitions'' found at *https://www.archives.gov/federal-register/write/legal-docs/definitions.html* (last accessed Feb. 16, 2023).

[19] Section 103, Definition of ''Administrator'' (1)(B).

household or individually in these circumstances and the Claims Office will accept the claim for review. Nothing in the current definition prohibits claims filing either as a household or individually.

Comment: A commenter suggested the definition of ''injured person'' be modified to include ''acequia, land grant'' immediately after ''school district'' in the definition.

FEMA Response: FEMA does not believe this amendment is required to cover the entities referenced. Rather, these entities are covered under the current definition as an ''other non-Federal entity that suffered injury resulting from the Hermit's Peak/Calf Canyon Fire.''

Comment: Another commenter stated FEMA should amend the definition of ''injured person'' to include flooding, mudflow, mold, and debris flow as a cause of injury and damage that can be compensated.

FEMA Response: FEMA disagrees that this edit is required to the regulatory text. The current definition provides for these types of injuries, as well as other types of injuries that may be considered an injury resulting from the Fire. Adding this language may narrow the scope of damages an injured person may seek to claim. The proposed language also conflates injuries from flooding, mudflow, mold, and debris irrespective of their connection with the Fire with injuries from flooding, mudflow, mold, and debris that are connected to the Fire. Only the latter are compensable under the Act. Therefore, FEMA prefers to retain the current definition of the Fire, which will allow claimants suffering injuries resulting from the Fire to present their claims.

Comment: Commenters wrote that nonprofit organizations should be considered ''injured person.''

FEMA Response: The current definition of ''injured person'' includes an ''other non-Federal entity that suffered injury resulting from the Hermit's Peak/Calf Canyon Fire'' and that terminology encompasses non-profit organizations. FEMA understands non-profit organizations may have suffered injuries resulting from the Fire, and FEMA believes the current definition sufficiently encompasses all types of for-profit and non-profit entities. FEMA's website at *https://www.fema.gov/hermits-peak* provides more information explaining the regulatory text to help claimants better understand who is considered an injured person under the Act.

Comment: Some commenters suggested that FEMA amend the definition of ''subsistence resources'' to include ''and other natural resource'' to reflect the types of resources gathered and the broad range of subsistence use practices of both acequia-served communities, as well as Tribal and Pueblo sovereigns.

FEMA Response: Consistent with these suggestions, FEMA is adding ''or other natural resource'' to the definition of ''subsistence resources'' to reflect the specific needs of the impacted communities. As explained above, the Hermit's Peak/Calf Canyon Fire impacted an area that is economically and culturally distinct from the communities impacted by the Cerro Grande Fire. This change reflects FEMA's understanding that other natural resources beyond firewood may be gathered for subsistence purposes.

E. Comments on the Claims Process Generally

Commenters offered comments and suggestions on a wide range of issues on the claims process. Commenters offered suggestions on ways to streamline the process and to make the process more accessible to the impacted communities. Commenters wrote of experiences with FEMA and other Federal agencies, stating how FEMA and other agencies handled their cases under other programs.

Comment: One commenter stated, ''Nothing in my experience with F[EMA] so far gives me faith that you are on my side or have my best interests at heart.'' The comment continued ''So far communication between government entities and organizations has been nonexistent or completely dysfunctional . . . I need to have more confidence in your ability to work with other entities, or even communicate within F[EMA].'' Commenters provided suggestions on hiring personnel for the Claims Office, including the Claims Office Director, Claims Navigators, Claims Reviewers, and other staff, and how the agency should train the staff. Commenters also stated their anger, frustration, and mistrust of the process and requested to be treated with respect and compassion. One commenter wrote ''Cataloging every single thing we lost in the fire, correlating it with a receipt, and looking up how much it will currently cost to replace it has been a full-time job for a while now, and extremely difficult emotionally.'' Another commenter wrote about a recent experience with FEMA stating ''it did nothing to build trust or confidence in FEMA. The end effect has been the exact opposite. And in turn, I have since prepared myself to expect more of this inappropriate treatment from FEMA in all future interactions.'' A different commenter wrote ''HPFAA administrators and claims reviewers must handle all injured victim cases as though this injury to their lives and livelihoods is a direct result of a felony act of arson deliberately committed against them all. Government employees and contractors responsible for this conflagration will never truly be held accountable to receive due punishment for actions which will never even 'officially' be considered gross incompetence, but that doesn't make the end result any less destructive than an act of intentional criminal arson would be.'' One commenter stated ''I want you to remember that this is a fire caused by the [F]ederal government and that we are the victims of this. Please treat us with respect.''

FEMA Response: FEMA acknowledges the unique challenges faced by the communities impacted by the Fire and how challenging it has been for claimants to recover. FEMA and the Federal government provided a range of existing programs to those impacted by the Fire, many of which were not designed to meet the needs of the impacted communities, given the extent of the injuries suffered as a result of the Fire. Those programs were not designed to provide full financial compensation to those injured by the Fire. For example, the Individuals and Households Program (IHP) provides financial and direct services to eligible individuals and households affected by a disaster, who have uninsured or under-insured necessary expenses and serious needs. IHP is not a substitute for insurance and cannot fully compensate for all losses caused by a disaster; rather, that assistance is intended to meet basic needs and supplement disaster recovery efforts.[20] As disaster assistance programs are not designed to fully compensate those impacted by disasters, some applicants in these communities are frustrated with and uncertain about, the Federal government's ability to assist them. The Act's commitment to compensate victims through the Claims Office process allows FEMA to directly provide claimants with compensation to better assist claimants and communities in more fully recovering from this devastating Fire. The Agency is committed to working with claimants and communities to ensure the Claims Office meets their needs and compensates claimants for the damages resulting from the Fire. The Claims Office hired Claims Navigators from the community to guide claimants through

[20] *https://www.fema.gov/assistance/individual/program* (last accessed Mar. 3, 2023).

the application process, focusing on ensuring that claimants understand the process of applying for compensation, what compensation is available for their losses, and what documentation is needed to obtain this compensation.

The Claims Office operates independently of FEMA's other programs, and it provides a great deal more flexibility in the process of applying for and receiving compensation than these more traditional grant programs. Unlike FEMA's Individual Assistance and Public Assistance, which provide disaster assistance to individuals and households impacted by declared disasters, the Claims Office is not subject to any caps on the amount of assistance it can provide. Unlike FEMA's Public Assistance Program, which provides grants to States, Federally recognized Tribal governments, U.S. territories, local governments, and certain private non-profit (PNP) organizations, the Claims Office does not have any cost share requirements, and there are no conditions placed on receipt of the compensation.

1. Comments on the Claims Office Administrator

Comment: Commenters made specific requests regarding the appointment of the Claims Office Administrator. Commenters requested that an Independent Claims Administrator be appointed. One commenter stated that the broad ''make whole'' compensation approach of the Act was different from FEMA's normal disaster relief operation and Congress recognized this by providing for the appointment of an Independent Claims Administrator in the Act. This commenter stated the number of potential claimants and broad scope of the harm they have suffered required the appointment of an Independent Claims Administrator with experience in 'make whole' compensation processes. A different commenter wrote that these claims processes are extremely complex, with many moving parts and unique issues, and would be best overseen by a claims manager familiar with fire-related claims processes. Another commenter suggested an independent trustee or claim administrator be appointed to manage and stated FEMA should not be in charge of administration.

FEMA Response: Section 104(a)(3) gives the Administrator the option to appoint an Independent Claims Manager to head the Claims Office. In her discretion, the Administrator selected a Claims Office Director with over 15 years of experience building and managing Federal programs to start up the Claims Office and did not opt to appoint an Independent Claims Manager. FEMA understands the commenters' desire to have an Independent Claims Manager appointed. Given the short timelines that the Agency had to publish the IFR and begin processing claims, FEMA determined it was both efficient and effective to select a candidate with extensive experience in government assistance programs to lead the Claims Office. FEMA also understands concerns that other FEMA programs do not operate in the same way in which the Act requires the Claims Office to operate. However, FEMA was tasked with the implementation of the Act, including operation of the Claims Office for this Fire, and further has prior experience in operating a Claims Office in New Mexico for the Cerro Grande Fire in 2000. FEMA recognizes the distinctions between the two fires, but also believes the Agency can build on best practices and incorporate principles of equity, as well as lessons learned from the Cerro Grande Claims Office, to implement a Claims Office for the Hermit's Peak/Calf Canyon Fire Assistance Act that will acknowledge the differences between the two fires and best serve the claimants and communities impacted by the Hermit's Peak/Calf Canyon Fire.

Comment: In addition to requesting an independent claims administrator, several commenters requested the claims administrator be a New Mexico attorney and/or retired judge.

FEMA Response: As explained above, the Administrator has exercised her discretion and selected the Director of the Claims Office. The Director has extensive experience building and managing Federal assistance programs and will lead the Claims Office in these nascent stages. FEMA appreciates commenters' concerns that the Claims Office be led by someone with familiarity with New Mexico law, as well as the unique political, economic, and cultural institutions of the impacted communities. FEMA has engaged in an extensive effort to recruit locally for positions to support the processing of claims and provision of compensation to claimants impacted by the Fire to ensure these specific concerns are addressed. FEMA believes that local hiring at all other levels of the Claims Office will better serve to meet the needs of claimants and communities rather than a single hire at the Director level. Additionally, FEMA is making changes in the Final Rule to better reflect the needs of the impacted communities.

Comment: One commenter suggested another commenter be appointed as the Independent Claims Office Administrator.

FEMA Response: As explained above, the Administrator has exercised her discretion to hire the Director of the Claims Office with extensive experience building and managing Federal programs to lead the Claims Office.

2. Comments on the Claims Office

Commenters offered suggestions on how to staff and manage the Claims Office.

Comment: Commenters suggested that FEMA hire members of the local community to increase trust in the claims process. Some commenters stated the importance of hiring New Mexicans familiar with acequias.

FEMA Response: FEMA agrees with these comments. As explained above, FEMA has engaged in an extensive effort to recruit locally for positions to support the processing of claims and provision of compensation to claimants impacted by the Fire to ensure these specific concerns are addressed.[21] FEMA believes that hiring local applicants at all other levels of the Claims Office will better serve to meet the needs of claimants and communities by helping to ensure the Claims Office is staffed with individuals familiar with the specific needs of the communities impacted by the Fire. As of April 10, 2023, almost 70 percent of the permanent Claims Office team are local staff.[22] Local staff work out of Claims Offices in Santa Fe, Las Vegas, and Mora, New Mexico, and serve in multiple capacities ranging from the Deputy Director, Advocate and Claims Navigators, to external affairs and facility support. Additionally, FEMA is making changes in the Final Rule to better reflect the needs of the impacted communities.

Comment: A commenter suggested FEMA stay alert to favoritism ''infiltrating the ranks of claims reviewers hired from the local population.''

FEMA Response: FEMA appreciates the commenter's concerns regarding favoritism. Federal employees are held to certain basic obligations of public

[21] FEMA hosted a Hiring Fair on January 10, 2023, in Mora, NM and provided Federal Resume Writing webinars on December 29, 2022, and January 3, 2023. Details regarding the available positions were also posted to *https://www.fema.gov/fact-sheet/hermits-peakcalf-canyon-claims-office-now-hiring* (last accessed Feb. 16, 2023).

[22] FEMA notes that given the permanent positions in the Claims Office are located in Mora, Las Vegas, and Santa Fe, New Mexico, most applicants seeking these positions were local.

service that require employees to ''act impartially and not give preferential treatment to any private organization or individual.'' [23] As part of the hiring and onboarding process, these obligations are explained, and training is provided to ensure employees understand the obligations of public service. FEMA also is coordinating with the Department of Homeland Security Office of Inspector General and the FEMA Fraud unit to ensure vigilant oversight.

Comment: Some commenters suggested FEMA hire a specific contractor to assist the manager and FEMA to process claims.

FEMA Response: Consistent with the Federal Acquisition Regulation,[24] FEMA awarded multiple competitive contracts to provide support services to the Claims Office. Services include consulting, claims processing, systems analysis, operation, and data analysis support. Each contractor shall, to the maximum extent possible, create opportunities for the utilization of local small businesses, including the utilizing of businesses from underserved communities and develop a plan to utilize local firms and/or hire local residents.

Comment: One commenter suggested FEMA hire an experienced claims processor that can start handling claims immediately stating FEMA would need to figure out how to handle claims first.

FEMA Response: The Claims Office engaged in a competitive hiring action to hire an experienced Claims Chief. This position oversees the claims process from the completion of the Notice of Loss to the final payout on the claim. The Claims Office also hired a number of experienced contract claims examiners with insurance adjusting experience to review and make recommendations on claims. The Claims Chief oversees Claims Reviewers at the main Claims Office, as well as at least three public-facing claims offices in Mora, San Miguel, and Las Vegas, New Mexico.

Comment: A commenter suggested FEMA take the time that is required to provide substantial training for newly hired staff.

FEMA Response: FEMA agrees that training will be critical for all newly hired staff for the Claims Office. FEMA intends to provide standard onboarding training for all new employees, as well as specialized training for all Claims Office employees to fully understand the claims process and the Act's requirements. Training includes roles and responsibilities, claims processes and operations, cultural awareness, statutes and regulations, customer service and customer experience, risk reduction practices, coordination with State agencies, and other related trainings.

Comment: One commenter provided a recent experience with a field inspector that inspected their homestead for potential disaster relief and stated that ''the person you chose to do this inspection is an incompetent at such work as this.'' The commenter suggested FEMA be very careful in their hiring practices and contracting of third parties for claims office operations to prevent ''such outrageous incidents'' as described in their experience.

FEMA Response: FEMA appreciates the commenter's honesty and willingness to share their experience. FEMA intends to staff the Claims Office with local hires that can better understand the unique political, economic, and cultural institutions of the communities impacted by the Fire, as well as claimants seeking compensation under the Act, in addition to experienced contract employees. As explained above, FEMA plans to provide training for all Claims Office employees to fully understand the claims process and the Act's requirements.

Comment: One commenter provided a memorandum with a seven-step process on how the Claims Office can develop a mindset to get to yes and serve clients effectively. This individual also submitted comments on the culture of the Claims Office. The comment ''focus[ed] on a seven-step plan to help this program transform its approach as it processes the regulation comments, from a denial-based approach to a positive, effective process for those it is meant to serve.''

FEMA Response: FEMA appreciates the commenter's detailed suggestions. As pointed out by the commenter, the Claims Office process will be different from FEMA's disaster relief programs, and it will be important for employees of the Claims Office to acknowledge and embrace those differences in process and implementation efforts. Based on the comments received, FEMA established a set of guiding principles for the Claims Office culture needed to deliver this mission.[25] FEMA will work to ensure a full understanding by the entire Claims Office staff of the claims process and the Act's requirements and the importance of focusing on the needs of claimants and communities impacted by the Fire. With that in mind, the Claims Office provides each claimant with an assigned Navigator. The Claims Navigator works directly with the claimant and Claims Reviewers, asking questions, helping claimants obtain documentation, helping claimants complete the Notice of Loss and Proof of Loss, and shepherding the claimant through the process to better ensure that the claimant is fully compensated for their loss.

The Claims Office has also established an independent Claims Office Advocate. The Claims Office Advocate responds to, manages, and recommends solutions to issues with the process itself, whether those issues be with the Claims Navigators and Claims Reviewers, the claims process itself, or how the process is being implemented. The Claims Office Advocate is responsible for identifying issues with the claims process and addressing those issues on the claimant's behalf. The Claims Office Advocate serves as an additional resource to claimants by helping to improve their understanding of the claims process and providing guidance about the steps in that process and the associated requirements.

The Claims Office Advocate also identifies issues, risks, and opportunities for improvement and develops recommendations for claims process enhancements that will address these and deliver a better, fairer claims process that is accessible to all claimants. While the Claims Navigators and Claims Reviewers report to a Team Lead, the Advocate reports directly to the Director of the Claims Office. As such, the Claims Office Advocate has a direct line of communication with the Director of the Claims Office, and the Advocate is positioned to advocate on behalf of claimants and to make recommendations for enhancements to the claims process.

Comment: One commenter suggested that State Case Managers be integrated into the program and trained as Navigators.

FEMA Response: FEMA anticipates that Claims Navigators will provide the assistance envisioned by the commenter and additional staffing outside of the Claims Office will not be required. However, the Claims Office is implementing procedures to coordinate with the State of New Mexico as appropriate.

Comment: One commenter asked how many claims would be covered by each Claims Reviewer.

FEMA Response: FEMA does not have an estimate on the volume of claims per Claims Reviewer at this time. FEMA anticipates Claims Reviewers will have a workload balance reflective of both

[23] 5 CFR 2635.101(b)(8).

[24] *See https://www.acquisition.gov/browse/index/far.*

[25] *See https://www.fema.gov/hermits-peak.*

claim volume and claim complexity to ensure claimants' needs are effectively met by the Claims Office.

3. Comments on the Use of Funds

Comment: Commenters sought clarification on how FEMA would use the funds provided by the Act between administrative costs and claims payments to claimants. Some commenters wrote about experiences with administrative costs with one commenter stating that ''to provide a trailer for a family it can cost 300k with much of this money going to pay FEMA workers and for admin costs.'' Commenters asked what the administrative costs would be and how much of the available appropriated funding would go to administrative costs and how much funding would go to claimants. One commenter wrote ''how much of the available funds will go to administration and how much will go to victims?''. Another commenter stated, ''I wonder what the administrative costs are if they are going to come out of this $2.5 billion of it is gone before any money goes to anybody in this room and maybe that's necessary.''

FEMA Response: Section 104(a)(2)(C)(i) of the Act states that ''The Office shall be funded from funds made available to the Administrator for carrying out this section.'' FEMA is required to use the funding provided under the Act for the administrative costs to run the Claims Office. FEMA has a general obligation to spend Federal funds wisely and Congress required FEMA to provide quarterly reports to the Committee on Appropriations of the Senate and House of Representatives on the obligations and expenditures of the funds made available under the Act.[26] Congress also directed a portion of the funding to the Department of Homeland Security Inspector General to fund program oversight. FEMA intends to comply with this Congressional reporting requirement regarding the use of funding under the Act. This transparency will help allay the commenters' concerns about the total administrative costs for the Claims Office.

Comment: Commenters suggested FEMA provide transparency in how the funds appropriated under the Act were spent. One commenter suggested that information about how the funds were being spent be shared publicly in real time via an online dashboard. Such a tool would help prevent internal fraud and help FEMA identify external fraud and program favoritism while also allowing everyone the ability to be alerted to something suspicious happening with funds. Another commenter agreed, recommending that FEMA allow the public to review the overall project budget and other transparency related to fiscal accountability. One commenter wrote that ''FEMA should provide full transparency of cost, budget, expenditures, etc. including administrative costs, operational costs, total payouts, total denials, etc. to not only to the [Department of Homeland Security's Office of the Inspector General] but also to the State—without violation of the Privacy Act.''

FEMA Response: As explained above, Congress required FEMA to provide quarterly reports to the Committee on Appropriations of the Senate and House of Representatives on the obligations and expenditures of the funds made available under the Act.[27] FEMA intends to comply with this Congressional reporting requirement regarding the use of funding under the Act. This transparency will help allay the commenters' concerns about the total administrative costs for the Claims Office. In addition, the Claims Office Advocate will be creating easily understandable reports with program metrics to be shared on *https://www.fema.gov/hermits-peak* and through other communications channels.

Comment: Commenters also provided recommendations on ways to use and/or distribute the funding appropriated. One commenter suggested funding be dedicated to the reintroduction of beavers to the region to help repair the land.

FEMA Response: FEMA does not have the authority under the Act to dedicate funding as recommended by the commenter as claimants must submit claims demonstrating their injuries resulting from the Fire to obtain compensation. Funding for activities like reintroduction of beavers may be eligible as a nature-based solution to reduce the heightened risk of wildfire, flood, or other natural disaster and claimants seeking compensation must demonstrate that this claim is clearly tied to an increased risk that resulted from the Fires.

Comment: A commenter wrote suggesting that FEMA ''create a grid system on a map with a baseline payment scale using at least 1.5 billion dollars to be distributed equally where the [F]ire/flooding/damaged areas are the epicenter with the highest baseline ($250,000) payment and the areas with lesser damage (such as minimal property damage, *i.e.,* smoke damage or food loss) still receive baseline funding at a lesser significant (over $2,500) amount.'' The commenter wrote that none of the funding provided should be taxable income. The commenter stated this proposal is to ''ensure that all landowners in the affected areas get a baseline of funding.'' The commenter also suggested ''[$]2 billion in funding go to the public entities to prevent future disasters such as monies allocated to public safety.'' The commenter suggested ''another [$]1 billion to public utility infrastructure and public communications.'' The commenter wrote that the rest of the funding could be used for ''paying out and making individuals with losses whole and covering gaps missed in my proposed comments above.''

FEMA Response: FEMA is authorized under the Act to pay claimants for actual compensatory damages for injuries resulting from the Fire.[28] FEMA does not have the authority under the Act to establish the type of funding system recommended by the commenter as claimants must submit claims demonstrating their injuries resulting from the Fire to obtain compensation. FEMA further did not receive sufficient funding under the Act to implement the payment plan proposed by the commenter. FEMA notes that the Act at section 104((h)(4) provides that the value of compensation provided under the Act ''shall not be considered income or resources for any purpose under any Federal, State, or local laws, including laws relating to taxation . . .'' FEMA cannot advise individual claimants on their individual tax obligations, however, and encourages claimants to consult with their tax advisers if they have questions related to tax obligations.

Comment: A commenter asked whether the funding provided under the Act covered the costs for the matching funds requirement waiver in section 104(k) of the Act or if the funding under the Act was exclusively reserved for claims.

FEMA Response: The Act does not authorize FEMA to utilize the funds appropriated to cover the matching funds requirement waiver in section 104(k). These additional matching funds to meet the 100 percent cost share will have to be provided from the funding provided for those programs generally, not the funding provided by the Act.

[26] Public Law 117–180, Division A, Section 136 (2022).

[27] Public Law 117–180, Division A, Section 136 (2022).

[28] *See* Sections 102(b) and 104(c) of the Act.

Comment: Commenters suggested ways in which the funding appropriated under the Act should not be used. Commenters suggested administrative costs be paid out of a separate budget rather than the appropriated funding. One commenter suggested administrative costs should be paid for out of a separate FEMA budget.

FEMA Response: As explained above, section 104(a)(2)(C)(i) requires FEMA to use the funding made available under the Act to fund the Claims Office. FEMA is required to follow the Act's requirement to fund the Claims Office from the Act's funding.

Comment: One commenter requested FEMA Claims Reviewers tour the entire burn scar area and not to use the funding appropriated for that tour.

FEMA Response: FEMA appreciates the request, the value placed in seeing the devastation resulting from the Fire first-hand, and the need for Claims Office staff to fully comprehend the extent of injuries suffered. FEMA plans to provide training to all Claims Office staff that will include extensive background information on the Fire and its impacts. FEMA believes that Claims Reviewers should be aware of the devastation to help comprehend the losses and spend their time focused on assisting claimants with their claims, not taking tours of the entire burn scar area.

Comment: Commenters stated the funding appropriated was not sufficient to fully compensate claimants. One commenter suggested the total $3.9 billion appropriated will not cover the cost of recovery from the level of destruction caused by the Fire. This commenter stated more destruction was guaranteed from the Fire and argued it would be worse if people rebuilt in the wrong places before the land stability is restored. Other commenters agreed that the amount appropriated was not sufficient to cover the damages and one of those commenters stated that the lack of sufficient funding would result in denying people compensation.

FEMA Response: The Act and subsequent legislation appropriated $3.95 billion in funding. FEMA is obligated to provide quarterly reports to Congress on the use of funds under the Act and these reports ensure transparency of the use of funds and the sufficiency of funding under the Act.

Comment: To combat fraud, one commenter recommended FEMA review fire-affected county audits performed by the New Mexico State Attorney General's Office to anticipate where and how acts of fraud will occur. Another commenter stated in their comment the New Mexico State Auditor performs these audits, providing links to recent reports.

FEMA Response: FEMA appreciates the concerns regarding potential fraud and is incorporating fraud awareness and detection training into the comprehensive training provided to all Claims Office staff. FEMA notes that Congress provided appropriations for the Department of Homeland Security's Office of the Inspector General for oversight of activities authorized by the Act.[29]

Comment: A commenter stated that insurance companies would demand compensation for the amounts they have paid or will pay to insured claimants.

FEMA Response: Insurance companies are eligible for compensation as injured persons under the Act. Section 104(d)(1)(A)(ii) of the Act requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. Section 296.13 of the IFR requires subrogees to file their Notice of Loss after they have made all payments entitled to the injured person for Fire-related injuries under the terms of the insurance policy. As explained below, FEMA is amending § 296.13 in the Final Rule to add language from the Act specifically to clarify the claims prioritization required. Further, § 296.21(f) of the regulation requires FEMA to compensate injured persons only for damages not paid and that will not be paid by insurance companies. As explained above, these provisions, in addition to the changes made to § 296.13 in this Final Rule, will help ensure that the compensation is first made available to injured persons that are not insurance companies.

Comment: Finally, commenters suggested other funds outside of those appropriated be used to pay for compensation under the Act. One commenter stated that FEMA ''not use taxpayer dollars to compensate victims, but instead seize the assets of the oil and gas companies whose industry has created global warming and red flag conditions all over the country and use those assets to compensate victims.'' One commenter suggested those responsible for causing the Fire should donate their retirement funds to those impacted by the Fire.

FEMA Response: Congress appropriated $3.95 billion for implementation of the Act and FEMA is required to use that appropriated funding to implement the Act and pay claimants actual compensatory damages for injuries resulting from the Fire.

[29] *See* Public Law 117–180, Division A, Section 136 (2022).

4. Comments on § 296.5 Overview of the Claims Process

Comment: One commenter suggested FEMA set up remote assistance given COVID, RSV, and influenza infection concerns. Another commenter stated that claimants should be allowed to meet remotely with claims reviewers as it was unreasonable for FEMA to expect victims to travel long distances. One commenter suggested FEMA set up mobile claim offices in southwest Colfax County and south Taos County. One commenter stated that ''60 to 70 percent of the people up in Mora [County] are Hispanic and a lot of people don't even have access to computers.'' The commenter suggested FEMA ''try to get somebody who can speak Spanish to go with these people because that's what we need.'' Commenters also suggested FEMA get out into the community as part of the claims process and outreach to the community.

FEMA Response: FEMA plans to offer opportunities for one-on-one engagement through Claims Reviewers who will work to engage claimants in ways to meet their needs whether in person or via remote technology. Claims Office Navigators are trained to accommodate the needs of claimants and are prepared to meet them in the satellite Claims Offices in Las Vegas, Mora, and Santa Fe, New Mexico at claimants' homes or offices, or any place convenient to claimants, taking into account health and safety concerns. Note that FEMA will provide services both at set office locations for the Claims Office, as well as pop-up offices that will rotate through communities and locations in the affected area, to reduce travel burdens on claimants. The pop-up offices will be staffed by Claims Navigators, who can assist claimants in completing and submitting Notices of Loss, providing claims updates, and answering general questions. FEMA recognizes the importance of having claims staff, who interact with claimants and help facilitate the claims process, that are able to speak both Spanish and English. FEMA locally hired bilingual speakers to ensure that claims staff can communicate with claimants in their preferred language.

Comment: Several commenters wrote that attorneys should be notified during the process when claimants are represented by counsel.

FEMA Response: With an appropriate Privacy Act waiver, FEMA will ensure contact is made with both claimants and their attorneys. The Claims Office has included consent language necessary to comply with the Privacy Act in the standard Notice of Loss form. The

consent is needed for an attorney or other third-party representative to have access to a claimant's privacy information maintained in the Claims Office system of records. In addition to providing basic information about the claimant and representative, the claimant must sign the consent section if they choose to be represented by a third party.

Comment: One commenter wrote that information on claim status and timeline to receive payment should also be easily accessible at the claimant level. Two commenters suggested FEMA provide an online method of checking the status of their claim and hard copies of documents for those claimants without internet access.

FEMA Response: FEMA is currently developing an online claims system that will provide claimants with real time access to claim status in addition to providing status information by phone or mail (electronic and/or physical). FEMA anticipates this system will be rolled out in the near future and will provide outreach to the community when the system is available for use to help claimants understand and utilize the system.

Comment: One commenter asked that State Case Managers be integrated into the program and trained as Navigators to serve as a single point of contact to help claimants throughout the process.

FEMA Response: As explained above, FEMA anticipates that Claims Navigators will provide the assistance envisioned by the commenter and additional staffing outside of the Claims Office will not be required. In the event a claimant has unmet needs or otherwise requests a Disaster Case Manager, the standard Notice of Loss form includes a section for the claimant to consent to sharing claim data maintained in the system of record with Disaster Case Managers.

Comment: Several commenters suggested that FEMA streamline the claims process. One method for streamlining the process suggested by commenters related to access to available Federal programs. Commenters suggested that FEMA streamline access to available Federal programs and, in addition to funds appropriated under the Act, to utilize other Federal funding opportunities when and where available.

FEMA Response: FEMA agrees with this suggestion and is coordinating with other Federal agencies to ensure data sharing and better communication between programs. FEMA has engaged with and continues to engage with the Small Business Administration, the Department of Agriculture, and other Federal agencies to help facilitate coordination of the assistance available to claimants and the impacted communities. Consistent with the Act's requirements in section 104(g), FEMA is consulting with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process and provide for local concerns. To preserve funding from the Hermit's Peak/Calf Canyon appropriations to pay eligible claims, FEMA requires applicants eligible for FEMA's Public Assistance program to exhaust available public assistance funds before seeking compensation from the Claims Office.

Comment: Another suggestion involved preparing formulas for compensation. One commenter asked how FEMA would compensate claimants for a variety of damages and requested transparency and a formula that should be shared with claimants. Another commenter suggested that FEMA move forward with developing estimates to help reduce the wait for compensation. One commenter asked how claims would be made equitable and if there would be standard reimbursement rates for similar claims. Two commenters suggested monetary thresholds be established to ensure time and effort are proportionate to the claim values being made. As one of the commenters explained, there are thresholds throughout many other Federal programs where the burden of proof is significantly less based on the overall claim value. Another commenter, however, stated that ''no two claims will be alike, and the process cannot be developed or allowed to become an assembly line approach.''

FEMA Response: FEMA recognizes the need for an efficient, streamlined process through the use of a damage calculation formula, while also balancing the unique types of claims being presented under the Act and ensuring claimants are paid actual compensatory damage as required by the Act. FEMA anticipates developing some damage calculation formulas, such as providing for a certain dollar amount of compensation per acre of land damaged, so that claimants have the option to leverage one of those formulas or present their individual claim and request for specific damage amounts. FEMA believes this optionality will best balance the need for an efficient process with the individual needs of claimants, as claimants will be able to make the choice in presenting their claim for compensation.

5. Comments on § 296.10 Filing a Claim Under the Act

Comment: One commenter suggested FEMA allow claimants to file a Notice of Loss in person consistent with the IFR. Another commenter stated that FEMA should allow claimants to file claims in person, as well as via mail, email, and a web-based portal system to ensure accessibility. A commenter suggested FEMA allow for applications, correspondence, and supporting documentation to be exchanged by postal mail. This commenter also recommended FEMA create centralized locations where northern New Mexicans can physically go to access the electronic application and receive assistance in filling out the applications in multiple languages so that the application and supporting documentation can be submitted in a timely manner.

FEMA Response: FEMA appreciates these suggestions. FEMA does not believe changes to the Final Rule are necessary to implement these suggestions, but rather that as the Claims Office continues to expand operations, the information would be made available to the public via *https://www.fema.gov/hermits-peak* and other resources including direct community outreach. FEMA is currently accepting Notice of Loss forms in person at the claim's office locations in Santa Fe, Mora, and Las Vegas, New Mexico and those office addresses can be found at *https://www.fema.gov/hermits-peak*. FEMA will provide services both at set office locations for the Claims Offices, as well as pop-up offices that will rotate through communities and locations in the affected area, to reduce travel burdens on claimants. The pop-up offices will be staffed by Claims Navigators, who can assist claimants in completing and submitting Notices of Loss, providing claims updates, and answering general questions.

6. Comments on § 296.11 Deadlines

Comment: Several comments were received regarding the two-year deadline for filing a claim detailed in § 296.11 of the IFR, with most commenters stating that a two-year period to file a claim was insufficient. Commenters suggested extending the deadline based on an inability to determine damages because of the current inability to access their property, the potential for future impacts from flooding, and/or the long-term health and environmental effects given the size and scope of the Fire. A commenter suggested extending the deadline to three years for mitigation

efforts. Some commenters asked FEMA to be flexible in granting extensions. One commenter asked that extensions be granted in cases where knowledge of damages, recovery efforts, etc. are hindered by cooperation with government agencies.

FEMA Response: Some deadlines in the rule are beyond FEMA's control. Section 104(b) of the Act requires claimants submit their Notice of Loss no later than November 14, 2024, two years from the date the IFR was promulgated. FEMA was required by the Act to publish the IFR within 45 days of the Act's passage and the IFR was published 45 days after the Act's passage.[30] FEMA has built in extensions of the claim processing timeline after receipt of the Notice of Loss for good cause, recognizing the realities of the Fire's impact. Sections 296.34 and 296.35 establish a process for notifying FEMA of injuries that are not referenced in the initial Notice of Loss. Whether a claimant tells FEMA about an injury in the initial Notice of Loss or an amendment under § 296.34, FEMA must know about the injury by November 14, 2024. For heightened risk reduction efforts, a claimant must include the claim in their Notice of Loss by November 14, 2024, or an amended Notice of Loss filed no later than November 14, 2025. *See* § 296.21(e)(5).

Comment: One commenter indicated the two-year period did not end on November 14, 2024, because the Final Rule had not been promulgated and it would not be promulgated until 60 days after filing in the **Federal Register**.

FEMA Response: FEMA disagrees with this characterization of the two-year period and rule promulgation. Specifically, Section 104(f)(1) of the Act requires FEMA to ''promulgate and publish in the **Federal Register** interim final regulations for the processing and payment of claims under this Act.'' Publication of an IFR constitutes promulgation of a rule, as the rule was effective upon publication, and comments were requested post-promulgation. This sequence of events, publication of the interim final rule, followed by a public comment period, occurred here. Consistent with the Act's purpose at section 102(b), the immediate effective date of the rule ensures FEMA was able to begin accepting and processing claims on the date of publication.

7. Comments on § 296.12 Election of Remedies

Comment: Commenters sought clarifications about how the election of remedies worked. One commenter asked what would happen if the claimant did not accept the final determination by the Claims Office. Another commenter asked if people did not want to go through FEMA, whether they could sue and if there were multiple owners of a single property whether some could go through FEMA and also sue.

FEMA Response: As explained in the IFR's preamble, the Act provides that an injured person who accepts an award under the Act waives the right to pursue any claims arising out of or relating to the same subject matter under the Federal Tort Claims Act (FTCA) or a civil lawsuit. Similarly, those claimants who accept an award under the FTCA or a civil lawsuit waive the right to pursue claims under the Act. Until the final award payment is accepted, the claimant may pursue any and/or all of the options available. This flexibility allows injured persons to pursue different avenues of compensation until a final award is accepted. The IFR language states that an injured person who accepts *an award* under the Act or through a FTCA or civil action waives their right to pursue all claims for injuries arising out of or related to the same subject matter. To ensure this is clear in the Final Rule, FEMA is revising paragraphs § 296.12(a) and (b) to clarify that the injured person only waives the right to pursue all claims upon acceptance of a *final* award through the Act, the FTCA, or through a civil action.

Comment: A commenter stated that a claimant's right to civil action or other redress should not be waived or limited until a final payment has been agreed upon with FEMA, and that it must be clear to claimants at what point(s) in the process they are waiving their rights to further legal action, as well as how they can retain their right to further legal action for different types of subject matter. Another commenter agreed and recommended FEMA clarify that the waiver of the right to pursue claims under the FTCA or a civil action only applies to final awards, and when the claimant has signed a Release and Certification Form.

FEMA Response: FEMA agrees and as explained above, is revising § 296.12(a) and (b) in the Final Rule to clarify that the injured person only waives the right to pursue all claims upon acceptance of a final award.

Comment: One commenter wrote on the feasibility of waiving future claims given the extent of damages, losses, and expenses may not be fully known at the time of the award. The commenter suggested a lump sum payment of 15 percent of all injury, damages, losses, and expenses be added to each claim to cover these future unknown items.

FEMA Response: FEMA understands the concerns with waiving rights to pursue further claims after accepting a final award. The Act at section 104(b) requires claims to be submitted within two years and requires a waiver of rights to pursue further claims upon acceptance of a final award. Claims related to future losses as a result of the Fire would need to be made through other remedies as the Act sets a two-year limitation for claims under the Act. FEMA is unable to pay lump sum payments to cover future unknown injuries, as unknown injuries are speculative in nature and the Act requires FEMA to pay for actual compensatory damages.

Comment: Commenters stated the Federal government committed crimes and that the Act did not preclude criminal charges. These commenters recommended allowing claimants the ability to apply for crime victim compensation.

FEMA Response: As explained above, the Act sets forth means for claimants to seek compensation for injuries suffered as a result of the Fire. Section 104(h) of the Act offers claimants three options to seek compensation from the Federal government for injuries resulting from the Fire: (1) a claim under the Act; (2) a FTCA claim or civil action; or (3) an authorized civil action under any other provision of law. The Act does not expand the scope of the FTCA or other civil actions under any other provision of law. The Act does not provide for criminal prosecution or other remedies. The Act also does not provide for crime victim compensation. Rather, section 104(c)(3) of the Act provides for payment of actual compensatory damages. FEMA is not authorized under the Act to pay additional compensation beyond actual compensatory damages.

Comment: One commenter stated the Federal government ''should not be allowed to dictate limits on compensation to victims they violated. The victims should be allowed to state what will make them individually whole and what will be required for their healing for the next several years, or however long it takes, to recover from the offending actions as only the victim will know what that is and what it will take for them to heal.'' The commenter further stated that claimants should not be required to use other Federal programs.

FEMA Response: As explained above, Section 104(h) of the Act offers claimants three options to seek compensation from the Federal government for injuries resulting from

[30] 87 FR 68085 (Nov. 14, 2023).

the Fire: (1) a claim under the Act; (2) a FTCA claim or civil action; or (3) an authorized civil action under any other provision of law. Claimants may choose among these remedies to address their personal circumstances and needs, taking into account timely resolution and costs of each option. Only upon acceptance of a final compensation award under one of these options will claimants release the Federal government from further claims arising out of or relating to the same subject matter. The Act further requires in section 104(d)(1)(B) that FEMA make determinations as to whether the claimant is an injured person under the Act; the injury resulted from the Fire, whether the claimant is otherwise eligible to receive payment, whether sufficient funds are available for payment, and the amount to be allowed and paid under the Act. The Act only authorizes FEMA to make these determinations and sets the framework for how FEMA must make them. The Act does not authorize FEMA to honor and accept all requests for compensation.

8. Comments on § 296.13 Subrogation

Comment: Three commenters suggested FEMA delete references to insurance companies in the regulation. One commenter stated that insurance companies will demand compensation for the amounts they have paid or will pay to insured claimants and found that to be fair. However, the commenter stated that greed may influence the insurers' claims and those claims would then negatively affect claimant compensation. Two other commenters stated that this section should be revised to reflect the Act's prioritization of injured persons over subrogees.

FEMA Response: As explained above, insurance companies are injured persons under the Act. FEMA does not believe it is appropriate to delete references to insurance companies in the regulation, as the Act's references to them requires FEMA to discuss them in the regulation. Section 104(d)(1)(A)(ii) requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. Section 296.13 of the IFR requires subrogees to file their Notice of Loss after they have made all payments entitled to the injured person for Fire-related injuries under the terms of the insurance policy. The IFR does not, however, include the prioritization language from the Act. Given the confusion and concerns with this section, FEMA is amending § 296.13 to specifically clarify the prioritization required under the Act in the Final Rule by requiring that subrogation claims from insurance companies will be paid only after paying claims submitted by injured persons that are not insurance companies seeking payment as subrogees.

9. Comments on § 296.14 Assignments

Comment: Several commenters stated that assignment of rights could not be prohibited. Commenters stated that New Mexico law allowed for assignment of rights. A commenter stated that ''New Mexico law allows lawyers to recover their fees by way of liens, and FEMA regulations should not seek to interfere with the lawyer and client relationship nor with the ability of the claimant's lawyer to recover their fee.'' The commenter also wrote that the FTCA has no prohibition on assignments.

FEMA Response: FEMA disagrees that the assignment of rights cannot be prohibited. Federal law generally prohibits assignment of claims against the Federal government. The Assignment of Claims Act prohibits the assignment of a claim against the Federal government unless the claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued.[31] The Assignment of Claims Act requires that the assignment must specify the warrant and the assignment must be made freely and attested to by two witnesses.[32] The person making the assignment must acknowledge it before an official who may acknowledge a deed, that official must certify the assignment, and the certificate issued by the official must state that the official explained the assignment when it was acknowledged.[33] Thus, FEMA can only allow for an assignment of a claim after the Authorized Official's Determination has been issued and accepted by the claimant and the claimant has completed the other steps in the process required under the Federal law to have the assignment reference FEMA's award determination. The process includes being attested to by two witnesses and acknowledged by an official who will certify the assignment and their explanation of the assignment to the claimant. This extensive process is contrary to the authorizing Act's purpose and the requirements placed on FEMA by the Act to compensate victims of the Fire and expeditiously settle claims for those injured. Prohibiting assignment of claims under the Act is consistent with the purpose of the Act and other Federal law. The Final Rule will not include amendments to the assignment of rights. FEMA notes that assignments are generally not allowed under the Federal Tort Claims Act.[34] Also, to the extent that a lien does not involve an assignment, it is a question of State law to be resolved between the lien holder and the claimant.

Comment: Three commenters suggested that assignment be allowed in instances of death, with one other commenter also requesting a process by which compensation can be provided to surviving heirs if a claimant passes away. These commenters stated that if the claim is legitimate, the owner's right to assign for a variety of reasons should not be limited. Another commenter suggested provisions be made for dependent family members and property co-owners to receive full compensation in situations where a claimant dies.

FEMA Response: Claimants who pass away during the claims process can continue to pursue claims through their surviving heirs under applicable New Mexico estate law.[35] An assignment of rights is not required for surviving heirs to pursue a claim under the Act. FEMA notes that some claimants may wish to have family members pursue the claim on their behalf and some commenters during public meetings stated they were pursuing claims on behalf of relatives. The current regulatory text allows a claimant to authorize a relative or other third party to have access to claims information and to represent them on the claim by executing the appropriate section in the Notice of Loss. The authority to represent a claimant does not require an assignment of benefits.

Comment: A commenter stated FEMA did not have the authority under the Act or New Mexico law to restrict assignment of property, stating claimants should have the right to sell their property and the new property owner should be able to recover damages to the property as well as family assignment in case of death. Another commenter requested that they be able to assign their claim if they want to sell their property or have someone inherit their claim.

FEMA Response: FEMA disagrees that the assignment of rights cannot be prohibited. As explained above, Federal law generally prohibits assignment of claims against the Federal government.[36] The extensive process required to assign claims against the

[31] 31 U.S.C. 3727(b).

[32] *Id.*

[33] *Id.*

[34] *See United States* v. *Shannon,* 342 U.S. 288 (1952).

[35] *See* Uniform Probate Code, Chapter 45, New Mexico Statutes Annotated (2021).

[36] 31 U.S.C. 3727(b).

Federal government is contrary to the authorizing Act's purpose and the requirements placed on FEMA by the Act to compensate victims of the Fire and expeditiously settle claims for those injured. Prohibiting assignment of claims under the Act is consistent with the purpose of the Act and other Federal law and is not amending the Final Rule. The Final Rule will not include amendments to the assignment of rights.

Comment: One commenter said that claimants should have the ability to assign rights to family members or friends but stated ''assignment of rights cannot be to the detriment of the individual signing it away or to the benefit of the person who is trying to get it.'' This commenter further stated that they ''want to see representation for people who need it but not necessarily assign the rights over.''

FEMA Response: FEMA appreciates the commenter's concerns and believes that assigning rights in the context of a claim under the Act could result in unscrupulous activity. The extensive process required by the Assignment of Claims Act to assign a claim against the Federal government was put in place for several reasons, one of which was to reduce concerns about predatory assignments.[37] FEMA seeks to avoid situations where predatory assignments could occur. Consistent with Federal law and the reasons stated above, FEMA is not amending the Final Rule.

Comment: A commenter wrote that FEMA should modify this section to allow the State of New Mexico to file a claim on behalf of residents solely for private property debris removal work not eligible for Category A/B reimbursements under the Public Assistance Program. Another commenter wrote of a shortage of available contract resources impacting the cost and timing of rebuilding efforts and recommending FEMA allow individuals to permit State agencies to act on their behalf to address debris removal and damage through a opt in assignment. Other commenters stated concerns with the effective use of funds for debris removal generally.

FEMA Response: FEMA recognizes the challenges presented with debris removal on private property and the concerns with ensuring funding is effectively utilized under the Act. Under the Act, the Claims Office is authorized to compensate injured persons for their injuries resulting from the Fire. The Office recognizes that due to the timing of debris removal, as well as other elements of a claim, a claimant may require funds quickly and is prepared to make partial payments to claimants for severable elements of a claim, including debris removal, allowing claimants to choose who clears the debris.

F. Comments on § 296.21(a) Allowable Damages

1. Comments on Allowable Damages Generally

Comment: Several commenters suggested FEMA cover specific types of damages and detail them further in the regulation. Commenters frequently requested that the claims process ''make them whole.'' One commenter often recited specific types of damages for which FEMA should be prepared to compensate (to make whole) to include those damages they considered to be ''immeasurable'' or ''unseen.'' One commenter stated that ''FEMA must compensate injured victims for immediately measurable losses (*i.e.* destroyed homes, buildings and their contents, property infrastructures, forestland resources, croplands and crops, and domestic water conveyances and storage facilities, etc.) and for intangible losses as well (*i.e.* destroyed sentimental items which can never be replaced, mental and emotional tolls regardless of the extent of professional treatment received, and future potential value of everything damaged and lost).'' One commenter stated that, in addition to damage caused as a result of the Fire, ''there is more damage continuing to happen to injured victims each day on a level which cannot be seen, measured, or described by any metric'' and further that the Act's ''reconciliations should go far beyond mere recovery to day-before-the-fire life conditions for every injured victim because the damage runs far deeper and much wider than what actually burned in the fire. It has severely, irreversibly damaged injured victims' souls, and they deserve to be compensated for that too.''

FEMA Response: FEMA recognizes the significant injuries suffered by claimants and the long-term recovery needed for the communities impacted by the Fire. The Act at section 104(c)(3)(A) limits payment to ''actual compensatory damages measured by injuries suffered.'' Section 104(d)(4) of the Act limits allowable damages to uncompensated damages for loss of property, business loss, and financial loss; and therefore, limits the actual compensatory damages FEMA may provide to economic damages. This limitation of the Act with respect to allowable damages excludes non-economic damages such as pain and suffering. FEMA recognizes that making people whole for the full scope of loss after a devastating fire may not be possible. The Act authorizes payment of damages, and money cannot restore the full array of the human experience. Section 296.21(e)(3) does authorize payment for out-of-pocket mental health treatment expenses, which can help alleviate the emotional suffering and enable affected individuals to recover. Where New Mexico law allows pain and suffering and non-economic damages in limited circumstances primarily involving personal injuries, a claimant that suffered personal injury may choose to pursue a judicial remedy against the United States Forest Service under the Federal Tort Claims Act or other civil law. The Act provides the claimant with considerable flexibility and allows the claimant to opt out of the Claims Office option and into litigation at any time up until acceptance of a final offer.

2. Comments on Non-Economic Damages

Several commenters wrote that non-economic damages must be considered allowable damages.

Comment: One commenter wrote that claimants were entitled to claims for nuisance and trespass for fire damage to their property under New Mexico law. Another commenter expanded on the nuisance theory stating ''A wildfire likely qualifies [as] a private or mixed public/private nuisance, and therefore is actionable either way, at least for those who suffered damage to their real or personal property. Noneconomic damages are recoverable for a nuisance claim for 'annoyance, discomfort, and inconvenience.' Notably, a plaintiff need not prove economic damages (*e.g.,* a diminution in property value) to recover damages for 'annoyance, discomfort, and inconvenience.' ''

FEMA Response: The Act does not authorize FEMA to provide non-economic damages for nuisance and trespass.

Comment: A different commenter also noted the potential trespass claim, writing ''A defendant commits common-law trespass in New Mexico by redirecting a foreign substance onto the plaintiff's property. . . . Under this

[37] *See generally Spofford* v. *Kirk,* 97 U.S. 484, 489 (1878) ''the question remains, whether the act of Congress was not intended to render all claims against the government inalienable alike in law and in equity, for every purpose, and between all parties. The intention of Congress must be discovered in the act itself. It was entitled 'An Act to prevent frauds upon the treasury of the United States.' It may be assumed, therefore, that such was its purpose. What the frauds were against which it was intended to set up a guard, and how they might be perpetrated, nothing in the statute informs us. We can only infer from its provisions what the frauds and mischiefs had been, or were apprehended, which led to its enactment.''

reasoning a wildfire that spreads onto a plaintiff's property would also constitute a trespass. Although a plaintiff may recover damages for 'annoyance, discomfort, and inconvenience' caused by a private nuisance, there is no New Mexico authority expressly allowing similar damages on trespass claims. That said, many jurisdictions allow damages for annoyance, discomfort, and distress proximately caused by a trespass. Some of these distinguish between those damages and emotional distress, while others appear to conflate the two. New Mexico would likely strictly limit recovery to 'annoyance, discomfort, and distress' and not allow true emotional-distress damages.''

FEMA Response: The Act does not provide for non-economic damages for nuisance and trespass.

Comment: Several commenters stated emotional distress, disturbance, annoyance, and other non-economic losses for those with real and/or personal property losses from the Fire regardless of whether or not the claimant suffered a physical injury as well as those same losses for those claimants who suffered a reasonable fear of death or serious bodily injury as a result of their proximity to the zone of fire danger, regardless of whether the claimant suffered a physical injury should be compensated.

FEMA Response: The Act does not provide for non-economic damages for emotional distress, disturbance, and annoyance.

Comment: Three commenters supported the expansion of allowable damages to include non-economic damages, including loss of enjoyment, loss of lifestyle, as well as mental and emotional distress, sentimental losses, and disturbance and annoyance damages. These commenters stated that these losses may be greater and more important than the financial loss.

FEMA Response: The Act does not authorize FEMA to provide non-economic damages for loss of enjoyment, loss of lifestyle, mental and emotional distress, sentimental losses, or disturbance and enjoyment.,

3. Comments on Emotional Distress/ Mental Health Damages

Some commenters stated the specific non-economic damages for which they suggested compensation should be available under the Act.

Comment: One commenter wrote suggesting claimants could assert a claim for intentional infliction of emotional distress, stating ''those individuals who were within the fire's zone of danger and had a reasonable, objective fear of death or serious bodily injury should be able to recover non-economic, emotional distress damages as well . . . Emotional distress is available under New Mexico law when there is a physical injury . . . These victims suffered smoke inhalation, which is a physical injury, and thereby makes them eligible for emotional distress damages under New Mexico law.''

FEMA Response: The Act does not authorize FEMA to provide non-economic damages for intentional infliction of emotional distress.

Comment: A commenter wrote that New Mexico law recognizes claims for both negligent and intentional infliction of emotional distress. The commenter discussed negligent infliction of emotional distress and intentional infliction of emotional distress, stating that claimants may be able to allege an intentional infliction of emotional distress claim by ''showing the defendant's conduct was reckless and outrageous enough to warrant liability.'' The commenter further noted that claimants prevailing on either claim for infliction of emotional distress would be entitled to damages for ''physical pain, nervousness, grief, anxiety, worry, and shock.'' The commenter added that the Federal government had a special relationship with claimants given their responsibility for the control of the forests and had neglected that special relationship, ignored its own regulations, and caused much emotional distress.

FEMA Response: The Act does not authorize FEMA to provide non-economic damages for negligent and intentional infliction of emotional distress.

Comment: One commenter stated that the FTCA includes damages for emotional distress and that New Mexico law also provided the authority to award emotional distress damages. The commenter also stated that disturbance and annoyance damages for the interference of real property, which are non-economic damages, are recoverable. The commenter also cited to *Castillo* v. *City of Las Vegas* [38] as another source for recoverable non-economic damages including emotional or sentimental damages.

FEMA Response: The Act does not authorize FEMA to provide non-economic damages for emotional distress If a claimant believes they are eligible for non-economic damages under New Mexico law and the Federal Tort Claims Act, they may choose to file a civil claim against the United States Forest Service in Federal court. They may file suit at any time prior to acceptance of a final determination.

Comment: One commenter stated that FEMA should provide reimbursement for the physical, the mental, and the emotional stress caused by the Fire and referenced the Camp Fire in California as an example of where these types of damages were paid.

FEMA Response: The Act does not authorize FEMA to provide non-economic damages for physical, mental, and emotional distress. The Camp Fire claims were adjudicated applying California law, which differs significantly from the Hermit's Peak/ Calf Canyon Fire Assistance Act. The Camp Fire claims also involved claims asserted in a bankruptcy proceeding against a private company, not the Federal government.

4. Comments on Other Damages

Commenters also raised compensation for future work and loss of opportunity, future potential land use plans, sentimental value, and loss of wildlife.

Comment: One commenter asked how claimants would be compensated for the conservation practices of the area, including grazing and thinning out dense forest lands and making habitat for wildlife. The commenter also asked how claimants would be compensated for future work and loss of opportunity for those conservation practices.

FEMA Response: Congress established the Claims Office to provide actual compensatory damages to injured persons that suffered injury resulting from the Fire. To the extent that individual claimants establish injury from the Fire, the Claims Office will work with them to identify appropriate measures of damage. The Claims Office is prepared to work with claimants to identify and hire experts to assist in valuing complex or unusual claims. Under the Act, other Federal agencies with particular expertise also can be engaged to assist.

Comment: Another commenter wrote suggesting FEMA consider future land use plans to properly compensate claimants, detailing their own plans for development of their property impacted by the Fire.

FEMA Response: Under the Act, the Claims Office provides provide actual compensatory damages to injured persons that suffered injury resulting from the Fire. Some claims may be too speculative to be eligible for tort compensation under applicable law, but all potential claimants are encouraged to submit a Notice of Loss to enable the Claims Office to evaluate individual claims.

[38] 145 N.M. 205 (2008).

Comment: One commenter wrote that New Mexico law allows recovery of sentimental value for personal and real property and stated that victims are not made whole unless they recover both the economic value of contents, structures, and trees, plus their sentimental value.

FEMA Response: Under the Act, the Claims Office provides provide actual compensatory damages to injured persons that suffered injury resulting from the Fire, but not for non-economic damages. All potential claimants are encouraged to submit a Notice of Loss to enable the Claims Office to evaluate individual claims. The Office will work with claimants to identify eligible economic losses and to properly value claims. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

In addition to specific damages, commenters suggested FEMA provide compensation for specific reimbursements associated with damages.

Comment: Two commenters suggested FEMA compensate for property taxes, either to the local government or individual property owners. One of these commenters suggested property taxes be addressed by the New Mexico legislature, as it was for the Cerro Grande Fire, and that Federal funds should pay State and local governments the difference in property tax funds.

FEMA Response: Under the Act, the Claims Office provides actual compensatory damages to injured persons that suffered injury resulting from the fire. All potential claimants are encouraged to submit a Notice of Loss to enable the Claims Office to evaluate individual claims. The Office will work with claimants to identify eligible economic losses and to properly value claims. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

Comment: One commenter suggested FEMA pay for indirect damage, including damages resulting from mandatory evacuation, burn scar flooding, and contractor damages.

FEMA Response: To the extent that damage resulted from the Fire, damages are compensable under the regulation as written. Specifically mandatory evacuation expenses and burn scar flooding can be compensable if resulting from the Fire. Contractor damages may not be compensable, but the Claims Office encourages claimants to submit all possible losses to be evaluated. As previously explained, the regulation provides types of actual compensatory damages that are compensable under the Act, but that list is not all-inclusive. Claimants seeking compensation for actual compensatory damages not specifically listed in the regulation can still submit a claim for compensation under the Act.

Comment: Other commenters suggested that FEMA provide air and water quality testing/monitoring.

FEMA Response: FEMA understands the concerns regarding water and air quality and the need for testing and monitoring. These types of expenses might be compensable as expert opinion expenses under § 296.31(a) or as part of the lump sum incidental expenses for claims expenses reimbursement under § 296.31(b).

Comment: Two commenters suggested funding to address economic development as the population (per capita) had decreased since the Fire, as either business and/or financial loss under the Act.

FEMA Response: Economic development can be speculative and a claimant seeking compensatory damages for loss of economic development would need to be able to demonstrate such loss and that such loss was a result of the Fire. As explained above, the regulation provides types of actual compensatory damages that are compensable under the Act, but that list is not all-inclusive. Claimants seeking compensation for actual compensatory damages not specifically listed in the regulation should still submit a claim for compensation under the Act. For this type of claim, claimants can work with their Claims Navigator and Claims Reviewer to demonstrate that such damages would be considered actual compensatory damages for injuries resulting from the Fire consistent with the Act. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

Comment: One commenter suggested an additional amount be awarded where the claimant dies to compensate for the further injury inflicted as a result of delays in compensation.

FEMA Response: FEMA disagrees with this commenter. This proposed claim would not be for actual compensatory damages for injuries resulting from the Fire and is not authorized.

5. Comments on Flood Damages

Comment: One commenter suggested FEMA add flood damage to § 296.21(a) writing that it was ''illogical to provide compensation for flood insurance as a financial loss in § 296.21(e)(2) but not for flood damage.'' A different commenter stated that claimants face risks of further injury from flooding, landslide/mudslide, and debris flow and that full cooperation from owners of all affected property parcels located upstream and upslope was essential to recovery. The commenter requested FEMA acknowledge, address, and compensate for those long-term risks.

FEMA Response: FEMA is revising the purpose of the regulation in § 296.1 to incorporate language to address this issue. By changing the current regulatory text addressing the compensable injuries from ''suffered from'' to ''resulting from'' the Fire, this change addresses the commenters' concerns with whether flood damage is an allowable damage. Further, the definition of ''injured person'' includes injuries ''resulting from the Hermit's Peak/Calf Canyon Fire'' and is broad enough to encompass flooding as well as other types of injuries that may be considered to be resulting from the Fire.

6. Comments on Personal Injury Damages

Comment: Commenters suggested that FEMA clarify that personal injury is an allowable damage.

FEMA Response: Section 296.21(a) allows for payment of actual compensatory damages for injury and ''injury'' is defined in § 296.4 to include personal injury. All potential claimants are encouraged to submit a Notice of Loss to enable the Claims Office to evaluate individual claims. The Claims Office will work with claimants to identify eligible economic losses, which could include compensation for economic losses associated with personal injury such as medical bills, on-going therapy, and the like and to properly value claims.

Comment: One commenter suggested that FEMA provide compensation for health issues for residents and animals affected by compromised water and air quality issues.

FEMA Response: FEMA agrees these types of damages are generally compensable under the Act as personal injury damages and damage to property. These health issues, if resulting from the Fire, could be considered injuries under the Act's definition and compensable as such.

7. Comments on Calculation of Damages

Comment: One commenter noted that the legal precedent in New Mexico does not require claimants to adhere to a strict formula to calculate damages. Another commenter agreed, citing to *Maestas* v. *Medina*.[39] A different commenter asked which New Mexico laws were being used to calculate damages.

FEMA Response: In paragraph 296.21(a) FEMA states, consistent with the Act, that the agency will apply New Mexico law to the calculation of damages. The Claims Office will work with claimants to identify an appropriate measure of damages consistent with applicable law.

8. Comments on Reasonable Damages

Comment: Finally, commenters discussed the requirement that damages must be reasonable in amount in the IFR. Some commenters suggested that FEMA delete the requirement that damages must be reasonable in amount while others recommended it be changed to actual damages supported. One commenter stated that FEMA should give claimants the autonomy to define reasonableness for themselves.

FEMA Response: The Act limits compensation to actual damages incurred by the claimant. To better ensure that the claimant is only being compensated for the actual damages incurred and that claimant is not being compensated in amounts that exceed the actual damages incurred, FEMA requires that the damages be reasonable in amount.

G. Comments on § 296.21(b) Exclusions

1. Comments on Punitive Damages

Comment: Two commenters suggested claimants be allowed to seek punitive damages.

FEMA Response: Section 104(c)(3)(B)(ii) of the Act specifically excludes punitive damages from the compensation available under the Act. It is thus beyond FEMA's statutory authority to compensate for these damages.

2. Comments on Criminality

Comment: One commenter wrote ''Essentially, the USFS committed a crime when—against all experience-informed protests from local citizens—its agents (the district ranger, burn boss and all commanding managers above them) made the decision to begin the Dispensas Prescribed Burn which rapidly and irreversibly exploded into the catastrophe now known as the Hermit's Peak Fire. They also committed a crime of negligence when they failed to properly monitor burn piles which reignited and caused the Calf Canyon Fire which merged with the Hermit's Peak Fire to cause widespread devastation now wreaking havoc for victims of the fire.''

FEMA Response: FEMA is not authorized under the Act to pursue these types of claims. In the Act, the United States accepted responsibility for damage resulting from the Fire and waived sovereign immunity to compensate victims in tort. By excluding punitive damages, the Act makes clear that damages for intentional and other behavior otherwise giving rise to heightened liability are not compensable. FEMA is not revising the Final Rule.

3. Comments on Attorneys' and Agents' Fees

While one commenter specifically expressed support for this provision,[40] a large number of commenters wrote that FEMA should pay attorneys' and agents' fees associated with the claims process.

Comment: One commenter wrote that the Administrator had the discretion to pay legal fees under the Act because the Act allows the award of financial losses of ''any other loss that the Administrator determines to be appropriate for inclusion as financial loss.'' The commenter stated that claimants using lawyers are likely to have more complete and better documented claims and that FEMA should want and encourage claimants to have complete and well documented claims. The commenter also noted that if claimants pay the financial expense of a lawyer the victims will not be made 100 percent whole unless they recover both 100 percent of losses and 20 percent for legal fees. A different commenter also stated that FEMA should encourage the efficiency and assistance that will result from allowing claimants to obtain attorney assistance and be made whole by allowing claimants to recover their attorney's fees.

FEMA Response: The Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.[41] While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. Further, the ''American Rule,'' generally applicable in civil litigation and accepted by the United States Supreme Court initially in the case of *Arcambel* v. *Wiseman*,[42] provides that in the absence of a statute indicating otherwise, each party is responsible for paying their own attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required.

Comment: A commenter wrote ''The Fire Victim Trust in California added legal fees to gross economic awards, and it has been a tremendous benefit as around 90 [percent] of claimants hired lawyers.''

FEMA Response: As noted, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.[43] While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. FEMA is applying the generally accepted American Rule for attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required. Also as noted, the Fire Victim Trust in California involved a private party defendant under the oversight of a bankruptcy court applying California law and does not present a useful

[39] 2011 N.M. App. Unpub. LEXIS 276 (2011).

[40] The commenter wrote ''Subpart C Section 296.21(b) Excludes reimbursement for attorney's fees and agents' fees, plus claimant's cost of prosecuting a claim. This should stay. We want all of the money to go to the people injured in any way by the Hermit's Peak/Calf Canyon Fire.''

[41] *Animal Legal Defense Fund* v. *USDA,* 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas,* 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith,* 206 F.3d 1389 (11th Cir. 2000). *See also United States* v. *Roof,* 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank* v. *Vaden,* 396 F.3d 366, 370 (4th Cir. 2005).

[42] 3 U.S. (3 Dall.) 306 (1796). *See also Peter* v. *NantKwest, Inc.,* 140 S.Ct. 365 (2019), *Hardt* v. *Reliance Standard Life Insurance Co.,* 560 U.S. 242 (2010), *Ruckelshaus* v. *Sierra Club,* 463 U.S. 680 (1983), and *Summit Valley Industries, Inc.* v. *Carpenters,* 456 U.S. 717 (1982).

[43] *Animal Legal Defense Fund* v. *USDA,* 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas,* 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith,* 206 F.3d 1389 (11th Cir. 2000). *See also United States* v. *Roof,* 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank* v. *Vaden,* 396 F.3d 366, 370 (4th Cir. 2005).

paradigm for the Hermit's Peak/Calf Canyon Fire.

Comment: A commenter wrote that Congress only prevented the award of punitive damages and interest in the Act, not the award of legal fees.

FEMA Response: As noted, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.[44] While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. FEMA is applying the generally accepted American Rule for attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Also as noted, the Act is a limited waiver of sovereign immunity, and similar to cases decided under the Federal Tort Claims Act,[45] the Act does not waive sovereign immunity to allow payment of attorney fees.

Comment: Several commenters stated the process was too complicated and required professional and/or legal assistance to navigate and that payment of these fees would help to make them whole.

FEMA Response: One purpose of the Act is to provide for expeditious consideration and settlement of claims from the Fire. The Claims Office interprets this to require an approach to settling claims that claimants can complete without engaging the services of attorneys or other professionals. To achieve this goal, FEMA hired a number of Claims Navigators from the local community, trained these Claims Navigators to identify compensable losses and to understand what is needed to complete a Proof of Loss, and developed a Claims Office ethos that emphasizes the needs of the claimant. The Claims Navigators work with claimants to ensure that they develop the information needed to receive compensation for all eligible losses. The Claims Office recognizes that some claims will require special expertise and will pay for experts that are needed to value particular claims. FEMA also notes that at the time the comment was submitted, the Claims Office had not yet fully developed the claims procedures, so it is understandable that the commenters did not recognize that the process is designed so that claimants do not need legal assistance.

Comment: One commenter wrote that the Act recognized that claimants may seek legal assistance and capped those fees at 20 percent. The commenter stated that a FEMA representative, ''protected by sovereign immunity, with no legal, ethical, or fiduciary obligation to the claimant, will be advising the claimant on the strategy to meet their burden of proof to obtain make-whole damages allowed by the language of the HPFAA and New Mexico State law. This approach puts claimants in the hands of FEMA representatives who have a conflict of interest. That is simply improper, unfair, unduly harmful to claimants, and places an administrative burden on FEMA and its representatives that otherwise would be borne by the claimant's attorneys.'' This commenter also stated that the claims process required claimants to make decisions with legal implications and that FEMA employees and contractors would be able to obtain legal advice and assistance from their counsel in the process. The commenter stated that FEMA's legal team would be paid from Act's funds as an administrative expense and that claimants' attorneys' fees should be as well. The commenter also added that if represented by attorneys, FEMA should pay those funds directly to the attorneys for proper handling and lien resolution through authorized IOLTA trust accounts stating that claimants would have lien obligations that must be satisfied out of the compensation received, whether to satisfy fees, mortgages, medical liens, or other liens.

FEMA Response: As with the Cerro Grande Act, in this Act, Congress limits attorney fees that an attorney is able to charge given it has established a claims process statutorily mandating the expeditious provision of compensation to all injured persons. FEMA designed the program to help claimants navigate the process. The Claims Office is implementing measures to eliminate potential conflicts of interest, and otherwise the Claims Office has no incentive not to pay claimants for all eligible losses. The Act creates the Claims Office and instructs the Director of the Claims Office, other officials, and staff to fully compensate claimants applying the authorizations and limitations in the law. The Director, other officials, and staff have a legal duty to pay eligible claimants the full amount of proven claims. Third, the assignment of benefits prohibition in the regulations.

Comment: One commenter stated that attorneys' fees should be covered to help with the claims process for those especially that are elderly, handicapped, or those with basic literacy skills that don't have the ability to file the claims process themselves, that ''the attorneys' fees should not come out of the final claim; that should be added on top of it.''

FEMA Response: As discussed above, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.[46] While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. Further, the ''American Rule,'' generally applicable in civil litigation and initially accepted by the United States Supreme Court in the case of *Arcambel* v. *Wiseman,*[47] provides that in the absence of a statute indicating otherwise, each party is responsible for paying their own attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required. Also, the State of New Mexico has identified several programs providing free legal representation for individuals affected by the Fire.

Comment: One commenter stated that attorneys' fees and consultant fees need to be paid out of the Act's funding if the fees to administer the program would be paid out of the Act's funding.

FEMA Response: As explained above, section 104(a)(2)(C)(i) requires FEMA to use the funding made available under the Act to fund the Claims Office. FEMA is required to follow the Act's

[44] *Animal Legal Defense Fund* v. *USDA,* 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas,* 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith,* 206 F.3d 1389 (11th Cir. 2000). *See also United States* v. *Roof,* 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank* v. *Vaden,* 396 F.3d 366, 370 (4th Cir. 2005).

[45] E.g., *Anderson* v. *United States,* 127 F.3d 1190, 1191 (9th Cir. 1997) (''The FTCA does not contain an express waiver of sovereign immunity for attorneys' fees and expenses.''); *Joe* v. *United States,* 772 F.2d 1535 (11th Cir. 1985).

[46] *Animal Legal Defense Fund* v. *USDA,* 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas,* 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith,* 206 F.3d 1389 (11th Cir. 2000). *See also United States* v. *Roof,* 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank* v. *Vaden,* 396 F.3d 366, 370 (4th Cir. 2005).

[47] 3 U.S. (3 Dall.) 306 (1796). *See also Peter* v. *NantKwest, Inc.,* 140 S.Ct. 365 (2019), *Hardt* v. *Reliance Standard Life Insurance Co.,* 560 U.S. 242 (2010), *Ruckelshaus* v. *Sierra Club,* 463 U.S. 680 (1983), and *Summit Valley Industries, Inc.* v. *Carpenters,* 456 U.S. 717 (1982).

requirement to fund the Claims Office from the Act's funding. Additionally, as discussed above, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.[48] While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. Further, the ''American Rule,'' generally applicable in civil litigation and initially accepted by the United States Supreme Court in the case of *Arcambel* v. *Wiseman,*[49] provides that in the absence of a statute indicating otherwise, each party is responsible for paying their own attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required.

Comment: Some commenters stated that the funding provided under the Act was not sufficient to pay the claims and attorneys' and agents' fees.

FEMA Response: FEMA is also concerned about the use of funds under the Act to pay attorneys' fees. As explained above, FEMA is committed to hiring staff and providing resources to assist all claimants with their claims. While claimants can seek counsel on their own, the claims process, as structured, will provide claimants with the assistance needed to prepare and submit their claims effectively.

Comment: A commenter requested consistency in awards for damage, asking if FEMA would treat all claimants equitably whether the claimant chose to represent themselves and hired an attorney to handle their claim.

FEMA Response: FEMA understands the commenter's concern but reiterates that the agency is bound to act in a fair manner with all claimants, regardless of representation. FEMA is committed to hiring staff and providing resources to assist all claimants with their claims. While claimants can seek counsel on their own, the claims process, as structured, will provide claimants with the assistance needed to prepare and submit their claims effectively.

4. Comments on the Cost of Prosecuting a Claim

Comment: Several commenters sought to remove this exclusion from damages. One commenter wrote ''Absolutely every second of time spent on every action required of victims for them to receive compensations from the Hermit's Peak Fire Assistance Act must be covered as recoverable expense since this situation has been foisted upon victims against their will and through no fault of their own. This must be the case no matter the severity level of injury suffered by victims because this entire ordeal is both time consuming and stressful as it drags on to full conclusion.'' A different commenter wrote ''Time spent in claims preparation is not considered a damage. The time required for processing this claim is extensive. Loss of my time is a loss of that part of my life, and it should be considered valuable.''

FEMA Response: FEMA provides claimants with the ability to recover the reasonable costs incurred in providing documentation requested by the Claims Office pursuant to § 296.31(a) and incidental expenses pursuant to § 296.31(b). However, time spent in the prosecution of a claim is not considered an actual compensatory damage. Section 104(c)(3)(A) of the Act requires FEMA to reimburse claimants only for actual compensatory damages. FEMA cannot reimburse claimants for time spent working on their claims as such reimbursement is beyond the agency's statutory authority.

Comment: One commenter wrote that because the Act authorizes compensation for 'any other loss that the Administrator determines to be appropriate for inclusion,' FEMA can allow the cost of prosecuting a claim to be recoverable.

FEMA Response: As explained in the IFR, compensatory damages for time spent in claims preparation or prosecuting a claim are not available under New Mexico law or the Federal Tort Claims Act. Moreover, there is no evidence Congress intended that claimants be compensated for the value of their time in preparing a claim. As explained in the IFR, FEMA is choosing to exercise discretion to provide a lump sum payment to claimants for miscellaneous and incidental expenses incurred in the claims process. FEMA will provide a lump sum payment of five percent of the insured and uninsured loss (excluding flood insurance premiums), not to exceed $25,000. The minimum lump sum payment is $150. Section 296.31(b) of the IFR represents a fair and reasonable accommodation between the agency's responsibility to spend Federal funds wisely and the desire to compensate claimants as fully as possible.

Providing compensation for a claimant's time would be difficult to administer, as FEMA would have to determine equitably the value of a claimant's time and to verify that claimants have expended the number of hours that are claimed. FEMA's payments under the Act are subject to independent audit by the GAO and the DHS OIG and claimants would likely find attempts by auditors to verify the payment for hours spent in the claims process highly intrusive. Additionally, the type of compensation requested by commenters here would require production of receipts and other documentation, resulting in an overly burdensome process for this payment to claimants contrary to other comments requesting the agency streamline and simplify the claims process.

H. Comments on § 296.21(c) Loss of Property

Comment: One comment stated flood damage should be specifically added to this section. Several other commenters suggested an addition to this paragraph to allow for other losses including anticipated future damages from flooding through November 14, 2032. These commenters noted that it could be up to ten years before conditions stabilize in the impacted forests and watersheds and that the Act's language indicates that post-fire flooding injuries should be considered as actual compensatory damages.

FEMA Response: As explained above, FEMA is revising § 296.1 of the Final Rule to clarify that claimants may seek compensatory damages for injuries resulting from the Fire. This language is broad enough to encompass a range of injuries resulting from the Fire, including flood damages. Additionally, the definition of ''injured person'' includes injuries ''resulting from the Hermit's Peak/Calf Canyon Fire'' and is broad enough to encompass flooding, mudflow, mold, and debris flow as well as other types of injuries that may be considered to be resulting from the Fire. FEMA does not believe additional edits to this section of the regulation are required as a result. Further, FEMA is unable to extend the deadline for claims submission requested by the

[48] *Animal Legal Defense Fund* v. *USDA,* 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas,* 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith,* 206 F.3d 1389 (11th Cir. 2000). *See also United States* v. *Roof,* 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank* v. *Vaden,* 396 F.3d 366, 370 (4th Cir. 2005).

[49] 3 U.S. (3 Dall.) 306 (1796). *See also Peter* v. *NantKwest, Inc.,* 140 S.Ct. 365 (2019), *Hardt* v. *Reliance Standard Life Insurance Co.,* 560 U.S. 242 (2010), *Ruckelshaus* v. *Sierra Club,* 463 U.S. 680 (1983), and *Summit Valley Industries, Inc.* v. *Carpenters,* 456 U.S. 717 (1982).

commenters. As previously explained, some deadlines in the rule are beyond FEMA's control and authority to change. Section 104(b) of the Act requires claimants submit their Notice of Loss no later than November 14, 2024, two years from the date the IFR is promulgated. FEMA has built in extensions of this timeline for good cause, recognizing the realities of the Fire's impact. Sections 296.34 and 296.35 below establish a process for notifying FEMA of injuries that are not referenced in the initial Notice of Loss. Whether a claimant tells FEMA about an injury in the initial Notice of Loss or an amendment under § 296.34, FEMA must know about the injury by November 14, 2024. For heightened risk reduction efforts, a claimant must include the claim in their Notice of Loss by November 14, 2024, or an amended Notice of Loss filed no later than November 14, 2025. *See* § 296.21(c)(5). Additionally, FEMA recognizes the potential long-term impacts of flooding after fire and will encourage claimants to consider risk reduction measures to address those risks.

1. Comments on § 296.21(c)(1) Real Property and Contents

Comment: Several commenters wrote about how FEMA would value real property and contents when analyzing claims under the Act. Most of these commenters suggested FEMA consider the actual costs to rebuild and construct in the future, acknowledging increasing market values of land, construction, and other costs such as inflation. with some commenters stating that it may not be safe to immediately rebuild.

FEMA Response: The language in the IFR addresses these concerns as it explains the costs of reconstruction must factor in post-Fire construction costs as well as current building codes at the time of construction. FEMA will work with claimants to ensure that compensation effectively addresses future construction cost concerns and compensation for any decrease in the value of the land on which the structure sat as detailed in § 296.21(c)(1). FEMA is not making any changes to this section of the Final Rule.

Comment: Some commenters stated that it may not be safe to immediately rebuild. One commenter wrote claimants face decades of uncertainty regarding terrain stability and that ''such areas are now extremely high-risk hazard zones.''

FEMA Response: FEMA understands concerns about rebuilding immediately after the Fire and will work with claimants to ensure that compensation effectively addresses concerns regarding stabilizing the land and for any decrease in the value of the land on which the structure sat as detailed in § 296.21(c)(1). The current text in the IFR is sufficient to address this concern and is not making any changes to this section of the Final Rule.

Comment: Commenters raised questions regarding compensation for other damages beyond home reconstruction. Some commenters suggested FEMA consider the intrinsic value of the property lost, as well as loss of use damages and compensation for future potential land use. Commenters suggested that damages be calculated based on replacement and/or intrinsic value—not fair market value. Other commenters wrote requesting compensation for lost sentimental value for damaged real and personal property and the loss of use of personal or real property.

FEMA Response: Generally, FEMA's calculation of damages, including how damaged property is valued, will be governed by the Act and Federal law. To the extent that this valuation is not pre-empted by Federal law, New Mexico law will govern.

Comment: Some commenters suggested payment of double compensatory damages for trespass under New Mexico Statutes Annotated section 30–14–1.1.

FEMA Response: As noted, the Act does not provide for punitive or non-economic damages, including non-economic damages for nuisance and trespass. Economic damages associated with nuisance and trespass are available upon proper proof. However, because the Act limits recovery to actual damages, double compensation would not be available.

Comment: Two commenters suggested FEMA compensate for property taxes, either to the local government or individual property owners.

FEMA Response: The Claims Office compensates claimants for actual damages resulting from the Fire. Any increases in property tax or any decreases in property tax revenue income, if resulting from the Fire, would be compensable under the IFR.

Comment: One commenter asked how losses for wells, water, and erosion would be compensated.

FEMA Response: While the IFR addresses erosion, FEMA is adding paragraph (c)(5) to § 296.21 of the Final Rule specifically address damages for physical infrastructure including irrigation infrastructure such as acequia systems. This change in the Final Rule can also encompass concerns raised regarding well and water losses to the extent those losses are of physical infrastructure. Those losses may also be considered part of real property and contents losses in § 296.21(c)(1).

Comment: One commenter suggested FEMA find ways to compensate people that work a land grant, as those claimants would not have deeds to the property and figure out ways to get them documentation to support their claims.

FEMA Response: The IFR language sufficiently addresses these commenters' concerns. Specifically, FEMA defines ''injured person'' in § 296.4 to include individuals, businesses, Indian Tribes, State and local government entities, and ''other non-Federal entit(ies).'' This broad definition currently encompasses all potential claims associated with land grants as a result. As explained above, the Claims Office locally hired Navigators to assist claimants compiling necessary documentation and completing the Proof of Loss in support of the claim. Claims Navigators and Claims Reviewers will work with each claimant to ensure that they are able to get the proper documentation to complete their claim and will use alternative methods to prove ownership when the deed is not available, such as affidavits, utility bills, and tax records.

Comment: One commenter inquired as to whether or not their vehicle and newly published book would be covered under the regulation.

FEMA Response: Section 296.21(c)(1) of the IFR explains that claimants can seek compensation for the contents of real property damaged by the Fire. The commenter's personal property mentioned is covered by the current language and no changes to the regulatory text is required for the Final Rule.

Comment: Several commenters focused on the issue of compensation for debris removal under this paragraph. Commenters generally sought clarification on what compensation was available. Commenters sought wages as compensation for debris removal efforts they complete because of the lack of available contractors in the area. One commenter stated ''there is so much devastation, the cleanup part of the reimbursement is going to fall mainly on the landowner because there [are] not enough contractors or help out there to do this much clean up. And so, in order to do that, the landowners are going to need to pay themselves for their time and equipment that they use and need to cleanup a massive amount of trees. And so, I would hope that part of the compensation for the debris removal and reforestation is, would include wages for the landowners or their

friends or whoever to pay to get it done.''

FEMA Response: Claimants seeking compensation for their own work or the work of those they hire to remove debris can claim this expense under § 296.21(c)(1). FEMA does not believe further edits to the regulatory text are required for claimants to seek this compensation.

Comment: Commenters questioned the extent to which adjacent property owners could be held responsible for debris flow traced to their property.

FEMA Response: FEMA recognizes that not every property owner will file a claim or seek to restore their property and FEMA cannot require property owners to do so. Claimants seeking to promote recovery of their properties can file a claim under this paragraph. Also, the Act does not authorize FEMA to pursue liability against third parties who may be responsible for damage.

Comment: Other commenters raised concerns about current debris removal efforts. A commenter stated that trees being removed for right of way created stumps that were too high and dangerous and a lack of inspections on the work performed. The commenter stated a general lack of progress on debris removal and how a lack of fencing resulted in animals in the road, presenting a danger to commuters in the area.

FEMA Response: FEMA understands the challenges associated with debris removal after a wildfire and subsequent flooding. This paragraph of the IFR provides claimants the ability to receive compensation for removing debris and burned trees. As noted, FEMA and other Federal and State agencies have a number of programs that provided assistance after the Fire and had responsibilities for debris removal. The Claims Office provides compensation for damages resulting from the Fire, including debris removal, and is not responsible for debris removal and other post-disaster activities undertaken by other Federal and State agencies.

Comment: Finally, some commenters sought clarification on prioritization of claimants with respect to this paragraph. Commenters generally suggested that FEMA focus first on those who lost their homes, including mobile homes, and do everything possible to make them whole.

FEMA Response: FEMA intends to prioritize individual claimants over subrogees consistent with the Act's mandate at section 104(d)(1)(A)(ii). FEMA understands the unique challenges presented for those that lost their homes in the Fire and agrees that those claims require immediate attention. FEMA will work to ensure that all claims are reviewed in an expeditious and fair manner.

Comment: A commenter raised concerns about FEMA assistance through the Individual Assistance Program related to SBA loans, stating that an SBA loan would not make claimants whole.

FEMA Response: Under the Act, this commenter has the option of filing a claim to be compensated for these damages if the assistance provided under the Individual Assistance Program was insufficient to fully compensate them.[50] FEMA notes that the Individual Assistance Program has specific criteria for assistance,[51] including requirements regarding pursuing a loan with the Small Business Administration, that are not found in the Act. FEMA encourages claimants to seek compensation for actual compensatory damages for injuries resulting from the Fire and as explained above, the Act can provide compensation if the assistance provided under the Individual Assistance Program was insufficient to fully compensate claimants. Notably, Small Business Administration loans, and the interest accrued on these loans, is compensable under the Act.

Comment: One commenter asked if the Act would compensate for looting that occurred on their property after the Fire, stating they were denied assistance under the Individual Assistance Program.

FEMA Response: Under the Act, this commenter has the option of filing a claim to be compensated for these damages if the assistance provided under the Individual Assistance Program was insufficient to fully compensate them.[52] FEMA notes that the Individual Assistance Program has specific criteria for assistance.[53] FEMA encourages claimants to seek compensation for actual compensatory damages for injuries resulting from the Fire and as explained above, the Act can provide compensation for damage from the Fire if the assistance provided under the Individual Assistance Program was insufficient to fully compensate them.

2. Comments on § 296.21(c)(2) Reforestation and Revegetation

Comment: Most commenters opposed the formula to pay 25 percent of the pre-Fire value of the lot and structures as compensation for reforestation and revegetation. Commenters stated 75 percent less value was unacceptable when there were large parcels of land previously forested before the Fire and recommended FEMA delete the 25 percent cap on reforestation damages, with several commenters stating the 25 percent limit violated New Mexico law. One commenter wrote ''For landowners that have more than 100 acres, this is a tremendous financial burden when they need to come up with 75 [percent]. The compensation needs to be changed from 25 [percent] to a greater extent to cover losses from fire, erosion, creeks and water ways, meadows, deep canyons, pine trees, oak brush, and trees.'' A different commenter wrote ''Generations of stakeholders have provided a free ecological service maintaining the lands that make up the watersheds that provide clean water for millions downstream. This includes best practices for farming and forestry. Restoring the forests and planting new trees is essential for regenerating a healthy ecosystem, and repairing the harm done by the US government. Providing 100 [percent] of costs for loss will ensure that future generations have a better chance to develop this unique rural/mountain economy.''

FEMA Response: In the IFR, FEMA limited compensation for trees and other landscaping to 25 percent of the pre-Fire value of the structure and lot. This approach was generally consistent with the approach taken in the Cerro Grande Fire Assistance process. As explained in the IFR, the 25 percent limitation does not apply to business losses for timber, crops, and other natural resources under § 296.21(d). In response to commenter concerns and confusion regarding the application of this formula, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula. FEMA understands that the land impacted by this Fire was more heavily forested than the Cerro Grande Fire and that those resources were relied on for personal, subsistence, and business needs, making the formula in this section of the IFR particularly confusing. The Final Rule allows for

[50] Section 296.21(e)(1) provides for compensation under the Act for interest paid on loans for damages resulting from the Fire as well as proceeds from the compensation award to repay any SBA loans obtained.

[51] For information on the criteria for participation in the Individual Assistance Program please see the Individual Assistance Program and Policy Guide, Version 1.1 found at *https://www.fema.gov/sites/default/files/documents/fema_iappg-1.1.pdf* (last accessed Feb. 24, 2023).

[52] Section 296.21(e)(1) provides for compensation under the Act for interest paid on loans for damages resulting from the Fire as well as proceeds from the compensation award to repay any SBA loans obtained.

[53] For information on the criteria for participation in the Individual Assistance Program please see the Individual Assistance Program and Policy Guide, Version 1.1 found at *https://www.fema.gov/sites/default/files/documents/fema_iappg-1.1.pdf* (last accessed Feb. 24, 2023).

compensatory damages for the cost of replacement of destroyed trees and other landscaping and removes references to the 25 percent formula.

Comment: Several commenters opposed to this paragraph stated the distinctions between the Cerro Grande Fire and Hermit's Peak/Calf Canyon Fire communities necessitated a different valuation analysis for the claims process. One commenter wrote ''Landowners of Mora and San Miguel are usually on many acres of land (some have been passed down through generations), whereas Cerro Grande were on smaller lots. 75 [percent] less value is unacceptable when you have a large parcel of land that was previously forested.'' Another commenter wrote ''This approach was used in the Cerro Grande Fire Assistance Process in Los Alamos, New Mexico of which is one of the wealthiest counties per capita in the nation. I suspect the structures and land parcels are of higher value in Los Alamos versus Mora, New Mexico based on property assessments. It is suggested to reconsider the formula because properties in Mora would receive less compensation for similar damage from the wildfire versus Los Alamos.'' A commenter wrote ''Unlike properties in Los Alamos that were damaged by the Cerro Grande Fire and upon which this interim rule is based, many of the properties damaged by the Hermit's Peak and Calf Canyon Fires consist of hundreds of tree-covered acres, not small, landscaped lots. New Mexico has a long history of subsistence use of forests and trees that should be recognized by this rule.''

FEMA Response: As explained above, FEMA appreciates the insights provided by commenters on the distinctions between the areas impacted by the Cerro Grande Fire and the Hermit's Peak/Calf Canyon Fire. These differences are important to recognize, and FEMA agrees that these differences require revision to the IFR where the process implemented for the Cerro Grande Fire will no longer meet the needs of claimants for the Hermit's Peak/Calf Canyon Fire. In response to commenters' concerns, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula. As explained above, FEMA understands the communities impacted by this Fire were less densely populated and contained larger areas of privately held land. This land was also more heavily forested, making the loss of trees and vegetation a particularly devastating loss for claimants. The Final Rule allows for compensatory damages for the cost of replacement of destroyed trees and other landscaping and removes references to the 25 percent formula.

Comment: A commenter wrote that the Act did not impose caps on tree or mitigation damages and that New Mexico law did not have a cap on damages to trees or for mitigation, but rather that New Mexico law allows plaintiffs to recover the full value of any trees destroyed on their property. This commenter further stated that ''New Mexico law allows as compensatory damages double the value of tree damages. While the Act prohibits 'punitive damages' it does not prohibit statutory compensatory damages but requires application of New Mexico law which includes section 30–14–1.1.''

FEMA Response: In the IFR, FEMA limited compensation for trees and other landscaping to 25 percent of the pre-Fire value of the structure and lot. This approach was generally consistent with the approach taken in the Cerro Grande Fire Assistance process. As explained in the IFR, the 25 percent limitation does not apply to business losses for timber, crops, and other natural resources under § 296.21(d). In response to commenter concerns and confusion regarding the application of this formula, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula. FEMA understands that the land impacted by this Fire was more heavily forested than the Cerro Grande Fire and that those resources were relied on for personal, subsistence, and business needs, making the formula in this section of the IFR particularly confusing. The Final Rule allows for compensatory damages for the cost of replacement of destroyed trees and other landscaping and removes references to the 25 percent formula.

Comment: Commenters asked how the valuation used in the formula would be made under the formula, with one commenter requesting the inclusion of intrinsic value to be part of the damage's calculation for real property loss. A commenter asked how the 25 percent would be quantified and qualified. A different commenter requested that losses be calculated using replacement and/or intrinsic value, not fair market value and that these values should account for the generational investment in the land and forest that was destroyed, as well as the loss that will be incurred while regrowth takes place.

FEMA Response: In response to commenter concerns and confusion regarding the application of this formula as explained above, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula. The Final Rule allows for compensatory damages for the cost of replacement of destroyed trees and other landscaping. Valuation of losses under this revised language will be at 100 percent of the damage. Generally, FEMA's calculation of damages, including how damaged property is valued, will be governed by the Act, Federal law, and New Mexico law, but only to the extent that New Mexico law is not pre-empted by Federal law.

Comment: In lieu of the proposed formula, one commenter suggested FEMA pay per acre ($10,000 per acre) to be used to replant and rebuild loss.

FEMA Response: FEMA appreciates the suggestion for a payment formula based on acreage. FEMA attempted to streamline the process by offering the formula presented in the IFR and understands there can be advantages to formulas to better assist claimants in receiving prompt payment. Given the challenges with the specific formula in the IFR and the unique concerns of the impacted communities because of the heavily forested areas and personal, subsistence, and business uses of the forest and vegetation, FEMA is removing the 25 percent formula from this section of the regulation. However, FEMA is looking at ways to better streamline the claims process in response to other comments and is considering offering payment formulas based on acreage such as the one suggested by one of the commenters to claimants. Any such type of formula would provide claimants with the option to either leverage that formula with their claim or submit documentation detailing their specific damages.

Comment: Another commenter stated that landowners should be allowed to request wages as compensation for reforestation efforts on their land because of the lack of contractors to assist in the area.

FEMA Response: Claimants seeking compensation for their own work or the work of those they hire for reforestation efforts can claim this expense under this paragraph. FEMA does not believe further edits to the regulatory text are required for claimants to seek this compensation.

Comment: Commenters also commented on limiting compensation where the costs may be covered by another Federal program. Most commenters suggested FEMA remove this limitation, stating claimants should not be required to use other Federal programs, with some raising concerns those Federal programs may not have sufficient funding to cover the losses associated with the Fire. One commenter stated that FEMA must be

responsible for identifying other Federal programs and help claimants receive other identified funding in a timely manner to ensure they do not lose out on the Act's funding based on available funding that they may otherwise never receive.

FEMA Response: Section 296.21(c) of the IFR states that compensatory damages may be awarded for the ''cost of reforestation or revegetation not covered by any other Federal program.'' This language has caused confusion with commenters as interpreting it to require claimants to first apply with other Federal programs. FEMA does not require claimants to apply to other Federal programs associated with reforestation and/or revegetation. Rather, the language was intended to clarify that, where the claimant has received payment from another Federal program, FEMA will only be able to compensate for reforestation and/or revegetation under the Act for those costs not covered already in the payment received from the other Federal program. This avoids a duplication of payment for the same damage. Claimants have the option of seeking assistance from other Federal programs for reforestation and revegetation, filing for compensation under the Act, or pursuing both other Federal program and compensation under the Act. The language in § 296.21(c) is simply to clarify that FEMA cannot duplicate payment but can provide additional payment to cover actual compensatory damages for reforestation and revegetation. As explained above, FEMA is coordinating with other Federal agencies to ensure data sharing and better communication between programs. FEMA has engaged with and continues to engage with the Small Business Administration, the Department of Agriculture, and other Federal agencies to help facilitate coordination of the assistance available to claimants and the impacted communities. Consistent with the Act's requirements in section 104(g), FEMA is in consultation with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process to include ways to ensure claimants have the information they need regarding Federal programs available to them.

Comment: Commenters also sought clarification on the distinctions between claims for reforestation and revegetation and subsistence or business loss. A commenter wrote that many claimants used trees for subsistence resources and asked for clarification regarding whether trees could be considered subsistence resources based on the language of the IFR.

FEMA Response: As explained in the IFR, FEMA limited compensation for trees and other landscaping to 25 percent of the pre-Fire value of the structure and lot. This approach was generally consistent with the approach taken in the Cerro Grande Fire Assistance process. As explained in the IFR, the 25 percent limitation did not apply to business losses for timber, crops, and other natural resources under § 296.21(d). In response to commenter concerns and confusion regarding the application of this formula, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula as the Cerro Grande formula is not appropriate given the geographic, economic, and cultural distinctions between that area and the areas impacted by this Fire. The Final Rule allows for compensatory damages for the cost of replacement of destroyed trees and other landscaping. Compensation for business loss and subsistence resources continue to be compensated at 100 percent. FEMA further notes that the definition of ''subsistence resources'' in § 296.4 of the Final Rule includes firewood or other natural resource gathering, timbering, or agricultural activities undertaken by the claimant without financial renumeration. This definition should encompass the loss of trees as subsistence resources. The edits made to § 296.21(c)(2) of the Final Rule are sufficient to address the commenters' concerns and modify the claims process to more appropriately address the needs of the claimants and communities impacted by this Fire.

3. Comments on § 296.21(c)(3) Decrease in Value of Real Property

Comment: Several commenters recommended FEMA delete the requirement that claimants demonstrate the value of the real property was permanently diminished as a result of the Fire. Two commenters recommended FEMA revise the language to ''significantly'' or ''long-term.''

FEMA Response: FEMA agrees that it will be difficult to demonstrate the real property value is permanently diminished given the size and scope of the Fire as well as the types of damages caused to real property in this area. As discussed above, the Hermit's Peak/Calf Canyon Fire impacted communities that are less densely populated and more heavily forested than the Cerro Grande Fire. These undeveloped areas may not be able to easily establish a permanent diminution in value as a result of the Fire. FEMA is removing the term ''permanently'' from § 296.21(c)(3) in the Final Rule and is rewriting this paragraph to read that the claimant can establish that the value of the real property was significantly diminished long-term as a result of the Hermit's Peak/Calf Canyon Fire. This change addresses the commenters' concerns regarding their ability to prove property values were permanently diminished while also still requiring some demonstration of a significant diminution in property value that is long-term in nature. The change in the Final Rule balances the need to compensate claimants for actual compensatory damages with the challenges of demonstrating a loss of property value where the claimant does not sell the property.

Comment: Commenters raised specific concerns in documenting the diminution of property value, noting real estate sale amounts are not available in public records in New Mexico and recommending FEMA develop a method to compensate for real property claims using local appraisers, insurance records, and tax assessments.

FEMA Response: FEMA understands these concerns and will be developing tools to assist claimants with this process. The regulatory text does not require revision as the process for demonstrating this injury can be better addressed in tools developed for claimants to accompany Claims Office policy and procedures.

Comment: Some commenters sought the inclusion of intrinsic value in this loss calculation.

FEMA Response: Generally, FEMA's calculation of damages, including how damaged property is valued, will be governed by the Act and Federal law and, to the extent it is not pre-empted by Federal law, New Mexico law.

Comment: One commenter stated the loss calculation would increase if neighboring homes were not also rebuilt.

FEMA Response: FEMA recognizes that not every property owner will file a claim or seek to rebuild on their property. Claimants receiving payment for their real property are not required to rebuild and FEMA cannot require property owners to do so. Claimants may provide information on how the lack of rebuilding in their area is impacting their property value when filing a claim under this paragraph.

Comment: Another commenter suggested FEMA provide more than two years to be able to claim the loss of property value. The commenter stated ''for those of us who are not going to sell our property in the next two years, how

are we going to claim the loss in value of our property due to the fire and flood? I believe that the regulation should contemplate more than [two] years to be able to claim this loss.''

FEMA Response: As explained above, some deadlines in the rule are beyond FEMA's control. The Act requires claimants submit their Notice of Loss no later than November 14, 2024, two years from the date the IFR is published. FEMA has built in extensions of this timeline for good cause, recognizing the realities of the Fire's impact. Sections 296.34 and 296.35 below establish a process for notifying FEMA of injuries that are not referenced in the initial Notice of Loss. In § 296.35, the IFR allows claimants to reopen a claim no later than November 14, 2025 if they sold their real estate and wished to present a claim for decrease in the value of real property. Additionally, claimants may request compensation for a decrease in the value of real property if they can demonstrate the value of the real property was significantly diminished long-term as a result of the Fire pursuant to changes made to this section in the Final Rule.

Comment: Several commenters suggested FEMA incorporate language regarding water rights into this paragraph because water rights are treated as property rights in New Mexico and a claimant should be permitted to submit a claim for the decrease in value of a water right.

FEMA Response: Claimants can file a claim for damages regarding water rights under the current language of this section and no changes are required in the Final Rule. Specifically, the current regulatory language regarding real property can be read to include water rights attached to that real property.

4. Comments on § 296.21(c)(4) Subsistence

Comment: Commenters raised questions about how damages would be defined and calculated under this paragraph. One commenter stated claimants in the area tend to practice self-sustainability in addition to using the land for business purposes and asked that FEMA further define on how losses under this would be calculated. Another commenter wrote ''FEMA needs to build in as much flexibility as possible for compensating future claims related to lost subsistence. The restoration of certain subsistence resources is difficult to predict, and the services may be permanently lost in certain cases.'' Comments were also received on the appropriate timeline for when these resources can reasonably be expected to return to the level of availability that existed prior to the Fire. Some commenters suggested that FEMA determine a date of five years as the timeline by which subsistence resources can be expected to return to the level of availability that existed before the Fire while at least one commenter felt that five years was not a sufficient period of time.

FEMA Response: FEMA recognizes the challenges associated with calculating damages for subsistence. FEMA anticipates consulting experts with respect to subsistence resource claims to ensure the damages calculations address the reasonable cost of replacing these resources and the timeline for when these resources can reasonably be expected to return to the level of availability that existed prior to the Fire. FEMA is looking at ways to better streamline the claims process in response to other comments and is considering offering payment formulas for subsistence. Any such type of formula would provide claimants with the option to either leverage that formula with their claim or submit documentation detailing their specific damages.

Comment: Some commenters suggested that income losses be considered part of subsistence losses. A commenter suggested that the regulations acknowledge that subsistence resources can also be the primary source of revenue and income for impacted individuals and businesses.

FEMA Response: FEMA disagrees with the commenter. As defined at § 296.4, ''subsistence resources'' include ''activities undertaken by the claimant without financial renumeration'' and losses involving revenue and income are better addressed as business loss.

Comment: Other commenters sought compensation for ongoing costs for rent, food, energy, and other resources needed to maintain a subsistence lifestyle both in the immediate and long-term. One commenter suggested FEMA fully cover the recovery costs necessary to restore agricultural systems and damages and mitigation costs related to water quality, water rights, and soil health impairments for household and subsistence uses.

FEMA Response: FEMA recognizes that the loss of subsistence resources can result in the need to obtain substitute resources in the cash economy. The current IFR allows for the costs of obtaining substitute resources in the cash economy to be considered compensatory damages. Other Federal and/or State programs may also address some of the immediate costs such as rent raised by commenters. To the extent the agricultural system and related costs constitute a subsistence resource (*i.e.,* one for which the claimant receives no financial renumeration), it can be considered under a subsistence resource claim. To the extent such a system and related costs are for financial renumeration, a claim can be filed for damages as a business loss. As explained above, claimants can file a claim for damages regarding water rights under the current language of the regulation and no changes are required in the Final Rule. Specifically, the current regulatory language regarding real property can be read to include water rights attached to that real property.

Comment: Several commenters on this paragraph focused on the need for firewood and other subsistence resources, with one commenter requesting vouchers for firewood for the next five to ten years or until the forests have regrown to support subsistence firewood requirements.

FEMA Response: The IFR includes firewood gathering as a subsistence resource that can be compensable. Claimants can seek compensation for firewood under the subsistence resources paragraphs of the regulation and, where firewood may have been sold by the claimant, under the business loss paragraph of the regulation.

5. Comments on Physical Infrastructure (New § 296.21(c)(5))

Comment: Several commenters suggested FEMA incorporate language into the regulation clarifying the availability of compensation for damages to physical infrastructure. Two commenters recommended FEMA specifically incorporate guidance on acequias in the Final Rule to help alleviate challenges for claimants. Another commenter suggested language be added to this paragraph to include physical infrastructure such as irrigation infrastructure, acequias, and the loss of use of irrigation water rights appurtenant to the land with which other commenters agreed.

FEMA Response: Consistent with the Act at section 104(d)(4)(A)(iii), FEMA is adding paragraph (c)(5) to § 296.21 to address physical infrastructure damage. This paragraph clarifies that claimants may seek compensation for the damage or destruction of physical infrastructure that may include damage to irrigation infrastructure such as acequia systems. This addition is consistent with the Act and incorporating this language better reflects the unique challenges faced by the communities impacted by the Fire. As explained above, claimants can file a claim for damages regarding water

rights under the current language of the regulation and no changes are required in the Final Rule.

I. Comments on § 296.21(d) Business Loss

Comment: Some commenters raised questions about the types of damages that would be considered as business losses, from opportunities to seek other business ventures to compensating for lost opportunity, agricultural loss, future business loss, lost income from landowner tag use or national forest permits, and future lost income.

FEMA Response: In paragraph (d), FEMA details the types of damages generally considered eligible for compensation. This list, however, is not all inclusive and FEMA will review each claim on a case-by-case basis to determine whether the loss is eligible for compensation under the Act. Claimants should submit all claims associated with loss or damages resulting from the fire for review and consideration.

Comment: Two commenters suggested compensation for economic development for the areas impacted by the Fire.

FEMA Response: As explained above, economic development can be speculative and a claimant seeking compensatory damages for loss of economic development would need to be able to demonstrate such loss was a result of the Fire. The IFR currently provides the types of actual compensatory damages that are compensable under the Act, but that list is not all-inclusive. Claimants seeking compensation for actual compensatory damages not specifically listed in the regulation can still submit a claim for compensation under the Act. For this type of claim, claimants should consider how these damages would be considered actual compensatory damages for injuries resulting from the Fire consistent with the Act. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

Comment: One commenter suggested FEMA cover damages and mitigation costs related to water quality and water rights impacts to businesses, including agricultural producers.

FEMA Response: Businesses may file claims for damages associated with water rights as part of claims associated with damages to real property under that paragraph and/or under business loss.

Comment: Some commenters asked how FEMA would calculate business losses and specifically loss of business income given the economic challenges presented by the COVID–19 pandemic. Commenters generally stated that FEMA consider the time period prior to the pandemic, but also to consider other factors such as prior fires impacting the area.

FEMA Response: FEMA understands the challenges regarding the appropriate timeline for consideration of business loss calculations given the COVID–19 pandemic and prior disasters. FEMA must also consider the programs available to businesses during those periods and the financial resources those programs may have provided to businesses. Claimants seeking compensation should present what they believe is a reasonable period of time to demonstrate their income and business losses resulting from the Fire. FEMA anticipates future policy and procedure documents will provide examples to help claimants with this type of compensation request.

Comment: Commenters also asked about the types of businesses that are covered under the Act. One comment stated the statutory construction of the Act allows for reimbursement of business loss for nonprofit organizations.

FEMA Response: The current definition of ''injured person'' includes ''other non-Federal entity'' and that terminology encompasses non-profit organizations. While FEMA understands the importance of non-profit organizations in the relief process, the agency believes the current definition sufficiently encompasses all types of for-profit and non-profit entities and those entities can seek damages for business loss.

Comment: Two commenters asked about the eligibility for business losses for those communities that were not in the direct area of the Fire but suffered losses as a result of the Fire. In prioritizing these claims, a commenter asked FEMA to first consider claims from claimants with actual fire and flood damage, but then consider business loss for claimants where the State closed off areas during the Fire.

FEMA Response: Unlike disaster declarations that cover a specific geographic area, the Act covers all injured parties that suffered injuries as a result of the Fire. Claimants seeking compensation for their business losses should file a claim demonstrating their loss was a result of the Fire for consideration. Regarding prioritization, FEMA is amending § 296.13 to specifically clarify the prioritization required under section 104(d)(1)(A)(ii) of the Act that requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. FEMA will work to ensure that all claims are reviewed in an expeditious and fair manner.

Comment: Finally, a commenter asked questions about the reforestation damages formula and its application to business losses for revenue received from cutting Christmas trees on their property.

FEMA Response: As explained in the IFR, business losses are distinct from reforestation losses and a formula developed for reforestation would not be applied to those losses. Timber, crops, and other natural resources were listed under business losses in paragraph (d). With the updates made to paragraph (c)(2) above, FEMA has removed the 25 percent reforestation formula from the regulation. Business losses are not subject to a specific formula as part of compensation under the regulation.

J. Comments on § 296.21(e) Financial Loss Generally

Comment: Commenters raised questions about the types of financial losses to be covered under the Act and the eligible claimants for financial losses. One commenter suggested FEMA clarify how claimants can be compensated for the increased cost of homeowner and business insurance, stating these additional expenses will be ongoing for decades. Another commenter suggested FEMA cover unforeseen financial costs associated with evacuations.

FEMA Response: In paragraph (e), FEMA details the types of damages generally considered eligible for compensation under financial loss. This list, however, is not all inclusive and FEMA will review each claim on a case-by-case basis to determine whether or not the loss is eligible for compensation under the Act. Claimants should submit all claims associated with financial loss for review and consideration.

Comment: One comment stated the statutory construction of the Act allows for reimbursement of financial loss for nonprofit organizations.

FEMA Response: The current definition of ''injured person'' includes ''other non-Federal entity'' and that terminology encompasses non-profit organizations. While FEMA understands the importance of non-profit organizations in the relief process, the agency believes the current definition sufficiently encompasses all types of for-profit and non-profit entities and

those entities can seek damages for financial loss.

Comment: One commenter made several specific suggestions in their comment seeking funding for public transportation and increased county staff salaries and fringe benefits.

FEMA Response: As explained above, FEMA details the types of damages generally considered eligible for compensation under financial loss in this paragraph in the IFR. This list, however, is not all inclusive and FEMA will review each claim on a case-by-case basis to determine whether or not the loss is eligible for compensation under the Act. Claimants should submit all claims associated with business loss for review and consideration. FEMA reminds claimants that they must demonstrate that the financial loss was a result of the Fire. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek financial losses if they can demonstrate these losses were a result of the Fire.

Comment: Two commenters wrote that FEMA should provide funding to allow for economic redevelopment and stimulus activities under business and/or financial loss.

FEMA Response: As explained above, economic development can be speculative and a claimant seeking compensatory damages for loss of economic development would need to be able to demonstrate such loss was a result of the Fire. The IFR currently provides the types of actual compensatory damages that are compensable under the Act, but that list is not all-inclusive. Claimants seeking compensation for actual compensatory damages not specifically listed in the regulation can still submit a claim for compensation under the Act. For this type of claim, claimants should consider how these damages would be considered actual compensatory damages to compensate claimants for injuries resulting from the Fire consistent with the Act. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

1. Comments on § 296.21(e)(1) Recovery Loans

Comment: One commenter wrote that claimants are carrying the cost burden of paying interest on loans provided by the SBA and suggested that FEMA define a process in coordination with the SBA such that when an individual signs a Notice of Loss, any further payment of SBA interest will be deferred.

FEMA Response: Section 296.21(e)(1) of the IFR provides compensation for interest paid on recovery loans, including SBA loans, and FEMA will cooperate with the SBA for procedures on the repayment of those loans. While FEMA intends to compensate claimants for interest paid on their SBA or other recovery loan, FEMA does not have the statutory authority to defer payment of interest on SBA loans in the interim.

2. Comments on § 296.21(e)(2) Flood Insurance

Comment: Commenters suggested specific changes to this section of the IFR. Specifically, commenters suggested the agency delete the two-year limitation on flood insurance. Some commenters requested a five-year period for flood insurance coverage while suggested a 10- or 15-year period of coverage. Commenters also requested that these premium payments be available as compensation for claimants that are not required to purchase flood insurance.

FEMA Response: Section 104(d)(4)(C)(viii) of the Act provides for payment of flood insurance premiums required to be paid on or before May 31, 2024. FEMA expanded upon this section of the Act to provide claimants with payment for flood insurance premiums even if the claimant is not required to purchase flood insurance, as the agency understands some claimants may have legitimate reasons for concern around flooding even if they are not currently required to maintain flood insurance. FEMA exercised the discretion in section 104(d)(4)(C)(x) to allow compensation for flood insurance premiums if the claimant purchased flood insurance after the Fire due to the fear of heightened flood risk. FEMA does not believe, however, that the agency has the statutory authority to extend these payments beyond the period set by Congress in the Act. The current regulatory text sufficiently addresses the timeline and explains that both claimants currently required to purchase flood insurance and those claimants that purchase flood insurance based on their fear of heightened flood risk will be compensated for their flood insurance premiums due on or before May 31, 2024. As explained in the IFR, FEMA may provide flood insurance to such claimants directly through a group or blanket policy. The terms of that policy may allow for a longer period of coverage than the annual renewals under the regular National Flood Insurance Program Standard Flood Insurance Policy so long as the premium for that policy is paid on or before May 31, 2024. Additionally, FEMA notes that the Act provides for funding for heightened risk reduction to help alleviate the long-term impacts of flooding. This funding under § 296.21(e)(5) is available for claimants to file a claim until November 14, 2025.

Comment: One commenter wrote asking FEMA to clarify that an increase in flood insurance premiums is allowable as an allowable financial loss.

FEMA Response: As explained above, section 104(d)(4)(C)(viii) of the Act provides compensation for payment of flood insurance premiums paid on or before May 31, 2024. The current regulatory text sufficiently addresses the timeline and explains that both claimants currently required to purchase flood insurance and those claimants that purchase flood insurance based on their fear of heightened flood risk will be compensated for their flood insurance premiums paid on or before May 31, 2024 even if those premiums increase. FEMA does not believe changes to the regulatory text are required in the Final Rule for this clarification.

3. Comments on § 296.21(e)(3) Out-of-Pocket Expenses for Mental Health Treatment

Comment: Commenters were generally supportive of this paragraph but sought clarifications and an extension of the time for which expenses would be compensated. Most commenters asked FEMA to consider the long-term impacts of the Fire and extend the coverage of expenses beyond 2024. A commenter stated that negative mental and emotional impacts would continue for decades, if not through the remainder of their lives. Another commenter wrote that not all mental health impacts of this major disaster were known to us now and would take additional time to be identified and treated, recommending FEMA extend this reimbursement deadline to treatments rendered by the end of 2025.

FEMA Response: FEMA appreciates the concerns raised by commenters on the timeline associated with out-of-pocket mental health expenses. In the IFR, FEMA limited this timeline to April 6, 2024, two years after the date the Fire began. FEMA agrees that this timeline should be extended and recognizes that mental health treatment may extend beyond the deadline to file a claim. The Final Rule extends the deadline allowing claimants to seek reimbursement for out-of-pocket mental health treatment expenses for treatment identified on or before November 14, 2024. FEMA is extending the deadline

until November 14, 2024 for consistency with the timeline to file a claim under the Act to ensure that all treatment identified during that period may be claimed. FEMA recognizes that mental health treatment may extend beyond the deadline for filing a claim and claimants may also reopen claims under § 296.35 for good cause.

Comment: One commenter expressed confusion about whether or not mental health treatment would be compensated. Other commenters requested clarification that the mental health treatment expenses apply to conditions that the Fire worsened.

FEMA Response: FEMA is revising § 296.21(e)(3) in the Final Rule to clarify that compensation will be available for out-of-pocket mental health treatment expenses for conditions resulting from and conditions that were worsened by the Fire. This change in the Final Rule will ensure those victims whose conditions worsened as a result of the Fire will be able to receive compensation for out-of-pocket mental health treatment expenses.

Comment: Commenters also raised questions about personal injuries and physical health conditions, raising questions about long-term health effects because of exposure to contaminant and carcinogens and other air and water pollutants as a result of the Fire and how FEMA would cover those damages.

FEMA Response: As one commenter noted, FEMA defines injury in § 296.4 to include personal injury consistent with the Federal Tort Claims Act and personal injury damages are compensable under the Act. FEMA lists the types of damages for which compensation may be awarded for financial loss. This list, however, is not all inclusive and FEMA will review each claim on a case-by-case basis to determine whether or not the loss is eligible for compensation under the Act. Claimants should submit all claims associated with personal injury for review and consideration. FEMA does not believe changes to the regulatory text from the IFR are required in the Final Rule given the definition of injury clearly encompasses personal injury.

4. Comments on § 296.21(e)(4) Donations

Comment: Most commenters generally supported extending the timeframe provided for donations beyond the September 20, 2022 timeframe provided in the IFR. Three commenters supported changing the timeframe for donations to one year after the Fire was contained. Two of the three commenters disagreed on the appropriate date to reflect one year after the Fire's containment with one commenter recommending August 30, 2023 and another recommending FEMA change the date to August 21, 2023.

FEMA Response: FEMA agrees that the timeframe should be extended and given the confusion regarding the timeline for the Fire's containment, FEMA is changing the deadline in the Final Rule from September 20, 2022 to November 14, 2022 to reflect the date the IFR was published. FEMA seeks to balance the need to extend this deadline with concerns raised by other commenters regarding the inclusion of donations as allowable financial loss damages in the IFR. Setting the timeframe for these donations to the IFR's publication date ensures that those donations made to support those suffering from the Fire will be compensated up until the date at which claimants had a better understanding of how FEMA would provide for compensation for their losses and the date when claimants could begin to pursue a claim under the Act thus reducing the need to rely on these donations.

Comment: Two individual commenters opposed the inclusion of donations in the regulation. A commenter wrote ''Voluntary and charity is just that, given freely and without expectation of gain or reimbursement. If that was the actual intent of the presence of these organization in the area, then they should not be reimbursed for their acts of charity and volunteering.'' Another commenter asked if there were other programs that could compensate these organizations for the donations provided to the people of impacted by the Fire. A different commenter recommended FEMA prioritize payment of claims for property loss, financial loss, and business loss before reimbursing claims for voluntary donations.

FEMA Response: FEMA incorporated the ability to seek compensation for financial loss for donations consistent with the Cerro Grande Fire Assistance process. FEMA heard from the public that this Fire is distinct in many ways from the Cerro Grande Fire and requires differences in the process but believes the ability to compensate those that provided donations should remain in the Final Rule given the Hermit's Peak/Calf Canyon Fire's impact. FEMA understands that these donations may have come from individuals, businesses, and other entities not just charitable organizations whose sole purpose is providing such services and wants to ensure those claimants are able to seek compensation for their donation efforts to support the community. Recognizing the concerns raised by these commenters as well as those commenters that felt this was an important component of the IFR, FEMA is extending but still limiting the timeframe available for those seeking compensation for financial losses associated with donations to the date the IFR was published. Setting the timeframe for these donations to the IFR's publication date ensures that those donations made to support those suffering from the Fire will be compensated up until the date at which claimants had a better understanding of how FEMA would provide for compensation for their losses and the date when claimants could begin to pursue a claim under the Act thus reducing the need to rely on these donations. FEMA also recognizes that donations to injured parties are not considered a duplication of benefits and that extension of the time frame would create the anomalous situation where FEMA would be duplicating compensation. FEMA agrees with the commenter that prioritization of claims should be focused first on claims for property loss, financial loss, and business loss before reimbursing claims for voluntary donations and will implement a process to ensure this prioritization to the greatest extent possible.

5. Comments on § 296.21(e)(5) Heightened Risk Reduction

Comment: Commenters generally opposed the formula for compensation provided for heightened risk reduction efforts. Several commenters recommended deleting the 25 percent formula for heightened risk reduction efforts. A commenter wrote that the Act did not impose caps on tree or mitigation damages. A different commenter wrote that the Act addressed limits on damages, limiting them to 'actual compensatory damages measured by injuries suffered' and that the Act further placed New Mexico law in a position subordinate to the terms of the Act itself by allowing for New Mexico law to govern the calculation of damages. Another commenter stated that ''these arbitrary Urban Centric caps do not make victims whole as required by the Act but rather shorts the landowners.''

FEMA Response: FEMA recognizes that this Fire is distinct from the Cerro Grande Fire and that the formula for compensation utilized for the Cerro Grande Fire Assistance process will not sufficiently address the risk reduction needs for claimants in this Fire and is eliminating the 25 percent formula from

the Final Rule. Specifically, FEMA is removing the language ''Compensation under this section may not exceed 25 percent of the higher of payments from all sources (*i.e.,* the Act, insurance proceeds, FEMA assistance under the Stafford Act) for damages to the structure and lot, or the pre-fire value of the structure and lot'' from the Final Rule. FEMA also recognizes that compensation for risk reduction is not generally compensable under New Mexico law.

Comment: Commenters also questioned the language in the IFR requiring that claimants must complete the risk reduction project for which they receive compensation. One commenter wrote that the requirement that the risk reduction project must be completed before compensation can be awarded was an incorrect reading of the Act. ''The word 'incurred' in Section 104(d)(4)(C)(vii) of the Act does not mean 'completed' or 'paid.' Rather, the word 'incur' means ''to become through one's own action liable or subject to.' (Oxford English Dictionary.) If a claimant has contracted for risk reduction work or started but not completed the work for which he/she will be financially responsible, the claimant has ''incurred'' the cost within the meaning of the statute. Requiring the work to be completed before compensation is awarded defeats the purpose of the Act to compensate fire victims for their losses. Requiring work to be completed prior to compensation defeats the intent of the Act and is patently unreasonable. To require a wildfire victim to advance money to remediate the damage caused by the Forest Service, but not be recompensed until the work is complete, is not within the express language or intent of the Act.'' Another commenter wrote that requiring completion of the risk reduction work before compensation would be provided defeated the purpose of the Act as many claimants would not be able to afford to do the work without the compensation funds. This commenter stated that once a claimant secured a contract for the risk reduction work, they would have technically incurred the costs and the Act allows for advance or partial payments before final settlement.

FEMA Response: FEMA disagrees with the commenters' reading of the IFR that there is a requirement to complete the work before compensation can be received. Rather, the IFR states that claimants ''must complete the risk reduction project for which they receive compensation.'' FEMA does not require that the work be completed prior to payment. Rather, the language requires applicants to complete the work for which they receive compensation related to the risk reduction project. FEMA understands that claimants may not have completed the project at the time the claim for this compensation is filed and anticipates these claims may include estimates for the work to be done specifically by allowing claimants to amend their Notice of Loss by November 14, 2025. Claimants must ultimately complete the risk reduction project for which they receive compensation as failing to do so would be contrary to the Act's purpose in providing compensation to reduce these risks, and because the compensation provided would not generally be otherwise available in litigation under New Mexico law. FEMA retains the right to inspect real property. See § 296.30.

Comment: One commenter suggested removing all language related to the 25 percent formula as well as language regarding the deadlines associated with filings and that claimants should consider current building codes and complete the project for which they receive compensation.

FEMA Response: FEMA agrees with the commenter regarding the formula and is removing the sentence associated with it as explained above. However, FEMA disagrees that the agency can and should remove the remaining language in the IFR. The IFR provides a deadline by which claimants must submit the claim for compensation for heightened risk reduction efforts. This language is consistent with other sections of the regulation where deadlines are provided, and the deadline provided here is consistent with the Act. FEMA generally does not have the statutory authority to extend this deadline. FEMA further believes claimants should be encouraged to consider current building codes and standards when completing heightened risk reduction projects as these codes and standards should generally result in more resilient rebuilding and likely will be mandatory under local building ordinances. Finally, as explained above, claimants must complete the risk reduction project for which they receive compensation as failing to do so would be contrary to the Act's purpose in providing compensation to reduce these risks. FEMA retains the right to inspect real property. See § 296.30.

Comment: One commenter requested that FEMA not attempt to reassure claimants of the safety of rebuilding homes where they once stood as the Fire impacts now made those areas extremely high-risk hazard zones.

FEMA Response: FEMA understands concerns about rebuilding immediately after the Fire and will work with claimants to discuss how these concerns can be addressed as part of the heightened risk reduction process. The Act allows for these damages and FEMA is required to provide actual compensatory damages to claimants seeking them under the Act. FEMA does not believe any changes to this section of the Final Rule are required to address this concern.

Comment: One commenter asked how heightened risk reduction loss would be calculated and whether payment would be made for processes completed and for those anticipated to be completed.

FEMA Response: Claimants seeking compensation for this loss should submit the documentation they have showing costs incurred or expected to be incurred as part of the heightened risk reduction project. As explained above, the IFR states that claimants ''must complete the risk reduction project for which they receive compensation.'' FEMA does not require that the work be completed prior to payment. Rather, the language requires applicants to complete the work for which they receive compensation related to the risk reduction project. FEMA understands that claimants may not have completed the project at the time the claim for this compensation is filed and anticipates these claims may include estimates for the work to be done specifically by allowing claimants to amend their Notice of Loss by November 14, 2025. Claimants must ultimately complete the risk reduction project for which they receive compensation as failing to do so would be contrary to the Act's purpose in providing compensation to reduce these risks. FEMA retains the right to inspect real property. See § 296.30.

Comment: Several commenters recommended FEMA add language to this section to state that ''compensation under this section will not be awarded for costs that have been reimbursed under FEMA's Public Assistance Programs or by insurance.'' The commenters requested that FEMA interpret this limitation liberally and in alignment with FEMA's mission.

FEMA Response: FEMA appreciates the commenters' desire for clarity, but the agency believes § 296.21(e) resolves these concerns. Specifically, the IFR at § 296.21(e) states that FEMA is not authorized to compensate claimants for damages paid by insurance. Further, § 296.21(f)(2) states that ''compensation will not be awarded under the Act for injuries or costs that are eligible under the Public Assistance Program.'' FEMA

does not believe revising the Final Rule as requested by the commenters is necessary to meet the intent of the statute. FEMA notes the commenters' desire for the agency to consider additional risk reduction efforts to make individuals and communities more resilient than the pre-Fire condition, but the Act limits FEMA's authority to compensate claimants to the costs of reasonable efforts to reduce risks to levels prevailing prior to the Fire. If a claimant seeks to implement a heightened risk reduction project that will result in reduced risks beyond the level prevailing at the time of the Fire, FEMA will consider such a request on a case-by-case basis consistent with the agency's discretion under the Act.

Comment: A commenter wrote regarding nature-based solutions, stating that the science was well established, and that these solutions were actively applied by the U.S. Forest Service to burned areas. The commenter mentioned mulching, seeding, and replanting burned forest ground as accepted means of reduction the risk of flood waters running downslope.

FEMA Response: FEMA appreciates the commenter's response to the agency's request for feedback regarding nature-based solutions. FEMA continues to support implementation of these solutions where appropriate and encourages claimants to consider nature-based solutions as part of their claim for compensation under this provision.

Comment: One commenter recommended that FEMA develop some pre-approved mitigation opportunities for homeowners, businesses, and other entities to allow claimants to better determine the appropriate projects for them. The commenter stated that this would allow the Claims Office to automatically approve those projects with the present dollar amount and thus not require every single specific claim go through some arduous mitigation process.

FEMA Response: FEMA appreciates the suggestion for a pre-approved project plan and associated cost formula. FEMA attempted to streamline the process by offering the formula presented in the IFR and understands there can be advantages to these types of schemes to better assist claimants in receiving prompt payment. As explained above, FEMA is revising the language in this paragraph to eliminate the 25 percent formula that raised so many concerns with commenters. However, FEMA is looking at ways to better streamline the claims process in response to other comments and is considering offering payment formulas based on specific project types as the commenter suggested. For example, FEMA is considering a menu of potential actions claimants may take for heightened risk reduction claims that would reduce claim review time and streamline payment for those claims. Any such type of formula would provide claimants with the option to either leverage that formula with their claim or submit documentation detailing their specific damages and costs.

K. Comments on § 296.21(f) Insurance and Other Benefits Generally

Comment: As mentioned above, some commenters requested FEMA eliminate references to other Federal government programs and their use in the claims process. Commenters raised general concerns about the burden placed on claimants to engage in other Federal programs and expressed concerns about a lack of interagency cooperation.

FEMA Response: FEMA does not intend to require claimants to apply to other Federal programs, except for FEMA's Public Assistance program. Rather, the language was intended to clarify that, where the claimant has received payment from another Federal program, FEMA will only be able to compensate claimants under the Act for those costs not covered already in the payment received from the other Federal program. This avoids a duplication of payment for the same damage. Claimants have the option of seeking assistance from other Federal programs, filing for compensation under the Act, or pursuing both other Federal program and compensation under the Act. The language in this section of the IFR simply clarifies that FEMA cannot duplicate payment but can provide additional payment to cover actual compensatory damages that were not covered by other Federal programs. FEMA notes that the IFR only prohibits payment under the Act for injuries or costs that are eligible under the Public Assistance Program. The Act provides in section 104(k) to waive the matching funds required for Federal programs and require that those programs pay the cost share directly. This ensures that those funds are taken from those Federal programs rather than the Act's funding and thus helps further extend the ability of the Act to fund compensation for claimants. Section 296.21(f)(2) of the IFR confirms that FEMA will not pay claimants for injuries or costs that are eligible under the Public Assistance Program but rather that these injuries and costs need to be paid through the Public Assistance Program and given the Act's provisions, FEMA is required to pay those eligible costs at 100 percent without a cost share requirement for State and local projects.

As explained above, FEMA is coordinating with other Federal agencies to ensure data sharing and better communication between programs. FEMA has engaged with and continues to engage with the Small Business Administration, the Department of Agriculture, and other Federal agencies to help facilitate coordination of the assistance available to claimants and the impacted communities. Consistent with the Act's requirements in section 104(g), FEMA is consulting with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process to include ways to ensure claimants have the information they need regarding Federal programs available to them.

Comment: One commenter requested FEMA streamline access to available Federal programs and, in addition to funds appropriated under the Act, to utilize other Federal funding opportunities when and where available. The commenter asked that State Case Managers be integrated into the program and trained as Navigators to serve as a single point of contact to help claimants throughout the process. The commenter also requested FEMA reopen Federal programs where deadlines may have passed to submit applications to allow claimants the opportunity to take advantage of those programs.

FEMA Response: FEMA anticipates that Claims Navigators will provide the assistance envisioned by the commenter and additional staffing outside of the Claims Office will not be required. FEMA is unable to reopen non-FEMA Federal programs for claimants but can work with claimants regarding Federal program availability generally and the deadlines associated with FEMA-specific programs.

1. Comments on § 296.21(f)(1) Insurance

Comment: Three commenters recommended FEMA delete all references to insurance companies in the regulation.

FEMA Response: Section 104(d)(1)(C) of the Act requires FEMA to reduce the amount paid for the claim by the amount that is equal to the total of insurance benefits and other payments or settlements with respect to the claim. FEMA does not have the statutory authority to delete this requirement.

Comment: One commenter requested FEMA note that if an insurance company has not paid all that FEMA anticipated, FEMA should commit to awarding the difference at the time the

authorized official's determination is made.

FEMA Response: In the preamble to the IFR, FEMA stated that the agency can award the difference at the time the Authorized Official's determination is made. FEMA also noted in the preamble that the State of New Mexico generally requires insurance companies to settle catastrophic claims within 90 days of the date the claim was reported, and the agency expects that most, if not all, insurance claims will be paid before the determination is issued. FEMA further explained in the IFR preamble that if the insurance claim is resolved after the determination and the claimant is due additional compensation as a result, the claim can be reconsidered under sections 296.34 or 296.35 of the IFR. FEMA believe this process is sufficient to resolve the commenter's concerns and no changes to the regulatory text of the Final Rule are required.

Comment: Another commenter stated that insurance companies will demand compensation for the amounts they have paid or will pay to insured claimants and found that to be fair. However, the commenter stated that greed may influence the insurers claims and those claims would then negatively affect claimant compensation.

FEMA Response: Section 104(d)(1)(A)(ii) of the Act requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. Section 296.13 of the IFR requires subrogees to file their Notice of Loss after they have made all payments entitled to the injured person for Fire-related injuries under the terms of the insurance policy. FEMA is amending § 296.13 to specifically clarify the prioritization required under the Act. Further, § 296.21(f) of the regulation requires FEMA to compensate injured persons only for damages not paid or not to be paid by insurance companies. As explained above, these provisions, in addition to the changes made to § 296.13 of the Final Rule, will help ensure that the compensation available to injured persons is not negatively affected.

Comment: One individual commenter expressed concerns that insurance benefits would be impacted by claims under the Act and that claims under the Act will impact insurance benefits.

FEMA Response: As explained above, Section 104(d)(1)(A)(ii) of the Act requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. Section 296.13 of the IFR requires subrogees to file their Notice of Loss after they have made all payments entitled to the injured person for Fire-related injuries under the terms of the insurance policy. FEMA is amending § 296.13 to specifically clarify the prioritization required under the Act. Further, § 296.21(f) of the regulation requires FEMA to compensate injured persons only for damages not paid or not to be paid by insurance companies. As explained above, these provisions, in addition to the changes made to § 296.13 of the Final Rule, will help ensure that the compensation available to injured persons is not negatively affected.

2. Comments on § 296.21(f)(2) Coordination With FEMA's Public Assistance Program

Comment: Some commenters requested FEMA remove references to the Public Assistance Program as the deadlines have passed for that program. Other commenters suggested the paragraph be reworded from expecting claimants to apply for the program to encouraging them to do so and to state that compensation under the Act will not be awarded for damages already compensated by FEMA's Public Assistance Program instead of all eligible costs.

FEMA Response: FEMA disagrees with the commenters seeking to delete this provision of the IFR. FEMA is retaining this language in the Final Rule as the agency believes it is important to clarify that those injuries and costs eligible under the Public Assistance Program must be paid from that program to ensure the funds are used consistently with the Act's provision in section 104(k). FEMA understands that the Public Assistance application period has closed but will continue to accept these applications given the Act's requirements. Those entities eligible for Public Assistance should continue to apply for and seek assistance through that program.

Comment: One commenter requested that FEMA, in coordination with the New Mexico Department of Homeland Security and Emergency Management, assist claimants in applying for and receiving assistance under the Public Assistance Program.

FEMA Response: As explained above, FEMA is coordinating with other Federal agencies to ensure data sharing and better communication between programs. FEMA has engaged with and continues to engage with the Small Business Administration, the Department of Agriculture, and other Federal agencies to help facilitate coordination of the assistance available to claimants and the impacted communities. Consistent with the Act's requirements in section 104(g), FEMA is in consultation with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process to include ways to ensure claimants have the information they need regarding Federal programs available to them.

Comment: A commenter requested compensation in several areas that may qualify for the Public Assistance Program.

FEMA Response: Any claimant with an injury or costs that may be eligible for Public Assistance should apply for Public Assistance. FEMA understands that the Public Assistance application period has closed but will continue to accept these applications given the Act's requirements.

3. Comments on § 296.21(f)(3) Benefits Provided by FEMA's Individual Assistance Program

Comment: One commenter requested that FEMA amend this section to make clear that if FEMA only partially compensated a claimant for injuries or costs under the Individual Assistance Program that the Claims Office will compensate the remainder of costs and injuries under the Act.

FEMA Response: FEMA does not believe the language in the IFR requires revision on this point. The current language provides that FEMA will not award compensation under the Act for those injuries or costs that have been reimbursed under the Individual Assistance program. This language necessitates that those injuries or costs that have not been fully reimbursed are eligible under the Act for compensation. FEMA is not making any changes to the Final Rule in this paragraph given the current language is sufficiently clear.

Comment: Two commenters requested FEMA clarify that temporary emergency support and sheltering, as well as temporary housing costs provided by FEMA should be considered in addition to the Act's funding and should not impact an individual claim.

FEMA Response: FEMA disagrees with these commenters. FEMA cannot pay for temporary housing costs under the Act if the individual has already received payment for these expenses under the Individual Assistance program as this would result in a duplication of payment. These costs, however, would not be deducted from a real property claim. Thus, if a claimant obtained a temporary housing unit through FEMA's Individual Assistance program but sought compensation to rebuild their home after the Fire, FEMA would fully compensate the claimant for the costs associated with rebuilding

their home and would not deduct the costs associated with the claimant's time in the temporary housing unit from the claim as these are distinct costs.

L. Comments on Claims Evaluation

1. Comments on § 296.30(a) Burden of Proof

Comment: Commenters raised a range of concerns about this paragraph. Several commenters requested that FEMA consider alternative ways of demonstrating ownership, particularly given the multigenerational landowners in the region and lack of availability of real estate sale amounts in the public record in New Mexico. A commenter suggested FEMA pay attention to uninsured claimants and those without ''proper'' paperwork, particularly those multigenerational landowners. A different commenter stated that sale prices, appraisals, and mortgage amounts were not public information in New Mexico, asking how claimants seeking to prove the value of their land would get that information.

FEMA Response: The burden of proof remains with the claimant to demonstrate injuries resulting from the Fire, but, as explained above, the Claims Office locally hired Navigators to assist claimants compiling necessary documentation and completing the proof of loss in support of the claim. When necessary, the Claims Office can fund appraisals, surveys, or other data collections efforts to aid the claimant in proving value or ownership of property. Further, as explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other documentary evidence and an affidavit executed by the claimant. Claims Office staff are aware of issues surrounding proof of ownership for land and will work with each claimant to determine alternate methods in determining ownership when deeds are not available. FEMA will work with claimants on this issue and allow claimants the flexibility to extend the deadline for submission of the Proof of Loss where good cause to do so is found.

Comment: A commenter requested claims be assumed to be reasonable and true with the burden of proof on the Federal government to disprove the claim, stating that claimants should be allowed to ''self-certify'' their claims. One commenter wrote that claims should be assumed reasonable and true, and that the burden of proof should be on the Federal government to disprove the claim. This commenter also suggested that claimants should be allowed to self-certify their claims under the penalty of law.

FEMA Response: The burden of proof remains with the claimant to demonstrate injuries resulting from the Fire. FEMA has a legal responsibility to ensure that funds appropriated for claims under the Act are used to pay valid claims. The agency cannot assume that all claims are reasonable and true without appropriate supporting documentation, as such a process would open the Act's funding to significant fraud and abuse. To ensure the Act's funds are properly paid to claimants that suffered injuries as a result of the Fire, FEMA must review supporting documentation associated with each claim. As explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other evidence and affidavits executed by the claimant and others.

Comment: Other commenters also requested the burden be placed on FEMA to research their claims and if the burden was not shifted to FEMA, that claimants should be able to utilize their own experts to assist with their claim and should be reimbursed for the expert's costs.

FEMA Response: As stated above, the burden of proof remains with the claimant to demonstrate injuries resulting from the Fire. As explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other evidence and affidavits executed by the claimant and others. Additionally, § 296.31(a) provides for the use of experts in the process. FEMA is revising the IFR language regarding expenses for experts as detailed below to help address this and other commenters' concerns about the use of experts and the costs associated with doing so. FEMA will work with claimants on this issue and allow claimants the flexibility to extend the deadline for submission of the Proof of Loss where good cause to do so is found pursuant to § 296.30(b). FEMA also provides flexibility in supplementing and reopening claims as detailed in sections 296.34 and 296.35.

Comment: One commenter stated that while they understood that providing proof of ownership was necessary and important for good governance of the funds provided in the Act, they had concerns that the burden of proof would be overly burdensome and difficult for some claimants. The commenter recommended FEMA be flexible in determining what documentation is required.

FEMA Response: As explained above, the burden of proof remains with the claimant to demonstrate injuries resulting from the Fire. As discussed above, the Claims Office locally hired Navigators to assist claimants compiling necessary documentation and completing the proof of loss in support of the claim. Further, as explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other evidence and affidavits. Claims Office staff are aware of issues surrounding proof of ownership for land and will work with each claimant to determine alternate methods in determining ownership when deeds are not available such as affidavits, utility bills and tax records. FEMA will work with claimants on this issue and allow claimants the flexibility to extend the deadline for submission of the Proof of Loss where good cause to do so is found. The goal of the claims process is to reduce complexity and provide assistance with the claims process to the extent possible.

2. Comments on § 296.30(b) Proof of Loss

Comment: One commenter requested that claimants be able to ''self-certify'' their claims under penalty of perjury.

FEMA Response: The burden of proof remains with the claimant to demonstrate injuries resulting from the Fire. As explained above, FEMA has a legal responsibility to ensure that funds appropriated for claims under the Act are used to pay valid claims. The agency cannot assume that all claims are reasonable and true without appropriate supporting documentation, as such a process would open the Act's funding to significant fraud and abuse. To ensure the Act's funds are properly paid to claimants that suffered injuries as a result of the Fire, FEMA must review supporting documentation associated with each claim. FEMA does currently require that claimants submit claims under penalty of perjury to help reduce the potential for fraud, but the agency is unable to allow for self-certification of claims to ensure the good governance of the Act's funds. As explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other evidence and affidavits executed by the claimant and others.

Comment: Commenters raised questions about the deadline for submitting a Proof of Loss. Commenters felt the 150-day period was too short with some commenters stating they may not have information on what damages would be covered by insurance or other

Federal and State government programs within that timeframe. Some commenters suggested the time frame to provide proof of loss be extended to no less than 270 days, especially in cases where expert opinions/reports were needed for the claim.

FEMA Response: As the preamble to the IFR explained, claimants are required to submit their Proof of Loss within 150 days of submission of their Notice of Loss. Section 104(d)(1)(A)(i) of the Act states that FEMA must determine the compensation due to a claimant within 180 days of the date upon which the Notice of Loss is filed. To ensure FEMA meets this mandate, claimants need to provide specific details about their injuries by signing the Proof of Loss. FEMA recognizes the challenges with these deadlines and intends to allow extensions where such extensions are for the claimants' benefit. Claimants who submit their Notice of Loss should submit a signed Proof of Loss to the Claims Office not later than 150 days after the initial Notice of Loss was submitted. Adherence to this deadline will leave FEMA with 30 days to determine the compensation due to the claimant and enable the agency to meet the 180-day timeframe required by Congress. FEMA also provides that this deadline may be extended for good cause at the discretion of the Director of the Claims Office.

Comment: Some commenters wrote they would be required to submit a Proof of Loss Form with extensive supporting documentation by April 14, 2023 if the Notice of Loss was submitted as early as November 15, 2022 under the timeline provided in the IFR. These commenters stated this was unfair as FEMA had not made available a Proof of Loss Form. These commenters recommended a 250-day timeline to submit a Proof of Loss.

FEMA Response: As explained above, claimants are required to submit their Proof of Loss within 150 days of submission of their Notice of Loss. Section 104(d)(1)(A)(i) of the Act states that FEMA must determine the compensation due to a claimant within 180 days of the date upon which the Notice of Loss is filed, which is the date the Notice of Loss is acknowledged by the Claims Office. FEMA would be unable to fulfill this mandate if claimants do not provide specific details about their injuries by signing the Proof of Loss. FEMA recognizes the challenges with these deadlines and intends to allow extensions where such an extension is for the claimant's benefit. Claimants who submit their Notice of Loss should submit a signed Proof of Loss to the Claims Office not later than 150 days after the initial Notice of Loss was acknowledged. Adherence to this deadline will leave FEMA with 30 days to determine the compensation due to the claimant and enable the agency to meet the 180-day timeframe required by Congress. FEMA also provides that this deadline may be extended for good cause at the discretion of the Director of the Claims Office. FEMA notes that the agency completed an emergency information collection associated with the IFR for the Notice of Loss and Proof of Loss forms in November 2022.[54] Those forms were revised in February 2023.[55]

Comment: Two commenters raised concerns about the 150-day deadline for claimants to submit their Proof of Loss, stating FEMA had an additional 180 days to respond to claims. One of the commenters wrote ''Also interesting is how 120-day response time limits are placed on Hermit's Peak Fire victims while HPFAA Administrators and Reviewers and such have 180-day limits to respond to victims submitted claims/amendments and such while they are all drawing cushy government pay checks the entire time they spend on claims assessment, judgement and payment.''

FEMA Response: FEMA disagrees with the commenters' interpretation of the timeline provided in the IFR. Claimants are required to submit their Proof of Loss within 150 days of submission of their Notice of Loss. Section 104(d)(1)(A)(i) of the Act states that FEMA must determine the compensation due to a claimant within 180 days of the date upon which the Notice of Loss is filed. This timeline gives FEMA 30 days to process the Proof of Loss to issue a determination on the claim. Claimants who submit their Notice of Loss should submit a signed Proof of Loss to the Claims Office not later than 150 days after the initial Notice of Loss was submitted to ensure the Congressional mandate for FEMA to process claims within 180 days can be met.

Comment: A commenter requested the deadline for the Proof of Loss submittal be relative to the Notice of Loss Acknowledgement date, not relative to the Notice of Loss submittal date. The commenter requested that the deadline for Proof of Loss submittal should be made relative to the Notice of Loss acknowledgement date, not relative to the Notice of Loss submittal date like it says in the handouts. Another commenter, however, commented that FEMA must pay claims within 180 days and that the 180-day clock must begin when the claim is filed, not based on a FEMA-determined milestone after the claim.

FEMA Response: The IFR in § 296.30(b) currently provides that the requirement to submit the Proof of Loss is 150 days from the date the Notice of Loss was submitted. This language is sufficiently clear without change, as FEMA has explained in additional guidance that ''submitted'' under the regulation is the date FEMA acknowledges receipt of the Notice of Loss. Further, § 296.10(f) explains that a Notice of Loss is deemed to be filed on the date it is received and acknowledged by the Claims Office. FEMA is thus not changing the Final Rule language. The language in the IFR is consistent with the Act's requirement to pay claimants within 180 days of the claim's submittal. FEMA does not believe a Notice of Loss can be submitted until it has been reviewed for sufficiency and receipt has been acknowledged by FEMA. This review and acknowledgement of receipt benefits the claimant. FEMA heard commenters above expressing concerns with the timeline to submit a Proof of Loss and while the agency is limited in its ability to extend that timeframe, allowing FEMA the time to review the Notice of Loss and issuing an acknowledgement before starting the 150-day timeline by which claimants must submit their Proof of Loss allows FEMA to identify any initial challenges with the claim and provide the claimant with initial guidance to update the Notice as required in advance of starting to work on the Proof of Loss resulting in a better overall claim and a more efficient review of that claim.

Comment: One commenter asked that the Proof of Loss be an iterative process between FEMA and the claimant, allowing claimants to supplement the Proof of Loss as appropriate.

FEMA Response: FEMA agrees. In § 296.5, FEMA explains the process will involve Claims Reviewers working with claimants to assist in developing a strategy to obtain the documentation required for their claim. FEMA anticipates Claims Reviewers will engage with claimants to ensure the Proof of Loss is as comprehensive as possible at the time of submission. Further, Section 296.34 explains the process to supplement claims after submission of a Proof of Loss.

[54] *See* OMB Control No. 1660–0155 found at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202211-1660-001* (last accessed Mar. 1, 2023).

[55] *See* OMB Control No. 1660–0155 revision found at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202302-1660-001* (last accessed Mar. 1, 2023).

3. Comments on § 296.30(c) Release and Certification Form

Comment: One commenter wrote about the feasibility of waiving future claims given the extent of damages, losses, and expenses may not be fully known at the time of the award. The commenter wrote that the full extent of damages, losses, and expenses may not be known at the time of award, and it was beyond anyone's ability to foretell those future damages to claim them on their Notice of Loss. The commenter suggested FEMA allow a lump sum payment of 15 percent of all injury, damages, losses, and expenses to be added on to each claim to cover for these future unknown items to resolve this concern.

FEMA Response: FEMA understands the concerns with waiving rights to pursue further claims after accepting a final award, but section 104(e) of the Act requires that payment made be final and conclusive with respect to all claims on the same subject matter and that such payment constitute a full release of all claims against the United States on the same subject matter. FEMA is bound by this statutory language to require a release for all final payments. As explained in § 296.30(b), the deadline to submit a Proof of Loss may be extended for good cause. Additionally, sections 296.34 and 296.35 allow claimants to supplement and/or reopen claims. FEMA recognizes the latest deadline for these actions is November 14, 2025; however, this deadline is consistent with the Agency's statutory authority and FEMA does not have the authority to further extend this deadline. Claims related to future damages as a result of the Fire would need to be made through other remedies as the Act sets a two-year limitation for claims under the Act. FEMA is unable to pay lump sum payments to cover future unknown injuries, as unknown injuries are speculative in nature and the Act requires FEMA to pay for actual compensatory damages.

Comment: A commenter stated that a claimant's right to civil action or other redress should not be waived or limited until a final payment has been agreed to with FEMA and that it must be clear to claimants at what point(s) in the process they are waiving their rights to further legal action as well as how they can retain their right to further legal action for different types of subject matter.

FEMA Response: An injured person who accepts an award under the Act waives the right to pursue any claims arising out of or relating to the same subject matter under the Federal Tort Claims Act or a civil lawsuit. Similarly, those claimants who accept an award under the Federal Tort Claims Act or a civil lawsuit waive the right to pursue claims under the Act. Until the final award payment is accepted, the claimant may pursue any and/or all of the options available. This flexibility would allow for injured persons to pursue different avenues of compensation until a final award is accepted. To ensure this is clear in the Final Rule, FEMA is revising paragraphs (a) and (b) of § 296.12 to clarify that the injured person only waives the right to pursue these options upon acceptance of a final award.

Comment: A commenter requested FEMA not seek to recover possible overpayments where FEMA has made a material mistake, or to establish a specific, short window of time after the Release is signed and denote a value for which it would recover. The commenter wrote that allowing FEMA to recover overpayments when a material mistake was made could lead to a culture of distrust in which claimants were reluctant to seek damages due to a fear that if the agency made a mistake, the claimant could be held liable for repayment. The commenter recommended FEMA either not recover possible overpayments, or to establish a specific, short window of time after the Public Release is signed and denote a value for which it would recover. Another commenter agreed, stating FEMA's reclamation of costs due to an administrative mistake could jeopardize local trust in the program and should be disallowed or limited to extremely rare and clearly defined circumstances. One commenter stated that once FEMA has made a payment to the claimant, any errors made by FEMA should not be recoverable.

FEMA Response: FEMA appreciates the concerns raised by these commenters, but the agency is legally obligated to recover funding issued in error. The Act limits compensation to actual damages incurred as a result of the Fire. If the claimant was not injured or did not suffer damages as a result of the Fire and payment is made, such payment is not compensation for actual compensatory damages. FEMA is legally obligated to recover funds paid in situations of civil or criminal fraud, misrepresentation, presentation of a false claim, and where the claimant was not eligible for partial payment under the Act. FEMA considers partial payments made where the claimant was not eligible for the compensation to be a material mistake in § 296.30(d). FEMA also notes that Congress provided appropriations for the Department of Homeland Security's Office of the Inspector General for oversight of activities authorized by the Act, including oversight of payments made in error.[56]

M. Comments on Reimbursement of Claims Expenses

1. Comments on § 296.31(a) Expert Opinions

Comment: Commenters generally opposed the requirement that FEMA request an appraisal or other third-party opinion before such an expense could be reimbursed under the Act. Most commenters requested FEMA delete the requirement that FEMA request the appraisal or opinion. Commenters stated they would not be made whole if they were not reimbursed for expert opinions.

FEMA Response: FEMA heard commenters' concerns regarding this provision in the IFR and is making changes to the Final Rule. Specifically, the IFR language only allows for reimbursement if requested by the Claims Office. FEMA is revising this paragraph in the Final Rule to allow for reimbursement for reasonable costs incurred in providing appraisals or other third-party opinions that the Claims Office deems necessary to determine the amount of the claim. FEMA recognizes the size and scope of this Fire, along with the geographic, economic, and cultural distinctions between this Fire and the Cerro Grande Fire, may result in claimants having to rely more frequently on expert opinions in their claims process and is updating the Final Rule to reflect this need. This revision will allow claimants to seek reimbursement for reasonable costs incurred in obtaining expert opinions that the Claims office reviews and agrees are necessary to determine the amount of the claim. This revision in the Final Rule provides more flexibility to claimants to seek expert opinions as part of the claims process while also retaining good governance of the use of the Act's funds to those opinions that are necessary to effectively determine the claim amount.

Comment: Commenters stated that New Mexico law allowed for compensation for expert opinions and that given the complexity of the claims process, claimants needed experts to help value their claims.

FEMA Response: As explained above, FEMA is revising this paragraph in the Final Rule to allow for reimbursement for reasonable costs incurred in providing appraisals or other third-party opinions that the Claims Office deems

[56] *See* Public Law 117–180, Division A, Section 136 (2022).

necessary to determine the amount of the claim. This revision will allow claimants to seek reimbursement for reasonable costs incurred in obtaining expert opinions that the Claims office reviews and agrees are necessary to determine the amount of the claim.

Comment: One commenter noted that there are very few appraisers or title companies in the area.

FEMA Response: FEMA acknowledges the lack of experts in the area and anticipates working with claimants to obtain appropriate resources for these needed opinions.

Comment: Another commenter stated that many claimants had already incurred costs for obtaining expert opinions and stated reimbursement for those expenses would acknowledge that the recovery process did not start when the Claims Office launched, but well in advance. Several commenters agreed that FEMA should exercise discretion to pay the reasonable costs of expert services obtained prior to the IFR's publication.

FEMA Response: FEMA considered this approach when making the decision to revise the language to this paragraph of the Final Rule. However, FEMA felt this deadline would not fully address most commenters' concerns with the ability to effectively value their claim on their own and the need for experts to assist. The revision to the Final Rule to allow reasonable costs for these opinions that the Claims Office agrees are necessary regardless of when the opinion was requested will provide more flexibility to claimants to seek expert opinions as part of the claims process while also retaining good governance of the use of the Act's funds to those opinions that are necessary to effectively determine the claim amount.

Comment: A commenter requested that FEMA make available technical assistance and expert services to claimants, including arborists, surveyors, appraisers/adjusters, and engineers to help with the most common losses.

FEMA Response: FEMA agrees and will work with claimants to identify appropriate resources to assist with valuing claims as explained above.

Comment: One commenter requested compensation for a Habitat Equivalency Analysis and GIS mapping as necessary to prove loss in the most accurate way. One commenter suggested FEMA provide claimants with access to all after-wildfire high-resolution aerial imagery of the Fire area to determine the extent of the damage more accurately to private forestlands as well as surrounding forestlands, stating the most recent imagery is insufficient.

FEMA Response: FEMA recommends claimants seeking compensation for expert opinions or resources submit their claim for reimbursement explaining why the opinion and/or resource was required to effectively value their claim. As explained above, if claimants are having difficulty obtaining these opinions and/or resources, FEMA will work with the claimant to assist in locating the resources needed to effectively value their claim.

2. Comments on § 296.31(b) Lump Sum Payments for Incidental Expenses

Comment: Several commenters requested that FEMA pay for all expenses associated with the claims process, removing the exclusion for damages for time spent prosecuting a claim in § 296.21(b) and changing the lump sum payment in paragraph (b) to allow for full recoupment of all expenses, including time. Some commenters focused in on specific incidental expenses, requesting reimbursement for expenses such as travel expenses and replacement of documents.

FEMA Response: As explained in the IFR, compensatory damages for time spent in claims preparation are not considered actual compensatory damages. There is no evidence Congress intended that claimants be compensated for the value of their time in preparing a claim. Providing compensation for a claimant's time would be difficult to administer, as FEMA would have to determine equitably the value of a claimant's time and to verify that claimants have expended the number of hours that are claimed. FEMA's payments under the Act are subject to independent audit by the GAO and the DHS OIG and claimants would likely find attempts by auditors to verify the payment for hours spent in the claims process highly intrusive. Additionally, the type of compensation requested by commenters here would require production of receipts and other documentation, resulting in an overly burdensome process for this payment to claimants contrary to other comments requesting the agency streamline and simplify the claims process. As explained in the IFR, FEMA is choosing to exercise discretion to provide a lump sum payment to claimants for miscellaneous and incidental expenses incurred in the claims process. FEMA will provide a lump sum payment of five percent of the insured and uninsured loss (excluding flood insurance premiums), not to exceed $25,000. The minimum lump sum payment is $150. Section 296.31(b) of the IFR represents a fair and reasonable accommodation between the agency's responsibility to spend Federal funds wisely and the desire to compensate claimants as fully as possible.

Comment: One commenter suggested FEMA partner with a trusted local financial institution to carry out payment of approved claims expense reimbursements to help ensure prompt, complete, and correct payments to approved claimants.

FEMA Response: The current claims process requires claimants to provide FEMA with information on how they want to be paid, either by electronic funds transfer or check. No third-party financial institution is required for these transactions.

Comment: Two commenters recommended that subrogation claimants and those claimants whose only Fire-related loss is for flood insurance premiums should be eligible if their property was not previously designated in a flood zone but is now considered to be in one as a result of the Fire.

FEMA Response: FEMA disagrees that these claimants should be eligible for a lump sum payment for incidental expenses incurred in their claims preparation. Subrogees are generally insurance companies, and their industry involves claims review and preparation. These entities have no legal right to pursue expenses for claims preparation. The burden placed on those claimants only seeking flood insurance premiums is minimal, as the only claim made is for flood insurance premiums and the documentation needed to support such a claim would be very limited compared to other claims. To ensure the funding provided under the Act is utilized to compensate claimants as fully as possible while also ensuring Federal funds are wisely spent, these claimants should not be eligible for a lump sum payment for incidental expenses. FEMA is retaining the language in paragraph (b) in the Final Rule making these types of claimants ineligible for the lump sum payment.

N. Comments on §§ 296.34 and 296.35 Supplementing Claims and Reopening a Claim

1. Comments on § 296.34 Supplementing Claims

Comment: A few commenters sought clarification and/or revision to this section of the IFR. One commenter asked if claimants made an error whether they were allowed to file again.

FEMA Response: As explained in the IFR, there is flexibility built into the process for claimants to tell FEMA

about injuries and damages that they could not have discovered or did not remember when they signed the Notice of Loss or Proof of Loss. This may also include situations where a claimant makes an inadvertent error. Sections 296.34 and 296.35 explain this flexibility. Section 296.34 allows claimants to supplement their claim by working directly with a Claims Reviewer prior to submitting their Proof of Loss. If a claimant is not prepared to sign a Proof of Loss within the timeframe required, an extension may be requested from the Director of the Claims Office. Alternatively, the claimant may withdraw the claim and re-file the claim before November 14, 2024. Once the Proof of Loss is filed, a claimant can request to supplement their claim by writing to the Director of the Claims Office providing the reasons why the claim needs to be supplemented. The claimant should consult with the Claims Reviewer about the procedure for obtaining permission from the Director of the Claims Office.

Comment: Several commenters requested FEMA update the supplementing claims section of the regulation to simplify the process for supplementing claims and eliminate references to the Administrative Appeals process. These commenters wrote that requiring claimants to supplement a claim pursuant to comparatively complex adjudicatory-like procedures undermined FEMA's intent to create a simple claims process that is sensitive to the burdens already placed upon claimants by the Fire.

FEMA Response: FEMA disagrees with the commenters' suggestion that incorporating language on the Administrative Appeals process in this section of the regulation complicates the process. Section 296.34 allows claimants to supplement their claim by working directly with a Claims Reviewer prior to submitting their Proof of Loss. If a claimant is not prepared to sign a Proof of Loss within the timeframe required, an extension may be requested from the Director of the Claims Office. Once the Proof of Loss is filed, a claimant can request to supplement their claim by writing to the Director of the Claims Office providing the reasons why the claim needs to be supplemented. The claimant should consult with the Claims Reviewer about the procedure for obtaining permission from the Director of the Claims Office. The Director of the Claims Office will then directly review the additional claim consistent with how the Director reviews claims in the Administrative Appeal process. By providing for the procedures used in the Administrative Appeal process, FEMA ensures that the supplemental claims information is reviewed directly by the Director after the Authorized Official's determination is issued on the remainder of the claim. If the claimant decides to appeal the Authorized Official's determination on other injuries, the Director of the Claims Office will decide both matters in a single appeal proceeding to expedite processing. Alternatively, the claimant may withdraw the claim and re-file the claim once before November 14, 2024, when the injuries are better defined. The process provided for in § 296.34 is sufficient and not overly burdensome on the claimant.

Comment: A commenter requested that FEMA allow claims to be reopened and supplemented in response to future flooding events.

FEMA Response: As explained above, there is flexibility built into the process for claimants to tell FEMA about injuries and damages that they could not have discovered or did not remember when they signed the Proof of Loss, including future flooding events. Sections 296.34 and 296.35 allow claimants to supplement and/or reopen claims respectively.

2. Comments on § 296.35 Reopening a Claim

Comment: A few commenters sought clarification and/or revision to the reopening claims section of the IFR. Most of these commenters were concerned about the deadline to reopen a claim, stating additional damages may be experienced. One commenter asked how to proceed where their claim is paid, and they then suffer additional damages from flooding seeking clarification on whether they should file another Notice of Loss.

FEMA Response: FEMA recognizes that damages may continue beyond the deadline for submitting a claim. The agency is generally bound by the Act's requirements for claims to be submitted within two years of the IFR's publication. In the IFR, FEMA allows for claimants to reopen their claims for up to an additional year after submitting their initial claim.

Comment: One commenter requested that FEMA allow a lump sum payment of 15 percent of all injuries, damages, losses, and expenses to be added on to each claim to cover for future unknown items.

FEMA Response: As explained above, FEMA recognizes that damages may continue beyond the deadline for submitting a claim. The agency is generally bound by the Act's requirements for claims to be submitted within two years of the IFR's publication. In the IFR, FEMA allows for claimants to reopen their claims for up to an additional year after submitting their initial claim. Claims related to future damages as a result of the Fire would need to be made through other remedies as the Act sets a two-year limitation for claims under the Act. FEMA is unable to pay lump sum payments to cover future unknown injuries, as unknown injuries are speculative in nature and the Act requires FEMA to pay for actual compensatory damages. To the extent that a claimant is able to reasonably quantify expected future losses, future losses are compensable.

Comment: Two commenters recommended FEMA insert ''real property'' in place of ''home'' in this section to ensure that this clause is not limited to homes but includes all real property.

FEMA Response: FEMA concurs with this recommendation and is amending the IFR language that limits the close of the sale to a home. FEMA agrees with commenters that changing the language to address the sale of real property instead of a home is more appropriate and is revising § 296.35 to reflect that those claimants could reopen a claim if they closed on the sale of real property and wish to present a claim for a decrease in the value of the real property under § 296.21(c)(3). This change is consistent with concerns raised by commenters that the Cerro Grande Fire Assistance process was not necessarily appropriate to this Fire given the distinct geographic, economic, and cultural considerations of the impacted communities. As explained above, this Fire impacted significant forested areas and more rural areas than the Cerro Grande Fire. This change in the Final Rule more appropriately reflects the Hermit's Peak/Calf Canyon Fire claimants' needs by including all real property.

Comment: Several commenters requested FEMA update this section of the regulation, providing specific suggestions to revise the section on reopening claims to separate out claims for heightened risk reduction, the sale of real property, reconstruction, and good cause, as well as providing an open-ended deadline for submission of reopened claims allowing a deadline to be set in the future via a **Federal Register** notice.

FEMA Response: Section 296.35 provides for reopening a claim after the claimant has submitted a Release and Certification Form again with the goal to allow claimants an opportunity to request damages in excess of those previously awarded. Claimants can use

the reopening provision of this section to seek compensation for an injury not previously reported to FEMA in circumstances where claimants seek heightened risk reduction compensation under § 296.21(e)(5); the claimant closed the sale of a home and wishes to present a claim for a decrease in the value of the real property under § 296.21(c)(3); the claimant has incurred additional losses under § 296.21(c)(1) as part of a reconstruction in excess of those previously awarded; or where the Director of the Claims Office determines good cause exists to reopen the claim. While FEMA does not believe the current language in the IFR needs to be restructured as these commenters suggested in the Final Rule, FEMA recognizes that damages may continue beyond the deadline for submitting a claim. FEMA plans to consider and incorporate future losses into the claims valuation methodology, where appropriate. In the IFR, FEMA allows for claimants to reopen their claims for up to an additional year after submitting their initial claim. FEMA is revising § 296.35 consistent with the commenter's request to use the Cerro Grande process to extend the deadline where reconstruction costs under § 296.21(c)(3) exceed the previously paid claim or for good cause. FEMA will issue notice in the **Federal Register** and at *https://www.fema.gov/hermits-peak* of this future deadline. FEMA believes this change is consistent with the prior Cerro Grande process and will help ensure claimants are compensated for their actual damages as a result of the Fire.

3. Comments on § 296.37 Confidentiality of Information

Comment: One commenter stated the Federal government is responsible for providing the right to privacy to claimants. One commenter raised concerns about privacy violations with local hires.

FEMA Response: FEMA agrees that the Federal government is responsible for ensuring confidentiality for private information submitted by claimants. Section 296.37 provides that confidential information submitted by individual claimants is protected from disclosure to the extent permitted by the Privacy Act. The Privacy Act protects the confidentiality of information provided by individual claimants. This information may only be disclosed with the consent of the claimant or pursuant to a routine use, which has been disclosed to the public. Confidential, proprietary, and trade secret information provided by entities, such as business, Indian Tribes, Tribal entities, and government agencies, are not eligible for Privacy Act protection, but may be exempt from disclosure under the Freedom of Information Act. All FEMA employees are obligated to follow the Privacy Act requirements, whether they are local hires or not and FEMA will ensure that all employees receive appropriate training on the Privacy Act.

O. Comments on § 296.41 Administrative Appeal

Comment: Commenters raised concerns and questions about the appeals process provided in § 296.41. Some commenters asked for more detail in the regulation regarding the appeals process. A commenter wrote that the regulations were unclear as they did not outline under which circumstances a victim could appeal FEMA's decision, nor a timeline of the appeals process. The commenter asked that if a claimant wished to appeal, must the claimant appeal the entire award, or could the appeal be limited to the portion of the award to which the claimant objects. The commenter also asked if a claimant wished to have their case heard in the United States District Court, did that mean that the claimant had to file a Federal Tort Claim and begin the process from square one, or would the District Court review the award given by FEMA for legal error and the standard of review if heard by the District Court. The commenter further asked if there would there be an opportunity for appellate review thereafter.

FEMA Response: The current regulatory text is sufficient to provide claimants with a general understanding of the process and that details of the process are more appropriate for additional guidance or procedural documents, not the regulation. The regulation states that in their appeal, a claimant should identify the portion of the Authorized Official's determination they believe is incorrect, whether that be the entire claim or just certain portions of the claim. The regulation also enables the claimant to supplement the record with additional documentary evidence supporting the appeal. After the appeal is decided, if the claimant continues to be dissatisfied with the determination, the claimant can pursue arbitration pursuant to Section 104(h)(3) of the Act or elect to seek record review of the decision in the Federal District Court for the District of New Mexico pursuant to Section 104(i) of the Act. Alternatively, the claimant can elect not to pursue compensation through the Hermit's Peak/Calf Canyon Claims Office and elect to pursue their other legal remedies against the United States as explained in the Act.[57]

Comment: Two commenters raised questions about how the appeals process would work, asking what happened if claimants did not accept the Authorized Official's final determination but chose not to appeal while another commenter asked if claimants would be allowed to choose their own attorney if they file an appeal.

FEMA Response: If a claimant opts not to appeal and does not accept the final determination, the claimant remains free to pursue other remedies as detailed in the regulation at § 296.12. Claimants that wish to have legal representation may select their own counsel at any point in the claims process.

Comment: FEMA received one comment in support of the IFR's allowance for either the Claims Office Director or the claimant to request a conference. The commenter, however, requested additional changes to the IFR. The commenter wrote ''I support this Interim Rule, with two caveats. First, to be fair and effective, attorneys representing claimants must be involved with their clients in either conferences or mediations. Second, mediators must be qualified and independent. In other words, they cannot be employees or representatives of FEMA or any other branch or agency of the United States Government. Th[e]s[e] changes would make the proposed conference and mediation process comport with ordinary and fair claims processing practice.''

FEMA Response: As explained above, claimants that wish to have legal representation may select their own counsel at any point in the claims process. With an appropriate Privacy Act waiver, which is included in the Notice of Loss form, FEMA will ensure attorneys are allowed to participate with claimants in any and all parts of the Claims Process, up to and including any appeal-related conferences and arbitration of the claim. The Arbitration Administrator will maintain a list of qualified arbitrators who have agreed to serve. The Claims Office is using a contracting vehicle to engage independent arbitrators to serve as Claims Office arbitrators. Where possible, the Claims Office will use arbitrators that are local to New Mexico. The arbitrations will be decided by one arbitrator if the amount in dispute is $500,000 or less and a panel of three arbitrators if the amount in dispute exceeds $500,000. Arbitrators will be

[57] *See* Sections 104(h)(1)(B) and 104(h)(1)(C) of the Act.

assigned by the Arbitration Administrator through a random drawing.

Comment: One commenter requested FEMA allow claimant's attorney to be notified and included throughout the entire hearing process. The commenter also requested that the rule be changed to allow the claimant to discover the evidence and opinions of those considered or proffered by the Claims Office against the claimant.

FEMA Response: As explained above, claimants that wish to have legal representation may select their own counsel at any point in the claims process. With an appropriate Privacy Act waiver, which is included in the Notice of Loss form, FEMA will ensure attorneys are allowed to participate with claimants in any and all parts of the Claims Process, up to and including arbitration of the claim if the claimant elects to proceed to arbitration. As required by the Privacy Act, 5 U.S.C. 552a, and implemented through Claims Office procedure, claimants always have access to their entire claims files. Moreover, FEMA is working to establish the System of Record, Claim and Loss Information Portal (CLIP), that will have a public facing portal where claimants can choose to create a secure account to review the status of their claim and upload documentation related to their Proof of Loss.

Comment: Another commenter suggested FEMA allow for in-person conferences and hearings as often as possible.

FEMA Response: Section 296.41(g) of the IFR states that hearings will generally be conducted virtually, but also allows the Director of the Claims Office to convene an in-person hearing at a location in New Mexico designated by the Director. The IFR language allows for in-person hearings and claimants can request in-person hearings if they prefer. FEMA does not believe the IFR requires amendment to allow for in-person hearings and is not revising the Final Rule.

P. Comments on § 296.42 Arbitration

Comment: Three commenters stated that expenses incurred for arbitration should be covered as compensatory damages.

FEMA Response: It is unclear what the specific arbitration expenses are that are referenced in this comment. Generally, the Claims Office will pay all the fees and expenses of the arbitrator(s), as well as any associated fees and expenses for securing a location to hold the arbitration. The claimant is responsible for any expenses they incur, including travel costs. As explained in the IFR, compensatory damages for time spent in claims preparation are not available under New Mexico law or the Federal Tort Claims Act. Moreover, there is no evidence Congress intended that claimants be compensated for the value of their time in preparing a claim. Providing compensation for a claimant's time would be difficult to administer, as FEMA would have to determine equitably the value of a claimant's time and to verify that claimants have expended the number of hours that are claimed. FEMA's payments under the Act are subject to independent audit by the GAO and the DHS OIG and claimants would likely find attempts by auditors to verify the payment for hours spent in the claims process highly intrusive. Additionally, the type of compensation requested by commenters here would require production of receipts and other documentation, resulting in an overly burdensome process for this payment to claimants contrary to other comments requesting the agency streamline and simplify the claims process. As explained in the IFR, FEMA is choosing to exercise discretion to provide a lump sum payment to claimants for miscellaneous and incidental expenses incurred in the claims process. FEMA will provide a lump sum payment of five percent of the insured and uninsured loss (excluding flood insurance premiums), not to exceed $25,000. The minimum lump sum payment is $150. Section 296.31(b) of the IFR represents a fair and reasonable accommodation between the agency's responsibility to spend Federal funds wisely and the desire to compensate claimants as fully as possible.

To the extent the commenter is requesting that attorney's fees be compensated by the Claims Office, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.[58] While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. Further, the ''American Rule,'' generally applicable in civil litigation and initially accepted by the United States Supreme Court in the case of *Arcambel* v. *Wiseman,*[59] provides that in the absence of a statute indicating otherwise, each party is responsible for paying their own attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required.

Comment: A commenter requested FEMA allow for in-person conferences and hearings as often as possible. Another commenter also suggested that these hearings take place in person and in the county of loss as virtual hearings are challenging because of limited or no broadband service in many areas impacted by the Fire.

FEMA Response: Section 296.42(d) of the IFR states that hearings will generally be conducted virtually, but also allows the arbitrator to convene an in-person hearing at a location in New Mexico designated by the Arbitration Administrator. The IFR language allows for in-person hearings and claimants can request in-person hearings if they prefer. FEMA does not believe the IFR requires amendment to allow for in-person hearings and is not revising the Final Rule.

Comment: Comments were also received on the independence, selection, and qualifications of arbitrators. One commenter requested the list of qualified arbitrators be provided by an independent source outside of FEMA. Commenters asked about the independence of arbitrators hired by FEMA. One commenter stated ''I seriously question the independence of an arbitrator who is both hired by and paid by FEMA . . . The one time in the past when I had to go to binding arbitration, the arbitrators were chosen from a board of independent arbitrators, not someone who was hired by the plaintiff or the defendant I should say in this case.'' Another commenter stated, ''I have never seen where the arbitrators brought in and both sides don't get to eliminate based on how that arbitrator rules his rulings.'' A different commenter requested that arbitrators be from New Mexico as they needed to be aware of the culture, the livelihood, the history, the importance of the people in the impacted communities. Another

[58] *Animal Legal Defense Fund* v. *USDA,* 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas,* 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith,* 206 F.3d 1389 (11th Cir. 2000). *See also United States* v. *Roof,* 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank* v. *Vaden,* 396 F.3d 366, 370 (4th Cir. 2005).

[59] 3 U.S. (3 Dall.) 306 (1796). *See also Peter* v. *NantKwest, Inc.,* 140 S.Ct. 365 (2019), *Hardt* v. *Reliance Standard Life Insurance Co.,* 560 U.S. 242 (2010), *Ruckelshaus* v. *Sierra Club,* 463 U.S. 680 (1983), and *Summit Valley Industries, Inc.* v. *Carpenters,* 456 U.S. 717 (1982).

commenter suggested that the arbitrators should be people who know New Mexico law.

FEMA Response: FEMA understands the concerns raised by commenters regarding the selection of arbitrators for the claims process. These concerns are best addressed in policy and procedure documents associated with the claims process and not the regulations. FEMA is thus not making changes to the Final Rule regarding this issue.

Q. Comments on the Rulemaking

Comment: One commenter wrote on the lack of public comments posted with over half of the comment period completed and asked what FEMA was doing to publicize how to comment on the rulemaking. The commenter also asked questions about the availability of a local library for people to use the internet for public comment submission and suggested local FEMA offices accept verbal comments that could be posted online.

FEMA Response: FEMA received over 190 written comments on this rule in addition to over 100 comments during six public meetings held during the comment period across the area impacted by the Fire. FEMA provided public outreach to include News Releases, Media Advisories, and targeted communications to Federal, State, and local officials and their staff in New Mexico to help promote the process for submitting comments to *https://www.regulations.gov.* As explained above, transcripts of the public meetings were posted to the docket at *https://www.regulations.gov* to allow the public the opportunity to review comments made during these meetings if unable to attend.

Comment: A commenter asked how out-of-state property owners would be notified of the Act and suggested FEMA obtain a list from the assessor's office to mail those individuals information.

FEMA Response: The IFR was published in the **Federal Register** at *https://www.federalregister.gov/documents/2022/11/14/2022-24728/hermits-peakcalf-canyon-fire-assistance* and also via print publication at 87 FR 68085 on November 14, 2022. The **Federal Register** is national in scope and this notice in addition to the information provided at *https://www.fema.gov/hermits-peak* constitute sufficient notice to out-of-state property owners.

Comment: One commenter requested that FEMA provide access to the **Federal Register** to claimants.

FEMA Response: FEMA provided access to the IFR by providing the link to the **Federal Register** containing the IFR at *https://www.fema.gov/hermits-peak.* Additionally, as explained above, the IFR was published in the **Federal Register** at *https://www.federalregister.gov/documents/2022/11/14/2022-24728/hermits-peakcalf-canyon-fire-assistance* and also via print publication at 87 FR 68085 on November 14, 2022.

Comment: Two commenters sought virtual means of attending the public meetings on the IFR.

FEMA Response: FEMA was unable to provide video conferencing or virtual attendance options during these meetings as they were not held in FEMA facilities. FEMA provided an explanation of this challenge in the Notice of Additional Public Meetings published on December 9, 2022. Transcripts of all public meetings are available on the docket at *https://www.regulations.gov.*

Comment: A commenter stated that that they were unable to hear a comment during a public meeting. Another commenter stated that the transcripts from the public meetings had not been posted to the public docket as of January 6, 2023 and suggested that all public meeting transcripts be posted preferably 72 but not less than 48 hours before the comment period closed.

FEMA Response: Transcripts of all public meetings are available on the docket at *https://www.regulations.gov.* FEMA understands the commenters' concerns about the timing of posting these transcripts and the agency worked diligently to have all of the transcripts posted prior to the end of the public comment period. Two transcripts were posted on January 9, 2023. Three transcripts were posted on January 12, 2023, and the remaining transcript from the last public meeting was posted on January 13, 2023 in advance of the close of the public comment period. Given the volume of public meetings made available and the availability of the transcripts in advance of the close of the comment period provided sufficient opportunity for the public to either attend and/or review the meeting transcripts in advance of submitting any comments on the rule. FEMA notes that over 100 comments were received during the six public meetings held and over 50 comments were received on the last day of the comment period.

Comment: Another commenter stated that FEMA may be having too many meetings as the meetings were taking a toll on the community and another commenter at that meeting also agreed, stating the meetings just felt like lip service and asked for progress on the Final Rule and changes to issues raised during meetings such as reforestation.

FEMA Response: FEMA has worked diligently to the review and adjudicate all of the comments received on the IFR. FEMA is publishing this Final Rule in less than 8 months after the public comment period closed. This timeframe demonstrates the agency's commitment to expeditiously process claims under the Act and resolve outstanding concerns of the community regarding the Act's implementation by FEMA.

Comment: One commenter suggested FEMA post responses to comments while a commenter at a public meeting suggested that FEMA publish a table that lists the comments and FEMA's responses.

FEMA Response: FEMA is providing responses to comments received as a result of the rulemaking process in this Final Rule.

Comment: One commenter suggested that when fee or reimbursement schedules were developed, to allow for notice and comment and another commenter at a public meeting agreed.

FEMA Response: FEMA appreciates this suggestion and if FEMA decides to proceed with payment formulas as discussed above, FEMA will consider whether notice and comment would be appropriate for such formulas at that time.

Comment: One commenter requested the opportunity to comment on the Final Rule.

FEMA Response: The rulemaking process as set forth in the Administrative Procedure Act does not require an agency to accept comment on a Final Rule.[60] Further information on the rulemaking process can be found at *https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.*[61]

R. Other General Comments

1. Comments on the Fire Footprint and Loss

Commenters sought clarification and offered suggestions regarding claimants' eligibility outside of the Fire's immediate footprint.

Comment: One commenter indicated that people and businesses outside the Fire's direct footprint were impacted and should be compensated. This commenter wrote that many people and businesses outside of the Fires' direct footprint were impacted due to things like the forest closures during fire response as well as the months following. A different commenter suggested relief be provided to New Mexico residents that do not live in the

[60] 5 U.S.C. 553.

[61] Last accessed Mar. 1, 2023.

direct area of the fire as their business experienced a significant loss due to the Fire and damage to property in the impacted area. A commenter asked whether there was a geographic boundary for who is eligible to file a claim, explaining how the Fire impacted several counties with evacuations. Another commenter stated that the flooding impacted communities downstream from San Miguel and Mora counties and that there were several businesses impacted as well in those areas. However, another commenter requested claims be limited to residents of a specific geographic area. The commenter requested that FEMA limit claims to only residents and property owners in Mora and San Miguel Counties and bordering areas of neighboring counties stating that the funding that had been allocated to these victims was far from sufficient to cover the immediate, obvious loss that the people experienced with the Fire.

FEMA Response: The Act recognizes that injured persons can seek compensation for actual compensatory damages for injuries incurred as a result of the Fire. There are no geographic limitations on this compensation beyond the claimant demonstrating they were injured as a result of the Fire. While the disaster declarations were limited to specific counties and further narrowed by the FEMA program,[62] the Act has no such limitations. FEMA thus anticipates receiving and processing claims for any claimant suffering injury as a result of the Fire and seeking actual compensatory damages.

2. Other General Comments

Comment: A commenter expressed concern that FEMA was not seeking input from local leadership knowledgeable in the local culture and business and regulatory processes while a commenter at a public meeting requested accountability to local groups who are responsible for long-range recovery planning.

FEMA Response: Consistent with the Act's requirements in section 104(g), FEMA is in consultation with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process and provide for local concerns.

Comment: One commenter suggested FEMA involve the United States Attorney for the District of New Mexico or the New Mexico State Attorney General to ensure the regulations follow New Mexico law.

FEMA Response: As explained above, section 104(g) of the Act requires FEMA to consult with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process. FEMA has consulted and continues to consult with Federal, State, local, and Tribal authorities consistent with the Act's requirements. FEMA consulted with a range of relevant Federal, State, and local agencies and governments. FEMA also completed a Tribal consultation as part of the regulatory process.

Comment: One commenter suggested that FEMA review the minutes of the meeting held by Representative Fernandez' in Mora after the Act's passage to understand the intent of the Act.

FEMA Response: FEMA appreciates the commenter's input on Representative Fernandez' public meeting. FEMA has met with the New Mexico Congressional Delegation regarding the Act's implementation and received a comment on the IFR from the Delegation. FEMA has adjudicated that comment in this Final Rule and continues to engage with Congressional Representatives regarding the implementation of the Act.

Comment: One commenter suggested FEMA provide education and awareness to county residents on preparedness for future manmade and natural disasters.

FEMA Response: While this suggestion is outside the scope of the Act, the suggestion does fall within FEMA's overall mission. The agency is coordinating with the State on the integration of long-term recovery efforts and resilience resources under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (''Stafford Act'') and other applicable statutory authorities.[63]

Comment: One commenter asked FEMA to do outreach to the community and assist people, as the experience with seeking benefits from FEMA during the disaster had been one of being turned away.

FEMA Response: Unlike the FEMA programs operated under the Stafford Act, the Hermit's Peak/Calf Canyon Fire Assistance Act offers a distinct claims process for claimants to seek actual compensatory damages for injuries suffered as a result of the Fire. The Act's provisions do not have the same eligibility requirements associated with the Public Assistance and Individual Assistance Programs under the Stafford Act. Claimants that were denied assistance under those programs should not assume their claim will be rejected under the Act. The regulation provides the general framework for compensation under the Act and claimants that have been injured as a result of the Fire should pursue claims for compensatory damages under the Act even if they were denied assistance under the Stafford Act programs.

FEMA is currently accepting Notice of Loss forms in person at the Claims Office locations in Santa Fe, Mora, and Las Vegas, New Mexico and those office addresses can be found at *https://www.fema.gov/hermits-peak.* FEMA will provide services both at set office locations for the Claims Offices, as well as pop-up offices that will rotate through communities and locations in the affected area, to reduce travel burdens on claimants. The pop-up offices will be staffed by Claims Navigators, who can assist claimants in completing and submitting Notices of Loss, providing claims updates, and answering general questions. FEMA plans to offer opportunities for one-on-one engagement with Navigators and Claims Reviewers who will work to engage claimants in ways to meet their needs whether in person or via remote technology. Claims Office Navigators are trained to accommodate the needs of claimants. FEMA recognizes the importance of having claims staff, who interact with claimants and help facilitate the claims process, that are able to speak both Spanish and English. FEMA locally hired bilingual speakers to ensure that claims staff can communicate with claimants in their preferred language.

Comment: Another commenter asked that FEMA listen to the community on what they value, as it is different from how FEMA appeared to be valuing buildings, the land, the trees, or the water.

FEMA Response: FEMA heard the comments regarding the need to reassess the formulas placed in the IFR and is making changes in the Final Rule to address those concerns. The Final Rule's changes better reflect the impacted communities' needs and values while maintaining consistency with the Act's authorities.

Comment: A commenter stated ''Every time there is a flood, every time there is a massive weather event, FEMA is to come out now. So, they are understaffed, but here there is a big difference because the appropriations that our legislators have fought to get something in place. So, if you got something, you got something to work with, and I am saying that like our flood was in 2017, and I still haven't recovered . . . So, your comments, and you're coming to these meetings are

[62] *See* DR–4652–NM found at *https://www.fema.gov/disaster/4652* (last accessed Mar. 1, 2023).

[63] 42 U.S.C. 5121 *et seq.*

demonstrations that you care about yourselves, you know they are not going to chase you off.''

FEMA Response: FEMA agrees with the commenter that the Act's provisions are different from Stafford Act programs and that claimants should engage with FEMA on their claims. As the commenter stated, FEMA received appropriations for the Act and is required to staff the Claims Office to meet the needs of the community to process their claims in an expeditious manner.

Comment: One commenter stated that the communities needed to leverage the Act's funding in conjunction with the overall rollout of infrastructure funding to protect food security and food systems.

FEMA Response: FEMA recognizes that other funding may be available to further support the long-term recovery of the impacted communities beyond the funding appropriated by the Act. FEMA appreciates the commenter's suggestion that the impacted communities also consider that funding and how all available funding can work to improve the community. FEMA has consulted and continues to consult with Federal, State, local, and Tribal authorities consistent with the Act's requirements.

Comment: One commenter stated that they were concerned that money from the Act would go to contractors that are coming in from the outside area.

FEMA Response: FEMA understands the need for local hiring for the Claims Office and FEMA has engaged in an extensive effort to recruit locally for positions to support the processing of claims and provision of compensation to claimants impacted by the Fire to ensure these specific concerns are addressed. FEMA is not responsible for hiring contractors to handle local projects under the Act. FEMA recognizes that other Federal programs, including FEMA Stafford Act programs, may leverage contract support for local projects. The process associated with those contracts varies by program. General information on contracting for FEMA programs can be found at *https://www.fema.gov/grants/procurement.*[64]

Comment: Another commenter provided a suggestion on how to spend the funding allocated under the Act by requiring it to cycle through the community several times before it leaves the impacted communities.

FEMA Response: FEMA is authorized under the Act to pay claimants for actual compensatory damages for injuries resulting from the Fire.[65] FEMA does not have the authority under the Act to require claimants to spend the compensation awarded in the local community.

Comment: Another commenter recommended FEMA hire local contractors for FEMA projects. The commenter stated ''The other piece is the issue with contracts. So, we have a lot of local contractors working here. We have local contractors working. We have the majority of them not working and that is another FEMA issue. Massive contracts went out, the Mora people, or Mora contractors are being subcontracted; they are not even given the opportunity—that is wages lost. If you are working for a contractor as a subcontractor, you've lost wages. You've lost revenue, and that's another part that FEMA's failed to do and failed to represent the people.''

FEMA Response: As explained above, FEMA is not responsible for hiring contractors to handle local projects under the Act. FEMA recognizes that other Federal programs, including FEMA Stafford Act programs, may leverage contract support for local projects. The process associated with those contracts varies by program. General information on contracting for FEMA programs can be found at *https://www.fema.gov/grants/procurement.*[66] The Claims Office encourages its contractors to hire locally.

Comment: A commenter stated the Claims Office was responsible for clarifying and ensuring that claimants are not taxed for the claims payments they receive through the program.

FEMA Response: FEMA appreciates claimants' concerns with taxes. Section 104(h)(f) of the Act states that ''the value of compensation that may be provided under this Act shall not be considered income or resources for any purpose under any Federal, State, or local laws, including laws related to taxation, welfare, and public assistance programs . . .'' FEMA is providing this information to claimants as part of the payment process. FEMA is not responsible for taxation and encourages claimants to obtain specific assistance if a Federal, State, or local entity seeks to consider compensation under the Act as taxable income or income for welfare or public assistance purposes. The agency does not believe changes to the IFR regulatory text are needed in the Final Rule to effect the commenter's request.

S. Change Chart

The below table summarizes the changes FEMA has made in this final rule. The economic impacts of these changes are discussed further in Section IV.B, ''Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improving Regulation and Regulatory Review.''

44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.1	This part implements the Hermit's Peak/Calf Canyon Fire Assistance Act (Act), Division G of Public Law 117–180, 136 Stat. 2114, 2168, which requires the Federal Emergency Management Agency (FEMA) to establish the Office of Hermit's Peak/Calf Canyon Fire Claims (''Claims Office'') to receive, evaluate, process, and pay actual compensatory damages for injuries suffered from the Hermit's Peak/Calf Canyon Fire.	This part implements the Hermit's Peak/Calf Canyon Fire Assistance Act (Act), Division G of Public Law 117–180, 136 Stat. 2114, 2168, which requires the Federal Emergency Management Agency (FEMA) to establish the Office of Hermit's Peak/Calf Canyon Fire Claims (''Claims Office'') to receive, evaluate, process, and pay actual compensatory damages for injuries resulting from the Hermit's Peak/Calf Canyon Fire.	Consistency with authorizing statute's language and clarity that injuries resulting from the Fire are compensable.	None.

[64] Last accessed Mar. 1, 2023.

[65] *See* Sections 102(b) and 104(c) of the Act.

[66] Last accessed Mar. 1, 2023.

44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.4	Subsistence Resources means food and other items obtained through hunting, fishing, firewood gathering, timbering, grazing or agricultural activities undertaken by the claimant without financial remuneration, on land damaged by the Hermit's Peak/Calf Canyon Fire.	Subsistence Resources means food and other items obtained through hunting, fishing, firewood or other natural resource gathering, timbering, grazing or agricultural activities undertaken by the claimant without financial remuneration, on land damaged by the Hermit's Peak/Calf Canyon Fire.	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	Higher claims values for those claiming assistance for ''other natural resource'' gathering. Potential increase in transfer payments from FEMA to claimants.
296.12(a)	An Injured Person who accepts an award under the Act waives the right to pursue all claims for injuries arising out of or relating to the same subject matter against the United States or any employee, officer, or agency of the United States through the Federal Tort Claims Act or a civil action authorized by any other provision of law.	An Injured Person who accepts a final award under the Act waives the right to pursue all claims for injuries arising out of or relating to the same subject matter against the United States or any employee, officer, or agency of the United States through the Federal Tort Claims Act or a civil action authorized by any other provision of law.	Clarity that claimants only waive their rights upon acceptance of a final award.	None.
296.12(b)	An Injured Person who accepts an award through a Federal Tort Claims Act claim or a civil action against the United States or any employee, officer, or agency of the United States relating to the Hermit's Peak/Calf Canyon Fire waives the right to pursue any claim arising out of or relating to the same subject matter under the Act.	An Injured Person who accepts a final award through a Federal Tort Claims Act claim or a civil action against the United States or any employee, officer, or agency of the United States relating to the Hermit's Peak/Calf Canyon Fire waives the right to pursue any claim arising out of or relating to the same subject matter under the Act.	Clarity that claimants only waive their rights upon acceptance of a final award.	None.
296.13	An insurer or other third party with the rights of a subrogee, who has compensated an injured person for Hermit's Peak/Calf Canyon Fire related injuries, may file a Notice of Loss under the Act for the subrogated claim. A subrogee may file a Notice of Loss without regard to whether the Injured Person who received payment from the subrogee filed a Notice of Loss. A Subrogation Notice of Loss should be filed after the subrogee has made all payments that it believes the Injured Person is entitled to receive for Hermit's Peak/Calf Canyon Fire related injuries under the terms of the insurance policy or other agreement between the subrogee and the Injured Person, but not later than November 14, 2024. By filing a Notice of Loss for any subrogated claim, the subrogee elects the Act as its exclusive remedy against the United States or any employee, officer, or agency of the United States for all subrogated claims arising out of the Hermit's Peak/Calf Canyon Fire. Subrogation claims must be made on a Notice of Loss form furnished by the Claims Office.	An insurer or other third party with the rights of a subrogee, who has compensated an injured person for Hermit's Peak/Calf Canyon Fire related injuries, may file a Notice of Loss under the Act for the subrogated claim. A subrogee may file a Notice of Loss without regard to whether the Injured Person who received payment from the subrogee filed a Notice of Loss. A Subrogation Notice of Loss should be filed after the subrogee has made all payments that it believes the Injured Person is entitled to receive for Hermit's Peak/Calf Canyon Fire related injuries under the terms of the insurance policy or other agreement between the subrogee and the Injured Person, but not later than November 14, 2024. By filing a Notice of Loss for any subrogated claim, the subrogee elects the Act as its exclusive remedy against the United States or any employee, officer, or agency of the United States for all subrogated claims arising out of the Hermit's Peak/Calf Canyon Fire. Subrogation claims must be made on a Notice of Loss form furnished by the Claims Office and such claims will be paid only after paying claims submitted by injured persons that are not insurance companies seeking payment as subrogees.	Consistency with authorizing statute's language.	None.
296.21(a)	(a) *Allowable damages.* The Act provides for the payment of actual compensatory damages for Injury or loss of property, business loss, and financial loss. The laws of the State of New Mexico will apply to the calculation of damages. Damages must be reasonable in amount.	(a) *Allowable damages.* The Act provides for the payment of actual compensatory damages for injury or loss of property, business loss, and financial loss. The laws of the State of New Mexico will apply to the calculation of damages. Damages must be reasonable in amount.	Technical edit	None.

44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.21(c)(2)	*Reforestation and revegetation.* Compensation for the replacement of destroyed trees and other landscaping will not exceed 25 percent of the pre-fire value of the structure and lot.	*Reforestation and revegetation.* Compensatory damages may be awarded for the cost of destroyed trees and other landscaping.	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	Removes the formula for compensation for destroyed trees and other landscaping. This would potentially lead to an increase in the value of awarded claims. Claimants would benefit by receiving additional assistance and be able to recover more fully. This would not affect the maximum total impact of the rule of $3.95B, but transfer payments from FEMA to these claimants would potentially increase. FEMA may also bear an additional administrative cost to process the additional claims.
296.21(c)(3)(ii)	The claimant can establish that the value of the real property was permanently diminished as a result of the Hermit's Peak/Calf Canyon Fire.	The claimant can establish that the value of the real property was significantly diminished long-term as a result of the Hermit's Peak/Calf Canyon Fire.	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	None.
296.21(c)(5)	N/A	*Physical Infrastructure.* Compensatory damages may be awarded for the damage to physical infrastructure, including damages to irrigation infrastructure such as acequia systems.	Consistency with authorizing statute's language and with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	None.
296.21(e)(3)	*Out of pocket expenses for treatment of mental health conditions.* FEMA may reimburse an individual claimant for reasonable out of pocket expenses incurred for treatment of a mental health condition rendered by a licensed mental health professional, which condition resulted from the Hermit's Peak/Calf Canyon Fire. FEMA will not reimburse for treatment rendered after April 6, 2024.	*Out of pocket expenses for treatment of mental health conditions.* FEMA may reimburse an individual claimant for reasonable out of pocket expenses incurred for treatment of a mental health condition rendered by a licensed mental health professional, which condition resulted from or was worsened by the Hermit's Peak/Calf Canyon Fire.	Reflects public comment feedback on to allow for claims to be filed under deadline for all other claims and revised for clarity on the types of mental health conditions covered.	Removes time limit on reimbursements for treatment. Additional claims will potentially be filed after April 6, 2024, leading to more claims and claims payments. This would potentially lead to an increase in the value of awarded claims. Claimants would benefit by receiving additional assistance and be able to recover more fully. This would not affect the maximum total impact of the rule of $3.95B, but transfer payments from FEMA to these claimants would potentially increase. FEMA may also bear an additional administrative cost to process the additional claims.
296.21(e)(4)	*Donations.* FEMA will compensate claimants for the cost of merchandise, use of equipment or other non-personal services, directly or indirectly donated to survivors of the Hermit's Peak/Calf Canyon Fire not later than September 20, 2022. Donations will be valued at cost.	*Donations.* FEMA will compensate claimants for the cost of merchandise, use of equipment or other non-personal services, directly or indirectly donated to survivors of the Hermit's Peak/Calf Canyon Fire not later than November 14, 2022. Donations will be valued at cost.	Reflects public comment feedback on appropriate timeline.	Extends the deadline by approximately 8 weeks for compensation for donations to survivors of the fire. Additional claims for reimbursement were potentially be filed between September 21 and November 14, 2022, leading to more claims and claims payments. This would potentially lead to an increase in the number of awarded claims. More claimants would benefit by receiving assistance and be able to recover more fully. This would not affect the maximum total impact of the rule of $3.95B, but transfer payments from FEMA to claimants would increase. FEMA may also bear an additional administrative cost to process the additional claims.

44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.21(e)(5)	*Heightened Risk Reduction.* FEMA will reimburse claimants for the costs incurred to implement reasonable measures necessary to reduce risks from natural hazards heightened by the Hermit's Peak/Calf Canyon Fire to the level of risk prevailing before the Hermit's Peak/Calf Canyon Fire. Such measures may include, for example, risk reduction projects that reduce an increased risk from flooding, mudslides, and landslides in and around burn scars. Compensation under this section may not exceed 25 percent of the higher of payments from all sources (*i.e.,* the Act, insurance proceeds, FEMA assistance under the Stafford Act) for damage to the structure and lot, or the pre-fire value of the structure and lot. Claimants seeking compensation for heightened risk reduction must include the claim in their Notice of Loss by November 14, 2024 or an amended Notice of Loss filed no later than November 14, 2025. Claimants should take into account current building codes and standards and must complete the risk reduction project for which they receive compensation.	*Heightened Risk Reduction.* FEMA will reimburse claimants for the costs incurred to implement reasonable measures necessary to reduce risks from natural hazards heightened by the Hermit's Peak/Calf Canyon Fire to the level of risk prevailing before the Hermit's Peak/Calf Canyon Fire. Such measures may include, for example, risk reduction projects that reduce an increased risk from flooding, mudslides, and landslides in and around burn scars. Claimants seeking compensation for heightened risk reduction must include the claim in their Notice of Loss by November 14, 2024 or an amended Notice of Loss filed no later than November 14, 2025. Claimants should take into account current building codes and standards and must complete the risk reduction project for which they receive compensation.	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	Removes the formula for compensation for measures taken to reduce risk from natural hazards heightened by the Fire. This would potentially lead to an increase in the value of awarded claims. Claimants would benefit by receiving additional assistance and be able to recover more fully. This would not affect the maximum total impact of the rule of $3.95B, but transfer payments from FEMA to these claimants would potentially increase. FEMA may also bear an additional administrative cost to process the claims.
296.21(f)	*Insurance and other benefits.* The Act allows FEMA to compensate Injured Persons only for damages not paid, or will not be paid, by insurance or other third-party payments or settlements.	*Insurance and other benefits.* The Act allows FEMA to compensate Injured Persons only for damages not paid, and that will not be paid, by insurance or other third-party payments or settlements.	Technical edit	None.
296.31(a)	FEMA will reimburse claimants for the reasonable costs they incur in providing documentation requested by the Claims Office. FEMA will also reimburse claimants for the reasonable costs they incur in providing appraisals, or other third-party opinions, requested by the Claims Office. FEMA will not reimburse claimants for the cost of appraisals or other third-party opinions not requested by the Claims Office.	FEMA will reimburse claimants for the reasonable costs they incur in providing documentation requested by the Claims Office. FEMA will also reimburse claimants for the reasonable costs they incur in providing appraisals, or other third-party opinions, that the Claims Office deems necessary to determine the amount of the claim. FEMA will not reimburse claimants for the cost of appraisals or other third-party opinions not requested by the Claims Office.	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	None.

44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.35	The Director of the Claims Office may reopen a claim if requested to do so by the claimant, notwithstanding the submission of the Release and Certification Form, for the limited purpose of considering issues raised by the request to reopen if, not later than November 14, 2025, the claimant desires heightened risk reduction compensation in accordance with § 296.21(e)(5); the claimant closed the sale of a home and wishes to present a claim for decrease in the value of the real property under § 296.21(c)(3); the claimant has incurred additional losses under § 296.21(c)(1) as part of a reconstruction in excess of those previously awarded; or the Director of the Claims Office otherwise determines that claimant has demonstrated good cause.	The Director of the Claims Office may reopen a claim if requested to do so by the claimant, notwithstanding the submission of the Release and Certification Form, for the limited purpose of considering issues raised by the request to reopen if, not later than November 14, 2025, the claimant desires heightened risk reduction compensation in accordance with § 296.21(e)(5); the claimant closed the sale of real property and wishes to present a claim for decrease in the value of the real property under § 296.21(c)(3). Claimants may request to reopen claims where the claimant has incurred additional losses under § 296.21(c)(1) as part of a reconstruction in excess of those previously awarded or the Director of the Claims Office otherwise determines that claimant has demonstrated good cause no later than the deadline established by the Director of the Claims Office as published in the **Federal Register** and at *https://www.fema.gov/hermits-peak.*	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process while also incorporating a past practice from Cerro Grande to extend the deadline by **Federal Register** publication for certain losses.	A claimant may file a claim for depreciation after the sale of any real property, not only a home. The deadline to request to reopen a claim under limited circumstances is extended by publication in the **Federal Register**. Both of these changes would potentially lead to an increase in claims and more claims being awarded. Claimants would benefit by receiving additional assistance and be able to recover more fully. This would not affect the maximum total impact of the rule of $3.95B, but transfer payments from FEMA to these claimants would potentially increase. FEMA may also bear an additional administrative cost to process the claims.

IV. Regulatory Analysis

A. Administrative Procedure Act (APA)

The IFR that this Final Rule makes final, with the changes detailed above in response to public comment is already in effect. FEMA issued the IFR pursuant to statutory authority under the Act. Specifically, section 104(f)(1) requires FEMA to publish ''interim final regulations for the processing and payment of claims under this Act.'' Further, the IFR had to be published ''not later than 45 days after the date of enactment.'' Given Congress' specific authority to issue an IFR, the agency had good cause to proceed without advance notice and comment as would have otherwise been required under the APA. See 5 U.S.C. 553(b)(B); Hermit's Peak/Calf Canyon Fire Assistance, 87 FR 68085, 68095 (Nov. 14, 2022) (''Consistent with Congress' direction in section 104(f)(1) of the Act that FEMA publish 'interim final regulations for the processing and payment of claims under [the] Act,' good cause exists pursuant to 5 U.S.C. 553 (b)(B) as it would be impracticable and contrary to the public interest to require notice and comment rulemaking in this instance.'').

FEMA finds there is good cause, under 5 U.S.C. 553(d)(3), not to require a 30-day delayed effective date for this rulemaking because delaying implementation of this Final Rule by 30 days is contrary to the goal of the statutory purpose found at section 102(b)(2) of the Act to provide for the expeditious consideration and settlement of claims for injuries resulting from the Fire. The Act required FEMA to promulgate and publish an IFR within 45 days after the Act's enactment, and delay in the effective date of a Final Rule with changes to that IFR would further negatively impact claimants seeking compensation through the Act. The updates made in this Final Rule will address concerns raised by commenters on the application of the Cerro Grande Fire Assistance processes for the Hermit's Peak/Calf Canyon Fire Assistance process and ensures the process better reflects the needs of injured persons and impacted communities from the Hermit's Peak/Calf Canyon Fire given the geographic, economic, and cultural distinctions between the Cerro Grande and Hermit's Peak/Calf Canyon Fires. This Final Rule will provide additional clarity to claimants seeking to utilize the Hermit's Peak/Calf Canyon claims process and receive compensation for actual compensatory damages suffered as a result of the Fire. Given the Congressional mandate to expeditiously consider and settle these claims, this Final Rule must be effective upon publication.

The Fire constitutes the largest wildfire in New Mexico history.[67] Over 340,000 acres of forest burned during the Fire and over half of the land impacted by the Fire consisted of privately-owned land, with just under 200,000 total acres burned.[68] At least 160 homes and a total of over 900 structures were destroyed during the Fire.[69] Despite containment, the impact of the Fire continues to be felt in the impacted areas, causing flooding and setting off a drinking water crisis.[70] The higher burn severity of soil on private lands increases the likelihood of flooding and mudslide impacts on those areas. Residents in the areas of the Fire have already suffered significant damage from flooding, including washed out roads and buildings, drowned pastures, and burned debris

[67] *See* Bryan Pietsch and Jason Samenow, ''New Mexico blaze is now largest wildfire in state history,'' The Washington Post, May 17, 2022 found at *https://www.washingtonpost.come/nation/2022/05/17/calf-canyon-hermits-peak-fire-new-mexico/* (last accessed July 27, 2023).

[68] *See* New Mexico Forest and Watershed Restoration Institute, ''Hermit's Peak and Calf Canyon Fire: The largest wildfire in New Mexico's recorded history and its lasting impacts'' Aug. 24, 2022 found at *https://storymaps.arcgis.com/stories/d48e2171175f4aa4b5613c2d11875653* (last accessed Sept. 27, 2022).

[69] *Id.*

[70] *See* Jordan Honeycutt, ''Rain brings flash flooding to Hermits Peak Calf Canyon burn scar,'' KRQE, July 13, 2022 found at *https://www.krqe.com/news/new-mexico/rain-brings-flash-flooding-to-hermits-peak-calf-canyon-burn-scar/* (last accessed July 27, 2023), and Simon Romero, ''How New Mexico's Largest Wildfire Set Off a Drinking Water Crisis,'' The New York Times, Sept. 26, 2022 found at *https://www.nytimes.com/2022/09/26/us/new-mexico-las-vegas-fire-water.html* (last accessed Sept. 27, 2022).

moved downstream.[71] In addition, as noted above, Congress explicitly mandated in section 104(f)(1) of the Act that FEMA promulgate these regulations expeditiously as interim final regulations, a factor that supports a finding of ''good cause'' to also issue this Final Rule without an effective date delay. Pursuant to section 104(f)(1) of the Act, consistent with 5 U.S.C. 553(d)(3), and for the reasons stated above, FEMA therefore will make this Final Rule effective immediately upon publication.

B. Executive Order 12866, Regulatory Planning and Review, as Amended, and Executive Order 13563, Improving Regulation and Regulatory Review

Executive Order 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review) and Executive Order 13563 (Improving Regulation and Regulatory Review), directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget (OMB) has designated this rule a ''significant regulatory action'' as defined under section 3(f)(1) of Executive Order 12866, as amended by E.O. 14094. Accordingly, the rule has been reviewed by OMB.

In the IFR, FEMA established a process by which claimants who were injured as a result of the Fire may apply for compensation under the Act. FEMA is updating that process through this Final Rule. Affected State, local, and Tribal governments, private sector businesses, not-for-profit organizations, and individuals and households are eligible to apply for compensation based on clarifying changes made in this Final Rule. The established process results in costs to claimants for time to apply for and substantiate a claim, and for FEMA to process and adjudicate claims. Claimants submit a Notice of Loss to FEMA, meet with a FEMA Claims Reviewer, obtain the documentation needed to substantiate claims, sign a Proof of Loss, and complete and return a Release and Certification Form. Additionally, affected insurance companies are eligible to submit a subrogation notice of loss for possible compensation under the Act. Claimants who disagree with FEMA's evaluation of the claim may also incur costs to appeal the determination. FEMA estimates approximately 28,725 claimants will seek compensation under the Act annually, totaling 732,490 burden hours per year.[72]

The IFR and this rule result in additional transfer payments from FEMA to victims for the settlement of claims for injuries resulting from the Fire. Injuries may include property, business and/or financial losses. Congress appropriated $3.95 billion to provide for the expeditious consideration and settlement of these claims.[73] The maximum total economic impact of these actions, therefore, is $3.95 billion (assuming that all funds awarded will be expended). These funds are for the settlement of actual compensatory damages measured by injuries suffered, FEMA's administration of the program, and DHS OIG oversight.[74] However, without knowing the dollar amount of claims that will be filed for these injuries, it is impossible to predict the amount of the economic impact with any precision. As of July 5, 2023, FEMA has received 1,353 Notices of Loss, which includes 2,257 claimants.

The Act requires claims to be submitted no later than two years after publication of the IFR or November 14, 2024.[75] The Act requires that FEMA determine and fix the amount to be paid for a claim within 180 days after a claim is submitted.[76] Although the impact of the rule could be spread over multiple years as claims are received, processed, and paid, the total economic effects of a specific payment would only occur once, rather than annually.

These actions provide distributional benefits to victims of the Fire. FEMA has provided immediate assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), as amended (Pub. L. 93–288) (42 U.S.C. 5121, *et seq.*) to those eligible for public and individual assistance pursuant to the President's declaration of a major disaster on May 4, 2022. The additional compensation from the Act will more fully compensate victims and allow affected State, local and Tribal governments, businesses, organizations, and individuals to rebuild.

In this Final Rule, FEMA is updating the established process by which claimants who were injured as a result of the Fire may apply for compensation under the Act. FEMA anticipates that several of the changes it made from the IFR to this Final Rule will lead to impacts on costs, benefits, and transfer payments. Below, FEMA discusses the impact of these changes relative to the IFR. Specifically, these changes include the following:

In 44 CFR 296.4, FEMA added ''other natural resources'' to the definition of ''Subsistence Resources.'' Expanding the definition leads to the potential for claimants to receive compensation for claims including other natural resources; however, FEMA anticipates any impact on claim values will be a de minimis amount, as the additional language is intended to be clarifying in nature. In § 296.21(c)(2), FEMA removed the formula on compensation for destroyed trees and other landscaping. Removing this formula leads to the potential for claimants to receive higher levels of compensation for these claims, and therefore, an increase in claims values. Section 296.21(e)(3) removes the time limit on reimbursements for treatment, allowing for claimants to file additional claims after April 6, 2024. This will potentially lead to an increase in the number and value of claims filed and awarded as compared to the IFR. Claimants will potentially benefit by receiving treatment for mental health conditions that they would not have sought out if their expenses could not be reimbursed. In § 296.21(e)(4), FEMA extended the deadline for compensation from September 20, 2022 to November 14, 2022 for donations claimants made to survivors of the Hermit's Peak/Calf Canyon Fire. This will potentially lead to an increase in the number and value of claims awarded by FEMA relative to the IFR. In § 296.21(e)(5), FEMA removed the formula for compensation for measures taken to reduce risk from natural disasters heightened by the Fire. Removing this formula leads to the potential for claimants to receive higher levels of compensation for these claims, and therefore, an increase in claims values. FEMA edited § 296.35 to allow

[71] *See* New Mexico Forest and Watershed Restoration Institute, ''Hermit's Peak and Calf Canyon Fire: The largest wildfire in New Mexico's recorded history and its lasting impacts'' Aug. 24, 2022 found at *https://storymaps.arcgis.com/stories/d48e2171175f4aa4b5613c2d11875653* (last accessed Sept. 27, 2022).

[72] Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for Notice of Loss and Proof of Loss, 88 FR 29144 (May 5, 2023). FEMA estimates that 28,725 applicants annually will incur approximately 25.5 burden hours each. Over the two-year period, FEMA estimates a total of 57,450 claims with a corresponding 1,464,980 burden hours.

[73] Division A of Public Law 117–180, *136 Stat. 2144 (2022)* and Consolidated Appropriations Act, 2023, Public Law 117–328, 136 Stat. 4459.

[74] *Id.*

[75] *Id.*

[76] Division G of Public Law 117–180, *136 Stat. 2114 (2022).*

for a claimant to file a claim for depreciation after the sale of any real property, not only the sale of a home. FEMA also extends a deadline in this section, allowing for a claimant to request to reopen a claim under limited circumstances until the deadline established in the **Federal Register**. Both of these changes will potentially lead to an increase in claims and more claims being awarded as compared to the IFR.

All increases in the number or value of claims payments in comparison to the IFR will lead to an increase in transfer payments from FEMA to affected recipients. The extent to which the claim values increase, recipients will benefit by being made more whole after their loss, thereby improving their ability recover and be resilient. Any increase in the number of claims filed will also lead to an increase in burden hours to claimants and administrative costs to FEMA. None of these changes will affect the maximum total impact of the rule of $3.95 billion.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)) applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously, FEMA did not issue a notice of proposed rulemaking, and was not required to do so under any law. Accordingly, the RFA's requirements do not apply to this Final Rule.

D. Unfunded Mandates Reform Act of 1995

As noted above, no notice of proposed rulemaking was published in advance of this action. Therefore, the written statement provisions of the Unfunded Mandates Reform Act of 1995, as amended, (2 U.S.C. 1501 *et seq.*) do not apply to this regulatory action.

E. Paperwork Reduction Act of 1995

This rule contains information collections necessary to support FEMA's implementation of the Act. The Notice of Loss and Proof of Loss forms (OMB Control Number 1660–0155) were submitted and approved under OMB's emergency clearance procedures on November 14, 2022 to allow FEMA to begin accepting claims immediately after publication of the IFR. A revision of the initial emergency collection was approved on February 16, 2023 to incorporate additional forms necessary to effectively process claims under the Act. FEMA is pursuing approval under the normal notice and comment process for this collection and will publish notice in the **Federal Register** for comment before receiving an extension of the emergency approval.

F. Privacy Act

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a regulation will result in a system of records. A ''record'' is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. See 5 U.S.C. 552a(a)(4). A ''system of records'' is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

In accordance with DHS policy, FEMA has completed a Privacy Threshold Analysis (PTA) for this rule. DHS has determined that this rulemaking does not affect the 1660–0155 OMB Control Number's compliance with the E-Government Act of 2002 or the Privacy Act of 1974, as amended. Specifically, DHS has concluded that the 1660–0155 OMB Control Number is covered by the DHS/FEMA/PIA–044 National Fire Incident Reporting Systems (NFIRS) Privacy Impact Assessment (PIA) and the DHS/FEMA/PIA–049 Individual Assistance (IA) Program PIA. Additionally, DHS has decided that the 1660–0155 OMB Control Number is covered by DHS/ALL–004 General Information Technology Access Account Records System (GITAARS), 77 FR 70792 (Nov. 27, 2012), and DHS/ALL–013 Department of Homeland Security Claims Records, 73 FR 63987 (Oct. 28, 2008) System of Records Notices (SORNs).

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

Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' 65 FR 67249, November 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations 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. Under this Executive Order, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

FEMA entered into consultation with the Indian Tribes that have been impacted by the Fire and whose Tribal entities or Tribal members have been impacted by the Fire during the public comment period of the Interim Final Rulemaking. The consultation was held on December 9, 2022 at 3:00 p.m. The concerns raised during that consultation are addressed above.

H. Executive Order 13132, Federalism

Executive Order 13132, ''Federalism,'' 64 FR 43255, August 10, 1999, sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that 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.'' Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and local officials before implementing any such action.

FEMA has determined that this rulemaking does 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, and therefore does not have federalism implications as defined by the Executive Order. FEMA, however, met with the State of New Mexico on January 10, 2023 to discuss the effect of the IFR on the State. The transcript from that meeting can be found on the public docket at *https://www.regulations.gov/document/FEMA-2022-0037-0142* and comments raised during that meeting are addressed above.

I. National Environmental Policy Act of 1969 (NEPA)

Under Section 102 of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq.,* an agency must prepare an environmental assessment or environmental impact statement for any major Federal action that significantly affects the quality of the human environment unless the action can be statutorily or categorically excluded. 40 CFR 1501.1(a), 1501.4. A ''major federal action'' includes new or revised agency rules or regulations. 40 CFR 1508.1(q)(2). A categorical exclusion is a category of actions that the Federal agency has determined, normally does not significantly affect the quality of the human environment. 42 U.S.C. 4336e(1). If there are extraordinary circumstances, however, a normally excluded action may have a significant effect, and if the effect cannot be mitigated, further environmental review is required. 40 CFR 1501.4.

This rulemaking is a major Federal action subject to NEPA. Based on the public comments received, the rulemaking revises the IFR to better address the needs of the communities affected by the Fire with particular consideration to their geographic, economic and cultural characteristics. The purpose of the rulemaking is to establish a process and procedures for FEMA to expeditiously pay actual compensatory damages for injuries resulting from the Fire. FEMA has determined that categorical exclusion A3 included in the list of exclusion categories at Department of Homeland Security Instruction Manual 023–01–001–01, Revision 01, Implementation of the National Environmental Policy Act, Appendix A, issued November 6, 2014, applies to this rulemaking. Specifically, categorical exclusion A3 covers the promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, and advisory circulars if they meet certain criteria provided in A3(a)–(f). This Final Rule meets Categorical Exclusion A3(a), ''[t]hose of a strictly administrative or procedural nature,'' and A3(b), ''[t]hose that implement, without substantive change, statutory or regulatory requirements.'' FEMA has determined that there are no extraordinary circumstances that prevent the use of this categorical exclusion for this rulemaking action.

J. Executive Orders 12898 and 14096 on Environmental Justice

Under Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' 59 FR 7629 (Feb. 16, 1994), as amended by Executive Order 12948, 60 FR 6381, (Feb. 1, 1995), FEMA incorporates environmental justice into its policies and programs. The Executive Order requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in programs, denying persons the benefits of programs, or subjecting persons to discrimination because of race, color, or national origin. Further, Executive Order 14096, ''Revitalizing Our Nation's Commitment to Environmental Justice for All,'' 88 FR 25251 (Apr. 26, 2023), charges Federal agencies to make achieving environmental justice part of their missions, consistent with statutory authority, by identifying, analyzing, and addressing the disproportionate and adverse human health and environmental effects and hazards of Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns.

This rulemaking does not have a disproportionate and adverse helath or environmental effect on communities, nor does it exclude persons from participation in FEMA programs, deny persons the benefits of FEMA programs, or subject persons to discrimination because of race, color, or national origin. The rulemaking finalizes the IFR and establishes the procedures for processing and paying claims for property, business and other financial losses to those person(s) sustaining losses from the Fire. The eligibility requirements are to ensure the validity of the claim for compensation. *See e.g.,* 44 CFR 296.4 (definition of ''injured person''), 296.20, 296.21, and 296.30. With its revisions to the IFR, the rulemaking better addresses the needs of the communities affected by the Fire based on the public comments received and the communities' particular geographic, economic, and cultural characteristics. Claimants also have appeal rights: they can file an administrative appeal of the decision by the Director of the Claims Office, and/or resolve a dispute through binding arbitration or appeal the Director's decision to the United States District Court for the District of New Mexico. All persons eligible for compensatory payments resulting from the Fire will benefit.

K. Congressional Review of Agency Rulemaking

Under the Congressional Review of Agency Rulemaking Act (CRA), 5 U.S.C. 801–808 before a rule can take effect, the Federal agency promulgating the rule must: submit to Congress and to the Government Accountability Office (GAO) a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; the proposed effective date of the rule; a copy of any cost-benefit analysis; descriptions of the agency's actions under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act; and any other information or statements required by relevant executive orders.

FEMA has submitted this rule to the Congress and to GAO pursuant to the CRA. The Office of Management and Budget has determined that this rule is ''economically significant,'' but this rule is not a ''major rule'' within the meaning of the CRA. FEMA believes this Final Rule is not subject to the additional review requirements under the CRA given the statutory mandate to issue the Interim Final Rule within 45 days of the Act's enactment under section 104(f) of the Act and Congress's desire for the agency to begin processing and paying claims pursuant to the Act expeditiously under section 102(b)(2). The changes made in the Final Rule need to be immediately effective to resolve the comments raised during the IFR's public comment period to the claims process and ensure the continued expeditious processing and payment of claims under the Act. This Final Rule is a procedural rule and does not confer any substantive rights, benefits, or obligations but rather only updates the agency's procedures for how to voluntarily file a claim under the Act. As such, this Final Rule is a ''rule of agency organization, procedure, or practice that does not substantially affect the rights or obligation of non-agency parties'' pursuant to 5 U.S.C. 804(3)(C). Finally, even if this final rule is considered a ''rule'' under the CRA, FEMA finds there is good cause to dispense with notice and public comment under 5 U.S.C. 808(2). Notice and public comment are impracticable and contrary to public interest given the Act's requirement for the agency to publish an IFR within 45 days of enactment and the Act's purpose to provide expeditious consideration and settlement of claims for victims of the

Fire as explained above. Therefore, there is no delay in its effective date under the CRA.

List of Subjects in 44 CFR Part 296

Administrative practice and procedure, Claims, Disaster Assistance, Federally affected areas, Indians, Indians—lands, Indians—Tribal government, Organization and functions (Government agencies), Public lands, Reporting and recordkeeping requirements, State and local governments.

■ For the reasons discussed in the preamble, the Federal Emergency Management Agency (FEMA) is revising part 296 to read as follows:

PART 296—HERMIT'S PEAK/CALF CANYON FIRE ASSISTANCE

Sec.

Authority: Pub. L. 117–180, 136 Stat. 2114, 2168; Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*

Subpart A—General

§ 296.1 Purpose.

This part implements the Hermit's Peak/Calf Canyon Fire Assistance Act (Act), Division G of Public Law 117–180, 136 Stat. 2114, 2168, which requires the Federal Emergency Management Agency (FEMA) to establish the Office of Hermit's Peak/Calf Canyon Fire Claims (''Claims Office'') to receive, evaluate, process, and pay actual compensatory damages for injuries resulting from the Hermit's Peak/Calf Canyon Fire.

§ 296.2 Policy.

It is our policy to provide for the expeditious resolution of damage claims through a process that is administered with sensitivity to the burdens placed upon claimants by the Hermit's Peak/Calf Canyon Fire.

§ 296.3 Information and assistance.

Information and assistance concerning the Act is available from the Claims Office, Federal Emergency Management Agency online at *https://www.fema.gov/hermits-peak.*

§ 296.4 Definitions.

Administrative Appeal means an appeal of the Authorized Official's Determination to the Director of the Claims Office in accordance with the provisions of Subpart E of this part.

Administrative Record means all information submitted by the claimant and all information collected by FEMA concerning the claim, which is used to evaluate the claim and to formulate the Authorized Official's Determination. It also means all information that is submitted by the claimant or FEMA in an Administrative Appeal and the decision of the Administrative Appeal. It excludes the opinions, memoranda and work papers of FEMA attorneys and drafts of documents prepared by Claims Office personnel and contractors.

Administrator means the Administrator of the Federal Emergency Management Agency.

Arbitration Administrator means the FEMA official responsible for administering arbitration procedures to resolve disputes regarding a claim. Contact information for the Arbitration Administrator can be found online at *https://www.fema.gov/hermits-peak.*

Authorized Official means an employee of the United States who is delegated with authority by the Director of the Claims Office to render binding determinations on claims and to determine compensation due to claimants under the Act.

Authorized Official's Determination means a report signed by an Authorized Official and mailed to the claimant evaluating each element of the claim as stated in the Proof of Loss and determining the compensation, if any, due to the claimant.

Claimant means a person who has filed a Notice of Loss under the Act.

Claims Office means the Office of Hermit's Peak/Calf Canyon Fire Claims.

Claims Reviewer means an employee of the United States or a Claims Office contractor or subcontractor who is authorized by the Director of the Claims Office to review and evaluate claims submitted under the Act.

Days means calendar days, including weekends and holidays.

Director means an Independent Claims Manager appointed by the Administrator who will serve as the Director of the Claims Office.

Good Cause, for purposes of extending the deadline for filing, supplementing a claim, or reopening a claim includes, but is not limited to: instances where a claimant, through no fault of their own, may not be able to access needed documentation in time to submit a claim or transmit relevant information or data; or where damage is found after a claim has been submitted; or other instances in which the Director of the Claims Office, in their discretion, determines that an undue hardship or change in circumstances on the claimant warrants an extension of a deadline or the supplementation or reopening of existing claims.

Hermit's Peak/Calf Canyon Fire means:

(1) The fire resulting from the initiation by the U.S. Forest Service of a prescribed burn in the Santa Fe National Forest in San Miguel County, New Mexico on April 6, 2022;

(2) The pile burn holdover resulting from the prescribed burn by the U.S. Forest Services which reemerged on April 19, 2022; and

(3) The merger of the two fires described in paragraphs (1) and (2) of this definition, reported as the Hermit's Peak Fire or the Hermit's Peak Fire/Calf Canyon Fire.

Household means a group of people, related or unrelated, who live together on a continuous basis and does not include members of an extended family who do not regularly and continuously cohabit.

Household Including Tribal Members means a Household that existed on April 6, 2022, which included one or more Tribal Members as continuous residents.

Indian Tribe means the recognized governing body of any Indian or Alaska Native Tribe, band, nation, pueblo, village, community, component band, or

components reservation individually identified (including parenthetically) in the list published most recently as of September 30, 2022, pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994.

Individual Assistance means the FEMA program established under subchapter IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5121, *et seq.,* which provides assistance to individuals and families adversely affected by a major disaster or an emergency.

Injured Person means an individual, regardless of citizenship or alien status; or an Indian Tribe, Tribal corporation, corporation, partnership, company, association, county, township, city, State, school district, or other non-Federal entity that suffered injury resulting from the Hermit's Peak/Calf Canyon Fire. The term Injured Person includes an Indian Tribe with respect to any claim relating to property or natural resources held in trust for the Indian Tribe by the United States. Lenders holding mortgages or security interests on property affected by the Hermit's Peak/Calf Canyon Fire and lien holders are not an ''Injured Person'' for purposes of the Act.

Injury means ''injury or loss of property, or personal injury or death,'' as used in the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1).

Notice of Loss means a form supplied by the Claims Office through which an Injured Person or Subrogee makes a claim for possible compensation under the Act.

Proof of Loss means a statement attesting to the nature and extent of the claimant's injuries.

Public Assistance Program means the FEMA program established under Subchapter IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5121, *et seq.,* which provides grants to States, local governments, Indian Tribes and private nonprofit organizations for emergency measures and repair, restoration, and replacement of damaged facilities.

Release and Certification Form means a document in the manner prescribed by section 104(e) of the Act that all claimants who have received or are awarded compensatory damages under the Act must execute and return to the Claims Office as required by § 296.30(c).

Subrogee means an insurer or other third party that has paid to a claimant compensation for Injury and is subrogated to any right that the claimant has to receive payment under the Act.

Subsistence Resources means food and other items obtained through hunting, fishing, firewood and other natural resource gathering, timbering, grazing or agricultural activities undertaken by the claimant without financial remuneration, on land damaged by the Hermit's Peak/Calf Canyon Fire.

Tribal Member means an enrolled member of an Indian Tribe.

§ 296.5 Overview of the claims process.

(a) The Act is intended to provide persons who suffered Injury from the Hermit's Peak/Calf Canyon Fire with a simple, expedited process to seek compensation from the United States. This section provides a brief explanation of the claims process for claims other than subrogation claims. It is not intended to supersede the more specific regulations that follow and explain the claims process in greater detail. To obtain compensation under the Act, an Injured Person must submit all Hermit's Peak/Calf Canyon Fire related claims against the United States or any employee, officer, or agency of the United States to the FEMA Claims Office. An Injured Person who elects to accept an award under the Act is barred from accepting an award pursuant to a claim under the Federal Tort Claims Act or a civil action against the United States or any employee, officer, or agency of the United States arising out of or relating to the same subject matter. Judicial review of FEMA decisions under the Act is available.

(b) The first step in the process is to file a Notice of Loss with the Claims Office. The Claims Office will provide the claimant with a written acknowledgement that the claim has been filed and a claim number.

(c) Shortly thereafter, a Claims Reviewer will contact the claimant to review the claim. Claims Reviewer will help the claimant formulate a strategy for obtaining any necessary documentation or other support. This assistance does not relieve the claimant of their responsibility for establishing all elements of the injuries and the compensatory damages that are sought, including that the Hermit's Peak/Calf Canyon Fire caused the injuries. After the claimant has had an opportunity to discuss the claim with the Claims Reviewer, a Proof of Loss will be presented to the claimant for signature. After any necessary documentation has been obtained and the claim has been fully evaluated, the Claims Reviewer will submit a report to the Authorized Official. The Claims Reviewer is responsible for providing an objective evaluation of the claim to the Authorized Official.

(d) The Authorized Official will review the report and determine whether compensation is due to the claimant. The claimant will be notified in writing of the Authorized Official's determination. If the claimant is satisfied with the decision, payment will be made after the claimant returns a completed Release and Certification Form. If the claimant is dissatisfied with the Authorized Official's determination, an administrative appeal may be filed with the Director of the Claims Office. If the claimant remains dissatisfied after the appeal is decided, the dispute may be resolved through binding arbitration or heard in the United States District Court for the District of New Mexico.

§§ 296.6–296.9 [Reserved]

Subpart B—Bringing a Claim Under the Hermit's Peak/Calf Canyon Fire Assistance Act

§ 296.10 Filing a claim under the Hermit's Peak/Calf Canyon Fire Assistance Act.

(a) Any Injured Person may bring a claim under the Act by filing a Notice of Loss. A claim submitted on any form other than a Notice of Loss will not be accepted. The claimant must provide a brief description of each injury on the Notice of Loss.

(b) A single Notice of Loss may be submitted on behalf of a household containing Injured Persons provided that all Injured Persons on whose behalf the claim is presented are identified.

(c) The Notice of Loss must be signed by each claimant, if the claimant is an individual, or by a duly authorized legal representative of each claimant, if the claimant is an entity or an individual who lacks the legal capacity to sign the Notice of Loss. If one is signing a Notice of Loss as the legal representative of a claimant, the signer must disclose their relationship to the claimant. FEMA may require a legal representative to submit evidence of their authority to act.

(d) The Claims Office will provide Notice of Loss forms through the mail, electronically, in person at the Claims Office or by telephone request. The Notice of Loss form can also be downloaded from the internet at *https://www.fema.gov/hermits-peak.*

(e) A Notice of Loss may be filed with the Claims Office by mail, electronically, or in person. Details regarding the filing process can be found at *https://www.fema.gov/hermits-peak.*

(f) A Notice of Loss that is completed and properly signed is deemed to be filed on the date it is received and acknowledged by the Claims Office.

§ 296.11 Deadline for notifying FEMA of injuries.

The deadline for filing a Notice of Loss is November 14, 2024. Except as provided in § 296.35 with respect to a request to reopen a claim, an injury that has not been described: on a Notice of Loss, on a supplement to a Notice of Loss or a request to supplement a Notice of Loss under § 296.34 received by the Claims Office on or before November 14, 2024 cannot be compensated under the Act. The Act establishes this deadline and does not provide any extensions of the filing deadline.

§ 296.12 Election of remedies.

(a) An Injured Person who accepts a final award under the Act waives the right to pursue all claims for injuries arising out of or relating to the same subject matter against the United States or any employee, officer, or agency of the United States through the Federal Tort Claims Act or a civil action authorized by any other provision of law.

(b) An Injured Person who accepts a final award through a Federal Tort Claims Act claim or a civil action against the United States or any employee, officer, or agency of the United States relating to the Hermit's Peak/Calf Canyon Fire waives the right to pursue any claim arising out of or relating to the same subject matter under the Act.

§ 296.13 Subrogation.

An insurer or other third party with the rights of a subrogee, who has compensated an injured person for Hermit's Peak/Calf Canyon Fire related injuries, may file a Notice of Loss under the Act for the subrogated claim. A subrogee may file a Notice of Loss without regard to whether the Injured Person who received payment from the subrogee filed a Notice of Loss. A Subrogation Notice of Loss should be filed after the subrogee has made all payments that it believes the Injured Person is entitled to receive for Hermit's Peak/Calf Canyon Fire related injuries under the terms of the insurance policy or other agreement between the subrogee and the Injured Person, but not later than November 14, 2024. By filing a Notice of Loss for any subrogated claim, the subrogee elects the Act as its exclusive remedy against the United States or any employee, officer, or agency of the United States for all subrogated claims arising out of the Hermit's Peak/Calf Canyon Fire. Subrogation claims must be made on a Notice of Loss form furnished by the Claims Office and such claims will be paid only after paying claims submitted by injured persons that are not insurance companies seeking payment as subrogees.

§ 296.14 Assignments.

Assignment of claims and the right to receive compensation for claims under the Act is prohibited and will not be recognized by FEMA.

§§ 296.15–296.19 [Reserved]

Subpart C—Compensation Available Under the Hermit's Peak/Calf Canyon Fire Assistance Act

§ 296.20 Prerequisite to compensation.

In order to receive compensation under the Act, a claimant must be an Injured Person who suffered an injury as a result of the Hermit's Peak/Calf Canyon Fire and sustained damages.

§ 296.21 Allowable damages.

(a) *Allowable damages.* The Act provides for the payment of actual compensatory damages for injury or loss of property, business loss, and financial loss. The laws of the State of New Mexico will apply to the calculation of damages. Damages must be reasonable in amount.

(b) *Exclusions.* Punitive damages, statutory damages under section 30–32–4 of the New Mexico Statutes Annotated (2019), interest on claims, attorney's fees and agents' fees incurred in prosecuting a claim under the Act or an insurance policy, and adjusting costs incurred by an insurer or other third party with the rights of a subrogee that may be owed by a claimant as a consequence of receiving an award are not recoverable from FEMA. The cost to a claimant of prosecuting a claim under the Act does not constitute compensatory damages and is not recoverable from FEMA, except as provided in § 296.31(b).

(c) *Loss of property.* Compensatory damages may be awarded for an uninsured or underinsured property loss, a decrease in the value of real property, damage to physical infrastructure, cost resulting from lost subsistence, cost of reforestation or revegetation not covered by any other Federal program, and any other loss that the Administrator determines to be appropriate for inclusion as a loss of property.

(1) *Real property and contents.* Compensatory damages for the damage or destruction of real property and its contents may include the reasonable cost of reconstruction of a structure comparable in design, construction materials, size, and improvements, taking into account post-fire construction costs in the community in which the structure existed before the fire and current building codes and standards. Compensatory damages may also include the cost of removing debris and burned trees, including hazardous materials or soils, stabilizing the land, replacing contents, and compensation for any decrease in the value of land on which the structure sat pursuant to paragraph (c)(3) of this section.

(2) *Reforestation and revegetation.* Compensatory damages may be awarded for the cost of replacement of destroyed trees and landscaping.

(3) *Decrease in the value of real property.* Compensatory damages may be awarded for a decrease in the value of real property that a claimant owned before the Hermit's Peak/Calf Canyon Fire if:

(i) The claimant sells the real property in a good faith, arm's length transaction that is closed no later than November 14, 2024 and realizes a loss in the pre-fire value; or

(ii) The claimant can establish that the value of the real property was significantly diminished long-term as a result of the Hermit's Peak/Calf Canyon Fire.

(4) *Subsistence.* Compensatory damages will be awarded for lost Subsistence Resources.

(i) FEMA may reimburse an injured party for the reasonable cost of replacing Subsistence Resources customarily and traditionally used by the claimant on or before April 6, 2022, but no longer available to the claimant as a result of the Hermit's Peak/Calf Canyon Fire. For each category of Subsistence Resources, the claimant must elect to receive compensatory damages either for the increased cost of obtaining Subsistence Resources from lands not damaged by the Hermit's Peak/Calf Canyon Fire or for the cost of procuring substitute resources in the cash economy.

(ii) FEMA may consider evidence submitted by claimants, Indian Tribes, and other knowledgeable sources in determining the nature and extent of a claimant's subsistence uses.

(iii) Compensatory damages for subsistence losses will be paid for the period between April 6, 2022 and the date when Subsistence Resources can reasonably be expected to return to the level of availability that existed before the Hermit's Peak/Calf Canyon Fire. FEMA may rely upon the advice of experts in making this determination.

(iv) Long-term damage awards for subsistence resources will be made to claimants in the form of lump sum cash payments.

(5) *Physical infrastructure.* Compensatory damages may be awarded for the damage to physical

infrastructure, including damages to irrigation infrastructure such as acequia systems.

(d) *Business loss.* Compensatory damages may be awarded for damage to tangible assets or inventory, including timber, crops, and other natural resources; business interruption losses; overhead costs; employee wages for work not performed; loss of business net income; and any other loss that the Administrator determines to be appropriate for inclusion as a business loss.

(e) *Financial loss.* Compensatory damages may be awarded for increased mortgage interest costs, insurance deductibles, temporary living or relocation expenses, lost wages or personal income, emergency staffing expenses, debris removal and other cleanup costs, costs of reasonable heightened risk reduction, premiums for flood insurance, and any other loss that the Administrator determines to be appropriate for inclusion as financial loss.

(1) *Recovery loans.* FEMA will reimburse claimants awarded compensation under the Act for interest paid on loans, including Small Business Administration disaster loans obtained after April 6, 2022 for damages resulting from the Fire. Interest will be reimbursed for the period beginning on the date that the loan was taken out and ending on the date when the claimant receives a compensation award (other than a partial payment). Claimants are required to use the proceeds of their compensation award to repay Small Business Administration disaster loans. FEMA will cooperate with the Small Business Administration to formulate procedures for assuring that claimants repay Small Business Administration disaster loans contemporaneously with the receipt of their compensation award.

(2) *Flood insurance.* FEMA will reimburse claimants for flood insurance premiums to be paid on or before May 31, 2024 if, as a result of the Hermit's Peak/Calf Canyon Fire, a claimant who was not required to purchase flood insurance before the Hermit's Peak/Calf Canyon Fire is required to purchase flood insurance or the claimant did not maintain flood insurance before the Fire but purchased flood insurance after the Fire due to fear of heightened flood risk. Alternatively, FEMA may provide flood insurance to such claimants directly through a group or blanket policy.

(3) *Out of pocket expenses for treatment of mental health conditions.* FEMA may reimburse an individual claimant for reasonable out of pocket expenses incurred for treatment of a mental health condition rendered by a licensed mental health professional, which condition resulted from or was worsened by the Hermit's Peak/Calf Canyon Fire. FEMA will not reimburse for treatment identified after November 14, 2024

(4) *Donations.* FEMA will compensate claimants for the cost of merchandise, use of equipment or other non-personal services, directly or indirectly donated to survivors of the Hermit's Peak/Calf Canyon Fire not later than November 14, 2022. Donations will be valued at cost.

(5) *Heightened risk reduction.* FEMA will reimburse claimants for the costs incurred to implement reasonable measures necessary to reduce risks from natural hazards heightened by the Hermit's Peak/Calf Canyon Fire to the level of risk prevailing before the Hermit's Peak/Calf Canyon Fire. Such measures may include, for example, risk reduction projects that reduce an increased risk from flooding, mudslides, and landslides in and around burn scars. Claimants seeking compensation for heightened risk reduction must include the claim in their Notice of Loss by November 14, 2024 or an amended Notice of Loss filed no later than November 14, 2025. Claimants should take into account current building codes and standards and must complete the risk reduction project for which they receive compensation.

(f) *Insurance and other benefits.* The Act allows FEMA to compensate Injured Persons only for damages not paid, and that will not be paid, by insurance or other third-party payments or settlements.

(1) *Insurance.* Claimants who carry insurance will be required to disclose the name of the insurer(s) and the nature of the insurance and provide the Claims Office with such insurance documentation as the Claims Office reasonably requests.

(2) *Coordination with FEMA's Public Assistance Program.* Injured Persons eligible for disaster assistance under FEMA's Public Assistance Program are expected to apply for all available assistance. Pursuant to the Act, the Federal share of the costs for Public Assistance projects is 100 percent. Compensation will not be awarded under the Act for injuries or costs that are eligible under the Public Assistance Program.

(3) *Benefits provided by FEMA's Individual Assistance program.* Compensation under the Act will not be awarded for injuries or costs that have been reimbursed under the Federal Assistance to Individual and Households Program or any other FEMA Individual Assistance Program.

(4) *Worker's compensation claims.* Individuals who have suffered injuries that are compensable under State or Federal worker's compensation laws must apply for all benefits available under such laws.

(5) *Benefits provided by non-governmental organizations and individuals.* Gifts or donations made to a claimant by a non-governmental organization or an individual, other than wages paid by the claimant's employer or insurance payments, will be disregarded in evaluating claims and need not be disclosed to the Claims Office by claimants.

§ 296.22–296.29 [Reserved]

Subpart D—Claims Evaluation

§ 296.30 Establishing injuries and damages.

(a) *Burden of proof.* The burden of proving injuries and damages rests with the claimant. A claimant may submit for the Administrative Record a statement explaining why the claimant believes that the injuries and damages are compensable and any documentary evidence supporting the claim. Claimants will provide documentation, which is reasonably available, including photographs and video, to corroborate the nature, extent, and value of their injuries and/or to execute affidavits in a form established by the Claims Office. FEMA may compensate a claimant for an injury in the absence of supporting documentation, in its discretion, on the strength of an affidavit or Proof of Loss executed by the claimant, if documentary evidence substantiating the injury is not reasonably available. FEMA may also require an inspection of real property. FEMA may request that a business claimant execute an affidavit, which states that the claimant will provide documentary evidence, including but not limited to income tax returns, if requested by the DHS Office of the Inspector General or the Government Accountability Office during an audit of the claim.

(b) *Proof of Loss.* All claimants are required to attest to the nature and extent of each injury for which compensation is sought in the Proof of Loss. The Proof of Loss, which will be in a form specified by the Claims Office, must be signed by the claimant or the claimant's legal representative if the claimant is not an individual or is an individual who lacks the legal capacity to execute the Proof of Loss. The Proof of Loss must be signed under penalty of perjury. Non-subrogation claimants should submit a signed Proof of Loss to the Claims Office not later than 150 days after the date when the Notice of

Loss was submitted. This deadline may be extended at the discretion of the Director of the Claims Office for good cause. If a non-subrogation claimant fails to submit a signed Proof of Loss within the timeframes set forth in this section and does not obtain an extension from the Director of the Claims Office, the Claims Office may administratively close the claim and require the claimant to repay any partial payments made on the claim. Subrogation claimants will submit the Proof of Loss contemporaneously with filing the Notice of Loss.

(c) *Release and Certification Form.* All claimants who receive compensation under the Act are required to sign a Release and Certification Form, including for partial payments under § 296.33. The Release and Certification Form must be executed by the claimant or the claimant's legal representative if the claimant is an entity or lacks the legal capacity to execute the Release and Certification Form. A Release and Certification Form must be received by the Claims Office before the Claims Office provides payment on the claim. The United States will not attempt to recover compensatory damages paid to a claimant who has executed and returned a Release and Certification Form within the periods provided above, except in the case of fraud or misrepresentation by the claimant or the claimant's representative, failure of the claimant to cooperate with an audit as required by § 296.36 or a material mistake by FEMA.

(d) *Authority to settle or compromise claims.* Notwithstanding any other provision of this part, the Director of the Claims Office may extend an offer to settle or compromise a claim or any portion of a claim at any time during the process outlined in this part, which if accepted by the claimant will be binding on the claimant and on the United States, except that the United States may recover funds improperly paid to a claimant due to fraud or misrepresentation on the part of the claimant or the claimant's representative, a material mistake on FEMA's part or the claimant's failure to cooperate in an audit as required by § 296.36.

§ 296.31 Reimbursement of claim expenses.

(a) FEMA will reimburse claimants for the reasonable costs they incur in providing documentation requested by the Claims Office. FEMA will also reimburse claimants for the reasonable costs they incur in providing appraisals, or other third-party opinions that the Claims Office deems necessary to determine the amount of the claim. FEMA will not reimburse claimants for the cost of appraisals or other third-party opinions not deemed necessary by the Claims Office.

(b) FEMA will provide a lump sum payment for incidental expenses incurred in claims preparation to claimants that are awarded compensatory damages under the Act after a properly executed Release and Certification Form has been returned to the Claims Office. The amount of the lump sum payment will be the greater of $150 or 5% of the Act's compensatory damages and insurance proceeds recovered by the claimant for Hermit's Peak/Calf Canyon Fire related injuries (not including the lump sum payment or monies reimbursed under the Act for the purchase of flood insurance) but will not exceed $25,000. Subrogation claimants and claimants whose only Hermit's Peak/Calf Canyon Fire related loss is for flood insurance premiums will not be eligible.

§ 296.32 Determination of compensation due to claimant.

(a) *Authorized Official's report.* After the Claims Office has evaluated all elements of a claim as stated in the Proof of Loss, the Authorized Official will issue, and provide the claimant with a copy of, the Authorized Official's determination.

(b) *Claimant's options upon issuance of the Authorized Official's determination.* Not later than 120 days after the date that appears on the Authorized Official's determination, the claimant must either accept the determination by submitting a Release and Certification Form to FEMA and/or initiate an Administrative Appeal in accordance with § 296.41. Claimants must sign the Release and Certification Form to receive payment on their claims (including for partial payments). The claimant will receive payment of compensation awarded by the Authorized Official after FEMA receives the completed Release and Certification Form. If the claimant does not either submit a Release and Certification Form to FEMA or initiate an Administrative Appeal no later than 120 days after the date that appears on the Authorized Official's determination, the claimant will be conclusively presumed to have accepted the Authorized Official's determination. The Director of the Claims Office may modify the deadlines set forth in this subsection at the request of a claimant for good cause shown.

§ 296.33 Partial payments.

The Claims Office at the request of a claimant may make one or more partial payments on any aspect of a claim that is severable. Receipt by a claimant of a partial payment is contingent on the claimant signing a Release and Certification Form for the severable part of the claim for which partial payment is being made. Acceptance of a partial payment in no way affects a claimant's ability to pursue an Administrative Appeal of the Authorized Official's determination or to pursue other rights afforded by the Act with respect to any portion of a claim for which a Release and Certification Form has not been executed. The Claims Office decision on whether to provide a partial payment cannot be appealed.

§ 296.34 Supplementing claims.

A claimant may amend the Notice of Loss to include additional claims at any time before signing a Proof of Loss. After the claimant has submitted a Proof of Loss and before submission of a Release and Certification Form, a claimant may request that the Director of the Claims Office consider one or more injuries not addressed in the Proof of Loss. The request must be submitted in writing to the Director of the Claims Office and received not later than the deadline for filing an Administrative Appeal under § 296.32 or November 14, 2024, whichever is earlier. It must be supported by the claimant's explanation of why the injury was not previously reported. If good cause is found to consider the additional injury, the Director will determine whether compensation is due to the claimant for the Loss under the Administrative Appeal procedures described in § 296.41.

§ 296.35 Reopening a claim.

The Director of the Claims Office may reopen a claim if requested to do so by the claimant, notwithstanding the submission of the Release and Certification Form, for the limited purpose of considering issues raised by the request to reopen if, not later than November 14, 2025, the claimant desires heightened risk reduction compensation in accordance with § 296.21(e)(5) or the claimant closed the sale of real property and wishes to present a claim for decrease in the value of the real property under § 296.21(c)(3). Claimants may request to reopen claims where the claimant has incurred additional losses under § 296.21(c)(1) as part of a reconstruction in excess of those previously awarded or the Director of the Claims Office otherwise determines that claimant has demonstrated good cause no later than the deadline established by the Director of the Claims Office as published in the **Federal**

Register and at *https://www.fema.gov/hermits-peak.*

§ 296.36 Access to records.

For purpose of audit and investigation, a claimant will grant the DHS Office of the Inspector General and the Comptroller General of the United States access to any property that is the subject of a claim and to any and all books, documents, papers, and records (including any relevant tax records) maintained by a claimant or under the claimant's control pertaining or relevant to the claim.

§ 296.37 Confidentiality of information.

Confidential information submitted by individual claimants is protected from disclosure to the extent permitted by the Privacy Act. These protections are described in the Privacy Act Notice provided with the Notice of Loss. Other claimants should consult with FEMA concerning the availability of confidentiality protection under exemptions to the Freedom of Information Act and other applicable laws before submitting confidential, proprietary or trade secret information.

§ 296.38–296.39 [Reserved]

Subpart E—Dispute Resolution

§ 296.40 Scope.

This subpart describes a claimant's right to bring an Administrative Appeal in response to the Authorized Official's Determination. It also describes the claimant's right to pursue arbitration or seek judicial review following an Administrative Appeal.

§ 296.41 Administrative appeal.

(a) *Notice of appeal.* A claimant may request that the Director of the Claims Office review the Authorized Official's determination by written request to the Appeals Docket, Office of Hermit's Peak/Calf Canyon Claims, postmarked or delivered within 120 days after the date that appears on the Authorized Official's determination pursuant to § 296.32. The claimant will submit along with the notice of appeal a statement explaining why the Authorized Official's determination was incorrect. Information regarding where to file can be found at *http://www.fema.gov/hermits-peak.*

(b) *Acknowledgement of appeal.* The Claims Office will acknowledge receipt of an appeal. Following the receipt of a timely filed appeal, the Director of the Claims Office will obtain the Administrative Record from the Authorized Official and transmit a copy to the claimant.

(c) *Supplemental filings.* The claimant may supplement their statement accompanying the appeal and provide any additional documentary evidence supporting the appeal within 60 days after the date when the appeal is filed. The Director of the Claims Office may extend these timeframes or authorize additional filings either on their own initiative or in response to a request by the claimant for good cause shown.

(d) *Admissible evidence.* The claimant may rely upon any relevant evidence to support the appeal, regardless of whether the evidence was previously submitted to the Claims Reviewer for consideration by the Authorized Official.

(e) *Obtaining evidence.* The Director of the Claims Office may request from the claimant or from the Authorized Official any additional information that is relevant to the issues posed by the appeal in their discretion.

(f) *Conferences.* The Director of the Claims Office may schedule a conference to gain a better understanding of the issues or to explore settlement or compromise possibilities. The claimant may also request a conference. Conferences will generally be conducted virtually. In limited circumstances, the Director may convene an in-person conference at a location in New Mexico designated by the Director. A claimant may request that the Director of the Claims Office appoint a mediator at FEMA's expense to facilitate such conferences.

(g) *Hearings.* The Director of the Claims Office may exercise the discretion to convene an informal hearing to receive oral testimony from witnesses or experts. The rules under which hearings will be conducted will be established by the Director of the Claims Office and provided to the claimant. Formal rules of evidence applicable to court proceedings will not be used in hearings under this subsection. Hearings will generally be conducted virtually, be transcribed, and the transcript will be entered in the Administrative Record. In limited circumstances, the Director may convene an in-person hearing at a location in New Mexico designated by the Director.

(h) *Decision on appeal.* After the allotted time for submission of evidence has passed, the Director of the Claims Office will close the Administrative Record and render a written decision on the Administrative Appeal. The Director of the Claims Office's decision on the Administrative Appeal will constitute the final decision of the Administrator of FEMA under sections 104(d)(2)(B) and 104(i)(1) of the Act.

(i) *Claimant's options following appeal.* The claimant's concurrence with the decision in the Administrative Appeal will be conclusively presumed unless the claimant initiates arbitration in accordance with § 296.42 or seeks judicial review in accordance with § 296.43. If the claimant concurs with the Director's determination, payment of any additional damages awarded by the Director will be made to the claimant upon receipt of a properly executed Release and Certification Form.

§ 296.42 Arbitration.

(a) *Initiating arbitration.* A claimant who is dissatisfied with the outcome of the Administrative Appeal may elect to submit the dispute to a binding arbitration process. A claimant may initiate arbitration by submitting a written request to the Arbitration Administrator for Hermit's Peak/Calf Canyon Claims. Additional information regarding how to submit a written arbitration request can be found at *http://www.fema.gov/hermits-peak.* The written request for arbitration must be electronically stamped or postmarked no later than 60 days after the date that appears on the Administrative Appeal decision.

(b) *Permissible claims.* A claimant may not arbitrate an issue unless it was raised and decided in the Administrative Appeal. Arbitration will be conducted on the evidence in the Administrative Record. Evidence not previously entered into the Administrative Record will not be considered.

(c) *Selection of arbitrator.* The Arbitration Administrator will maintain a list of qualified arbitrators who have agreed to serve. The arbitration will be decided by one arbitrator if the amount in dispute is $500,000 or less and a panel of three arbitrators if the amount in dispute exceeds $500,000. Arbitrators will be assigned by the Arbitration Administrator through a random drawing.

(d) *Conduct of arbitration.* Pursuant to guidelines from the Arbitration Administrator, which will be provided directly to claimants who have filed a request for arbitration, the arbitration process will include an arbitration hearing with consideration of the claimant's written request for arbitration, the Administrative Record, and oral testimony. Hearings will generally be conducted virtually. In limited circumstances, the arbitrator may convene an in-person hearing at a location in New Mexico designated by the Arbitration Administrator.

(e) *Decision.* After a hearing and reviewing the evidence, the arbitrator(s)

will render a written decision and will transmit the decision to the Arbitration Administrator, the claimant, and the Director of the Claims Office. If a panel of three arbitrators conducts the arbitration, at least two of the three arbitrators must sign the decision. The arbitrator(s) should render a decision no later than 10 Days after a hearing is concluded. The Arbitration Administrator may extend the time for a decision with notice to the claimant and the Director of the Claims Office. The decision will establish the compensation due to the claimant, if any, and the reasons therefor.

(f) *Action on arbitration decision.* The Arbitration Administrator will forward the arbitration decision to the claimant and, if additional compensation is awarded to the claimant, a Release and Certification Form. Additional compensation awarded in the arbitration will be paid to the claimant after the signed Release and Certification Form is received by the Arbitration Administrator.

(g) *Final decision.* The decision of the arbitrator(s) will be final and binding on all parties and will not be subject to any administrative or judicial review. The arbitrator(s) may correct clerical, typographical or computational errors as requested by the Arbitration Administrator.

(h) *Administration of arbitration.* The Arbitration Administrator oversees arbitration procedures and will resolve any procedural disputes arising in the course of the arbitration.

(i) *Expenses.* The Arbitration Administrator will pay all fees and expenses of the arbitrator(s). The claimant is responsible for any expenses they incur, including travel costs.

§ 296.43 Judicial review.

As an alternative to arbitration, a claimant dissatisfied with the outcome of an Administrative Appeal may seek judicial review of the decision by bringing a civil lawsuit against FEMA in the United States District Court for the District of New Mexico. This lawsuit must be brought within 60 Days of the date that appears on the Administrative Appeal decision. Pursuant to section 104(i) of the Act, the court may only consider evidence in the Administrative Record. The court will uphold FEMA's decision if it is supported by substantial evidence on the record considered as a whole.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

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LIST OF PUBLIC LAWS

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Last List August 9, 2023

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